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THE LAW
OF
PRIVATE CORPORATIONS
IN OHIO

TOGETHER WITH
DECISIONS, COMMENTARIES,
FORMS AND PRECEDENTS

BY

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SECOND EDITION

VOLUME I.

TWO-VOLUMES-IN-ONE EDITION

CINCINNATI
THE W. H. ANDERSON CO.

1924

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1924

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PREFACE TO SECOND EDITION

Important changes in corporation practice following the adoption of the no-par value stock law require a new edition of this work.

Other statutory additions and changes affecting corporations generally, made since the first edition was published in 1913, include the following:

The federal capital stock tax law.

The federal Clayton Act, sections 7 and 8.

The inheritance tax law, which prohibits corporations from registering transfers of stock standing in the name of a deceased holder, without the written consent of the tax commission.

The requirement of a certificate from the county treasurer that all personal property taxes of the corporation have been paid, as a condition precedent to the filing of a certificate of dissolution (G. C. No. 5521).

The relaxing of the requirement that the name of a corporation for profit begin with the word "The" and end with the word "Company". (G. C. No. 8625).

Valuable contributions to the corporation law of the state have been made by a number of decisions of the supreme court and courts of appeals, especially with respect to stockholders' voting rights and procedure at stockholders' meetings.

The author has continued, in this edition, the annotations from the opinions of the attorney general, whose interpretations of new statutes are often of great value.

HOWARD A. COUSE.

Cleveland, Ohio, October, 1923.

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ORGANIZATION AND MANAGEMENT OF PRIVATE CORPORATIONS FOR PROFIT.

§ 1. **Scope of chapter.** In this chapter it is attempted to treat the subjects from a practical standpoint, and to present in a concise form suggestions and statements of the rules of law which should be taken into consideration in the various proceedings of organization and management.

The federal income tax is mentioned in several places as a subject for investigation, but little or no attempt is made to discuss such problems in detail. Income taxes are important considerations in a number of corporate transactions, such, for instance, as sales of corporate property, mergers and issues of stock for property. Brief discussions of such problems are usually unsatisfactory and there are a number of excellent publications and exhaustive text books on the subject.

This chapter is intended to be read or used in connection with the forms immediately following. All of the statements in this chapter are not applicable to banking, insurance, public utility and other corporations which in many respects are governed by special statutes.

§ 2. **Advantages of corporation.** The usual forms under which several individuals may unite for business purposes are the corporation, partnership, limited partnership, the limited partnership association, and the "Massachusetts trust," so-called. In practice, corporations greatly outnumber all other forms of business association. Limited partnerships, at one time frequently met with in Ohio, are now comparatively rare. The organization of limited partnership associations is authorized by statute,¹ but these statutes are wholly unadjudicated by the courts and but little advantage has been taken of them.

"Massachusetts trusts" with transferable shares and limited liability are in use in many states but, according to the attorney general of Ohio, are unauthorized in this state.²

¹ G. C., §§ 8059 to 8078.

For contra opinion see article by

² Opins. Atty. Gen. 1915, p. 171.

Edward C. Daoust, 18 O. L. R. 526.

The corporate form of organization possesses distinct advantages, among which are the following:

a. *Limited liability.* A subscriber to stock in a corporation is liable to the extent of the par value of the stock purchased but no further. Having once paid for his stock, a stockholder is not liable for the debts or obligations of the corporation, nor can the corporation make additional assessments on him. The amount of his subscription is risked in the enterprise, but no more.³

When stock is transferred the new holder is not liable for more than the original holder. When stock has once been paid in full no holder is liable.

The liability of a member of a partnership, however, is not limited to the amount of his investment. If a partnership becomes insolvent, the individual property of the partners may be subjected to the payment of firm obligations.

Limited partnerships provide some features of limited liability but a limited partnership must have at least one general partner whose liability is unlimited.

b. *Transferable shares.* The capital stock of a corporation is divided into equal shares either with, or (in the case of common stock) without, par value, so that funds for the enterprise may be contributed by few or by many persons, as may be desired.

Paid up shares in a corporation are evidenced by certificates on which a blank assignment is usually printed. This enables a stockholder to easily transfer his interest in the corporation. A stockholder may not only sell his shares but may use them as collateral security in obtaining loans or credit.

The facility with which a stockholder's interest in a corporation may be transferred and utilized is a feature which is lacking in other forms of organization. The interest of a

³ Stockholders in banks, both national and state, who have paid for their stock, are, in case of insolvency of the bank, liable for an additional amount equal to the par value of their stock. Stockholders

in all Ohio corporations were formerly subject to a similar double liability, but this was abolished in November, 1903. The double liability of state bank stockholders was restored in 1912.

partner is not easily transferred and can not be pledged as security for loans.

c. *Corporate entity.* A corporation has a separate legal existence without regard to its individual members. Its membership may be completely changed without affecting the corporate existence.⁴

A member of a partnership can not enter into contracts with his firm, nor bring suits against it. A corporation, however, may make contracts with its stockholders, and may sue and be sued by them.

d. *Continuous existence.* The existence of a corporation is not affected by the death of one or more of its stockholders, nor by their bankruptcy, insanity or other incapacity, nor by disagreements between them. The corporate organization continues intact whereas a partnership under such circumstances would in many instances have been dissolved and the enterprise seriously interrupted.

The duration of the life of a corporation is not limited, except in the case of real estate corporations.⁵

Nominally a corporation has a perpetual existence, but it may be terminated, (1) by failure to make annual reports or to pay taxes,⁶ (2) by voluntary surrender of its charter by unanimous consent of its stockholders,⁷ (3) by dissolution through judicial proceedings, because of insolvency of the corporation or other conditions which render impracticable the accomplishment of its purposes,⁸ or (4) by forfeiture of its charter by the state for misuse or nonuse of corporate rights.⁹

Until a corporation has been terminated by one of such methods it continues to exist unaffected by vicissitudes or changing conditions among its stockholders.

⁴ *Andres v. Morgan*, 62 O. S. 236; *Bank v. Trebein*, 59 O. S. 316.

⁵ The life of a corporation formed to buy and sell real estate is limited to twenty-five years, but may be extended by proper action. G. C., §§ 8648, 8649.

⁶ G. C., §§ 5509 to 5513.

⁷ G. C., § 8740. Where no in-

stalments of capital stock have been paid, and there are no investments or unpaid debts, the charter may be surrendered by action of the holders of a majority of the stock. G. C., § 8738.

⁸ G. C., §§ 11938, 11943.

⁹ G. C., § 12323.

e. *Administrative system.* Each member of a partnership is impliedly authorized to act for the firm and to bind it by transactions within the scope of its business. With corporations, however, the rule is different. A stockholder, as such, has no authority to act as agent for the corporation. Representatives of the stockholders are selected, by vote, to conduct the corporate business and affairs.

The stockholders elect a board of directors which has the management and control of the business. It is possible for minority stockholders, by cumulative voting, to elect one or more directors and be represented in the management. The board of directors selects officers and agents who transact the business under the control and supervision of the board.

During their term of office, the directors, acting as a board, are supreme in the management of the corporate business and so long as they conduct the business lawfully and within the limits of the articles of incorporation, they are not subject to interference or control by the stockholders, even by a majority.

This system of representative management, when properly used, is practical and efficient, and is especially advantageous where the capital stock of a corporation is distributed among numerous holders.

§ 3. **Disadvantages of corporation.** The disadvantages of the corporation lie mainly (a) in the special taxes or fees imposed for the privilege of doing business as a corporation; (b) in the burdensome reports which are required from corporations; (c) in governmental surveillance of corporations; and, (d) in some instances, increased taxes.

a. *Special fees or taxes.* In addition to the initial cost of incorporation the following special taxes must be paid annually:

- (1) The Ohio franchise fee (Willis law tax).
- (2) The federal capital stock tax.¹
- (3) A franchise fee in each state other than Ohio in which the corporation has a place of business or transacts business other than interstate commerce.

¹ For amount of the Ohio and federal annual franchise taxes, see Sec. 5, *Expense of Incorporation.*

There is also the federal stamp tax on original issues, sales and transfers of stock.

b. *Reports.* The following reports are required from corporations:

- (1) Ohio franchise (Willis) tax, annually.
- (2) Federal capital stock tax, annually.
- (3) Franchise tax in each state other than Ohio in which the corporation has a place of business, or transacts business other than interstate commerce.
- (4) When required by order of the Federal Trade Commission, reports of organization, management, business, etc.²
- (5) A corporation may be required by the Federal Commissioner of Internal Revenue to report dividends paid by it to stockholders.³
- (6) If the corporation has issued bonds, or other similar obligations, it may be required by the Commissioner of Internal Revenue to report the interest paid thereon, regardless of amount. If the amount exceeds \$1,000, the report must be made by individuals as well as by corporations, without demand from the commissioner, and must include payments of rent, wages, annuities, etc., as well as interest.⁴
- (7) If the corporation has issued bonds containing a tax free covenant, it must report the interest paid, annually.⁵

The Ohio inheritance tax law imposes certain duties on corporations. Where a stockholder dies, the corporation is prohibited from transferring his stock on the corporate books, without the written consent of the state tax commission.⁶

The federal estate tax regulations require notice to be given by a corporation, to which stock of a deceased stockholder is presented for transfer, if the deceased stockholder was a non-resident of the United States and the transfer is not on the

² Federal Trade Commission Act,
38 U. S. Stats. 717, § 6.

³ Revenue Act of 1921, § 254.

⁴ Revenue Act of 1921, § 256.

⁵ Revenue Act of 1921, § 221.

⁶ G. C., § 5348-2.

order of an executor or administrator appointed in the United States.

c. *Governmental surveillance.* The Ohio Blue Sky Law places the issue and disposal of corporate stock, bonds and other securities under the supervision of the Department of Securities of the Department of Commerce.

The Federal Trade Commission has broader powers to investigate the organization, management and business of corporations engaged in interstate commerce than it has to investigate partnerships or individuals engaged in like business.

d. *Increased taxes.* It is sometimes asserted that general property tax laws are enforced more rigorously against corporations than against individuals or partnerships. This is probably true in some communities.⁷

The question of federal income taxes is important and should always be taken into consideration before a corporation is organized. Under former federal laws, the amount of the tax was, under some circumstances, a serious disadvantage to the corporation.⁸ But that disadvantage has very largely been removed by the Revenue Act of 1921. Indeed, under some circumstances, where the profits are not distributed to the stockholders, but, because of the reasonable needs of the business, are retained by the corporation, the total taxes payable by the corporation and its stockholders may be less under the corporate form than if the business were conducted as a partnership.⁹

§ 4. Selection of state for incorporation purposes.

a. *Ohio.* Where the principal business of a proposed corporation is to be transacted in Ohio it should, in general, be

⁷ See *City Railway Co. v. Beard*, 20 O. L. R. 213.

⁸ Article by Isador Grossman, 18 O. L. R. 269.

⁹ Surtaxes are imposed on the annual net incomes of individuals in excess of \$5,000, but there is no excess profits tax or surtax on the income of a corporation under the Revenue Act of 1921. Sec. 220 imposes an additional tax on stockholders where the corporation is

formed or availed of for the purpose of avoiding surtaxes on the stockholders. The fact that the corporation is a mere holding company or that its profits are permitted to accumulate beyond the reasonable needs of the business is made prima facie evidence of a purpose to escape the tax, if the Commissioner of Internal Revenue certifies that in his opinion the accumulation is unreasonable.

organized under the laws of this state. A private business corporation may be organized in another state, and may transact all of its business in Ohio upon compliance with requirements imposed by statute upon foreign corporations. In former years, when stockholders in Ohio corporations were subject to double liability, many companies were incorporated in other states to transact business in this state. But since the abrogation of the double liability in 1903, foreign incorporation is less frequently resorted to. Foreign incorporation increases the cost. Organization fees and annual franchise taxes must be paid in the state of incorporation and also the license fee and annual franchise tax to the state of Ohio. An additional expense is the maintaining of an office in the state of incorporation, which is required by the laws of many states.

Where the stock will be held by residents of Ohio, and the property and business of the corporation will be in another state, incorporation in this state may be advantageous. Stock in such foreign corporations, held by residents of Ohio, is taxable in Ohio, while stock in Ohio corporations is exempt from taxation. By Ohio incorporation, tax on the stock is avoided. If the stock is valuable, the entrance and franchise taxes paid by the corporation, in the state where its business is located, are usually less than the Ohio tax on the stock would amount to, under present laws.

Another objection to foreign incorporation is the possibility that the state of incorporation may increase the fees or impose additional restrictions on corporations. Both West Virginia and New Jersey made radical changes in their corporation laws, and many companies which had incorporated in those states found it advisable to surrender their charters and obtain charters in other states.

The state of Ohio has power to place additional restrictions on the right of foreign corporations to do business thereon and may increase the fees payable by foreign corporations.¹

b. *Foreign incorporation.* There are limitations in the Ohio laws which, in some instances, render foreign incorporation

¹ *Air-way Corporation v. Archer*, 279 Fed. 878.

necessary in order to accomplish the desired purposes. For instance, a holding company can not be incorporated under Ohio laws. A holding company may, however, be incorporated in any one of several states and may hold stock in an Ohio corporation and vote such stock at stockholders meetings held in Ohio,² but its place of business should be located outside of Ohio. It is not entitled to a license to do business in Ohio.³

An Ohio corporation may have only one main purpose, while the laws of several states authorize unlimited purposes.

If stock of the corporation is to be issued for property, the laws of several other states are well settled to the effect that the valuation at which the property is accepted by the directors is conclusive in the absence of fraud, while the law of Ohio on the subject is not equally well settled. If the stock is to be issued for patents, good will, services, or property located outside of Ohio, the Blue Sky Law must be complied with. In such cases the state authorities have usually required that such stock be deposited in escrow with the department to be held until the corporation is a demonstrated commercial success, under an agreement whereby the stock held in escrow will not share in the distribution of assets, in the event of liquidation while the stock is held in escrow, until all stock held by cash investors has been paid in full. These requirements have occasionally interfered with plans of business men who desired to invest their own money to exploit a patent or take over a business and good will, with full knowledge of how much stock was to be issued for the patent or good will, and without any purpose of selling stock to the public, directly or indirectly. Under such circumstances, incorporation in a state which has no Blue Sky Law has sometimes been resorted to, the entire transaction of offering the property to the corporation, and issuing the stock, being accomplished in the state of incorporation. In such cases the stock subscriptions by the cash investors should also be made by the investors, either in person or by proxy, outside of Ohio, and preferably in the state of incorporation.⁴

² Toledo Co. v. Smith, 205 Fed. 246; Rep. Atty. Gen. 1911-1912, p. 643. 61.

³ 5 Opins. Atty. Gen. (1903), 926, 969; Rep. Atty. Gen. 1910-1911, p.

⁴ See Sec. 15, "*Blue Sky*" Law.

If the proposed corporation will operate plants or do business in several states, including Ohio, it may be advantageous to incorporate in one of the other states or even in a state in which it will not transact business, except that pertaining to the corporate organization. Among the states having so-called liberal incorporation laws are Maine, Delaware, Massachusetts, New York, Arizona and South Dakota.

In selecting a state, the laws of which are best adapted to the purposes of the proposed corporation, the following are proper subjects for investigation:

Amount of organization fees and taxes.

Amount of annual franchise tax, if any.

Is there a state income tax? If so, is it limited to corporate income arising from business transacted and capital invested in the state?

Is there a state inheritance tax? If so, how does it affect non-resident stockholders?

Is there a state stock transfer tax?

Is there a "Blue Sky" Law?

Are the corporation laws well adjudicated?

Is the charter perpetual?

Corporate objects and purposes permitted.

Are nonresidents eligible as directors?

May stockholders' and directors' meetings be held outside of the state?

May the principal office be located outside of the state?

Are books required to be kept in the state?

Limitations and restrictions on amount of capital stock.

May no-par-value stock be issued?

May preferred stock be issued?

Amount of capital (subscribed and paid in) with which corporation may commence business.

Amount of capital required to be paid in money.

Power to issue stock in consideration for property, services, etc.

Conclusiveness of judgment of directors as to value of property, services, etc., received by the corporation as payment for stock.

May a voting trust be formed?

Liability of directors.

Liability of stockholders for corporate debts.

Protection of the minority. Cumulative voting.

Publicity of affairs required.

A careful investigation of these questions requires a visit to a law library containing the reports, statutes and most recent session laws of each state. Valuable information, however, may be found in Parker's Corporation Manual, which is published annually and contains a summary of the corporation laws of each state, and also in the publications of the Corporation Trust Company.

The corporation laws of several of the states require that an office be maintained in the state; that one director be a resident of the state; that the stock book and transfer book be kept in the office, and that stockholders' annual meetings be held in the state. In several of such states there are incorporating agencies which make a business of furnishing, for a moderate charge, office conveniences to corporations organized therein, but transacting all their business outside. In such cases an officer of the agency usually acts as resident director or agent.

§ 5. Expense of incorporation. In estimating the cost of incorporation the annual franchise fees, both state and federal, and other special taxes should be taken into consideration as well as the initial expense of organization.

a. *Initial organization expense.* The expense of organization includes the state filing fees, fees of acknowledgment, etc., equipment of books and seal, and counsel fees.

In Ohio the state fees required of a corporation with an authorized capital stock of \$50,000 or less are reasonable in amount as compared with the fees charged in other states. It is different, however, where the capitalization is large. For instance, the amount required of a corporation having an authorized capital of \$1,000,000 in Ohio is \$1,002; while in New Jersey it is \$210; in Maine \$117; in Delaware \$115; and in South Dakota \$25.

The initial expense of incorporating a company in Ohio with a capital stock of \$10,000, or less, may be estimated substantially as follows:

Secretary of State, filing articles of incorporation.....	\$10.00
Secretary of State, filing certificate of subscription.....	2.00
Notary fee, articles of incorporation.....	.40
Clerk's certificate, articles of incorporation.....	.35
Equipment of record book, stock ledger, transfer book, stock certificate book, and seal.....	\$18.50 and upwards
Attorney's fee	\$100.00 and upwards
Total.....	\$131.25

Where the capital exceeds \$10,000, the fee for filing the articles is one-tenth of one percent of the authorized capital stock (\$1 per \$1,000).¹

For no-par-value common stock, the filing fee is five cents per share, plus one-tenth of one percent of the par value of the preferred stock, if any. The minimum filing fee for a corporation having no par value common stock is \$25.²

b. *Annual State franchise tax.* The annual Ohio franchise tax, for the privilege of continuing business under the corporate form, popularly known as the Willis law tax, is based on capital stock which has been subscribed or issued and outstanding, and amounts to three-twentieths of one percent (\$1.50 per \$1,000) of stock having a par value,³ and five cents per share on no-par-value common stock.⁴ The minimum annual franchise tax is \$10.

Public utility companies pay taxes based on gross receipts instead of on capital stock.

c. *Federal capital stock tax.* A franchise tax is also imposed by the federal government known as the capital stock tax. It is not based upon the par value or number of shares, but upon the fair average value of the capital stock, including surplus and undivided profits, and amounts to \$1 for each full \$1,000 of the fair average value in excess of \$5,000.⁵

d. *Stamp taxes on stock.* The federal stamp tax on original issues of stock amounts to five cents per share on each \$100 of face value or fraction thereof, and, on no-par-value stock, five cents per share on each \$100 of actual value, or frac-

¹ G. C., § 176.

² G. C., § 8728-1.

³ G. C., § 5498.

⁴ G. C., § 8728-11.

⁵ Revenue Act of 1921, § 1000.

tion thereof. If the actual value is less than \$100 per share the tax is one cent on each \$20 of actual value or fraction thereof.⁶

On sales and transfers of stock, and agreements to sell stock, the tax is two cents on each \$100 of face value or fraction thereof, and, on no-par-value stock, two cents per share.

On original issues the stamps must be affixed to the stock books and not to the certificates issued. On transfers of certificates, the stamps should be affixed to the certificates.

e. Foreign corporations. Initial expense of entering State. There are two laws applying to foreign corporations entering Ohio. To enter the state for the purpose of doing business a foreign corporation must pay a *license* fee according to the amount of its capital stock, ranging from \$15 where the capital stock is less than \$100,000 to \$50 where the capital stock is \$1,000,000 or more. If the corporation owns or uses a portion of its capital or plant in Ohio, it must pay in addition to the foregoing license fee, an initial *franchise* tax of one-tenth of one percent upon the proportion of property owned and used and business done within the state.⁷

An *annual franchise* tax is imposed on foreign corporations amounting to three-twentieths of one percent upon the proportion of its authorized capital stock represented by property owned and used and business transacted in Ohio; minimum \$10.⁸

§ 6. Transactions before organization. A corporation is not "organized" until directors have been elected by the stockholders.¹ The business and property of a corporation are conducted and controlled by its board of directors.² Prior to organization no one is authorized to bind the corporation by any act or transaction.³

⁶ Revenue Act of 1921, Title XI, Schedule A(2).

⁷ G. C., §§ 178 to 182.

⁸ G. C., § 5503.

¹ An election for directors can not be held until ten percent of the capital stock has been subscribed. G. C., § 8635; *Trust Co. v. Floyd*, 47 O. S. 525; *Telephone Co. v. Cincinnati*, 73 O. S. 64, 77; *Hessler v. Cleveland, etc. Co.*, 61 O. S. 621.

Or in the case of a corporation

organized under the no-par-value stock law, until at least five persons have subscribed for one share or more each, and paid ten percent on each share subscribed for, and a certificate of subscription has been filed with the secretary of state. G. C., § 8728-2.

² G. C., § 8660.

³ *Mosier v. Parry*, 60 O. S. 388, 401; *Dayton, etc. Co. v. Coy*, 13 O. S. 84.

Agreements entered into by promoters prior to organization may become binding on the corporation if, after organization, such acts are expressly adopted and ratified by the board of directors, or if the corporation accepts the benefits of the acts.

b. *Contracts by promoters with third persons.* Assuming to represent proposed corporations, promoters sometimes enter into agreements with third persons. They engage attorneys to attend to the incorporation; they secure leases on property, and make contracts of purchase, frequently advancing money for such purposes. If, after organization, the corporation accepts the benefit of such a transaction, or expressly assumes it, it becomes the obligation of the corporation.⁴

But if there be a failure to incorporate, or if the corporation after organization neither accepts the benefits of the transaction nor expressly assumes it, the corporation is not bound. The promoter under such circumstances has no redress against the corporation, and may in some cases be personally liable to third persons on the contracts made with them.⁵

Where there are several promoters, one who has been held liable to third persons on such a contract may compel the others to pay their proportionate share of the losses.

Fraud of a promoter may invalidate his contracts which are adopted by the corporation in ignorance thereof. The corporation may rescind a contract of purchase of property, negotiated on its behalf by the promoter, who received secret commissions from the seller.⁶

c. *Agreements of promoters between themselves.* An agreement between individuals to form a corporation and providing for its future control is valid, as between the parties to it, if the corporation is created according to statutory requirements, and the objects contemplated are lawful and

⁴ City Bldg. Assn. v. Zahner, 6 W. L. B. 389; 10 Am. L. R. 181; Third Ward Bldg. Assn. v. Lotze, 11 W. L. B. 285.

⁵ Mosier v. Parry, 60 O. S. 338, 401.

⁶ Shipbuilding Co. v. Steamship Co., 215 Fed. 296, 304; 12 O. L. R. 455.

proper.⁷ Such an agreement, however, is not binding on the corporation or future stockholders, although after the corporation is organized it may make binding employment contracts and other contracts, to carry out the preliminary agreement.

§7. Subscriptions to stock before incorporation. No subscriptions to the capital stock or other preliminary agreements need be made prior to the filing of articles of incorporation with the secretary of state. After the articles have been filed and recorded it is the duty of the incorporators to open books for subscriptions.

It is sometimes desirable, however, to definitely commit, and, if possible, to legally bind the parties interested in a proposed enterprise, before the expense of preparing and filing articles is incurred.

A mutual agreement between individuals to become stockholders in a corporation thereafter to be organized is valid,¹ and has been held to bind the persons executing it from the time it is made, provided incorporation is perfected within a reasonable time.²

Such an agreement should be distinguished from an ordinary subscription to capital stock, made before incorporation. The latter is a continuing offer, merely, and not a present contract. Prior to incorporation there is no authority in any person to accept the subscription. There is a want of mutuality. A mere subscription may be withdrawn or cancelled, by the person making it, if he acts before the corporation is organized and his subscription accepted.³

If the subscription is not withdrawn, but is permitted to stand until the corporation is organized and the subscription accepted, the contract, according to the rule prevailing in a

⁷ Doan v. Rogan, 79 O. S. 372, 386.

¹ Doan v. Rogan, 79 O. S. 372, 386.

² Minneapolis Threshing Machine Co. v. Davis, 40 Minn. 110, 41 N. W. 1026; Knox v. Childersburg

Land Co., 86 Ala. 180, 183, 184, 5 So. 578.

³ Mill Co. v. Felt, 87 Me. 234.; Hudson Real Estate Co. v. Tower, 161 Mass. 10; Auburn Bolt Works v. Schultz, 143 Pa. St. 256; See Wallace v. Townsend, 43 O. S. 537.

majority of the states, becomes complete and enforceable by the corporation.*

In Ohio, however, it has been held that subsequent incorporation and acceptance of the subscription does not render a prior subscription enforceable.⁵

§ 8. Stockholders' rights and powers. a. In general. Stockholders have very limited powers and functions in the active management of the affairs of a corporation. The business and property are managed and controlled by the board of directors. Even a majority of stockholders can not interfere with or control the actions of directors so long as the affairs are conducted lawfully, within the limits of the articles of incorporation and in accordance with the corporate regulations.¹ When the holders of a majority of the stock of a corporation become dissatisfied with the management, the usual remedy is to elect other directors at the succeeding annual election. But majority stockholders may bring about an immediate change in the policy of management by increasing the number of directors at a special meeting of the stockholders.²

Among the rights and powers possessed by stockholders are the following:

b. *Election of directors.* Directors are elected by the stockholders and every owner of full paid stock has a right to be present at elections and to vote. By cumulative voting minority stockholders are sometimes enabled to elect one or more directors and to secure representation on the board.

c. *Information.* A stockholder has a right to examine the books and records of the corporation at all reasonable times. A corporation is required by statute to make an

*Nebraska Chicory Co. v. Lednicky, 79 Neb. 587, 113 N. W. 245; McNaught v. Fisher, 96 Fed. 168; Athol Music Hall Co. v. Carey, 116 Mass. 471; Planters, etc. Packet Co. v. Webb, 144 Ala. 666; Cook on Corporations, § 72 and cases cited.

⁵ Dayton Co. v. Coy, 13 O. S. 84, 91.

¹ Toledo Co. v. Smith, 205 Fed. 643, 673.

² G. C., § 8665; Gold Bluff, etc. Co. v. Whitlock, 75 Conn. 669; In re Griffing Iron Co., 63 N. J. L. 168, 357.

annual statement of its financial condition and to furnish a copy to each of its stockholders.³

d. *Prevention of breach of trust.* Stockholders may, under some circumstances, enjoin the directors from fraudulent dealings with the corporate property or from committing acts beyond the limits of the charter of the corporation.

e. *Regulations.* Stockholders have a right to adopt regulations for the government of the corporation. Regulations should not be confused with by-laws, which are adopted by the directors and are for the government of the directors only.⁴

The corporation laws of many other states provide for by-laws only, which are adopted by the stockholders and are similar to the regulations of Ohio corporations.

Although the "corporate powers, business and property must be exercised, conducted and controlled by the board of directors,"⁵ the stockholders are expressly authorized by statute to adopt regulations providing for "the duties and compensation of officers" and "the manner of election, or appointment, and the tenure of office, of all officers other than the trustees or directors."⁶

This authorizes the stockholders to place restrictions upon the salaries of the officers and directors, and to reserve the right to elect subordinate officers.

f. *Certificates of stock.* The holders of stock, which has been fully paid, are entitled to certificates evidencing the same. It is the duty of the president and secretary, on demand, to issue such certificates.

Upon any transfer of full paid stock the transferee is entitled to have it transferred to his name on the books of the company and to receive new certificates issued in his name.⁷

g. *Right to dividends and increased stock.* When dividends have been declared by directors each stockholder is entitled to be paid his share. When the capital stock is increased

³ G. C., § 8685.

⁴ *Morris v. Griffith*, 34 W. L. B. 191; *State v. Burial Assn.*, 8 C. C. n. s. 248; 18 C. D. 397.

⁵ G. C., § 8660.

⁶ G. C., § 8704.

⁷ G. C., §§ 8672, 8673.

each stockholder has a right to subscribe for and take his pro rata share of the increase.

h. *Certain acts of directors must be ratified by stockholders.* The entire property and assets of a corporation can not be sold unless the proposition has been submitted at a meeting of the stockholders called for the purpose and the proposition ratified by the holders of three-fourths of the stock. In such case minority stockholders who are dissatisfied with the sale are entitled to be paid the value of their stock.⁸

Bonds convertible into stock can not be issued by a corporation without the written assent of three-fourths of the stockholders representing three-fourths of the capital stock actually paid.⁹

i. *Changes in capital stock or corporate name or purpose.* The capital stock of a corporation can not be increased or reduced, nor can its articles of incorporation be amended, without the favorable action of the holders of at least a majority of its capital stock. Some changes require the consent of the owners of three-fourths or three-fifths of its stock.¹⁰

§ 9. Liability of stockholders. Where stock has been fully paid up, in cash or property, its holder is under no liability (except as to debts incurred by the corporation prior to November 23, 1903). A subscriber to stock is liable to the extent of the par value of his stock but no further. The corporation can not make additional assessments on him, nor is he liable for debts of the corporation.

A person to whom "watered stock" is issued by a corporation may, under some circumstances, be liable to creditors of the corporation for the amount of "water," that is, the difference between the par value of the stock and the amount actually paid for it.¹

Where "watered stock" is purchased from a stockholder for value, by a person having no notice that the stock is not fully paid up, the purchaser is not liable. The purchaser may

⁸ G. C., §§ 8710 to 8718.

⁹ G. C., § 8709.

¹⁰ G. C., §§ 8699, 8720.

¹ Gates v. Tippecanoe Stone Co.
57 O. S. 60.

rely on the representation of the corporation that the stock is full paid. The statement "full paid and nonassessable" on a stock certificate is a representation by the corporation that the stock has been paid up and the purchaser need not inquire further.²

A subscriber to stock which has no par value is liable to the extent of the price or consideration fixed by the incorporators (or, after organization by the directors or stockholders), but no further.

Double liability. Prior to the year 1903 a stockholder in an Ohio corporation who had paid for his stock was, in case of insolvency of the corporation, liable for an additional amount equal to the par value of his stock. This double liability was abolished by an amendment to the constitution. Stockholders are now subject to such double liability for debts incurred prior to November 23, 1903, but are under no liability for debts incurred subsequent to that date,³ except stockholders in banks, both state and national, who are subject to the double liability. The double liability of State bank stockholders was added by an amendment to the constitution adopted September 3, 1912, to take effect January 1, 1913.⁴

§ 10. Stock. The term "*capital stock*" is variously used to indicate (1) the nominal or authorized capital stock, (2) the paid up and issued capital stock (3) the capital or property of the corporation and (4) the common stock only, exclusive of the preferred stock.¹

a. The *nominal* or *authorized capital stock* is the amount specified in the articles of incorporation as the limit of capital which may be subscribed and paid in by stockholders.²

In taxation and certain other statutes the term *capital stock* has been used as meaning the *capital* or property of the corporation.³

¹ Roebing Sons Co. v. Shawnee, etc. Co., 4 N. P. n. s. 113, 121: 17 L. D. 8 aff'd no rep. 78 O. S. 408.

² G. C., § 8687.

³ Constitution, Art. XIII, § 3.

⁴ Miller v. Baker Co., 208 Fed. 190; 11 O. L. R. 557.

² See G. C., § 8625.

³ Lee v. Sturges, 46 O. S. 160; Bradley v. Bauder, 36 O. S. 34; Jones v. Davis, 35 O. S. 476, 477; Railway Co. v. Furnace Co., 49 O. S. 112.

A clear distinction, however, is recognized between the *capital stock* and the *capital* of a corporation.

The amount of the capital stock remains fixed while the actual property or capital fluctuates in value and continually increases or diminishes in amount.⁴

b. *A share of stock* is a right which entitles its owner to participate in the profits of the corporation, in its assets upon liquidation, and to vote at elections of directors, and upon certain matters required by statute to be submitted to stockholders.⁵

In this chapter the term "stock" is used as meaning *shares* of stock which is its generally accepted meaning at the present time. Formerly the word "stock" was used as the equivalent of capital stock.

c. *Issued stock* is that part of the nominal or authorized capital stock which has been subscribed for, or sold, and for which payment has been made. A certificate is not necessary to constitute a person, who has subscribed and paid for stock, a stockholder,⁶ as a certificate of stock is not the stock itself, but merely evidence of its ownership. Issued stock, however, is usually represented by certificates, and stockholders who have paid for their stock are entitled to have certificates issued to them.⁷

When originally issued by an Ohio corporation, stock must be fully paid for in cash, services, or property.⁸

d. *Unissued stock* is that part of the nominal or authorized capital stock which has not been subscribed for, or sold, and in which no property rights have been acquired.

Unissued stock is sometimes confused with *treasury stock*, but it differs widely from the latter. Unissued stock is not an asset of the corporation. It is merely the right in the corporation to issue stock.

e. *Treasury stock* is stock originally issued and full paid, which has been acquired by the corporation through gift, in

⁴State v. Jones, 51 O. S. 510, 511; Cleveland Trust Co. v. Lander, 62 O. S. 273.

⁵See Jones v. Davis, 35 O. S. 447.

⁶Ry. Co. v. Bank, 1 C. C. 199, 207; 1 C. D. 109.

⁷G. C., § 8672.

⁸Gates v. Tippecanoe Stone Co., 57 O. S. 60.

liquidation of a debt, or otherwise, and which is held subject to disposal by the directors.⁹

The term treasury stock is sometimes wrongly applied to unissued stock. Treasury stock is an asset of the corporation and may be sold below par. Treasury stock can not be voted.

f. *Preferred stock* is that which is given a preference over the other stock of the same corporation. It is issued in many different forms with various preferences and restrictions. The usual preference relates to dividends, and entitles its owner to dividends at a specified rate before any dividends are paid on common stock.

The Ohio statute¹⁰ prohibits the issuing of preferred stock in excess of "two-thirds of the actual capital paid in." If the corporation has common stock without par value the number of shares of preferred stock outstanding may not be more than two-thirds of the total number of shares, common and preferred, outstanding.¹¹

The priority dividend rate on preferred stock is limited to eight per cent. Priority in assets, on liquidation of the corporation, is given by the statute.

Preferred stock may be issued, subject to redemption at a fixed time and price, which must be stated on the certificate of such stock. The right to vote preferred stock may be limited or entirely withheld.

All preferences and restrictions should be set forth in the articles of incorporation and also on the certificates of stock.

After organization the capital stock of a corporation may be increased by an issue of preferred stock.¹²

Dividends on preferred stock may be made cumulative or noncumulative. If cumulative, all arrears must be paid in succeeding years before any dividend is paid on common stock. If noncumulative, no deficiency need be made up in subsequent years.

Whether preferred stockholders are entitled to dividends in excess of the stipulated rate, where the articles of incorporation

⁹ Cook on Corporations, § 46;
Taylor v. Miami Exporting Co., 6
Ohio 176, 220.

¹⁰ G. C., §§ 8667 to 8671.

¹¹ G. C., § 8728-1.

¹² G. C., § 8698.

are silent on the subject, is an unsettled question, on which the decisions of common pleas courts are in conflict.¹³ To avoid uncertainty, it should be clearly stated in the articles of incorporation and on the certificates of preferred stock, either that the holders of preferred stock are *not* entitled to dividends in excess of the stipulated rate, or that they *are* entitled to participate. Where preferred stockholders are entitled to such additional dividends, the stock is sometimes called participating preferred stock.

g. *Common stock* is all the capital stock of a corporation to which no advantage, preference or priority is given over other stock. An Ohio corporation may have common stock with, or without, par value.

h. *Full paid stock* is stock, the entire par value (or, in the case of no-par-value stock, the properly authorized price or consideration) of which has been paid, in money or property, and on which there is no liability to the corporation or to creditors.

i. "*Watered stock*" or "fictitiously paid stock" is stock having a par value which has been issued as full paid stock when in fact the entire par value has not been received by the corporation.

Before Ohio corporations were authorized by law to have no-par-value common stock, watered stock was frequently issued and sometimes persons receiving such stock from the corporation were, upon insolvency of the corporation, held liable to creditors for the amount of the "water," viz., the difference between the par value of the stock and the amount actually paid for it. Because of the possible liability watered stock was usually issued by some method whereby the records of the corporation were made to show that full value had been given for the stock. The method most frequently adopted was that of issuing stock for property or services at an overvaluation. That property has been fraudulently overvalued was usually difficult of proof, and this method

¹³ *Shimmon v. National Screw & Tack Co.*, 18 N. P. n. s. 569 (preferred stock does not participate in additional dividends). *Ryan v. Miami Company*, 10 Am. L. R. 263,

266 (preferred stock does participate, after the common stockholders have received dividends equal to the priority dividend on the preferred).

was regarded as the most effectual in concealing the real character of the stock.

Since the enactment of the no-par-value stock law, it is possible to accomplish, by proper and ethical methods, the purposes which were previously accomplished by means of watered stock.

§ 11. Capitalization—Meaning of term. Stock and bonds distinguished. The term “capitalization” is variously used. (1) In one acceptation it includes the entire authorized capital stock of a corporation, both common and preferred, whether issued or not, but does not include bonds. (2) In another acceptation the term capitalization represents the par value of stock which has been issued. (3) In its usual financial acceptation, the term includes both stock and bonds, but only to the extent they have been issued.

In financial practice, stocks and bonds are both treated as securities “issued against” the property of a corporation, but there is an important distinction between them. Bonds are evidences of debt. A bondholder is a creditor of the corporation. An issue of bonds is usually secured by a mortgage on all or a part of the property of the corporation. Interest on bonds falls due at fixed intervals, irrespective of whether profits have been earned, and if not paid, the corporate property may be swept away by foreclosure proceedings under the mortgage.

A stockholder, however, is not a creditor. The return on his investment is in the form of dividends, not interest; and dividends even on preferred stock can be declared only out of surplus profits.¹

§ 12. Amount of capitalization. Considerations affecting.

(A) *No-par-value stock corporation.* In organizing a corporation under the no-par-value stock law, it is sufficient to set out the total number of authorized shares of common stock, without stating, in the articles of incorporation, the price or consideration for which they are to be disposed of, or any

¹ G. C. § 8724; *Miller v. Ratterman*, 47 O. S. 141.

face or par value. But the amount of "*common capital*" with which the corporation will begin to carry on business must be stated. This may be fixed at any sum not less than \$500. Practical considerations require that the amount fixed be high enough for credit purposes, and to provide a proper equity below the bonds or preferred stock, if either are to be issued. On the other hand, the amount of such stated common capital must be fully paid in cash or property at its "*actual value*" before business is commenced. Directors who assent to the creation of debts before such common capital is fully paid, are personally liable for such debts. Where the common capital is to be paid in property, the amount should be fixed low enough to protect the directors, for they are, in effect, guarantors that such common capital has been paid in property "*taken at its actual value.*"¹

(B) *Par value stock corporation.* The term "*capitalization*" is here used as representing the par value of the stock which has been issued.

a. *Actual value.* The basis of capitalization contemplated by the law of Ohio is the amount of cash, or the actual value of property, for which stock is issued.²

There are certain classes of corporation, notably banks and financial institutions, which have rigidly adhered to this rule and are capitalized on the basis of actual values. The rule is also followed, in many instances, in the organization of trading or mercantile corporations.

In estimating the actual value of property, as a basis for capitalization, intangible assets may be included. Where an established business is taken over by a corporation, the good will and other intangible property are often exceedingly valuable.

Before issuing stock for good will, however, the Blue Sky Law should be considered. Approval from the department must be obtained before stock is issued for good will, patents, services or property not located in Ohio, and the department usually requires that such stock must be placed in escrow until the corporation is a demonstrated commercial success.

¹ G. C., §§ 8728-2, 8728-7.

² *Gates v. Tippecanoe Stone Co.*,
57 O. S. 60.

b. *Exceeding actual value. Earning power.* Numerous corporations have been capitalized not on the amount of money or the value of property invested (including intangible property at a fair appraisement) but on the basis of the prospective earning capacity. Bonds or preferred stock, and sometimes both, were issued up to the cost or value of the property and common stock was issued in such additional amounts as the estimated profits would pay dividends upon.

The practice of capitalizing in excess of property values was followed, in perhaps a majority of cases, in good faith and without fraudulent intent.

The persons to whom the stock was issued, in many cases, derived no personal gain from it, but immediately assigned it to the corporation or to trustees, to be treated as treasury stock and given as a bonus to the purchasers of bonds, or sold at a discount or otherwise used in raising funds for corporate purposes.

Since the enactment of the no-par-value stock law, it is rarely, if ever, necessary or advisable to resort to the device of "watering" par value stock.

In Ohio, capitalization at par values in excess of property values is contrary to the legal requirement that all stock issued must be fully paid for in money, services, or property.³

To avoid the liability imposed by this rule resort has been had, in organization proceedings, to fiction, by which it was made to appear that the stock has been fully paid. Usually property or services were accepted in payment by the directors at valuations which were inflated. As long as the corporation remains solvent there is but little danger of personal liability to creditors arising from the transaction. If there are stockholders who dissented from the transaction, the stock issue may be set aside,⁴ but as it was usually consummated at the time of organization of the corporation and with

³ Gates v. Tippecanoe Stone Co., 57 O. S. 60. chinery Co., 5 C. C. n. s. 540; 17 C. D. 107 (affirmed without report

⁴ Orton v. Edson Reduction Ma- 75 O. S. 580).

the consent of the original stockholders, the corporation is bound by the transaction.⁵

But in case of insolvency of the corporation, personal liability to subsequent creditors may result. If it is proved that stock was issued for property or services at a fraudulent overvaluation, persons who received the stock may be held liable for the difference between the actual value of the property and the par value of the stock.⁶

Whether the stock received for property constitutes taxable income to the person receiving it is a question which should receive careful consideration.⁷

c. *Less than actual value.* Where a corporation is organized to conduct a business of comparatively small proportions, and it is intended that the stock shall be held by few persons, and not sold to the public, it is sometimes advantageous to fix the capitalization at less than the actual value of the investment. By this means a saving is effected in the amount of state organization fees and annual franchise (Willis) taxes. In practice the excess of the property values over the capital stock is sometimes covered by a bond issue.

The former federal excess profits tax was measured by invested capital, excluding bonds. Capitalization at less than actual values was usually imprudent, prior to the repeal of the excess profits tax law in 1921.

d. *Capitalization of public utility companies and railroads.* Stocks and bonds issued by railroads and public utility companies are void unless the issue is authorized by the public utilities commission of Ohio after a hearing. The application to the commission for authority to issue stock or bonds must specify the amount, character and purpose of the issue, and certain information in detail. The money or property derived from the issue must be applied to the authorized purpose. The application must be signed and verified by the president and secretary and penalties are provided for false statements.⁸

⁵ Hoffard v. Williams Shoe Co., 95 O. S. 376; Old Dominion Co. v. Lewisohn, 210 U. S. 206.

⁶ Gates v. Tippecanoe Stone Co., 57 O. S. 60.

⁷ See Revenue Act of 1921, § 202.

⁸ G. G., §§ 614-53 to 614-55, 614-57.

§ 13. Form of capitalization. When all the stock is to be taken by the individuals who will be active in the business, common stock alone will in many instances answer the purpose. But if outside capital is to be obtained, it is often necessary to promise a definite return to the investor. The owner of common stock has no assurance of a definite return. He is entitled to his pro rata share of the dividends which have been declared by the directors out of surplus profits. But the directors have discretionary power to declare or to withhold dividends. It is only in exceptional cases that a stockholder can compel the declaration of a dividend, although there are surplus profits. Directors may, and often do, use the profits to enlarge and develop the business instead of making a division among the holders of common stock. In cases of bad faith or abuse of discretion on the part of directors, courts will interfere, but not otherwise.

To attract investors, bonds or preferred stock are usually resorted to. Unless the enterprise is an established one with a record of earnings over a period of years, a bonus of common stock is often given to purchasers of the bonds or preferred stock.

a. *Bonds* constitute a debt of the corporation, and are usually secured by a mortgage on the corporate property. Bonds have some advantages to the corporation. Interest paid on bonds is an expense and a proper deduction from profits for income tax purposes, whereas dividends paid on preferred stock are not. The prevailing interest rates on bonds, under normal business conditions, are usually less than the prevailing dividend rates on preferred stocks. On the other hand, if it is uncertain whether the earnings of the corporation will be sufficient to pay interest on the bonds, regularly and promptly when due, in addition to operating expenses, a bond issue is dangerous because of the right of foreclosure of the mortgage upon a default of interest.

The amount of bonds which may be issued by an Ohio corporation (except a corporation formed to buy and sell real estate) is limited. The corporation is not authorized to borrow

money in excess of "its capital stock."¹ This limit, however, does not apply to corporations organized or reorganized under the no-par-value stock law.²

On liquidation of the corporation, mortgage bonds have priority over general debts and over preferred stock.

b. *Preferred stock.* If conditions are such that preferred stock can be sold, it is usually safer for the corporation than bonds, for the reason it is not a debt, and there is no danger of foreclosure although dividends on the preferred stock are not paid when due. Dividends on preferred stock are payable out of surplus profits only, and if there are no surplus profits, dividends are not authorized.

Preferred stocks have some advantages to the investor. Ohio laws impose a property tax on bonds, while preferred stock in Ohio corporations is exempt from the tax. Dividends received by a stockholder are not "income" under the Federal Income Tax Law, for the purposes of the normal tax, although subject to the surtax. The rate of return is usually higher on preferred stocks than on bonds. Preferred stock has, under Ohio laws, priority in assets over common stock, in the event of liquidation of the corporation. And directors may generally be relied on to pay dividends on preferred stocks, when there are surplus profits, for the credit of the corporation would be injured by non-payment of dividends under such circumstances.

Because of these advantages counsel for investment houses expended great pains and effort, some years ago, to draft protective provisions intended to give the utmost safety consistent with the nature of preferred stock. Among other things, the protective provisions (1) required that a certain percentage of earnings be set aside as a sinking fund to redeem the preferred stock, (2) restricted the amount of dividends that could be paid on the common stock until all the preferred stock was redeemed, (3) required the corporation to maintain net assets equal to a certain percentage of the preferred stock outstanding, (4) prohibited any issue of bonds or other preferred stock,

¹ G. C., § 8705. The attorney general has ruled that a corporation is not authorized to borrow money in excess of its *paid in*

capital stock. Rep. Atty. Gen. 1913, p. 813.

² G. C., § 8728-2.

or any mortgage or lien or long term indebtedness, having priority over the preferred stock without consent of the holders of 75 percent of the preferred stock, and (5) gave voting rights to the preferred stock upon default of the dividends.

Investment brokers and some banks sold to Ohio investors large amounts of preferred stocks in companies having a record of earnings, under the impression that the interests of the investors were well secured by the protective provisions above referred to.

But during a subsequent period of business depression, the inherent weakness of preferred stocks, considered as investments, became manifest. Debts incurred in operating the business of the corporation have priority over preferred stock. It is practically impossible to give preferred stock priority over such indebtedness.³ In many cases of bankruptcy, or other forced liquidation, corporate assets proved insufficient to pay creditors, and the preferred stockholders received nothing. Because of such experiences, it is difficult, at the present time, to sell large issues of preferred stocks as "investments," except in enterprises having unusual earnings for a period of years.

It is often possible, however, to finance a corporation by means of a preferred stock issue, if the corporation is willing to give to the purchasers a reasonable share of the expected profits in addition to the stipulated preferred dividend. This may be accomplished by one of several different methods. (1) A bonus of no-par-value common stock may be given to purchasers of the preferred. (2) The preferred stock may be made "participating"; that is, after the stipulated dividend has been paid on the preferred, and an equal amount paid on the common, further dividends are declared pro rata on the preferred and common stock without distinction. (3) The holders of preferred stock may probably be granted the privilege of converting it into common stock.⁴

³ Priority to preferred stock might perhaps be obtained by special agreement with each general creditor at the time the indebtedness is contracted, but that is usually impracticable.

⁴ G. C., § 8669 does not expressly authorize the grant of an option

in advance to holders of preferred stock to convert it into common stock, although it authorizes conversion "upon such terms as from time to time may be proposed by the board of directors and accepted by the holders thereof." But in general, such an option may be

c. *Common stock. No-par-value stock.* Prior to 1919 all common stock was required to have a par or face value, but at the present time, common stock in shares without par or face value may be provided for.⁵

The no-par-value stock law makes it possible to give a bonus of common stock to purchasers of bonds or preferred stock, and to issue stock for good will, patents and other property of uncertain value, without liability. It is difficult to use par value stock for bonus purposes. If a corporation gives its unissued par value stock as a bonus, and subsequently becomes insolvent, the purchasers of bonds or preferred stock who received the bonus may be liable to the creditors up to the par value of the bonus stock received by them.⁶ To avoid this liability, it was common practice, in former times, to issue par value common stock for intangible property, such as patents or good will. The stock being thus "paid up," the person to whom it was issued returned it to the corporation to be used as treasury stock for bonus purposes. But this did not completely remove the risk of liability. If it could be proved that the intangible property was fraudulently overvalued, the individual to whom the stock was issued could be held liable. Under the no-par-value stock law, however, a bonus of common stock may be given to purchasers of bonds or preferred stock, without risk of liability, if the bonus is properly authorized by the directors or stockholders.

Likewise, no-par-value stock may be issued for patents, good will or other property of uncertain value, without risk of liability.⁷ The use of no-par-value stock for this purpose has largely superseded the unsatisfactory device of issuing "watered" or "fictitiously paid" stock.

good as a contract. *Totten v. Tison*, 54 Ga. 139; *Holland v. Railroad*, 151 Mass. 231; 24 N. E. 206; *Stafford v. Banking Co.*, 61 O. S. 160; see also *Hamlin v. Railroad Co.*, 78 Fed. 664.

⁵ G. C., §§ 8728-1 to 8728-11. Two excellent papers on the Ohio no-par-value stock law have been published: one by Isador Grossman of the Cleveland Bar in 18 O. L. R. 269, 289, and the other by Frank H. Shaffer of the Cincinnati Bar in 19 O. L. R. 70. Some of the defects

of the law pointed out in these papers have been removed by the 1921 amendments.

⁶ *Hoffard v. Shoe Co.*, 95 O. S. 376, 381.

⁷ Property of uncertain value should not, of course, be used to pay up the amount of "common capital" stated in the articles of incorporation as that with which the corporation will begin business. Such "common capital" must be paid in cash or property at "actual value." G. C. § 8728-2.

No-par-value common stock has other advantages. Where bonds or preferred stock are issued, the law requires a substantial equity or capital to be represented by common stock, if the common stock has par value. Bonds are not authorized in excess of the paid-in capital stock.⁸ "The amount of preferred stock at par value" may not "exceed two-thirds of the actual capital paid in cash or property."⁹ Neither of these requirements applies to corporations organized under the no-par-value stock law,¹⁰ which requires merely that the *number* of preferred shares shall not exceed two-thirds of the total number of shares, preferred and no-par-value common, outstanding.¹¹

Therefore, by organizing under the no-par-value law, it is possible to keep control of the corporation with a small amount of capital. It sometimes happens that one or two men see an opportunity for a promising venture. Their own funds are limited, but friends have faith in their ability and are willing to invest money in the project, although unwilling to devote time or to assume any responsibility. The active men will do the work and bear the responsibility for the enterprise and very justly desire that the organization be effected in such a manner that its control can not be taken away from them if they make a success of it. This can not be accomplished by organizing a corporation with par value common stock, unless the active managers put a substantial amount of money into common stock. If the friends are to contribute \$75,000, and it is desired to issue *bonds* to them, the paid up capital stock must be \$75,000. Although \$50,000 of this could be preferred stock, it would be necessary to have a paid up par value common stock of \$25,000. If, instead of bonds, it is desired to issue *preferred stock* for the \$75,000, a paid up par value common stock of \$37,500 would be required.

But the corporation may be organized under the no-par-value law with a comparatively small amount of money invested in common stock. The only requirements are:

(1) At least \$500 must be raised from the sale of the no-par-common stock.

⁸ G. C., § 8705; Rep. Atty. Gen. 1913, p. 813.

⁹ G. C., § 8667.

¹⁰ Limit as to borrowing money inapplicable. G. C., § 8728-2.

¹¹ G. C. § 8728-1; Opins. Atty. Gen. 1922, p. 260.

(2) The number of preferred shares must not exceed two-thirds of the total number of shares, preferred and common, outstanding. If \$75,000 preferred stock is issued, divided into 750 shares of \$100 each, there must be at least 375 shares of no-par-common.

No-par-value common stock may be divided into classes, one class having no voting power or restricted voting power.

Before organizing a corporation under the no-par-value stock law, the personal liability which it imposes on the directors should be given careful consideration. The amount of "common capital" with which the corporation will begin business must be stated in the articles of incorporation. Directors may be liable if they assent to the creation of debts before the amount of "common capital," as stated in the articles, has been fully paid in cash or in property taken at its "actual value." If the "common capital" is paid in property at less than "actual value" the directors may suffer personal loss although they acted in good faith and believed that they had accepted the property at its actual value.

This liability may be avoided by fixing the "common capital" with which the corporation will begin business at a sum which may be paid in cash. The "common capital" with which the corporation will begin business need not represent the entire consideration received for its no-par-value common stock. Such "common capital" may be fixed at any sum desired not less than \$500. The probable credit requirements of the corporation must, of course, be given great weight in determining the amount of stated common capital, but for the complete protection of the directors the amount decided upon should be paid in cash, or, at least in property of unquestionable value.

The amount of fees, both on initial organization and annual franchise, payable by Ohio no-par-value stock corporations should also be taken into consideration before organization, especially where the issue of a large number of shares is contemplated. Par stock corporations pay an annual franchise fee of \$1.50 on each \$1,000 of par value stock, issued or outstanding, irrespective of the number of shares. No-par stock corporations pay an annual fee of five cents per share of no-par-value stock issued or outstanding. Where no bonus of common stock is to be given with bonds or preferred stock, and no stock is to be issued for property of uncertain value, organization

under the no-par-value stock law may be considerably more expensive and have no compensating advantages.

Under the earlier Ohio no-par-value corporation law, it was possible to effect a considerable saving in fees by incorporating in Delaware, even where all the corporate business was to be transacted in Ohio. In 1921, however, the Ohio law was amended, the fees payable by Ohio no-par-value stock corporations being reduced and the fees payable by similar foreign corporations being increased.¹²

If the corporate business is to be transacted entirely in Ohio, no saving in fees can be effected by foreign incorporation, but if a substantial part of the business is to be transacted in other states, incorporation under the no-par-value law of Delaware or some other state may be less expensive.

§ 14. Capitalization. General considerations. In planning the capitalization of a corporation, in addition to the matters already discussed, the following should be taken into consideration:

(a) The Ohio Blue Sky Law and the Blue Sky Laws of the other states, if any, in which it is expected to sell stock or bonds.¹

(b) The possibility that additional financing may be necessary in the future. The amount of capital required is frequently underestimated, especially in the case of new enterprises. The form and amount of the original capitalization should, if possible, be planned so as to facilitate future financing.

(c) The expense, including organization fees, franchise taxes, both state and federal, and the federal stamp tax on issues and transfers of stock.²

(d) Future control of the corporation.

§ 15. Disposal of stocks and bonds. "Blue Sky" Law. It is difficult to describe the Ohio Blue Sky Law in a brief space, partly because of the numerous exceptions to its general requirements.¹ Speaking generally, and temporarily disregard-

¹² 109 v. 277; Air-way Corporation v. Archer, 279 Fed. 878.

¹ See Sec. 15. Blue Sky Laws of all states in which the same have been enacted are compiled in Elliott's Blue Sky Laws.

² See Sec. 5.

¹ See paper by Richard Inglis, "The Blue Sky Dilemma," 18 O. L. R. 513.

ing the exceptions, the law regulates the sale and disposal of corporate securities by (1) requiring a license to be taken out by sellers of securities, including a corporation which sells stock or bonds of its own issue, and (2) requiring issues of stocks and bonds to be approved and certified by the department² before the same are offered for sale. Before an issue of stock or bonds will be certified, detailed information³ must be furnished to the department on blanks which are furnished on request.

The consequences of overlooking or ignoring the Blue Sky Law may be serious. Violations are punishable by fine or imprisonment.⁴ And subscriptions to stock and contracts for the sale of corporate stock and bonds, made without complying with the law, are illegal and unenforceable.⁵

The law has occasionally been evaded by incorporating in a state which has no Blue Sky Law. This is usually possible only where the stock and other securities are taken by a small group, and where no stock is to be sold to the public, either directly or indirectly. In such cases, the subscriptions to stock by cash investors should be made, either in person or by proxy, outside of Ohio, in a state having no Blue Sky Law. If stock is to be issued for property, the entire transaction of offering the property to the corporation, accepting the offer, and issuing the stock, should be effected in the state of organization.⁶

There are three matters over which organizers of corporations have frequently had difficulty with the department: (a) promotion stock, and stock issued for patents, good will, etc.; (b) the amount of commissions to be paid for selling the securities; and (c) bonus stock to cash investors.

(a) The amount of stock issued for services, good will, patents, leases, contracts and property located outside of Ohio

² Originally the State Superintendent of Banks acted as "commissioner" under the Blue Sky Law. Later on, the legislature created the office of Commissioner of Securities. In 1921 the duties of the Commissioner were transferred to the Division of Securities of the Department of Commerce.

³ G. C., §§ 6373-9, 6373-14, 6373-16.

⁴ G. C., §§ 6373-20 to 6373-20c.

⁵ *Edward v. Ioor*, 205 Mich. 617; 172 N. W. 620; *Goodyear v. Meux*, 143 Tenn. 287; 228 S. W. 57.

⁶ See Sec. 4.

is closely scrutinized by the department, which in some cases has refused to certify the securities unless the amount of stock issued for the property was reduced, and in other cases has required such stock to be wholly eliminated. In all cases where stock is issued for intangible property, the patents must have been granted and assigned to the corporation, all contracts must have been properly executed and all leases properly recorded, before the security will be certified.⁷

The department has usually required all stock issued for patents, services, etc., to be placed in escrow with the department, or a trust company designated by it, to be held until the corporation is a demonstrated commercial success, and under an agreement that the stock held in escrow will not share in a distribution of assets of the corporation, in the event of liquidation while the stock is held in escrow, until all stock held by cash investors has been paid in full.⁸

(b) The amount of commissions payable for selling the stock is also scrutinized. Copies of all contracts with underwriters, brokers and agents must be filed with the application for certification of a security, and an irrevocable contract by each broker and salesman must be filed to the effect that the corporation will receive in cash not less than 85 percent of the proceeds of each sale of securities, without liability to pay any additional commission.⁹

(c) In some instances the department has required an increase in the amount of common stock bonus given to purchasers of preferred stock.

These three matters are, of course, not the only ones over which organizers of corporations have had difficulty with the department, but they have been frequent occasions of trouble and delay.

Exemptions. An Ohio corporation may dispose of securities, issued by it, without a license and without certification of the securities, under certain conditions. The disposal must be made in good faith and not for the purpose of evading the law, and must be for the sole account of the corporation, with-

⁷ Report of Department, published in Elliott's Blue Sky Laws, p. 589.

⁸ See Report of Department, Elliott's Blue Sky Laws, p. 590.

⁹ G. C., §§ 6373-14, 6373-14a.

out any commission and at a total expense of not more than two percent of the proceeds realized plus \$500. No part of the issue to be disposed of may be issued, directly or indirectly, for patents, services, good will, or for property not located in Ohio.

A statement of the existence of the above facts, and that the company is formed for the purpose of doing business in Ohio, must be made by the president and secretary, or by the incorporators if done before organization, and filed, before the securities are offered for disposal.¹⁰

Other exemptions in the law include the following:

(a) Exempt from obtaining a license.

1. National banks.
2. Any owner, not the issuer of the security, who disposes of his own property for his own account, when the disposal is not made in the course of repeated and successive transactions; a natural person, other than the underwriter of the security, who is the bona fide owner, and disposes of it for his own account.
3. One, who in a trust capacity created by law of the United States or Ohio or any other state, disposes of trust property.
4. An Ohio bank or trust company, not a regular dealer in securities, selling a security for a licensee, other than the issuer or underwriter, for a commission of not more than two percent.
5. One, not the issuer, who disposes of securities to a licensee or a company which regularly deals in or holds securities.
6. A pledgee, selling securities pledged to him as security for a debt, in good faith and not to avoid the law.¹¹

(b) Securities exempt from certification:

1. Securities issued by Ohio corporations not for profit.¹²
2. Securities, actual current sales of which, at prices

¹⁰ G. C., §§ 6373-2(f), 6373-14.

¹² G. C., § 6373-1.

¹¹ G. C., § 6373-2.

quoted, have been from time to time for not less than six months next preceding the disposal, published in regular market reports in news columns of a daily newspaper of general circulation in Ohio.

3. Securities of manufacturing or transportation companies, common carriers and other public utilities, issued and outstanding in the hands of bona fide purchasers for value prior to March 1, 1914; if the companies were on said date, and are at the time of sale, actual going concerns, either directly or through lessees, and there is no default in the payment of any interest or principal, at the time of sale.
4. Where detailed information as to the security, other than the approximate selling price, is contained in a standard manual, approved by the department.
5. Where the disposal is made for a commission of less than one percent of the par value, by a licensed dealer who is a member of a regularly organized stock exchange, having an established and lawfully conducted place of business in Ohio, regularly open for public patronage as such.¹³
6. Securities authorized by the public service commission or like body of any state or Canadian province.
7. Securities sold by or on behalf of an underwriter who, in good faith and not for the purpose of avoiding the Blue Sky Law, has purchased said securities for cash or its equivalent, at not less than 90 percent of the price at which the securities are thereafter sold by him.
8. Securities of a common carrier or an Ohio corporation engaged principally in the business of manufacturing, transportation, coal-mining, or quarrying, and the whole or a part of the property upon which the securities are predicated is located in Ohio, provided the company is an actual going concern, having been engaged in its principal business for one year or more, and having no obligations which are past due and unpaid.

¹³ Exemptions under 1 to 5 inclusive. G. C., §§ 6373-10, 6373-14.

9. Securities of a real estate or building company, all of whose property upon which the securities are predicated is located in Ohio.¹⁴

(c) Securities exempt from the law, if there is no default in interest or principal at the time of sale, and if the same have not been judicially declared invalid:

1. Corporate bonds and notes, secured by first mortgage on real estate, if more than fifty percent of the entire issue is included in a sale to one purchaser.
2. Securities of quasi-public corporations, issued by authority of the public utilities commission.
3. Stock or obligations of a national bank, or a state bank, trust company or building and loan association, organized under Ohio laws, subject to state supervision.¹⁵

Although securities may be exempt from certification, they must be disposed of through a licensed dealer or by one exempt from obtaining a dealer's license.¹⁶

The law apparently does not contemplate that claims for exemptions be submitted to the department, except in the case of a corporation selling securities of its own issue, without commission, etc., mentioned above, in which case a statement must be filed by the president and secretary on Form No. 1 provided by the department.

However, Form No. 4 provided by the department, contains questions relating to some of the exemptions, and although it is probably unnecessary to answer them, it is usually advantageous to furnish the information. The opinion of experienced department officials is thus obtained, in advance of a sale of the securities, as to whether the exemption is a proper one. In view of the general tendency of governmental bureaus and commissions to determine doubtful cases in favor of the government, an opinion favorable to an exemption would be entitled to respect, although it would not be binding on future

¹⁴ Exemptions 6 to 9. G. C., § 6373-14.

¹⁵ G. C., § 6373-2.

¹⁶ Opins. Atty. Gen. 1915, p. 2019.

officials of the department or on courts which in the future might be called on to determine the legality of the securities.

Before certifying a security, the department may examine the books and property of the issuer, and if, in its discretion, all or any part of the expense of examination should be paid by the applicant for certification, it may require the applicant to deposit money for such purpose. Each issuer of securities to whom a certificate is issued must file with the department a financial statement as of June 30th of each year.¹⁷

Following is a partial list of the forms which have been prepared by the department. These may be obtained on application to the Division of Securities, Department of Commerce, Columbus, Ohio. Forms having no relation to private corporations are omitted.

Form Nos.

1. Certificate of exemption, by president and secretary, of corporation about to dispose of securities of its own issue, without commission, etc.
2. Application for dealer's license.
3. Notice of application for dealer's license.
- 3a. Proof of publication of notice of application for dealer's license.
4. Information as to securities to be sold, including information as to exemption from certification.
- 4a. Information as to securities to be sold by licensed dealer.
5. Application for certification of securities.
8. Application to amend license by adding names of agents.
10. Application to amend license by striking out names of agents.

§ 16. Organization. Outline of procedure. The formal proceedings by means of which a corporation is organized are briefly outlined as follows:

(1) An instrument styled in the Ohio statutes "articles of incorporation," is prepared and executed by five or more incorporators.

(2) This instrument is filed in the office of the secretary of state, where it is recorded and a certified copy furnished to the incorporators.

(3) Books for subscriptions to the capital stock are opened by the incorporators and notice thereof either published or waived by the incorporators.

¹⁷ G. C., § 6373-16.

(4) Subscriptions for stock are received by the incorporators, whose duty it is to then collect from each subscriber ten percent of his subscription.

(5) When ten percent of the entire capital stock has been subscribed the incorporators so certify in writing to the secretary of state. In the case of a corporation organized with no-par-value common stock, the incorporators' certificate may be made when five or more persons have subscribed for at least one share each.

(6) The first meeting of stockholders is then called by the incorporators, who publish notice of the meeting, unless notice is waived by all the subscribers.

(7) At the first meeting of stockholders the number of directors is determined, directors elected and usually a code of regulations adopted and a time fixed for the first meeting of directors.

(8) Before meeting the directors qualify by taking an oath. At their first meeting the directors elect officers and usually enact by-laws. This perfects the organization.

§ 17. Incorporators. a. *Qualifications.* Only natural persons may act as incorporators. Corporations, firms, and associations are not qualified.¹ Incorporators must be sui juris. Infants are not competent to act.²

At least five incorporators must act in every case. A majority must be citizens of Ohio.

Incorporators are not required to become subscribers to stock or to have any financial interest in the corporation.³ It is a frequent practice for the attorneys who are employed to incorporate a company, or their clerks, to act as the incorporators. This is sometimes done because the real parties in interest do not desire to be known in that connection. At other times it is for the purpose of convenience or to expedite the organization.

b. *Functions.* Incorporators have in charge the formal organization proceedings. They sign and acknowledge the

¹Rep. Atty. Gen. 1908, p. 72; 2 Opinions Attys. Gen. 109.

²State v. Burial Assn., 8 C. C. n. s. 253; 18 C. D. 397.

³Kardo Co. v. Adams, 231 Fed. 950, 964; 14 O. L. R. 233, 241.

articles of incorporation, receive subscriptions to the capital stock and receive payment of the first instalment of ten percent. When ten percent has been subscribed (or, in the case of a corporation organized with no-par-value common stock, when five or more persons have subscribed for at least one share each) they so certify in writing to the secretary of state and call and give notice of the first meeting of stockholders.

c. *Liability.* A person may become involved in liability by acting as an incorporator unless care is taken in one important particular. By signing a "certificate of subscription" and filing it with the secretary of state, the incorporators certify, in effect, not only that certain capital stock has been subscribed, but also that ten percent on each share subscribed for has been paid, and incorporators may be held personally liable for any deficiency in its actual payment.⁴

d. *Dummy directors.* Persons without financial interest in the corporation, who participate as incorporators in the formal organization proceedings, sometimes go further and act as temporary directors and transact business of importance on behalf of the corporation. When stock is to be issued for property, the owners of the property are disqualified from acting as directors in the transaction. In such cases the nominal parties usually subscribe for the small amount of stock necessary to qualify them, are elected directors and pass resolutions authorizing the issuance of stock for the property. In such cases it is prudent for the nominal parties to pay for the stock which they subscribe for, using their own money for the purpose. If the stock is paid for by the owners of the property, the validity of the transaction is doubtful unless the stock is clearly an outright gift by them to the nominal parties.⁵

The terms "dummy incorporators" and "dummy directors" are sometimes applied to the persons who act as incorporators and directors without financial interest.

⁴ *Hessler v. Cleveland Punch & Shear Works*, 61 O. S. 621. G. C., § 8634. ⁵ *Cemetery Assn. v. Traction Co.*, 93 O. S. 161, 172.

§ 18. Articles of incorporation. "A charter is the instrument which creates the corporation."¹

In Ohio the formation of corporations is provided for by general laws. The charter of an Ohio corporation consists of the instrument known as "articles of incorporation" together with the general laws of the state.² Persons who fully comply with the general laws are entitled, as a matter of right, to organize a corporation. When articles of incorporation showing compliance with the general laws are presented to the secretary of state, with the proper fee, it is the duty of that officer to file and record the articles. He has no discretion except as to the form of the articles.³

Form. The matters to be set forth in articles of incorporation are specified by statute.⁴

The form of the articles is prescribed by the secretary of state. The better practice is to use the blank which is furnished without charge by that officer. If for any reason that is impracticable the language of such blank should be exactly followed.

Suggestions as to filling in and completing the blank forms are given in the paragraphs following.

When completed the instrument must be subscribed by the incorporators and acknowledged by them before a notary public or other officer authorized to take acknowledgments. The official character of such notary public or other officer must be certified by the clerk of the court of common pleas, and the instrument filed in the office of the secretary of state.

§ 19. Articles of incorporation. Statements in. Name of corporation. The name of a corporation for profit may begin with the word "the" and must end with the word "company," "corporation," "incorporated" or "inc."

When the business of a corporation is once established its name sometimes becomes of great value. The name is

¹ Cook on Corporations, § 2.

² Wegener v. Wegener, 101 O. S. 22, 26.

³ State v. Taylor, 55 O. S. 61.

⁴ G. C., § 8625. If organized under the no-par-value stock law, § 8723-1.

¹ G. C., § 8625.

often inseparable from the good will.² It is therefore important, especially in manufacturing and mercantile enterprises, to select a name for the corporation which is distinctive and in which trade-name rights may be acquired and protected.

The secretary of state is prohibited from accepting and filing articles of incorporation in which the name is that already assumed by an existing corporation, either an Ohio corporation or a foreign corporation which has qualified to do business in Ohio,³ or so similar thereto as to mislead the public, without the written consent of the existing corporation; nor can a corporation adopt a name which is likely to mislead the public as to the character or purpose of its business.⁴

The action of the secretary of state in filing and recording articles of incorporation is not conclusive against another corporation having a similar name. The older company may enforce its rights by injunction.⁵

The use by a corporation of a name which infringes the trade name of an individual, or of another corporation, may be enjoined. The fact of being incorporated by such name is not a defense.⁶

When a corporation is formed to take over a partnership business the name of the partnership is usually adopted, with such change as may be necessary to make the corporate name end with the word "company," "corporation," "incorporated" or "inc." Even where partnership assets, including good will, are sold through a receiver, the corporation may adopt the name previously used by the firm.⁷

§ 20. Location of corporation. Articles of incorporation must contain a statement of "the place where" the corporation "is to be located, or where its principal business is to be transacted."¹

² *Snyder Mfg. Co. v. Snyder*, 54 O. S. 86.

³ *Rep. Atty. Gen.* 1912, pp. 14, 22.

⁴ *G. C.*, § 8628.

⁵ *Cincinnati Vici Shoe Co. v. Cincinnati Shoe Co.*, 7 N. P. 135; 9 Low. D. 579.

⁶ *Thayer Carpet Cleaning, etc., Co. v. Geo. A. Thayer Co.*, 6 N. P. 300; 9 L. D. 288; *Backus Oil*

Co. v. Backus Oil, etc. Co., 5 W. L. B. 546; *Bissell Chilled Plow Works v. T. M. Bissell Plow Co.*, 121 Fed. Rep. 357; *Chickering v. Chickering*, 120 Fed. Rep. 69; *Higgins v. Higgins Soap Co.*, 144 N. Y. 462; *Wm. A. Rogers, Ltd., v. Rogers, etc., Bureau*, 247 Fed. 178.

⁷ *Snyder Mfg. Co. v. Snyder*, 54 O. S. 86.

¹ *G. C.*, § 8625.

The office building or street address of the corporation need not be specified. The requirement is satisfied by stating, in the articles, the name of the municipality or place where the principal office is to be located. Where a corporation has several offices, the office where the stockholders meetings are held is regarded as the principal office.

Under a former statute, similar in some respects to the present law, it was held that a corporation might, at pleasure, move its office from one building to another, within the specified municipality or place, although the motive was to avoid taxation.²

The personal property of a corporation (except property located in other counties) is taxed in the municipality or township where its principal office is located,³ although much of its business is carried on elsewhere.

The statement in the articles of incorporation is conclusive as to the location of the office.⁴

Vessel companies and corporations engaged in certain other kinds of business are able to avoid the higher taxes of the cities wherein much of their business is actually transacted, by locating their principal offices in small villages, or rural townships, where the tax rate is low.⁵

The removal of the principal office of a corporation to another municipality or place is accomplished by an amendment of its articles of incorporation. A vote of at least three-fifths of the issued capital stock is necessary for this purpose.⁶

Where a corporation is organized to construct an improvement which is not located in a single place, the route and termini of the improvement must be designated in the articles, in addition to the statement of the place of its principal office.⁷ This applies to railroad, gas, telephone and other similar companies.

² *Pelton v. Transportation Co.*, 37 O. S. 450; *Mercantile Trust Co. v. Etna Iron Works*, 4 C. C. 585.

³ G. C., § 5371; *Pelton v. Transportation Co.*, 37 O. S. 450; See *Sims v. Best*, 1 C. C. n. s. 41; 15 C. D. 149; *Hubbard v. Brush*, 61 O. S. 252.

⁴ *Pelton v. Transportation Company*, 37 O. S. 450; *Fairbanks Co. v. Wills*, 240 U. S. 642, 646, 647.

⁵ *Pelton v. Transportation Company*, 37 O. S. 450.

⁶ G. C., §§ 8719, 8720.

⁷ G. C., § 8625; *Opins. Atty. Gen.* 1919, p. 233.

§ 21. **Purpose of corporation.** Corporations may be organized for any purpose for which individuals may lawfully associate themselves except for carrying on professional business.¹

The purpose for which a corporation is formed must be clearly stated in the articles. The nature of the business to be transacted must be specified. Where articles of incorporation do not clearly and definitely set forth the corporate purpose, or where the statement of the purpose is ambiguous, the secretary of state may refuse to file and record the articles.²

It is good practice to state the purpose in general terms. It is improper to attempt to enumerate incidental powers, which are conferred upon the corporation by the general law.³

Single purpose. Except where special provision is made by statute, a corporation can be organized for one main purpose only. Several different classes of business can not be united in one organization.⁴

But several purposes which are incident to the main purpose of a corporation may be combined. Thus, a corporation organized for the main purpose of operating a street railway by electricity may also furnish electric light and power.⁵

To carry out the main purpose several means may be joined. A corporation organized to furnish light may, in its articles of incorporation, provide for furnishing both gas and electricity for such purpose.⁶

The secretary of state has refused to file and record articles of incorporation in which it was attempted to join several purposes which were unrelated to the main purpose.

§ 22. **The capital stock.** The number of authorized shares must be stated in the articles of incorporation. Common stock without par value may be provided for, but if the no-par

¹ G. C., § 8623.

² 4 Opinions Attys. Gen. 470; 5 Opinions Attys. Gen. 969.

³ Rep. Atty. Gen. (1909-10) 146

⁴ State ex rel. v. Taylor, 55 O. S. 67-68. For discussion of the "single

purpose" doctrine, see 3 O. L. R. 187, paper by T. H. Hogsett; 3 O. L. R. 205, paper by C. T. Lewis.

⁵ State v. Taylor, 55 O. S. 65; G. C. §§ 9134 to 9136.

⁶ Pickard v. Hughey, 58 O. S. 577.

corporation is to have preferred stock as well, the preferred must have a par value of \$5 per share or some multiple of \$5 not exceeding \$100.¹ The amount of such authorized preferred stock, as well as the number of shares and the par value of each must be stated. If the common stock is to have a par value, the total amount authorized, the number of shares, and the par value of each share must be stated.

All preferences and restrictions appertaining to the preferred stock must be specified in the articles.²

Considerations relating to the amount and form of the capital stock have been discussed elsewhere.³

Where stock has a par value it is usual to make the shares \$100 each.

Before the enactment of the no-par-value stock law, where stock was to be placed in small amounts among numerous holders, it was sometimes deemed good policy to make the par value of each share \$50 or \$10. Shares in mining companies were often given a par value of \$1 each. One of the objects of the no-par-value stock law was to provide a convenient form for the small investor.

§ 23. Articles of incorporation. Filing and recording.

Articles of incorporation are sent direct to the secretary of state, together with the proper fee. If the instrument is in proper form, and shows compliance with the law, it is the duty of the secretary of state to officially accept, file and record the same. In case of wrongful refusal, mandamus will lie to compel its filing and recording.¹

But where the instrument is defective in form, or where the corporate purpose is illegal, or unauthorized,² or is not clearly stated,³ or where it is attempted to unite several different classes of business,⁴ or the name of the corporation is misleading, or infringes the name of another corporation,⁵ or the law is not complied with in other respects, it is the

¹ G. C., § 8728-1.

² G. C., §§ 8668, 8669.

³ Secs. 11 to 13 above.

¹ State v. Taylor, 55 O. S. 61.

² State v. Laylin, 73 O. S. 90.

³ 4 Opinions Attys. Gen. 470.

⁴ State v. Taylor, 55 O. S. 61.

⁵ G. C. § 8628.

duty of the secretary of state to refuse to file and record the same.⁶

Correction of defective articles. Where articles of incorporation are refused acceptance and record, the secretary of state returns the same to the incorporators with an explanation of the defects. In such case, it is not proper practice to attempt to alter the original instrument or to correct it by interlineation. A new instrument should be prepared, signed and acknowledged by the incorporators.⁷

Effect of filing. The filing and recording of articles of incorporation do not create the corporation; they are merely authority to the incorporators to do so. The business for which the corporation is organized should not be transacted until the requisite stock has been subscribed and paid and the directors chosen.⁸

Certified copy of articles. A certified copy of articles of incorporation, which have been filed and recorded, is furnished by the secretary of state to the incorporators. Such copy is by statute made "prima facie evidence of the existence of the corporation."⁹

In appropriation proceedings in addition to such certified copy it is necessary for the corporation to prove the legal and proper organization including the subscription and payment of the requisite stock and the legal election of directors. This would be the safe course to pursue in any case where it is necessary to prove the legal existence of a corporation.¹⁰

§ 24. Articles of incorporation. Amendments. Articles of incorporation may be amended in the following respects:

- (1) The corporate name may be changed.
- (2) The location of the corporation may be changed.
- (3) The corporate purposes may be modified, enlarged or diminished.

⁶Trust Co. v. Ford, 75 O. R. 335.

⁷2 Opinions Attys. Gen. 243.

⁸State v. Insurance Co., 49 O. S. 440; Cemetery Assn. v. Traction Co., 93 O. S. 161.

⁹G. C. § 8629.

¹⁰Telephone Co. v. Cincinnati, 73 O. S. 64.

- (4) The number of shares of capital stock may be increased or decreased; preferred stock may be provided for, or unissued preferred stock may be dispensed with or changed into common stock; unissued common stock may be changed into preferred, or preferences and restrictions of unissued preferred stock may be amended, added to or eliminated; or there may be added matters omitted from the articles, or which might lawfully have been provided for in the original articles; or unnecessary provisions or provisions which might have been originally omitted may be taken out.

Limitations. A corporation can not, by amendment, change substantially the original purpose of its organization, nor may the capital stock, by amendment, be increased or diminished.

The restrictions upon the selection of the original corporate name apply also to a change of name.¹

Procedure. Amendments to articles of incorporation may be made only at a meeting of the stockholders, by a vote of the owners of at least three-fifths of its capital stock then subscribed. For the notices, or waivers of notices, required in connection with the stockholders' meeting, and for the certificate of amendment to be filed with the secretary of state, see the forms in the following chapter.

§ 25. Record or minute book. One book is usually sufficient to contain the record of the organization proceedings and also of the proceedings of the stockholders and directors.

A loose-leaf book is used to a considerable extent for this purpose, the advantage being that all records and minutes may be typewritten. Formerly loose-leaf books were subject to the objection that the records could be easily changed by the removal of pages and the substitution of others. At the present time loose-leaf books are made for this purpose, with the pages consecutively numbered and permanently marked, so that the risk of substitution is little if any greater than in the case of a bound book.

¹ G. C. § 8719.

Many corporations, however, use a bound book, the minutes being written with pen, or typewritten on thin paper and pasted in the book. In the latter case, substitutions are possible. If, however, each page is attested by the signatures of the president and secretary, no substitution can be made without the aid of such officers.

For the purposes of a small corporation a book of 100 pages is adequate. Corporations whose directors hold frequent meetings keep separate books for stockholders and directors minutes.

Preparation of organization record in advance. In the case of small and close corporations where the directors, officers and organization details have been agreed upon in advance by the parties in interest, it is a not uncommon practice for attorneys in charge of the incorporation to prepare in advance the entire organization record including the minutes of the first stockholders' and directors' meetings and the certificates of stock. By this method the minutes as well as all waivers, certificates, subscriptions, consents, etc., are ready for signature, and the organization proceedings may be consummated and the record completed with a considerable saving of time. If the meetings are actually held and the formal procedure actually carried out the practice is believed to be valid.

Contents of record. Organization proceedings should be recorded in full so that the due and complete organization and legal existence of the corporation may be readily proved, should occasion require.

Upon receiving from the secretary of state the certified copy of the articles of incorporation, the record book should be opened. On the title page should be entered, "Record of proceedings of the Incorporators, Stockholders and Directors of The Company."

The following matters should be recorded in the order given:

Proceedings of incorporators.

- (1) Copy of the articles of incorporation, with all certificates.

- (2) Order for opening books of subscription, with notice or waiver.
- (3) Order designating one incorporator to receive payment of first instalment on stock.
- (4) If the common stock has no par value, an order fixing the consideration to be paid therefor by the subscribers.
- (5) If the stock is to be exempted under the Blue Sky Law on the ground that the stock is to be sold by the corporation, without commission, etc., order for the filing of a statement for the exemption.
- (6) Subscription agreement.
- (7) Certificate of subscription.
- (8) Order for first stockholders' meeting.
- (9) Notice, or waiver of notice, of first meeting of stockholders.

Proceedings of stockholders.

- (1) Minutes of first meeting of stockholders.
- (2) Regulations.
- (3) Assent to adoption of regulations.
- (4) Certificate (by incorporators) of election of directors.

Proceedings of directors.

- (1) Oath of directors.
- (2) Minutes of first meeting of directors.
- (3) By-laws.

Forms for the above entries are given in detail in the following chapter.

All orders, subscriptions, certificates, waivers, etc., should be signed in the record book. This places the record of the entire organization proceedings in a compact and convenient form.

§ 26. Subscriptions to stock. a. *Opening books.* After a certified copy of the articles of incorporation is received from the secretary of state the first important duty of the incorporators relates to subscriptions to the capital stock.

All of the incorporators need not act. A majority may open the subscription book and sign the certificate of sub-

scription. But thirty days' previous notice of the opening of the subscription book must be published where only a majority act. Publication can not be waived unless all of the incorporators sign the waiver.¹

If the common stock has no par value, the incorporators should make an order fixing the consideration to be paid therefor by the subscribers.² No such order is necessary as to par value stock.

b. *By whom subscriptions received.* Before the election of directors, subscriptions are received by the incorporators. After the election of directors, the board has the right to dispose of whatever stock remains unsubscribed.³

c. *Compliance with the Blue Sky Law.* Whether incorporators may legally receive subscriptions without complying with the Blue Sky Law, is a question which has not been settled by judicial decision, and on which there is some difference of opinion among Ohio lawyers.⁴

Incorporators are expressly authorized by the Blue Sky Law to file a certificate for exemption where an issue of stock is to be disposed of without commission at a limited expense

¹ G. C., § 8631.

² G. C., § 8728-1.

³ *Sims v. Street Railroad Co.*, 37 O. S. 565.

⁴ Subscriptions obtained by incorporators probably come within the strict letter of the law, but whether they come within its spirit or reason is doubtful.

View that the law does not apply. The incorporators of a par value stock corporation, pursuing the organization procedure prescribed by statute, merely open a book and the subscribers sign the book for the purpose of providing the corporation with its original funds; the statutory subscription is a necessary part of the corporate organization, which is not complete until ten percent of the stock is subscribed and directors elected. There can be no corporation until there are stockholders. The Blue Sky Law could

not have been intended to affect the original statutory subscriptions, because they are payable at par in cash only, and there are no questions of discount, commission expense, or fraud. See paper by Richard Inglis, 18 O. L. R. 515.

View that the law does apply. Under G. C., § 8627, corporate existence begins immediately upon the filing of the articles for the purpose of obtaining subscriptions to stock. For that purpose and until directors are elected, the incorporators are the corporation. They are authorized to "contract and be contracted with" and, therefore, have authority to make a valid contract to pay commissions for obtaining subscriptions. Rep. Atty. Gen. 1914, p. 147. Excessive commissions were among the evils which the Blue Sky Law was intended to remedy.

and no stock of the same issue is to be issued for patents, services, good will, or property not located in Ohio.⁵

If the intention is to exempt the stock on the above ground, it is good policy for the incorporators to file the statement for exemption before receiving subscriptions and thus obviate any possible question of illegality of the subscriptions.

If the circumstances are such that the stock is not to be exempted on the ground above mentioned, then the incorporators should, if possible, comply with the Blue Sky Law.⁶ If it is decided to risk further proceedings without complying with the Blue Sky Law, then the minimum of stock necessary for organization purposes only should be subscribed for, and that preferably by the persons who are to be the first directors. After organization the directors should comply with the Blue Sky Law before disposing of more stock.

Because of the widespread belief that the Blue Sky Law does not apply to subscriptions received by the incorporators, the latter course has been followed in many instances, and it is believed that no very serious consequences will ensue unless the corporation belongs to a class authorized to appropriate property and attempts to exercise that power. For other practical purposes the corporate organization is sufficient.⁷ No one has been injured. The bulk of the stock has been certified or its exemption informally approved before disposition. Even if the courts should decide that the Blue Sky Law applies to organization subscriptions, the subscribers, under such circumstances, being the directors who authorized subsequent sales of the stock to others, could not repudiate their own subscriptions.⁸

d. *Formal requisites of subscriptions.* A subscription for stock must be in writing. A verbal agreement to take shares is not enforceable, in the absence of facts constituting an estoppel.⁹

The subscription need not be made in the book provided by the incorporators. A subscription on a separate paper is

⁵ G. C., § 6373-2(f). See Sec. 15 above.

⁶ See Sec. 15 above.

⁷ Kardo Co. v. Adams, 231 Fed. 950; 14 O. L. R. 233.

⁸ See 13 Corpus Juris, 499 to 501.

⁹ Fanning v. Insurance Co., 37 O. S. 339; Hanes v. Dayton, etc., R. Co., 40 O. S. 98.

valid.¹⁰ The subscription need not contain a statement of the times of payment, as payment is provided for by the statute.¹¹

e. *Ten percent payable with subscription.* An instalment of ten percent on each share is payable at the time the subscription is made. The incorporators are authorized to receive payment of this instalment.¹²

It is good practice for the incorporators to designate one of their number, by an order entered in the record of their proceedings, to receive payment.¹³

Payment is frequently made in the form of certified checks payable to the order of the corporation, which are turned over to the treasurer of the corporation upon his election.

f. *Medium of payment.* The incorporators of a corporation with par-value common stock are authorized to receive money, but no other kind of property, in payment of the first instalment.¹⁴ Where the common stock is no-par-value stock, subscriptions may be received therefor "for such consideration as may be decided upon by a majority of the incorporators at the time of ordering books to be opened for subscription."¹⁵

g. *Effect of nonpayment.* A subscriber who has not paid the first instalment of ten percent may be excluded from voting at elections for directors.¹⁶

But failure to pay the first instalment does not release the subscriber from liability on his subscription.¹⁷

Incorporators of a par-value stock corporation may render themselves liable if they certify to the secretary of state that ten percent of the capital stock is subscribed, before ten percent of each subscription has been paid.¹⁸

¹⁰ *Ashtabula Co. v. Smith*, 15 O. S. 328.

¹¹ *Chamberlain v. R. R. Co.*, 15 O. S. 225, 249; *Ashtabula, etc., R. Co. v. Smith*, 15 O. S. 328, 336.

¹² *Sims v. Street Railroad Co.*, 37 O. S. 565.

¹³ *Cincinnati v. Queen City Telephone Co.*, 2 N. P. n. s. 349, 364; 15 L. D. 43; affirmed 73 O. S. 64.

¹⁴ *Dayton, etc., R. Co. v. Hatch*,

1 *Disney* 96; See *Gates v. Tippecanoe Stone Co.*, 57 O. S. 74.

¹⁵ G. C., § 8728-1.

¹⁶ G. C., § 8636; *Queen City Telephone Co. v. Cincinnati*, 73 O. S. 77.

¹⁷ *Henry v. Vermillion R. R. Co.*, 17 Ohio 187; See *Chamberlain v. R. R. Co.*, 15 O. S. 225, 249; *Ashtabula R. R. Co. v. Smith*, 15 O. S. 328, 336.

¹⁸ *Hessler v. Cleveland Punch & Shear Works*, 61 O. S. 621.

h. *Release or withdrawal.* The incorporators being authorized to receive subscriptions, a subscription received by the incorporators after books have been opened is binding.¹⁹

Such subscriptions should be distinguished from subscriptions made before articles of incorporation have been filed, which have been held to be lacking in mutuality and not enforceable.²⁰

A subscription received by the incorporators is a contract, which can not be dissolved without the consent of both parties. The subscriber can not relieve himself from liability by attempting to withdraw or cancel his subscription. The corporation can not release the subscriber to the prejudice of any intervening creditor.²¹

Directors have no power to release or cancel a subscription, except with the unanimous consent of the other subscribers.²²

But the directors may compromise with and release a subscriber where there is a controversy as to his liability, or where the subscriber is insolvent.²³

Subscriptions obtained through fraud by promoters or representatives of a corporation may be rescinded, if the subscriber acts promptly upon discovery of the fraud.²⁴

i. *Payment.* As already stated, ten percent on each share is payable to the incorporators when the subscription is made. The balance is payable as required by the directors,²⁵ who may require the entire amount to be paid immediately, or may levy assessments as money is needed for the purposes of the corporation. Directors have power to accept property in payment of such balance.

After the first instalment of ten percent has been paid, nothing is due on a subscription until a call has been made

¹⁹ Milford Turnpike Co. v. Brush, 10 Ohio 113, 114; Ashtabula R. R. Co. v. Smith, 15 O. S. 334, 336.

²⁰ Dayton Co. v. Coy, 13 O. S. 84, 91.

²¹ Gaff v. Flesher, 33 O. S. 107; Royce & Pulling v. Tyler, 2 C. C. 175; 1 C. D. 428; Niles v. Olszak, 87 O. S. 229.

²² Cook on Corporations, §§ 168,

169; See Warner v. Callender, 20 O. S. 198; Royce & Pulling v. Tyler, 2 C. C. 187; 1 C. D. 428.

²³ Cook on Corporations, § 171; Warner v. Callender, 20 O. S. 198.

²⁴ See Armstrong v. Karshner, 47 O. S. 294; Nugent v. R. R. Co., 2 Dis. 302; Jewett v. Railway, 34 O. S. 609.

²⁵ G. C., § 8632.

by the directors specifying the person to whom, and the time and place where the instalment is payable.²⁶

A suit to collect an instalment can not be brought until sixty days after the time of payment designated in the call.²⁷

Where subscriptions are paid by instalments it is customary to issue transferable receipts for payments, the receipts being exchanged for certificates of stock when all the instalments are paid.

§ 27. Certificate of subscription. Liability of incorporators. As soon as ten percent of the capital stock has been subscribed or, in the case of a no-par-value stock corporation, when five or more persons have subscribed for at least one share each, and in either case when ten percent has been paid on each share so subscribed for, it is the duty of the incorporators, or a majority of them, to so certify in writing to the secretary of state. A blank form of such certificate is furnished to the incorporators by the secretary of state.

Incorporators sometimes fail to appreciate the full significance of the certificate of subscription, as, in the form provided, no mention is made of payment. Incorporators are liable for the amount of any deficiency in the actual payment of ten percent on each share of stock subscribed for.¹

In other words, by signing a certificate of subscription, incorporators become guarantors of the corporation to future creditors. This liability is a security for the creditors of the corporation, and may be enforced by creditors although they have no knowledge of the certificate.²

It is not difficult for incorporators to effectually guard against liability. They may, by order entered on the record of proceedings, designate one of their number to receive payment of the first instalment; and may refuse to accept any subscription unless the first instalment accompanies it.

It is probable that incorporators may refuse to call the first meeting of stockholders until the requisite sum is in the possession of the designated incorporator. If a first

²⁶ G. C., § 8632; *Railroad Co. v. Fink*, 41 O. S. 329.

²⁷ G. C., § 8674.

¹ G. C. § 8634.

² *Hessler v. Cleveland Punch & Shear Works Co.*, 61 O. S. 621; *Ames v. McGaughey*, 88 O. S. 297.

meeting is called, the incorporators have the right to act as inspectors or tellers of the first election of directors and may refuse to permit a subscriber to vote until he has paid the first instalment.³

All of the incorporators need not sign the certificate of subscription. A majority is sufficient.

In the case of corporations organized under the no-par-value stock law, the incorporators are merely required to certify that not less than five persons have subscribed for at least one share each and paid ten percent on each share subscribed for.⁴

Avoiding liability of incorporators under large capitalization. Where it is desired to issue a large part of the stock (of a corporation having common stock with par value) for property and to pay in the least possible cash for stock, a practice sometimes followed is to originally organize with a small capital stock, one-tenth of which is paid in cash. After organization the capital stock is increased to the desired amount. Incorporators have nothing to do with the increase, their duties and functions having ended with the organization and election of directors. All the increased stock is subsequently issued for property by the directors.

§ 28. First meeting of stockholders. The first meeting of stockholders is called by the incorporators after ten percent of the capital stock has been subscribed.

This meeting should be held within the state.¹

A notice of such meeting is required to be published thirty days before the time designated, but the notice may be, and in practice almost invariably is, waived in writing by all of the subscribers.²

For the routine of the first meeting of stockholders, see *Forms* in the chapter following.

The important business transacted at the first meeting consists of (1) the adoption of regulations, and (2) the election of directors.

³G. C. § 8636; *Cincinnati v. Queen City Telephone Co.*, 2 N. P. n. s. 364; 15 L. D. 43; affirmed 73 O. S. 64.

⁴G. C., § 8728-2.

¹*Myers v. Manhattan Bank*, 20 Ohio 283; *Cook on Corporations*, § 589.

²G. C. § 8631.

§ 29. **Regulations.** a. *Distinguished from by-laws.* Provisions are contained in the Ohio statutes for *regulations*, which are adopted by the stockholders for the government of the corporation and for *by-laws* which are adopted by the directors for the government of the directors.¹

In many states the corporation laws provide for by-laws only, which are adopted by the stockholders and correspond to the regulations of an Ohio corporation.

A corporation is not required to adopt regulations, but a carefully prepared code of regulations is important, as it provides for many details which would otherwise, in all probability, be entirely omitted.

Regulations must be consistent with the constitution and laws of the state. Regulations are intended to supplement the general provisions of the statutes and to provide permanent rules relating to the administration of the affairs of a corporation, and also relating to organization, in matters of detail.

b. *Provisions in.* Certain matters are specified by statute,² as proper subjects to be provided for in the regulations. It seems that there is no authority to make regulations upon other subjects, although other regulations have been sustained as contracts.³

The number of directors is fixed by the stockholders, within the statutory limitation that the number shall not be less than five nor more than thirty. As a matter of convenience the determination of the number of directors is usually in the form of a provision in the regulations. Where the regulations provide that more than a majority vote is necessary for amendments thereto,⁴ the provision relating to the number of directors should be omitted from the regulations, and a separate resolution should be passed fixing the number. By statute, the number of directors may be changed by a vote of a *majority* of the stock at a stockholders' meet-

¹ State v. Kreutzer, 100 O. S. 246; State v. Burial Assn., 8 C. C. n. s. 248; 18 C. D. 397.

² G. C. § 8704.

³ Nicholson v. Franklin Brewing Co., 82 O. S. 94, 110, 111.

⁴ Wangerien v. Aspell, 47 O. S. 260.

ing.⁵ For customary provisions of regulations, see *Forms* in the following chapter.

c. *Directors and officers, regulations relating to.* Stockholders are authorized by statute to provide in the regulations for (a) "the duties and compensation of officers" and (b) "the manner of election, or appointment, and the tenure of office, of all officers other than the trustees or directors."⁶

This confers important rights upon the stockholders, viz., the right to control (1) the salaries, (2) and duties of officers, and (3) the election and term of subordinate officers.⁷

A complaint sometimes made against the management of corporations, is that dividends are improperly diminished by the payment of extravagant salaries to the officers.⁸

The stockholders, through appropriate regulations, may remove the temptation to such abuse of power by the directors. It is sometimes provided in regulations that each director shall receive a certain sum (ranging from \$1 to \$20) for his attendance at any directors' meeting, and that he shall receive no other compensation as director.

The salaries of other officers may be specified in the regulations; or it may be provided that such salaries shall be fixed yearly in advance by the stockholders at the annual meeting. Or the regulations may merely place maximum limits on salaries, leaving the exact amount to be determined by the directors.

In the absence of regulations on the subject, the president, vice-president, secretary, treasurer and other subordinate officers are chosen by the board of directors. Stockholders may, in the regulations, reserve the right to elect all of such officers,⁹ with the exception of the president.¹⁰

This right is infrequently exercised except in the case of the secretary. As these officers perform their duties under the supervision of the directors, it is generally deemed

⁵ G. C. § 8665.

⁶ G. C. § 8704; *Morris v. Griffith*, 34 W. L. B. 191.

⁷ *Belting Co. v. Gibson*, 68 O. S. 449; *Morris v. Griffith*, 34 W. L. B. 191.

⁸ *Dissette v. Publishing Co.*, 9 C. C. n. s. 118; 19 C. D. 168; *Cook on Corporations*, § 657.

⁹ G. C. § 8704.

¹⁰ G. C. § 8664.

better policy to lodge the appointing power in the directors also.

d. *How adopted.* Regulations may be adopted, or amended, by the written assent of two-thirds of the stockholders, or by a majority of the stockholders at a meeting called for the purpose.¹¹

§ 30. **Election of directors.** a. *Qualifications and terms of office.* All directors must be the holders of stock in the corporation in an amount to be fixed by the by-laws, and a majority of the directors must be citizens of Ohio.¹

The voting at elections for directors must be by ballot. Directors elected at the first meeting of stockholders hold office until the next annual election, or until their successors are elected and qualified. Thereafter directors are elected for the term of one year.²

b. *The procedure* at elections is usually as follows: Nominations are called for by the presiding officer. When the nominations are closed, if there is a contest, tellers or inspectors of election are chosen, who take charge of the balloting.

If there is no contest, the secretary or some other officer may be instructed by motion to cast the ballot of all stockholders present for the persons nominated.

If there is a contest resulting in a tie on the first ballot, the stockholders have a right to ask for successive ballots until it is demonstrated that further balloting is futile.³

c. *Tellers or inspectors of election.* Stockholders are entitled to have the election conducted by tellers or inspectors of election. Where such officials are appointed, they, and not the president or chairman of the meeting, have the right to decide who may vote.

At the first election of directors the incorporators have a right to act as tellers or inspectors of election.⁴

¹¹ G. C. § 8703.

¹ G. C. § 8661.

² State v. Clough, 18 C. C. n. s. 509; aff'd no rep. 88 O. S. 590; Toledo Co. v. Smith, 205 Fed. 643, 647; Lutterby v. Brewing Co., 12 L. D. 67. For term of office of directors of Building and Loan and

certain Insurance Companies, see G. C., §§§ 9646, 9515.

³ State v. DuBrul, 100 O. S. 272.

⁴ G. C., § 8637; Queen City Telephone Co. v. Cincinnati, 2 N. P. n. s. 364; 15 Low. D. 43 (affirmed 73 O. S. 64).

At subsequent elections the right to choose the inspectors is vested in the stockholders, and not in the directors.⁵

Upon application by stockholders owning at least a one-tenth interest in the stock of a corporation, made prior to a stockholders' meeting, a court of common pleas may appoint three disinterested inspectors of election.⁶

d. *Who may vote.* In general, only persons who appear as stockholders on the books of the corporation are entitled to vote, in person or by proxy, at stockholders' meetings. The officers in charge of the election are governed by the stock books of the corporation. They can not take notice of the rights of third persons in the stock, nor can they refuse to permit a registered stockholder to vote.⁷

It is sometimes provided in the corporate regulations that only those persons may vote who appear on the books as stockholders for a certain period, usually ten days, prior to the meeting.⁸

Where stock is transferred during such period, it is customary for the transferrer to give a proxy enabling the transferee to vote at the meeting.

No person may vote on any stock on which an instalment is due and unpaid.⁹

Holders of preferred stock may vote unless by the terms of its issue the voting right is withheld.¹⁰

e. *Proxies.* Where a stockholder, in writing, authorizes another person to vote his stock at one or more stockholders' meetings, the written authorization is called a "proxy." The term "proxy" is also applied to the person to whom the authority is given.

A proxy may usually be revoked at any time by the stockholder, although by its terms it is "irrevocable."¹¹

⁵ State v. Merchant, 37 O. S. 251.

⁶ G. C., §§ 8640 to 8645.

⁷ Hafer v. Railway Co., 14 W. L. B. 68, 72 (1885); Franklin Bank v. Commercial Bank, 36 O. S. 355 (1881); See G. C. §§ 8642, 8643.

⁸ See G. C., § 8642.

⁹ G. C., § 8636.

¹⁰ State v. Urschel, 104 O. S. 172.

¹¹ Griffith v. Jewett, 15 W. L. B. 419. But where an "irrevocable" proxy is given as a condition to loans being made to the corporation and additional capital raised, the stockholder and his assigns may not be entitled to revoke it. Craig v. Furnace Co., 19 N. P. n. s. 545.

A stockholder who attends the meeting is entitled to vote, although he has given a proxy.

Proxies are usually unrestricted, and in such case, the holder of the proxy may vote as he deems best.¹² But a proxy may designate the candidates for whom the votes shall be cast, and such a proxy does not authorize its holder to vote on any other question, even on a motion to adjourn the meeting.¹³

An executor is not authorized to give an unrestricted proxy. To be valid it must give express instructions for whom the votes are to be cast, leaving no discretion to the holder of the proxy.¹⁴ An officer or director of the corporation may act as proxy.¹⁵

A regulation of the corporation requiring proxies to be deposited with the secretary at least one day before the time set for the meeting is valid.¹⁶

f. *Cumulative voting.* A stockholder in an Ohio corporation has the right to cast his votes under the so-called cumulative system. He may vote "the number of shares owned by him for as many persons as there are directors to be elected, or . . . cumulate said shares and give one candidate as many votes as the number of directors multiplied by the number of his shares of stock equals, or . . . distribute them on the same principle among as many candidates as he thinks fit."¹⁷

Cumulative voting is authorized for the purpose of enabling minority stockholders to secure representation on the board of directors.

For each director to be elected a stockholder is entitled to one vote per share of stock registered in his name on the books of the corporation. Under the cumulative system a stockholder may cast all of his votes for one candidate, or he may divide them among a part, or all, of the candidates.

Where there are five directors, a person owning one share is entitled to five votes, all of which may be cast for one candidate. Or one vote may be cast for each of five candi-

¹² Burch v. Coan, 17 L. D. 717.

¹³ State v. McIntosh, 23 C. C. n. s. 305.

¹⁴ State v. Voight, 2 Ohio App. 145; 17 C. C. n. s. 448.

¹⁵ Rep. Atty. Gen. 1912, p. 681.

¹⁶ Rep. Atty. Gen. 1913, p. 798.

¹⁷ G. C., § 8636.

dates, or the votes may be divided among the candidates in any other other manner desired.

If 500 shares of stock have been issued and are represented at a stockholders' meeting at which five directors are to be elected, a minority which controls 85 shares is enabled, under the cumulative system, to elect one director. The 85 shares are entitled to 425 votes. The balance of 415 shares is entitled to 2,075 votes. If the 425 minority votes are cast solidly for one candidate, it is impossible for the majority to defeat him.

Under the cumulative system it is impossible for a minority to obtain control of the board of directors, if the majority act together and cumulate their votes. But if the majority scatter their votes, a strong minority of stockholders may be able to secure a majority of the board.¹⁸

Stockholders may cumulate their votes not only on the first ballot, but on successive ballots so long as any directors remain to be elected.¹⁹

§ 31. Regular meetings of stockholders. a. *When held.*

An annual meeting of stockholders is usually provided for in the regulations, which specify the time, place and manner of calling and conducting the meeting and for the number of stockholders necessary to constitute a quorum.¹

In the absence of a regulation on the subject, the annual meeting should be held on the first Monday in January of each year.²

Meetings of stockholders should be held within the State.

b. *Notice.* Where the time and place of the annual meeting are provided for in the regulations, notice of the meeting, or of the business to be transacted, is not required to be given unless the regulations provide for notice.³

Regulations sometimes require notice to be mailed to the stockholders, but stipulate that failure to give the notice shall not invalidate proceedings at the meeting. Under such a

¹⁸ State v. DuBrul, 100 O. S. 272;
Schwartz v. State, 61 O. S. 497.

¹⁹ State v. DuBrul, 100 O. S. 272.

¹ State v. Kreutzer, 100 O. S. 246;
State ex rel. v. Shaw, 103 O. S. 660.

² G. C., § 8647.

³ State v. Kreutzer, 100 O. S. 246.

regulation, failure to give notice does not invalidate an election.⁴

The better practice, however, is to mail notices of all annual meetings. The notices should be signed by the secretary and a copy preserved, with the date of mailing.

If any business, other than the routine of the annual meeting, is to be considered at the meeting, it is prudent to mention it in the notice.

c. *Closing of stock records.* It is sometimes provided in the regulations that only those persons may vote who appear as stockholders on the stock books for a certain number of days before the meeting. Where the regulations contain such a provision it is customary to so state in the notice.

This provision is not, in effect, a closing of the transfer books. Transfers of stock may be made at any time, but the transferee can not vote as a stockholder unless the transferer gives a proxy enabling the transferee to vote at the meeting.

d. *Presiding officer.* The regulations usually provide that the president shall preside at meetings of the stockholders, and that the secretary shall keep a record of the proceedings of stockholders. In the absence of the president, the vice-president should preside. In the absence of both president and vice-president, a chairman of the meeting should be chosen by the stockholders. In the absence of the secretary, a secretary pro tem should be chosen.

e. *Quorum.* A quorum at a stockholders' meeting is the number of shares of stock necessary to be represented by the holders, or proxies, in order that business may legally be transacted. This is usually provided for in the regulations, the customary requirement being a majority of the stock issued and outstanding.

If there is no regulation on the subject, the stockholders present in person or by proxy, at a duly called meeting, may transact the business of that meeting although a majority of the stock is not represented.⁵

⁴ State v. Kreutzer, 100 O. S. 246.

⁵ Lutterby v. Herancourt Brewing Co., 12 L. D. 67, 72, 73.

Where a quorum is required by the regulations, it is important to determine at the outset of the meeting, whether a quorum is present. This may be ascertained by a roll call, or by requesting the stockholders and holders of proxies to report to the secretary.

Proxies should be filed with the secretary.

If a quorum is present, that fact should be noted on the minutes.

If a quorum is not present, the meeting may be adjourned to a specified time when, if a quorum is secured, the meeting may proceed. Adjournment should be by action of the stockholders present.

f. *Procedure at meetings.* Stockholders' meetings are usually conducted according to the rules of parliamentary law. It is sometimes provided in the regulations that meetings shall be conducted according to Robert's Rules of Order or some other handbook on parliamentary law.

g. *The order of business* at stockholders' meetings is usually prescribed in the regulations as follows:

(1). *Reading of minutes.* The minutes of the preceding annual meeting, and of all special meetings of the stockholders held subsequent thereto, should be read by the secretary.

This is not always an unimportant part of the meeting. As minutes are proper evidence of the proceedings,⁶ all incomplete or ambiguous statements, or errors, should be corrected before the minutes are approved. The record, or form of statement of the previous proceedings, is approved by an approval of minutes at a subsequent meeting.⁷

(2). *Reading of reports and statements.* Reports are frequently made by the president, treasurer, and sometimes by other officers. After being read, the reports may, on motion, be ordered received and placed on file. Some reports may properly be referred to special committees or to the incoming board of directors for attention.

(3). *Unfinished business.* This includes matters which may have been considered at previous meetings, but not disposed

⁶ Cook on Corporations, § 714.

⁷ Bank v. Iron Co., 30 W. L. B. 382.

of and also matters which have been referred to committees for attention.

(4). *The election of directors* has been discussed elsewhere in this chapter.

(5). *New or miscellaneous business.*

(6). *Adjournment.* The meeting may on motion be adjourned *sine die*, or to a definite time. An adjourned meeting is merely a continuation of the original meeting and notice of the adjourned meeting need not be given to the stockholders.⁸ Adjournment should be by action of a majority of the shares represented at the meeting.⁹ The directors have no power to postpone or adjourn a meeting.¹⁰

Where an annual meeting has been adjourned, the stockholders can not legally call a special meeting during the interim between the original meeting and the adjourned session.¹¹

§ 32. **Special meetings of the stockholders.** Unless waived by all stockholders of the corporation, two preliminaries are required for a special meeting of stockholders. (1) The meeting must be ordered or called by competent authority, and (2) Notice, specifying the time, place and object of the meeting must be given to all stockholders.

It is frequently provided in the regulations (1) that special meetings may be called by the board of directors or by a certain number of stockholders, and (2) that notice of the meeting may be given to the stockholders by mail.

No business can be legally transacted at a special meeting except that which is specified in the call and notice of the meeting.

Where a special meeting is held by consent of all the stockholders these rules do not apply. As a precautionary measure in such cases a waiver should be signed by all stockholders.

There are numerous statutory provisions for stockholders' meetings to take action on special matters. The provisions

⁸ State v. Bonnell, 35 O. S. 10;
State v. Kreutzer, 100 O. S. 246.

¹⁰ State v. Kreutzer, 100 O. S. 246.

⁹ State ex rel. v. Shaw, 103 O. S. 660.
¹¹ State ex rel. v. Shaw, 103 O. S. 660.

of the statute relating to the call for and notice of the meeting should be carefully followed in each case. Among the subjects specially provided for are the following: election of directors where, for any cause, directors have not been elected at the regular meeting; change in the number of directors; amendment of the articles of incorporation; amendment of the regulations; increase of capital stock; sale of entire assets of the corporation, and dissolution of the corporation.

§ 33. Minutes. The minutes of stockholders' meetings do not differ materially from the minutes of directors' meetings, except that the names of the directors present at the meeting are entered in the minutes, which is not the usual practice in making up the minutes of stockholders' meetings.

Matters are properly brought before a meeting in the form of motions or resolutions. Important matters are usually presented in the form of written resolutions. Other matters are brought up by motion, usually presented orally.

During a meeting the secretary, as a rule, takes notes of the proceedings and subsequently from his notes writes out the minutes in full. It is advisable to make up the full minutes within a short time after the meeting, before the circumstances are forgotten.

All motions and resolutions passed upon should be recorded in the minutes with the action taken thereon, whether favorable or adverse. It is not customary to mention the names of the persons by whom motions are made; but the names of the persons by whom important resolutions are offered are usually entered.

As motions are made verbally, care should be taken by the secretary to enter accurately the substance of every motion. When the secretary is in doubt as to the meaning of a motion, the person making it may be requested to repeat his motion, or to make it in writing.

The discussions over motions and resolutions are usually not entered, although the names of persons taking part in the debate are sometimes mentioned.

Reports, contracts and other instruments are frequently presented and acted upon at corporate meetings. Where the matter is important the document should be copied into the minutes. In other cases it is sufficient to describe the instrument so as to identify it, and to file the original.

Specimens and forms of minutes are given in the following chapter.

§ 34. Directors. a. *Qualifications.* A majority of the directors must be citizens of Ohio, and all directors must be holders of stock in the amount fixed by the by-laws.¹

A person not a stockholder may be elected a director and may, after election, qualify himself by acquiring stock.²

Where a director ceases to own stock, but continues to act as a director, he may be recognized as a *de facto* director and his acts as to third persons held valid.³

A person is not properly qualified where a share of stock is issued in his name merely for qualifying purposes, he indorsing and delivering the certificate of stock to the real owner, or agreeing to do so on demand.⁴ But stock may be given outright to a person for the purpose of qualifying him as a director,⁵ and a director may hold his shares in trust, where there is no agreement that the stock is held merely for qualifying purposes to be surrendered on demand.⁶

An oath, faithfully to discharge his duties as director, is required to be taken by each director before entering upon his duties.⁷

b. *Interlocking directors.* The Clayton Act, passed by Congress in 1914, provides that "no person at the same time shall be a director in any two or more corporations, any one of which has capital, surplus, and undivided profits aggregating more than \$1,000,000, engaged in whole or part in

¹ G. C. § 8661.

² *Greenough v. Railroad Co.*, 64 Fed. Rep. 22.

³ *Campbell Printing Press Co. v. Belman Bros. Co.*, 11 C. C. 360; 5 C. D. 389.

⁴ *Cemetery Assn. v. Traction Co.*, 93 O. S. 161; *State v. McIntosh*, 23

C. C. n. s. 305; *Bartholomew v. Bentley*, 1 O. S. 37.

⁵ *Cemetery Assn. v. Traction Co.*, 93 O. S. 161.

⁶ *Kardo Co. v. Adams*, 231 Fed. 950; 14 O. L. R. 223.

⁷ G. C., § 8663.

[interstate] commerce * * * if such corporations are or shall have been theretofore, by virtue of their business and location of operation, competitors, so that the elimination of competition between them would constitute a violation of * * * the anti-trust law." Interlocking directors of certain banks are also prohibited by the Clayton Act.

c. *Number.* The number of directors of a corporation is fixed by the holders of a majority of its stock, within the statutory limitation that the number must be not less than five nor more than thirty.⁸

Within the same limitations, the number of directors may be changed at a regular or special meeting of the stockholders. When majority stockholders become dissatisfied they may bring about a change in the policy of management by increasing the number of directors at a special meeting of stockholders.⁹

A director can not be ousted from his office by a decrease in the number of directors. In other words, a decrease in the number of directors does not become effective until the expiration of the terms of the directors then serving.

In practice the minimum number is usually the most satisfactory for small corporations. Where the stock of a corporation is equally divided between two separate interests, the number of directors is sometimes fixed at six, or some other even number, so that each interest may have an equal representation on the board.

In the case of large corporations, especially consolidated companies, a large directorate is not infrequently chosen in order that several interests may be represented on the board.

Where the number of directors is large, the work of the board is performed, to a considerable extent, through committees.

d. *Term.* The term of directors chosen at the first election continues until the time fixed for the annual election.¹⁰

⁸ G. C., § 8635.

⁹ G. C., § 8665; Gold Bluff, etc.,
Co. v. Whitlock, 75 Conn. 669; In

re Griffing Iron Co., 63 N. J. L.
168, 357.

¹⁰ G. C., § 8635.

Thereafter directors are elected for one year.¹¹

If no election is held at the time fixed for the annual meeting, or if an attempted election is invalid, the directors previously elected hold over and continue in office until their successors are properly elected and qualified.¹²

e. *Vacancies* on the board of directors caused by death, resignation, disqualification, etc., may be filled by the remaining directors, unless the by-laws otherwise provide.¹³

f. *Meetings*.¹⁴ Individual directors, as such, have no authority to represent the corporation. To bind the corporation the directors must act together as a board.¹⁵

Regular meetings of the board are usually provided for in the by-laws, to be held monthly or quarterly. No notice of regular meetings need be given to the directors unless notice is required by the regulations or by-laws.¹⁶

Notice of *special meetings* should in general be given all directors. But transactions at special meetings within the powers of the board of directors have been upheld, where a quorum was present, although a minority of the board were not personally notified of the meeting and were absent, but no objection was subsequently made by the absent members.¹⁷

Notice of a special meeting may be waived by all directors.

Where all the directors attend a meeting, failure to give notice does not invalidate the proceedings of the meeting, although notice is required by the by-laws.

g. *Quorum*. A majority of the entire board of directors constitutes a quorum.¹⁸

¹¹ State v. Clough, 18 C. C. n. s. 509; aff'd no rep. 88 O. S. 590; Toledo Co. v. Smith, 205 Fed. 643, 647; Lutterby v. Brewing Co., 12 L. D. 67. The terms of directors of Building and Loan, certain Insurance and other Companies, may in the regulations or by-laws, be fixed at from one to three years. G. C., §§ 9646, 9515.

¹² State v. Bonnell, 35 O. S. 10, 17; State v. Smalley, 7 C. C. 400; 4 C. D. 653.

¹³ G. C., § 8662.

¹⁴ For proceedings at the first

meeting of directors and for specimen minutes of other directors meetings including notices, waivers, etc., see *Forms*.

¹⁵ McCortle v. Bates, 29 O. S. 422; State v. Peoples Assn., 42 O. S. 583; Belting Co. v. Gibson, 68 O. S. 442, 449.

¹⁶ State v. Clough, 18 C. C. n. s. 509; aff'd no rep. 88 O. S. 590; State v. Kreutzer, 100 O. S. 246; State v. Bonnell, 35 O. S. 15.

¹⁷ Bank v. Flour Co., 41 O. S. 552, 559.

¹⁸ G. C., § 8664.

Directors must be present in person. A director can not act by proxy.¹⁹

Where a quorum is assembled, a majority of those present may bind the board and the corporation, although they constitute a minority of the entire board.²⁰

The acts of directors at a meeting at which a quorum is not present are voidable, but may be ratified by the acquiescence of the full board.²¹

A director who is personally interested in a contract to be authorized at a meeting is disqualified and should not be counted in determining whether a quorum is present.²²

h. *Minutes.* The minutes of directors' meetings do not differ materially from the minutes of the meetings of stockholders.

Where important business is transacted at a meeting, a practice sometimes followed is to insert below the minutes an approval thereof signed by all the directors.

i. *Compensation.* If the compensation of directors is provided for in the regulations of the corporation, directors are not entitled to additional compensation without the consent of the stockholders. Where no provision for compensation is made in the regulations, directors are probably entitled to reasonable compensation for their time and reimbursement for the expense incurred in attending meetings.²³

A director, who is also elected or appointed an executive officer of the corporation is entitled to reasonable compensation for his services *as such officer* although no agreement was made in advance regarding compensation, where the circumstances show that the intention of both parties was that he should be paid.²⁴ Where the regulations authorize the directors to fix the salaries of the executive officers, the action of a director in voting to increase his salary as an executive

¹⁹ Bank v. Iron Co., 30 W. L. B. 382.

²⁰ Kalb v. American Nat'l Bank, 21 C. C. 1, 7, 8; 11 C. D. 437; aff'd 65 O. S. 566.

²¹ Rolling Stock Co. v. Railroad, 34 O. S. 450.

²² Remelin v. Bumiller, 16 N. P. n. s. 22.

²³ State v. Peoples, etc., Assn., 42 O. S. 579, 583; Cook on Corporations, § 657.

²⁴ Dalton v. Brush Electric Light Co., 13 C. C. 505; 7 C. D. 141.

officer does not invalidate the action of the board,²⁵ unless the salaries are excessive under the circumstances.²⁶

Where directors have accepted compensation for a period of service they can not subsequently vote themselves "back pay" for the same period.²⁷

j. *Resignation.* A director has the right to resign at any time.²⁸ His resignation may be oral or in writing.

It is doubtful whether all the directors can resign at one time leaving the corporation helpless.

k. *Powers.* The corporate powers, business and property of corporations are exercised, conducted and controlled by the board of directors.

Within the limitations of the articles of incorporation, and the regulations of the corporation, the board of directors is supreme in the management of its affairs.²⁹

By express statutory provision, certain acts of unusual importance, such as a sale of the entire assets and property of the corporation, and the issuance of convertible bonds, are required to be ratified by stockholders.

It has already been stated that directors must act together as a board. One director as such has no authority to represent the corporation. The business transactions of the corporation are carried out through the executive officers or other agents; but the authority of such officers and agents must be traced to the board of directors in all cases, except where the officers' authority has been defined by the stockholders in the regulations.³⁰

The executive officers and other agents are chosen by the board of directors, unless by the regulations the stockholders have reserved the right to select them. Directors are eligible to become executive officers.³¹

l. *Directors' contracts with corporation.* Although a contract made by a corporation with a director, who partici-

²⁵ *Kirn v. Plumbing Co.*, 12 Ohio App. 55; 31 O. C. A. 47; Motion to certify record overruled 17 O. L. R. 392.

²⁶ *Wright v. Heublein*, 238 Fed. 321; affirming 227 Fed. 667.

²⁷ *State v. Peoples, etc., Assn.*, 42 O. S. 579.

²⁸ *Briggs v. Spaulding*, 141 U. S. 132, 154.

²⁹ *Bradford Belting Co. v. Gibson*, 68 O. S. 442.

³⁰ *Bradford Belting Co. v. Gibson*, 68 O. S. 442.

³¹ *Dalton v. Brush Electric Light Co.*, 13 C. C. 505; 7 C. D. 141.

pated in the directors' meeting at which the contract was authorized, is not wholly void,³² yet it may be avoided by the corporation upon a showing of its unfairness. It is the duty of a director to act in entire good faith, and to have no personal interest adverse to the corporation. He should refrain from making personal contracts which will restrict him in the free exercise of his judgment. An agreement by a director with reference to his official action (such, for instance, as an agreement that dividends will be declared and paid by the corporation), based upon a consideration personal to himself, is illegal and unenforceable.³³

Where contracts between the corporation and a director, including the fixing of the salary of a director for serving as an executive officer, come before the board for action, the better practice is for the interested director to refrain from voting, and for the minutes to so indicate.

m. *By-laws.* Directors may adopt by-laws for their government, consistent with the laws of the State and the regulations adopted by the stockholders.³⁴

n. *Power to issue stock for property.* A corporation may exchange its stock for property.³⁵

The board of directors has power (a) to accept property in payment of original stock subscriptions except the part required to be paid in cash, (b) to exchange for property any stock which remains unissued after organization, and (c) upon an increase of the capital stock to exchange for property that part of the increased stock which is not subscribed for by existing stockholders. Directors may accept property in payment of such subscriptions by existing stockholders.

The general rules of law governing such transactions require (1) that the property be taken at a fair valuation; (2) that the directors have no personal interest in the property or transaction; (3) that the directors act in good faith,

³² Rolling Stock Co. v. Railroad, 34 O. S. 450; Kirn v. Plumbing Co., 12 Ohio App. 55; 31 O. C. A. 47; motion to certify record overruled 17 O. L. R. 392.

³³ Thomas v. Matthews, 94 O. S. 32.

³⁴ G. C., § 8702.

³⁵ Gates v. Tippecanoe Stone Co., 57 O. S. 75; Orton v. Edson, etc., Co., 5 C. C. n. s. 540; 17 C. D. 107; affirmed 75 O. S. 580.

and (4) that the property be such as may be purchased by the corporation in the prosecution of its business.

The consequences of issuing par value stock for property at an over-valuation are discussed elsewhere.³⁶

Where corporations are organized to "take over" a "property" or business, a common procedure is to have the company incorporated by "dummy incorporators," sometimes clerks in the employ of the real parties in interest, or clerks in the office of the attorneys employed to attend the incorporation. The "dummy incorporators" subscribe for the minimum amount of stock necessary and pay the amount required to be paid in cash with their own funds. The incorporators are then elected directors, hold a directors' meeting, elect officers and adopt a resolution accepting a written proposition, made by the real parties in interest, to exchange property for stock. The "dummy directors" and officers then resign their positions, one by one, and the vacancies are filled by the election of the real parties in interest, who subsequently purchase the stock which has been subscribed and paid for by the "dummy directors."

When it is desired to pay up stock with property to the fullest extent permitted by law, and with the least possible cash, the following requirements should be taken into consideration:

Prior to the election of directors ten percent of the entire authorized capital stock must be subscribed (if the common stock is par value stock) and ten percent paid in cash on each share so subscribed for.

If the corporation is organized under the no-par-value stock law, it is sufficient for organization purposes that five or more persons subscribe for at least one share each, and pay ten percent on each share subscribed for. Before business can be commenced, or debts incurred, the common capital stated in the articles of incorporation must be fully paid in cash or in property taken at its actual value. The stated common capital may be fixed at any sum, not less than \$500, irrespective of the number of no-par-value common shares.³⁷

³⁶ Sec. 12(b).

³⁷ G. C., §§ 8728-1, 8728-2.

Although ten percent of the authorized capital stock of a par stock corporation must be subscribed for, and ten percent paid in cash on each share subscribed for, there is no requirement that any part of increased capital stock be paid in cash. A practice sometimes followed is to organize with a small capital stock, ten percent of which is paid in cash. After organization the capital stock is increased, the original stockholders waive their right to subscribe for the new stock, and all the new or increased stock is issued for the property.

Where any part of an issue of stock is issued for patents, services, good will or property not located in Ohio, the Blue Sky Law should be taken into consideration.³⁸

Whether the stock issued for property is taxable income to the person receiving it, should be investigated.

o. Liability. Directors may become personally liable: by incurring debts before ten percent of the capital stock has been paid in,³⁹ or, in the case of a no-par-value stock corporation, by assenting to the creation of debts before the stated common capital has been paid in full, and a certificate to that effect filed with the secretary of state;⁴⁰ by gross negligence whereby assets of the corporation are lost or wasted;⁴¹ by issuing or attesting false statements as to the financial condition of the corporation;⁴² by engaging in a business not authorized by the articles of incorporation, and wholly foreign thereto;⁴³ by fraudulently dealing with the property of the corporation to their own profit;⁴⁴ and for false statements in a prospectus or advertisement of the stock or bonds of the corporation.⁴⁵

³⁸ See Sec. 15.

³⁹ Trust Co. v. Floyd, 47 O. S. 525.

⁴⁰ G. C., § 8728-2.

⁴¹ Glass v. Courtright, 14 N. P. n. s. 273; Meisse v. Laren, 5 N. P. 307; Article by W. P. Rogers, 12 O. L. R. 619.

A director of a bank who wilfully fails to attend meetings of the board, and otherwise inform himself of the condition of the bank, and to supervise its affairs, is liable for losses resulting from gross mismanagement by the executive officers,

which a proper attention to his duty would have avoided. Bowerman v. Hammer, 250 U. S. 504.

⁴² Mason v. Moore, 73 O. S. 275.

⁴³ Medill v. Collier, 16 O. S. 599, 610; Ridenour v. Mayo, 40 O. S. 9; Mfgs. Assn. v. Lynchburg Drug Mills, 8 C. C. 112; 4 C. D. 350.

⁴⁴ Shawnee Co. v. Miller, 1 C. C. n. s. 569; 14 C. D. 199; Yeiser v. U. S. Co., 107 Fed. 340; Beck v. Fishel, 16 C. C. n. s. 130.

⁴⁵ G. C., § 6373-18.

By statute directors are also made personally liable for declaring dividends otherwise than out of surplus profits determined as directed by the statute; for advertising a greater dividend than has been actually earned and paid; and for advertising a larger amount of capital stock than has actually been subscribed and paid in.⁴⁶

Directors may be liable *criminally*, if, knowing the corporation to be insolvent, they sell securities issued by it, without disclosing to the purchaser the fact of insolvency.⁴⁷ They may also be criminally liable for acts committed in conducting the corporate business.⁴⁸ They can not shield themselves behind the corporation.⁴⁹

Trustees of corporation not for profit. The trustees of a corporation not for profit are liable for all corporate debts by them contracted.⁵⁰

As business men are often unwilling to assume such liability, clubs and other organizations are frequently incorporated as corporations for profit, although their purposes are really not for profit.

§ 35. Committees of the board. Executive committee. An executive committee is provided for in the regulations of many corporations. In larger corporations a finance committee is not uncommon. A loan or discount committee is usually appointed by the directors of banks.¹

These are permanent or standing committees of directors appointed to exercise certain powers of the board of directors during intervals between meetings of the board. The object of such committees is to render unnecessary frequent meetings of the board and to provide authority in cases where action must be taken quickly. Standing committees are more frequent in large corporations having numerous directors than in the case of small corporations. A small

⁴⁶ G. C., § 8728.

⁴⁷ G. C., § 6373-20c.

⁴⁸ *Meyer v. State*, 54 O. S. 242 (violation of pure food law); *Brown v. State*, 3 Ohio App. 52; 21 C. C. n. s. 545; motion to certify record overruled (treasurer converting

funds of another person to the use of the corporation).

⁴⁹ *Kelly v. United States*, 258 Fed. 392, 401.

⁵⁰ G. C., § 8666.

¹ G. C., §§ 710-62, 710-63.

committee is more easily convened than a large board and its decisions are more promptly and definitely reached.

The membership of a standing committee is determined by the regulation by which it is authorized. In many cases the president, treasurer and sometimes one other officer, *ex officio*, constitute the executive committee. The treasurer is usually *ex officio* a member of the finance committee. In other cases the members of the committee are chosen by the board. All members of standing committees must be directors.

Powers. The supervision and control of transactions in the usual course of business may undoubtedly be delegated to an executive committee.²

Whether the discretionary powers conferred upon directors by statute³ may be delegated to a committee has not been decided in Ohio. In other jurisdictions there is some conflict of authority upon the subject. It is said that, by the weight of authority, such powers may be delegated to an executive committee composed of directors, and that its acts and contracts are binding on the corporation.⁴

Where the acts of an executive committee are subsequently approved by the board of directors, no question can arise as to the powers of the committee. The question may arise, however, where the acts are not brought to the attention of the board, or, being brought to its attention, are repudiated.

In view of the unsettled condition of the law regarding the powers of an executive committee, it is advisable to clearly define in the regulations the duties and powers of the executive committee and to limit its functions so far as possible to transactions arising in the usual course of business.⁵

Where no executive committee is provided for in the regulations the board of directors may appoint such a committee, at least with limited powers, through a by-law provision or a resolution.

² Bank v. Iron Co., 30 W. L. B. 382; Cincinnati v. Cameron, 33 O. S. 336, 364.

³ G. C. § 8660, 8704.

⁴ Cook on Corporations, § 715; Thompson on Corporations (2 ed.)

§ 1207; Lutterby v. Herancourt Brewing Co., 12 L. D. 74.

⁵ See Bank v. Iron Co., 30 W. L. B. 382; Morris v. Griffith, 34 W. L. B. 191.

A standing committee should transact its business at meetings of which all members should have notice.⁶ A record of its proceedings and acts should be kept and frequent reports thereof made to the board for approval.

A standing committee is sometimes used as a device for the purpose of excluding minority directors from participation in the active management. An executive committee authorized to exercise "all the powers of the board" during intervals between meetings may (in jurisdictions where such powers may legally be delegated to the committee) become in effect the real managing body of the corporation.

This may be guarded against by inserting, in the regulation by which the committee is authorized, a provision requiring the members of the committees to be elected by the unanimous vote of the board of directors.

§ 36. Executive officers. a. *Who are.* A director is an "officer,"¹ but not an "executive officer."²

The executive officers are the president, secretary and treasurer,³ and probably also the chairman of the board, vice-president, managing director, etc., where such officers are provided for in the corporate regulations.⁴

b. *Qualifications.* The president must be a director.⁵ The other executive officers are not required to be members of the board of directors, but all executive officers must be holders of stock in an amount fixed by the by-laws.⁶

In practice the vice-president and treasurer are usually chosen from among the members of the board. The secretary is in many cases not a director. In small corporations two offices are frequently held by the same person.

c. *By whom elected or appointed.* The executive officers are chosen by the board of directors except where, in the regulations, the stockholders have otherwise provided for their

⁶ Hayes v. Canada Co., 181 Fed. 289.

¹ Railway Co. v. McCoy, 42 O. S. 253; G. C. § 8704.

² See G. C. § 8661; State ex rel. v. Peoples, etc., Assn., 42 O. S. 583; Schott, etc., Co. v. Insurance Co., 7 N. P. n. s. 548; 19 L. D. 249

affirmed in 11 C. C. n. s. 401; 20 C. D. 656; 83 O. S. 507.

³ G. C. § 8664.

⁴ G. C. § 8704.

⁵ G. C. § 8664.

⁶ G. C., § 8661; Bonnell v. Brown, 11 C. C. n. s. 58; Opins. Atty. Gen. 1915, p. 1974.

selection. The stockholders may, in the regulations, reserve the right to elect all of the officers,⁷ with the exception of the president.⁸

d. *Powers and duties.* The powers of executive officers are derived from (1) statute, (2) the regulations adopted by the stockholders, and (3) the board of directors.⁹

By statute, the president and secretary are authorized and required to execute stock certificates¹⁰ and certain certificates and reports to the state.

The regulations may, and usually do, contain provisions defining the duties of officers. All other powers of the executive officers are derived from the board of directors. The active business of a corporation is managed and controlled by the board of directors. Corporate contracts are usually negotiated and executed by the executive officers, but the authority of the officers to do so should, in some manner, be traced to the board of directors.¹¹

The executive officers are agents merely. Authority is conferred upon them in the same manner in which the authority of agents is bestowed in other cases. It may be given by the directors expressly in the form of by-laws, or by motion or resolution; or the authority may be given informally, by consent or acquiescence of the board. Unauthorized acts of officers may be ratified by the board of directors.¹²

In general, the burden of proof of an officer's authority rests on the party who affirms it.¹³

But in some cases the authority may be presumed. Written contracts and other instruments are usually executed in the name of the corporation by one or more of the executive officers. It is usually provided in corporate regulations that "the president shall sign all contracts, notes, and other papers

⁷ G. C. § 8704.

⁸ G. C. § 8664.

⁹ *Morris v. Griffith*, 34 W. L. B. 191.

¹⁰ G. C. § 8672.

¹¹ *Belting Co. v. Gibson*, 68 O. S. 442; *Minor v. Board of Control*, 20 C. C. 4; 11 C. D. 16.

¹² *Smead Foundry Co. v. Ches-*

brough, 18 C. C. 783; 6 C. D. 670; *East Cleveland R. R. Co. v. Everett*, 19 C. C. 205; 10 C. D. 493; *Armstrong v. Chemical, N. B.*, 83 Fed. Rep. 556; *Sun, etc., Assn. v. Moore*, 183 U. S. 642.

¹³ *Belting Co. v. Gibson*, 68 O. S. 442.

executed by this company." In the absence of such a regulation instruments are generally executed by the president, with the consent or acquiescence of the directors. It has been held that an instrument or contract, executed in proper form by the president and delivered, with the corporate seal affixed, is presumed to have been authorized by the directors, and that the burden of proof rests on the party denying such authority.¹⁴

This presumption is applied only to matters within the usual authority of the president. There is no presumption that the president is authorized to convey the entire property of a corporation,¹⁵ to make an assignment for creditors,¹⁶ to execute a cognovit note,¹⁷ to sell a bond issue of the corporation, and to employ a broker for that purpose,¹⁸ or to make promissory notes payable to himself.¹⁹

A certificate of stock issued to the president or secretary personally is valid in the hands of a bona fide holder, although issued fraudulently, the president and secretary being authorized by statute to execute such certificates.²⁰

e. *Compensation.* The stockholders, by appropriate provisions in the regulations, have the right to fix or limit the salaries of officers, or to provide that such salaries shall be fixed by the stockholders from time to time. In the absence of such a regulation the salaries may be fixed by the directors.

An executive officer is entitled to reasonable compensation for his services although no agreement was made in advance for compensation, where the circumstances show that it was the intention of all the parties that he should be paid.²¹

¹⁴ *Bank v. Flour Co.*, 41 O. S. 557; *C. H. & D. R. R. Co. v. Harter*, 26 O. S. 426; *Dexter Sav. Bank v. Friend*, 90 Fed. Rep. 703.

¹⁵ *DeLaVergne, etc., Co. v. German Sgs. Inst.*, 175 U. S. 40.

¹⁶ *Commercial N. B. v. Cincinnati N. B.*, 3 C. C. 513 (517) 2 C. D. 295.

¹⁷ *In re Metropolitan Bank*, 1 Ohio App. 409; 17 C. C. n. s. 324;

Smead Foundry Co. v. Chesbrough, 18 C. C. 783; 6 C. D. 673.

¹⁸ *East Cleveland R. R. Co. v. Everett*, 19 C. C. 205; 10 C. D. 493.

¹⁹ *In re Continental Iron Co.*, 2 O. L. R. 563; *Arnkens v. Rouse*, 26 W. L. B. 221.

²⁰ *Railway Co. v. Bank*, 56 O. S. 351.

²¹ *Dalton v. Brush, etc., Co.*, 13 C. C. 505; 7 C. D. 141.

In practice certain officers serve without the expectation of compensation.²²

In view of the foregoing, it is advisable to insert provisions regarding salaries in the regulations or by-laws, fixing in advance the salaries which are to be paid, and, where certain officers are to serve without salary, specifically stating that such officers shall receive no compensation.

f. *Resignation or removal.* An officer may usually resign at any time, unless he has entered into a contract with the corporation to serve for a certain time, in which case he may be liable for damages in the event of resignation. Where an officer has been appointed or elected for a certain term, and has accepted the appointment, a contract for that term is consummated. The officer can not be removed without liability for damages, unless the removal is for cause,²³ such as embezzlement or breach of trust.

g. *Liability.* Officers are not personally liable on corporate contracts within their authority, and within the powers of the corporation. But when they exceed their authority, officers may be held personally liable.²⁴

Officers should make all contracts in the name of the corporation.²⁵

Where an officer makes a contract or signs promissory notes, in his own name, he may be held personally liable thereon, although he has no personal interest in the transaction and did not intend to bind himself. Where he signs "John Doe, Treasurer," he is still personally liable. To relieve himself from liability the signature should be "The A. B. Company, by John Doe, Treasurer."²⁶

An officer may be personally liable for negligence or misconduct in the discharge of his duties. He may also be held personally liable for fraudulent or reckless and careless misrepresentations as to the financial condition of the corporation, which are relied on by other persons to their injury.²⁷

²² See *Fitzgerald Co. v. Fitzgerald*, 137 U. S. 98 (111).

²³ *State v. Bryce*, 7 Ohio pt. 2, 82; *Toledo Co. v. Smith*, 205 Fed. 643.

²⁴ *Medill v. Collier*, 16 O. S. 610.

²⁵ *Norris v. Dains*, 52 O. S. 215.

²⁶ *Aungst v. Creque*, 72 O. S. 551; *Titus v. Kyle*, 10 O. S. 444; *Eells v. Shea*, 20 C. C. 527; 11 C. D. 304; affirmed 66 O. S. 683.

²⁷ *Cable v. Bowlus*, 21 C. C. 53; 11 C. D. 563; affirmed 69 O. S. 563.

h. *President.* The president must be chosen from the members of the board of directors. He has, by virtue of his office, only such powers as are given him by statute, viz., to sign stock certificates and to make certain reports and certificates to the state. All other powers of the president are derived from the regulations or from the directors.

His duties as usually defined in the regulations are to preside at meetings of the stockholders and directors, to sign all bonds, contracts, notes, etc., of the corporation, and to perform other duties assigned to him by the directors.

As to the authorization by directors of the acts of the president see "*Powers*" above.

i. *Chairman of the board.* This office is sometimes created by the regulations of large corporations. The duties of the incumbent are usually limited to presiding at the meetings of the directors.

j. *The vice-president* performs the duties of the president in the absence or disability of the latter. In large corporations several vice-presidents are provided for, termed first vice-president, second vice-president, etc., and in some cases active executive duties are prescribed for the incumbents.

k. *The secretary* keeps the records of the meetings of the stockholders and directors, has charge of the corporate seal and the stock books, and together with the president executes certificates of stock,²⁸ and certain reports and certificates to the state.

As in the case of other executive officers the secretary has only such powers as are given him by statute, regulations, or the board of directors.²⁹

He has no implied authority to bind the corporation by statements to the effect that the corporation had refused to perform a contract,³⁰ nor has he implied authority to sign a petition for a street improvement, making the property of the corporation liable for an assessment.³¹

²⁸ G. C. §§ 8672, 8673.

²⁹ Belting Co. v. Gibson, 68 O. S. 442; Trustees v. Deposit Co., 76 O. S. 267.

³⁰ Belting Co. v. Gibson, 68 O. S. 442.

³¹ Minor v. Board of Control, 20 C. C. 4; 11 C. D. 16.

The secretary must obey the orders of a court of competent jurisdiction respecting the books of the corporation in his possession, and may be held for contempt of court for wilful disregard of such orders. It is no defense that he is acting under the orders of the directors.³²

1. *Treasurer.* The customary duties of the treasurer include the receipt and custody of all moneys and securities of the corporation, and the supervision of its accounts and financial affairs.

Usually the by-laws require all moneys received to be promptly deposited in some specified bank. All bank accounts should be kept in the name of the corporation. If a deposit of corporate money is made under the name of the treasurer, any loss by reason of the failure of the bank may fall upon the treasurer personally.

The treasurer is usually required to give bond in an amount sufficiently large to protect the corporation against loss.

Where a corporation is a creditor of a bankrupt, the claim should be proved by the oath of the treasurer. If that is impossible owing to his absence or disability, the proof may be made by another person having knowledge of the facts, but in such case the reason why the proof is not made by the treasurer must be stated.

m. *General manager.* The duties of a general manager, when such officer is provided for in the regulations, are usually to have charge of the transactions occurring in the usual course of the business of the corporation.³³

Transactions not occurring in the ordinary course of business are usually beyond his authority. It has been held that a general manager has no authority to sign a petition for a street improvement, making the corporate property liable for an assessment.³⁴

³² *Arbuckle v. Woolson Spice Co.*, 21 C. C. 356; 11 C. D. 727.

³³ *Washington Gas Light Co. v. Lansden*, 172 U. S. 534, 547; *Life Ass. Co. v. Statler*, 17 C. C. n. s.

59; 34 C. D. 391; *aff'd no rep.* 88 O. S. 59; *Brewing Co. v. Brunswick Co.*, 18 C. C. n. s. 255.

³⁴ *Minor v. Board of Control*, 20 C. C. 4; 11 C. D. 16.

n. *Managing director* The office of managing director is sometimes provided for in the regulations. A director appointed to this office usually performs the duties of the general manager, but he is given larger powers. He is regarded as the direct representative of the directors and, in the active management of the business, as the highest executive officer.

§ 37. **Certificates of stock.** a. *In general.* A holder of stock which has been paid in full is entitled to a certificate, signed by the president and secretary of the corporation, showing the number of shares owned by him.¹

A certificate of stock is not the stock itself but merely evidence of its ownership.² A person may be a stockholder without a certificate. The person who appears on the books of the corporation as the owner of stock is entitled to vote and to receive dividends. He is entitled to these rights although no certificates have been issued by the corporation, or although his certificates have been lost.³ Certificates of stock, however, are valuable as evidence of title. They enable the stockholder to readily dispose of his stock, or to use it as collateral security.⁴

A stockholder is not entitled to a certificate until his stock is paid in full.⁵

Where stock subscriptions are paid by instalments it is customary to issue transferable receipts for the payments; the receipts being exchanged for certificates when all the instalments are paid.

b. *Negotiability.* Certificates of stock issued after July 1, 1911, are negotiable, under the Uniform Stock Transfer Act.⁶

Certificates of stock issued prior to July 1, 1911, do not possess the legal essentials of negotiable instruments, but as

¹ G. C. § 8672.

² Bank v. Towle Mfg. Co., 67 O. S. 314.

³ Railroad Co. v. Robbins, 35 O. S. 502; Franklin Bank v. Commercial Bank, 36 O. S. 355; Norton v. Norton, 43 O. S. 522.

⁴ Railway Co. v. Bank, 56 O. S. 351; National Bank v. National Bank, 37 O. S. 215.

⁵ Cincinnati, etc., Ry. Co. v. Bank, 1 C. C. 208; 1 C. D. 109, 207.

⁶ G. C. §§ 8673-1, 8673-5.

a general rule, the corporation itself and former owners of the stock are estopped from setting up claims to stock evidenced by such certificates in the hands of an innocent purchaser for value.⁷

Liability of transferee. Where stock represented by certificates has not been fully paid, a purchaser who has notice of that fact may be liable to creditors for the amount unpaid. But a purchaser for value without notice that the stock is unpaid is not liable. The statement "full paid and non-assessable," printed on a stock certificate, is a representation by the corporation that the stock has been fully paid and the purchaser need not inquire further.⁸

c. *Transfers.* When stock is assigned the assignee is entitled to have the stock transferred to his name on the books of the corporation, and to have a new certificate issued to him.⁹

The regulations of most corporations contain provisions relating to the transfers of stock and the issue of new certificates. It is usually provided that old certificates must be surrendered before new certificates are issued in their place. In such a case where a corporation issues a new certificate without requiring a return of the old certificate which is subsequently presented by an innocent purchaser, the corporation is liable and must replace the stock or account for its value to the purchaser.¹⁰

d. *Method of transfer.* A form of assignment is customarily printed on the back of each stock certificate. In practice a stockholder usually transfers his stock by affixing his signature to the blank without filling in the name of the assignee or of the attorney to make the transfer on the books of the corporation. Certificates thus assigned in blank may be transferred by delivery only until the name of an assignee is filled in, in which case it should be presented for transfer

⁷ Dueber Co. v. Dougherty, 62 O. S. 589, 595; Railway Co. v. Bank, 56 O. S. 351; Railroad Co. v. Robbins, 35 O. S. 483.

⁸ Roebling Sons Co. v. Shawnee Co., 4 N. P. n. s. 113, 121; 17 L. D. 8; aff'd no rep. 78 O. S. 408.

⁹ Railroad Co. v. Fink, 41 O. S. 321.

¹⁰ Railroad Co. v. Robbins, 35 O. S. 483; Lee v. Citizens N. Bank, 2 C. S. R. 298.

on the corporate books. The name of the secretary is usually filled in as the attorney to make the transfer on the books. When surrendered for transfer a certificate should be marked "cancelled" by the secretary and pasted on the stub from which it was detached.¹¹

Trust companies are frequently employed by large corporations to act as *transfer agents* or *registrars*. This is for the purpose of guarding against an overissue of stock and as a guaranty to the public of the genuineness and regularity of certificates.

A transfer agent usually has possession of the stock certificate book, cancels surrendered certificates, fills out new certificates and, after they are signed by the president and secretary, the transfer agent endorses or otherwise authenticates the certificates.

A trust company is authorized to act as transfer agent or registrar.¹²

A registrar keeps a record or register of all stock issued and transferred, and countersigns the new certificates as issued.

e. *Consequences of failure to transfer.* On the books of the corporation, stock appears in the name of the original stockholder until the certificates are presented for transfer. A purchaser or pledgee of stock who merely holds the certificates endorsed in blank, and does not present them for transfer, is not entitled to vote and incurs the risk that the dividends may be paid to the transferrer. Furthermore, notices of stockholders' meetings and of proposed corporate action on important matters, such as a sale of the entire corporate property, or a consolidation, are sent to the person registered on the books as the owner. In some instances purchasers and pledgees of stock have suffered losses which might have been averted by a prompt transfer.¹³

¹¹ *Herrick v. Wardwell*, 58 O. S. 294.

¹² G. C., § 710-158.

¹³ See *Stafford v. Banking Co.*, 61 O. S. 160; *Railway Co. v. Bank*, 63

O. S. 582; *Railroad Co. v. Robbins*, 35 O. S. 502; *Schmuck v. Crume, etc., Co.*, 7 N. P. n. s. 24; 19 L. D. 819 (aff'd 78 O. S. 409).

f. *Pledged stock.* When stock is used as collateral security for a loan or credit, the certificates are usually assigned in blank and delivered to the pledgee together with a "collateral note." The pledgee is entitled to have the stock transferred to his name on the corporate books,¹⁴ the word "pledgee" usually being entered on the stock record after his name.

If the stock was issued by a foreign corporation and is taxable in Ohio, it is taxed in the name of the pledgor, where it has not been transferred to the pledgee on the corporate books.¹⁵

By holding the endorsed certificates, without a transfer on the corporate books, the pledgee does not avoid taxation on the note, or debt due him, but does avoid taxation on the stock.

Before the double liability of stockholders was abolished in the year 1903 there were good reasons why a pledgee should not have the stock transferred to his name. Where the stock was transferred the pledgee became the stockholder and became subject to the double liability; while such liability was avoided by merely holding the assigned certificates without a transfer.¹⁶

Since the abolishment of the double liability (except as to bank stockholders) this reason no longer exists. If the pledgee desires to collect the dividends, to vote and to receive notices of corporate meetings he should have the stock registered in his name.

g. *Transfer of stock standing in name of deceased person. Inheritance tax law.* The inheritance tax law prohibits a corporation from transferring on its books stock which stands in the name of a deceased person, without the written consent of the state tax commission.¹⁷ Failure to observe this requirement may render the corporation liable for the inheritance tax,¹⁸ but a corporation is not liable if it transfers stock in good faith without knowledge of the death of the stockholder,

¹⁴ *Railway Co. v. Bank*, 68 O. S. 599; *Dayton N. B. v. Merchants N. B.*, 37 O. S. 215; *Railway Co. v. Rawson*, 16 W. L. B. 423.

¹⁵ *Ratterman v. Ingalls*, 48 O. S. 468, 491.

¹⁶ *Henkle v. Salem Mfg. Co.*, 39 O. S. 547.

¹⁷ G. C., § 5348-2.

¹⁸ G. C., § 5348-2.

and without knowledge of circumstances sufficient to place it on inquiry.¹⁹

Foreign corporations licensed to do business in Ohio must comply with inheritance tax law, if their stock books are kept in Ohio, but need not do so if their stock books are kept outside of the state.²⁰

h. *Lost certificates* are usually provided for in corporate regulations, new certificates being issued in place of those lost, the corporation taking a bond of indemnity from the stockholder as security against loss from the reappearance of the old certificate in the hands of an innocent purchaser.²¹

The loss of a certificate does not deprive a stockholder of his right to vote and receive dividends, but without a certificate it is difficult for him to dispose of his stock.

An owner of a lost certificate may, by a proceeding in the probate court, require the corporation to issue a new certificate, upon the giving of a bond.²²

§ 38. Taxation of stock. a. *In Ohio corporations.* No person is required to list for taxation shares of stock in any Ohio corporation.¹

b. *In foreign corporations.* As a general rule, shares of stock in foreign corporations held by residents of Ohio are taxable in Ohio and the holders of such stock are required to list the same for taxation.²

But to this rule there is an important exception. Where all the property of a foreign corporation is taxed in the name of the corporation in Ohio, the stock of such corporation is exempt from taxation.³

Stock in a foreign corporation is also exempt from taxation where its holder furnishes satisfactory proof to the

¹⁹ G. C., § 5348-2a; Opins. Atty. Gen. 1919, p. 1491.

²⁰ Opins. Atty. Gen. 1919, p. 1332.

²¹ G. C., § 8673-17; See Hof v. Western German Bank, 6 W. L. B. 665 (697).

²² G. C., §§ 8673-17, 8677 to 8681.

¹ G. C. §§ 192, 5372; Jones v. Davis, 35 O. S. 474; Prior to the amendment of R. S. 148c in 1904 (97 O. L. 496) stock in Ohio cor-

porations was exempt from taxation only when the property of the corporation was taxed in its name in Ohio; Lander v. Burke, 65 O. S. 532 (1901).

² G. C. § 5372; Bradley v. Bauder, 36 O. S. 28; Lee v. Sturges, 46 O. S. 153.

³ G. C. §§ 192, 5372; Hubbard v. Brush, 61 O. S. 252.

taxing authorities that at least two-thirds of the property of such corporation is taxed in Ohio and the remainder in other states; providing the corporation pays, as an annual franchise tax, the same percentage on its entire authorized capital stock that is required of a domestic corporation on its subscribed or issued stock.⁴

But if any part of the corporate property is taxed in a foreign country, the stock is taxable in Ohio.⁵

§ 39. Reorganization under the no-par-value stock law.¹

A corporation originally organized with par value common stock may be reorganized under the no-par-value stock law. There are a number of circumstances under which such a reorganization is advantageous. Where new financing is necessary, and it is decided to issue preferred stock or bonds, and give a bonus of common stock to purchasers, reorganization will provide no-par-value stock which may be given as a bonus without liability. If par value common stock is used for bonus purposes there is danger of liability to corporate creditors.²

In cases where the original common stock of a corporation was issued for property of doubtful value, the persons to whom the stock was issued remain under possible liability, if the corporation should become insolvent. Reorganization will extinguish the liability of such stockholders to future creditors, although liability to existing creditors remains unaffected.³

If a corporation desires to acquire property of uncertain value and to pay for it with common stock, reorganization under the no-par-value law will avoid possible liability on the part of the persons to whom the stock is issued.

If the market price of par value common stock is too high for the stock to be popular with investors generally, reorganization under the no-par-value stock law, and an increase in the number of shares, may help the situation.

⁴ G. C. § 192.

⁵ Opins. Atty. Gen. 1915, p. 387.

¹ The advantages and disadvantages of original organization under

the no-par-value stock law were discussed in Sec. 13(c).

² *Hoffard v. Shoe Co.*, 95 O. S. 376, 381.

³ G. C., § 8728 8.

In a reorganization under the no-par-value law the common stock may be divided into classes, one or more of which have no voting rights or restricted voting rights.

Prior to the enactment of the Federal Revenue Act of 1921, reorganization under the no-par-value law was frequently utilized to accomplish mergers, consolidations and readjustments of classes of stock, without the excessive income taxes which would have attached if the transaction had been carried out with par value stock.

Reorganization under the no-par-value act may be somewhat expensive, as no credit is allowed to the corporation for the fees paid on original organization.⁴

Reorganization must be authorized by the stockholders. If every stockholder entitled to vote signs the certificate of reorganization, no stockholders' meeting is necessary. But reorganization may be authorized by the holders of two-thirds of the voting shares at a meeting of which two weeks' notice is given. If non-voting preferred stock or other non-voting stock is affected by the proposed reorganization, either by a proposed change in its terms or provisions, or an increase in the number or par value of its shares, or by any such change in a class of stock senior thereto, then such non-voting stock has full voting power upon the question of reorganization.⁵

The amount of common capital with which the reorganized corporation will begin to carry on business must be stated in the certificate of reorganization. If such stated common capital is less than the total par value of the previously issued and outstanding common stock, there must be annexed to the certificate an affidavit of the president or vice-president, and the secretary or treasurer, "setting forth the whole amount of the ascertained debts and liabilities of the corporation," and approval of the Commissioner of Securities (Chief of Division of Securities, Department of Commerce) must be endorsed on the certificate of reorganization to the effect that the stated common capital is sufficient for the proper purposes of the corporation and that the corporation has tangible assets equal to or in excess of its ascertained debts and liabilities and the

⁴ Opins. Atty. Gen. 1919, p. 1085.

⁵ G. C., § 8728-5.

stated common capital, and also the par value of its preferred stock, if any, outstanding or to be issued in exchange for outstanding stock.⁶

No debts may be incurred by the reorganized corporation until it has assets of actual value equal to the stated common capital, and a sworn statement of the president or vice-president and treasurer as to such facts must be filed. Directors who assent to the creation of any such debts are personally liable therefor.⁷

§ 40. Increase of capital stock. a. *Before organization*, both common and preferred stock or common stock only may be increased, if all the authorized capital stock is fully subscribed and ten percent paid on each share, by all the original subscribers consenting in writing to the increase and authorizing the incorporators, or a majority of them, to file a certificate of the increase with the secretary of state. The certificate must be filed before the increased stock is disposed of.

b. *After organization*, the common stock may be increased, if the authorized common stock is fully subscribed for and ten percent paid on each share, by a vote of the holders of a majority of all the stock (including preferred stock) at a stockholders' meeting called by a majority of the directors. Thirty days' notice of the meeting must be given both by publication and by letter to each stockholder whose address is known.

An increase by both common and preferred stock or common stock only may be effected, if the authorized common stock has been fully subscribed for and ten percent paid on each share, at a meeting at which all stockholders (including preferred stockholders) are present, in person or by proxy, and, in writing, waive notice of the meeting and agree to the increase, specifying the amount of increase and the proportion of common and preferred, when both are increased.

An increase by preferred stock alone may be effected at any time, upon the written consent of three-fourths of the stockholders representing at least three-fourths of both the subscribed and issued capital stock.¹

Where the increase is by preferred stock alone, it is not necessary that the authorized stock be fully subscribed and ten

⁶ G. C., § 8628-6.

⁷ G. C., § 8728-7.

¹ G. C., § 8698.

percent paid on each share.² Where the original articles of incorporation did not provide for preferred stock, the articles of incorporation should be amended so as to provide therefor.³

Upon any increase after organization, a certificate of increase must be filed with the secretary of state, before increased stock is issued.⁴

c. *Disposition of new stock.* Each stockholder is entitled to subscribe for and take new stock in proportion to his holdings of the old stock. This right may be waived by a stockholder. If a stockholder fails to avail himself of his right within the time fixed by the directors, the directors may dispose of the stock to others.⁵ Stockholders have no subscription rights in "any authorized and unissued stock appropriated by the board of directors, either for the purpose of retiring preferred stock or for any other purpose."⁶

Where capital stock is increased, there is no requirement that a certificate of subscription be filed with the secretary of state.⁷

Directors and stockholders may, however, incur a personal liability by acting as if it had been subscribed. In one case where an increase of capital stock was properly authorized by stockholders, a certificate of such action filed with the secretary of state, and a bond issue put forth on the faith of such increased stock and no effort was made to sell the new stock, it was held that an intention was thereby shown on the part of the stockholders to take new stock in proportion to their original holdings, and a judgment against the stockholders was rendered accordingly.⁸

d. *Stock dividend.* Where a surplus of corporate assets, in excess of all debts and of the capital stock, has been earned, the capital stock may be increased and the new stock distributed among the stockholders in the form of a stock dividend.⁹ This is frequently done where the market price of stock

² State v. Urschel, 104 O. S. 172; Opins. Atty. Gen. 1915, p. 1646; Rep. Atty. Gen. 1914, p. 305.

³ G. C., § 8698.

⁴ G. C., § 8698.

⁵ G. C., § 8699.

⁶ G. C., § 8699.

⁷ Rep. Atty. Gen. 1911-1912, p. 66.

⁸ Kreisser v. Ashtabula Gas Light Co., 2 C. C. n. s. 597; 14 C. D. 313.

⁹ State v. Insurance Co., 13 C. C. n. s. 49; 22 C. D. 262; aff'd 84 O. S. 459; Railway Co. v. Furnace Co., 49 O. S. 102.

is considerably above par. Stock dividends are not "income" to the stockholders under the federal income tax law.¹⁰

§ 41. Reduction of capital stock. With the written consent of the persons in whose names a majority of the stock stands on the books of a corporation, the directors may reduce the amount of its capital stock and the nominal value of all the shares.¹

The statute provides that the rights of corporate creditors can not be affected by a reduction of the capital stock. Where the subscriptions to the original capital stock have not been entirely called in, or assessed to the full amount, before the reduction of the stock, the subscribers will remain liable to existing creditors in the original amount.

Where corporate assets have been reduced by losses, the capital stock is sometimes reduced to bring it to the level of the assets, and to make the book value of the stock approximately par.

The annual franchise (Willis law) tax is assessed not on corporate assets but on the issued and outstanding stock. By a reduction of the capital stock, a saving is effected in such tax. The credit of the corporation is not affected, in many instances, by the reduction, as the nominal capital stock is not often relied upon in extending credit to a corporation.

§ 42. Organization of corporation to take over business of partnership or another corporation.¹

Corporations are frequently organized to take over the business of a partnership or of another corporation. Payment for the property and business transferred is usually made in the form of stock in the new corporation.²

One of the important things to be provided for in such cases is the indebtedness of the partnership or old corpora-

¹⁰ *Eisner v. Macomber*, 252 U. S. 189.

¹ G. C., § 8700. For forms of written consent of stockholders, resolution of directors, and certificate of reduction, see *Forms* in the following chapter.

¹ The consolidation of corporations, authorized by special statutes, is not considered in this paragraph.

² *Gas & Fuel Co. v. Dairy, Co.*, 60 O. S. 96, 105-106.

tion, if any indebtedness exists. Where partnership property is transferred to a new corporation, organized to continue the business, payment being made wholly in stock of the new corporation, the new corporation may be liable for the debts of the partnership.³

This rule does not, of course, apply where the new corporation purchases the assets for cash, unless the transaction is a fraudulent one.

Where the partnership, or old corporation, is solvent and the change is made to obtain the advantages of the corporate form of organization or for other good reasons, the debts may be assumed by the new corporation as a part of the transaction.

In investigating the financial condition of a corporation, its possible liability for federal income taxes for past years should not be overlooked. If its returns have not been checked by internal revenue examiners, and finally approved, security against liability should be taken.

Where the partnership or old corporation is insolvent or in serious financial embarrassment, there are grave objections to assuming its debts and it is difficult, if not impossible, to acquire its assets except for cash.

In case of insolvency the assets may be purchased for cash from the trustee in bankruptcy or assignee for creditors. But the value of the good will of the old concern will be largely destroyed by bankruptcy or an assignment. It is often possible for the old concern to effect a private settlement or composition with the creditors, without the financial difficulties becoming publicly known and without any cessation of business.

A corporation can not dispose of its entire property, except by the action of three-fourths of its directors, ratified at a stockholders' meeting by three-fourths of the votes cast.⁴

Where the property of a corporation is taken over, the foregoing proceedings should be taken.

³ *Andres v. Morgan*, 62 O. S. 236: Creditors may recover a judgment against the new corporation *ib.* Or they may, by other proceedings,

reach the property transferred. *Bank v. Trebein*, 59 O. S. 316; *Cook on Corporations* §§ 672, 673.

⁴ G. C. §§ 8710 to 8718.

Where a partnership is succeeded by a corporation the partnership name is usually adopted by the corporation, with such changes as are necessary to make it conform to the statutory requirement that a corporate name must commence with the word "The" and end with the word "Company."⁵

Before determining the basis on which stock is to be issued for the property of the partnership or old corporation, attention should be given to the question of how much, if any, taxable income will accrue to the persons to whom the stock is issued.⁶

§ 43. Ohio corporation doing business in other states. An Ohio corporation which enters another state to "do business" or "transact business" is, in such state, a foreign corporation. A state has power to wholly exclude foreign corporations from doing business within its borders, or it may admit them under any reasonable conditions or limitations.¹ But a state has no power to exclude or impose conditions upon a corporation engaged in interstate commerce, which transacts no business within the state other than interstate commerce.²

a. *What is "doing business" in state.* A foreign corporation which maintains a stock of goods within the state, from which deliveries are made of goods sold, is doing business in the state.³

But a foreign corporation is not doing business in the state where it maintains no stock of goods in the state and limits its business to shipping goods into the state, upon orders, and it need not register as a foreign corporation. This is true whether the orders are obtained through traveling salesmen or correspondence,⁴ or a resident broker,⁵ or whether the corporation maintains an office in the state with a resident agent in charge, for the purpose of soliciting orders.⁶

⁵ For right to adopt partnership name, see *Snyder Mfg. Co. v. Snyder*, 54 O. S. 86.

⁶ See Revenue Act of 1921, Sec. 202 (c) (3) and (b) (2).

¹ *Ashley v. Ryan*, 153 U. S. 436, affirming 49 O. S. 504.

² *Crutcher v. Kentucky*, 141 U. S. 47; *Sioux Remedy Co. v. Cope*, 235 U. S. 197.

³ *Cheney Co. v. Massachusetts*,

246 U. S. 147; *People v. Wample*, 131 N. Y. 64; 29 N. E. 1002; *Singer Mfg. Co. v. Adams*, 165 Fed. 877.

⁴ *Commercial Co. v. Mfg. Co.*, 55 O. S. 217.

⁵ *McBath v. Jones Cotton Co.*, 149 Fed. 383; *Doe v. Mfg. Co.*, 104 Fed. 684.

⁶ *Cheney Co. v. Massachusetts*, 246 U. S. 147; *Textbook Co. v. Pigg*, 217 U. S. 91.

Nor is it doing business in a state to consign goods to a commission merchant, located in the state, where the commission merchant conducts all the business in the state and pays all expenses of receiving, handling and storing the goods.⁷

A single and isolated transaction is not doing business in the state.⁸

Although it is not "doing business" in a state to merely ship goods into such state to fill orders, yet subsequent acts or dealings with reference to the goods may change the character of the transaction. The attachment of lightning rods to houses, by the seller, after the same have been shipped into the state, is "doing business" in the state.⁹ A manufacturer who sells his product to wholesalers in a state, and subsequently sends his salesmen into the state to take orders from retailers, the orders being turned over to wholesalers in the state, is "doing business" in the state.¹⁰ Construction work by a foreign corporation is "doing business," although the materials have been shipped from outside of the state,¹¹ as is also the business of repairing automobiles sold into the state in interstate commerce, and selling second-hand cars taken in part payment for new cars.¹²

Ohio corporation should, as a rule, qualify in other states before doing business therein. The consequences of failure to qualify are serious, in many states. In some states, the officers as well as the corporation are subject to fines and penalties. In many states, all contracts made by an unlicensed foreign corporation are void and unenforceable by the corporation, even in federal courts.¹³ In several states the officers, and, in a few states even the stockholders, are personally liable for debts and obligations of the corporation.¹⁴

⁷ Butler Bros. Shoe Co. v. U. S. Rubber Co., 156 Fed. 1; certiorari denied, 212 U. S. 577.

⁸ Cooper Mfg. Co. v. Ferguson, 113 U. S. 727.

⁹ Browning v. Waycross, 233 U. S. 16.

¹⁰ Cheney Co. v. Massachusetts, 246 U. S. 147.

¹¹ Buffalo Co. v. Penn. Co., 178

Fed. 696; Browning v. Waycross, 233 U. S. 16.

¹² Cheney Co. v. Massachusetts, 246 U. S. 147.

¹³ Hayes Wheel Co. v. American Distributing Co., 257 Fed. 881 (6th Cir. under Michigan statute).

¹⁴ Equitable Trust Co. v. Central Trust Co., 239 S. W. 171 (Tenn. 1922); Taylor v. Branham, 35 Fla. 297; 17 So. 552; 39 L. R. A. 362.

The requirements and procedure for qualifying in each state may be found in Parker's Corporation Manual, published annually.

In a few states, the fees and conditions imposed on foreign corporations are excessive. A foreign company which expects to transact much business in such a state may find it advantageous to organize a subsidiary company, under the laws of such state.

§ 44. Foreign corporations entering Ohio. A foreign corporation is one that has been organized under the laws of another state or of a foreign government.¹

Foreign corporations are permitted to do business in Ohio upon compliance with certain conditions. There are two laws imposing conditions upon foreign corporations entering the State: (a) the license fee law and (b) the franchise tax law.

a. *The license fee law* applies to nearly all private business corporations and requires the procurement of a certificate or license from the secretary of state.²

In order to procure a certificate from the secretary of state a corporation is required to file a sworn copy of its charter or articles of incorporation, and a statement showing the amount of its authorized capital stock, the kind of business proposed to be carried on, and to designate a principal office or place of business and a person upon whom process may be served, and to pay a small license fee based on its authorized capital stock.³

b. *Initial franchise tax.* Corporations which own or use a part or all of their capital or plant in Ohio must procure the certificate already mentioned and are further required to pay a franchise tax of one-tenth of one percent "upon the proportion of the authorized capital stock of the corporation represented by property owned and used and business transacted in Ohio."⁴

c. *Method of computing franchise tax.* This tax is based, not upon the property owned and used and business transacted in

¹ Cook on Corporations, § 7.

² G. C., §§ 178, 179, 180.

³ G. C., §§ 179, 180.

⁴ G. C., §§ 183, 184.

this state, but upon the *proportion of the total authorized capital stock* represented by such property and business. The proportion which the property owned and used and business transacted in Ohio bears to the entire property and business of the corporation is the proportion of the capital stock on which the tax is based. Thus, where the property owned and used and business transacted in Ohio is \$25,000, the entire corporate property and business \$50,000, and the authorized capital stock \$100,000, the tax is based on one-half of its authorized capital stock, or \$50,000, the Ohio property and business being one-half of the total property and business. If all of its property and business were in Ohio the tax would be based upon its total authorized capital stock, although all of the authorized capital stock has not been subscribed or issued.⁵

d. *What corporations are subject to law.* A foreign corporation organized to carry on professional business is not entitled to a certificate from the secretary of state as foreign corporations are permitted to enter the state to carry on only such business as may lawfully be carried on by Ohio corporations.⁶

The franchise tax law⁷ does not apply to banking, insurance, building and loan or bond investment corporations or to corporations engaged in interstate commerce. A foreign corporation engaged in interstate commerce which is not subject to the laws gains no advantage by voluntary compliance with their requirements.⁸

A foreign corporation engaged in purchasing mortgages through a local agent, who has no authority to approve mortgages or consummate purchases, and in making collections on the mortgage notes through local agents, need not comply with the franchise tax law, but should comply with the license fee law.⁹

A foreign corporation organized to deal in real estate may be admitted to do business in Ohio, but the application

⁵ State v. Fulton, 98 O. S. 350; State v. Coal Co., 17 N. P. n. s. 60; Opinion of Wade H. Ellis, Atty. Gen., 5 O. L. R. 163; Aetna Iron & Steel Co. v. Taylor, 13 C. C. 602; 5 C. D. 242; 4 Opins. Attys. Gen. 621-624 (1894); Rep. Atty. Gen.

1910-1911, p. 600.

⁶ State v. Laylin, 73 O. S. 90; See 5 Opins. Attys. Gen. 975 (1903).

⁷ G. C., §§ 183, 184.

⁸ Bigalow v. Armour, 74 O. S. 168.

⁹ Opins. Atty. Gen. 1918, p. 417.

for admission should expressly limit its life in Ohio to twenty-five years.¹⁰

e. *Consequences of failure to comply with law.* A foreign corporation can not maintain an action upon a contract made by it in this state until it has complied with the statutory requirements.¹¹

A contract made by a foreign corporation, before complying with the statutory requirements, is void on its behalf but is enforceable against it.¹²

The property of a foreign corporation "doing business" in Ohio without complying with the statutory requirements is subject to attachment.¹³

A foreign corporation engaged in interstate commerce which is not subject to the law does not become exempt from attachment by a voluntary compliance with the requirements.¹⁴

Certain penalties and fines are provided in the acts for noncompliance with the requirements, but in this respect the acts appear to be wholly unadjudicated.¹⁵

f. *Annual franchise tax.* A foreign corporation is required to file an annual report with the secretary of state and to pay an annual franchise tax of "three-twentieths of one percent upon the proportion of the authorized capital stock of the corporation represented by property owned and used and business transacted in Ohio, and to be not less than ten dollars in any case." This tax is computed on the same basis as the initial franchise tax mentioned above.

A foreign corporation which transacts no business in the state is not liable for the annual franchise tax, although it may have voluntarily paid the original license fee.¹⁷

§ 45. Syndicates. A syndicate is an unincorporated combination of persons united for the purpose of an enterprise

¹⁰ 5 Opin. Atty. Gen. 1002.

¹¹ G. C., §§ 178, 187.

¹² G. C., § 5508.

¹³ G. C., §§ 11819, 10253, 186.

¹⁴ Bigalow v. Armour, 74 O. S. 168.

¹⁵ G. C., §§ 182, 186.

¹⁶ G. C., § 5503.

¹⁷ Rep. Atty. Gen. 1912, pp. 50, 569; Rep. Atty. Gen. 1914, p. 1172.

too large for successful accomplishment by a single individual.¹

Syndicates are usually formed for the purpose of promoting or financing large corporations, or of holding corporate stocks and bonds.

Before an enterprise is incorporated, or its securities are offered to the public, it is often necessary or advantageous to obtain options on property, or to purchase property, and sometimes to develop and improve the property and place the enterprise in the situation of a going concern. For such purposes large amounts of money are often required. Where a syndicate is formed, its members contribute funds with which the property is acquired or developed. The property is subsequently turned over to the corporation and the stocks, bonds or money received from the corporation for the property are distributed among the members of the syndicate in proportion to the amounts contributed by each.²

Where, after the organization of a corporation, an issue of bonds, or of preferred stock is to be offered to the public, it is often desirable that there be some assurance or guaranty to the corporation that all of the securities will be sold. This is sometimes accomplished through an "underwriting syndicate," which agrees to purchase all of the bonds or stock which remain unsold at the end of a certain period.

The agreement. A syndicate agreement usually recites the purposes of syndicate and, where the syndicate is formed to raise funds, binds the members who are usually termed "syndicate subscribers," to pay in the amounts set opposite their respective names. The mutual promises of the parties to the agreement constitute the consideration.

A syndicate agreement usually appoints a treasurer to receive and disburse the funds, and one or more "syndicate managers" to act as agents or attorneys in fact for the syndicate and to take active charge of the business.

The powers of the syndicate managers are usually defined in detail. Extensive discretionary powers are sometimes

¹ Anderson's Dictionary of Law; Baltimore Trust & Guarantee Co. v. Hambleton, 84 Md. 456; 40 L. R. A. 216.

² Knickerbocker Trust Co. v. Evans, 188 Fed. 549; certiorari denied, 225 U. S. 702.

conferred. Under some circumstances, the managers have the status of promoters and occupy a fiduciary relation to the subscribers.³

A trust company is sometimes named as "depository." In one case the trust company was held to be a mere agent of the syndicate managers and not a trustee for the subscribers.⁴

Legal status. Judicial decisions as to the legal status of syndicates and the liabilities of syndicate members have not been entirely harmonious. This is perhaps due to the fact that individuals have united under the name "syndicate" for widely different purposes, and under agreements containing entirely dissimilar provisions. Whether the members of a syndicate are liable as partners has been variously decided. In a number of cases they have been held to be partners.⁵

In one case syndicate members were said to be "quasi partners" with the syndicate manager, whose relation to the members was "analogous to that of a partner to his copartner."⁶ In another case, the managers were held to be the principals and not agents for the syndicate subscribers.⁷

The true rule probably is that a syndicate is not necessarily a partnership, but the liability of its members for the acts of the syndicate managers or agents depends upon whether there exists "a basis of fact for the legal implication of agency."⁸

³ *Sim v. Edenborn*, 242 U. S. 131; *Gregg v. Megargel*, 248 Fed. 960; 254 Fed. 724.

⁴ *Kelly v. Trust Co.*, 215 Fed. 567.

⁵ *Bank v. Wehrmann*, 69 O. S. 160; 202 U. S. 295; 4 O. L. R. 344; *Wehrman v. McFarlan*, 6 N. P. 333; *Horner v. Meyers*, 29 W. L. B. 403; *Lape v. Parvin*, 2 Disney 560; *Baltimore Trust & Guarantee Co. v. Hambleton*, 84 Md. 456; 40 L. R. A. 216, 230; See note 18 L. R. A.

n. s. 1094; See also *Mooney v. Nagel*, 14 C. C. n. s. 228 (1911) affirming 9 N. P. n. s. 385.

⁶ *Runkle v. Burrage*, 202 Mass. 98 (1909).

⁷ *Jones v. Gould*, 209 N. Y. 419.

⁸ *Hornblower v. Crandall*, 7 Mo. App. 220, affirmed 78 Mo. 581; *Lane v. Fenn*, 120 N. Y. Suppl. 256 (1909); *Merrill v. Milliken*, 101 Me. 56; 63 Atl. Rep. 299 (1905).

PART II.

FORMS.

LIST OF FORMS.

Articles of Incorporation.

Form No.

1. Of corporation for profit with par-value common stock.
2. Preferred stock clause, where common stock has par value.
3. Of corporation for profit, no-par-value common stock.
4. Preferred stock clause, where common stock has no par value.
5. Optional preferred stock clauses.
 - (a) Preferred stock limited to preferential dividend.
 - (b) Preferred stock to participate in additional dividends.
 - (c) Preferred stock not entitled to vote.
 - (d) Preferred stock entitled to vote, except at elections of directors.
 - (e) Preferred stock to have equal voting rights upon default of dividends.
 - (f) Preferred stock to have exclusive voting rights, upon default of dividends.
 - (g) Provision for redemption.
 - (h) Sinking fund for redemption.
 - (i) Net assets provision.
 - (j) Annual audit.
 - (k) Insurance.
 - (l) Clause prohibiting long-term obligations, mortgages, liens and other preferred stock issues.
 - (m) Sale of entire assets and business prohibited.
 - (n) Restriction on common stock dividends.
 - (o) Authorizing dividends on common stock under certain conditions.
 - (p) Preferred stock not to be converted into common stock.
 - (q) Option to convert preferred into common stock.
 - (r) Rights of preferred stockholders limited to terms of issue.
 - (s) Rights of preferred stockholders inviolate.
 - (t) Voting rights not exclusive remedy of preferred stockholders.
 - (u) Priority in assets.
 - (v) Priority in assets. Another form.

Form No.

6. Preferred stock clause, first, second and third preferred stock, with no-par-value common stock; one class for employees.
7. Division of no-par-value common stock into classes.
8. Provision limiting each stockholder to one vote.
9. Purposes clauses.
 - Abstract company.
 - Advertising novelty company.
 - Agency company, real estate.
 - Agency company, insurance.
 - Air cooling company.
 - Amusement park company.
 - Architectural company.
 - Audit company.
 - Automobile bus company.
 - Automobile manufacturing company.
 - Baking company.
 - Band company.
 - Baseball club company.
 - Building and loan association.
 - Building company.
 - Business college.
 - Butchering company.
 - Car company.
 - Clay and brick company.
 - Coal company.
 - Coal company. Another form.
 - Collateral loan company.
 - Commercial school.
 - Common carrier company.
 - Construction company.
 - Construction company. Another form.
 - Construction company. Another form.
 - Cooperage company.
 - Co-operative store company.
 - Dairy company.
 - Directory company.
 - Dock and warehouse company.
 - Driving park company.
 - Drugstore company.
 - Drygoods and notions company.
 - Electric light and power company.
 - Elevator company.
 - Embalming fluid company.
 - Engineering and construction company.
 - Express company.
 - Fence company.
 - Foundry company.
 - Fish company.
 - Freight loading company.

Form No.

9. Purpose clauses—Continued.
- Furniture company.
 - Gas and electric company.
 - Natural gas company.
 - Artificial gas company.
 - General store company.
 - Glassware company.
 - Green house and nursery company.
 - Heating company.
 - Hotel and restaurant.
 - Insurance companies.
 - Life, accident, etc., insurance company.
 - Fire insurance company.
 - Mutual insurance company (liability, disability, etc.).
 - Accident, etc., company not for profit.
 - Mutual protective association (life and accident).
 - Live stock mutual protective association.
 - Credit insurance company.
 - Interurban and street railway company.
 - Iron company.
 - Light, heat and power company.
 - Live stock company.
 - Loan or discount company.
 - Lodge building company.
 - Lumber company.
 - Mail order company.
 - Mail tube company.
 - Manufacturing company.
 - Market house company.
 - Mausoleum company.
 - Meat market company.
 - Men's furnishing company.
 - Mercantile agency company.
 - Mercantile or trading company.
 - Messenger service company.
 - Millinery company.
 - Milling company.
 - Mineral water company.
 - Mining company.
 - Motion picture company.
 - Motion picture company. Another form.
 - Musical instrument company.
 - Ohio river bridge company.
 - Oil and gas company.
 - Oil and gas company. Another form.
 - Orchard land company.
 - Patent rights company.
 - Patent rights company. Another form.
 - Pipe-line company.
 - Plumbing and heating company.
 - Pottery company.
 - Printing and publishing company.
 - Publishing company.
 - Railroad company.
 - Real estate company.
 - Sales agency company.
 - Sand and gravel company.
 - Sanitorium company.
 - Sanitorium and drug company.
 - Scenic railway company.
 - Securities company.
 - Sewerage company.

Form No.

9. Purpose clauses—Continued.
- Stock yard company.
 - Taxicab and garage company.
 - Telephone company.
 - Telephone company. (Local.)
 - Telephone company. (Mutual.)
 - Tennis club company.
 - Theater company.
 - Title guarantee and trust company.
 - Towel supply company.
 - Transfer company.
 - Undertaking company.
 - Union interurban depot and terminal company.
 - Vessel company.
 - Warehouse company.
 - Waste paper and junk company.
 - Water transportation company.
 - Water transportation company. Another form.
 - Waterworks company.
 - Wrecking company.
 - 10. Articles of bank and trust company.
 - 11. Articles of farmers' co-operative association.
 - 12. Articles of union depot company.

Organization Proceedings.

13. Record of organization proceedings of corporations for profit.
- (1) Proceedings of incorporators.
 - (a) Order for, and waiver of notice of, opening of books of subscription.
 - (b) Notice of opening of books of subscription.
 - (c) Order for filing statement for exemption of stock under Blue Sky Law.
 - (d) Statement for exemption of stock under Blue Sky Law.
 - (e) Order designating one incorporator to receive payment of instalments of subscriptions.
 - (f) Subscriptions to capital stock. (Book.)
 - (g) Separate subscription for stock.
 - (h) Certificate of subscription, corporation with par value common stock.
 - (i) Certificate of subscription, corporation organized under non-par-value law.
 - (j) Order for first stockholders' meeting.
 - (2) Proceedings of stockholders.
 - (a) Notice of first meeting of stockholders.
 - (b) Waiver of notice of first meeting of stockholders.

Form No.

13. Record of organization, etc.—

Continued.

(2) Proceedings of stockholders—Continued.

- (c) Minutes of first stockholders' meeting.
- (d) Regulations of corporation for profit.
- (e) Regulations of a club.
- (f) Assent of stockholders to adoption of regulations.
- (g) Minutes showing election of directors.
- (h) Certificate of election of directors.

(3) Proceedings of directors.

- (a) Minutes of first directors' meeting.
- (b) Oath of directors.
- (c) By-laws of corporation for profit.
- (d) Resolution authorizing compliance with Blue Sky Law and disposal of stock.
- (e) Resolution accepting property in payment for stock.
- (f) Resolution fixing the price or consideration to be received for the no-par-value common stock.
- (g) Certificate of payment of stated common capital.
- (h) Resolution authorizing a bonus of no-par-value stock to purchasers of preferred.
- (i) Consent of stockholders to consideration receivable for no-par-value common stock.
- (j) Statement for exemption of stock under Blue Sky Law.

Miscellaneous Proceedings.

14. Reorganization into no-par-value corporation; proceedings.

- (a) Notice of stockholders' meeting.
- (b) Resolution for reorganization.
- (c) Certificate of reorganization.
- (d) Affidavit of president and secretary.
- (e) Approval of commissioner of securities.
- (f) Sworn statement of assets.

15. Amendments to articles of incorporation; proceedings for.

- (a) Waiver of notice of stockholders' meeting.
- (b) Notice of stockholders' meeting.
- (c) Minutes of stockholders' meeting.
- (d) Resolution for amendment of articles of incorporation.

Form No.

15. Amendments to articles, etc.—

Continued.

- (e) Waiver of notice of amendment.
- (f) Notice of amendment.
- (g) Certificate of amendment.

16. Increase of capital stock; proceedings for.

(1) Before organization.

- (a) Consent of subscribers.
- (b) Certificate of increase.

(2) After organization.

- (a) Waiver and agreement for purpose of increasing capital stock.
- (b) Notice of stockholders' meeting.
- (c) Resolution for increase.
- (d) Certificate of increase.
- (e) Written assent of stockholders.
- (f) Certificate of increase (preferred).
- (g) Waiver by stockholders of right to take increased stock.
- (h) Certificate of increase, by building and loan association.

17. Reduction of capital stock, proceedings for.

- (a) Consent of stockholders.
- (b) Resolution of directors.
- (c) Certificate of reduction.
- (d) Certificate of cancellation of preferred stock which has been redeemed.

18. Sale of entire assets of corporation; proceedings for.

- (a) Minutes of directors' meeting.
- (b) Notice of stockholders' meeting.
- (c) Waiver of notice of stockholders' meeting.
- (d) Minutes of stockholders' meeting.

19. Dissolution.

- (a) Call for stockholders' meeting.
- (b) Notice of stockholders' meeting.

20. Certificate of dissolution of corporation for profit where instalments of its capital stock have been paid.

- (d) Certificate of dissolution of corporation for profit where no instalments of its capital stock have been paid.
- (e) Certificate of voluntary dissolution of corporation not for profit.
- (f) Certificate by incorporators of abandonment of purpose to form corporation.

Foreign Corporations.**Form No.**

20. Statement by foreign corporation (G. C. 178-182).
21. Statement by foreign corporation (G. C. 183-192).
22. Statement by no-par-value stock foreign corporation, entering state.
23. Certificate of appointment of agent for foreign corporation.
24. Certificate of a foreign corporation retiring from business in Ohio.
25. Statement of increase of proportion of capital stock (G. C. 185).

Corporations not for Profit.

26. Articles of incorporation, corporation not for profit.
27. Purpose clauses.
Associated charities.
Association for apprehending horse thieves.
Athletic club.
Athletic club. Another form.
Builders' exchange.
Canoe club.
Cemetery association.
Chamber of commerce.
Charitable trust. Corporation to administer.
Chautauqua assembly.
Church or religious society.
Club house corporation.
College.
Consumers' league. (Ruling organization.)
Deaconess home.
Family association.
Farmers' institute society.
Farm laborers' association.
Free loan association.
Home for indigent and aged women.
Hospital.
Improvement association.
Law and order league.
Merchants' exchange. (Leaf tobacco.)
Musical club.
Musical club. Another form.
Mutual benefit association of employees.
Benevolent mutual aid association.
Political club.
Public library.
Retail merchants' association.
Salvage.
Social and improvement club.
Social settlement association.
Yacht club.
Young Men's Christian Association.
28. Agricultural society. Articles of incorporation.
29. Township agricultural society. Articles of incorporation.
30. Charitable trust. Articles of corporation to administer.
31. Endowment fund corporation. Articles of incorporation.

Form No.

32. Purpose clauses—Continued.
Fraternal benefit society. Articles.
33. Society for prevention of cruelty to animals. Articles.

Organization Proceedings.

34. Organization record of corporations not for profit.
(a) Record book and signatures of members.
(b) Minutes of meeting of incorporators for election of first trustees.
(c) Oath of trustees.
(d) Regulations.
(e) Written assent to regulations.

Miscellaneous Forms Relating to Organization and Management.

35. Resolution of directors for call or assessment on stock subscriptions.
36. Notice of call on stock subscriptions.
37. Notice of sale of stock for non-payment of call.
38. Receipt for instalment payment on stock.
39. Transferable receipt for instalment payment on stock.
40. Certificate of common stock, par value.
41. Certificate of common stock, no-par-value.
42. Certificate of preferred stock.
43. Certificate of stock reserving lien to secure indebtedness to corporation.
44. Corporation calendar.
45. Stock transfer book.
46. Stock ledger.
47. Proxy, one specified meeting.
48. Proxy, all meetings within a specified time.
49. Proxy, general.
50. Revocation of proxy.

Annual Meetings of Stockholders.

51. Notice of annual meeting.
52. Minutes of annual meeting.
53. Ballot.
54. Inspector's certificate of election.

Special Meetings of Stockholders.

55. Waiver of call and notice.
56. Call, by stockholders.
57. Call, by resolution of directors.
58. Notice of special meeting.
59. Minutes of special meeting (including resolutions (a) for increase in number of directors and (b) for committee to inspect books).

Amendment of Regulations.

60. Assent of stockholders to.
61. Resolution of stockholders for.

Directors' Meetings.**Form No.**

62. Notice of regular meeting.
63. Call for special meeting.
64. Notice of special meeting.
65. Waiver of notice of special meeting.
66. Minutes of directors' meeting, including (a) motion authorizing compromise of claim and (b) resolution declaring dividend.
67. Certificate to transcript of minutes.
68. Certificate by secretary to resolution.
69. Resolution filling vacancy caused by disqualification.
70. Resignation of director or officer.
71. Resolution accepting donation of treasury stock.
72. Donation of stock to treasury.
73. Resolution ratifying unauthorized act of officer.
74. Resolution declaring stock dividend.

Miscellaneous.

75. Dividend order.
76. Permanent dividend order.
77. Application for reinstatement.
78. Escrow agreement under Blue Sky Law.
79. Railroad consolidation agreement.
80. Railroad consolidation agreement. Another form.
81. Lease of railroad.
82. Release, by property owner, to railroad company of damages for occupation of street.
83. Deed of land to interurban traction company for railroad purposes.
84. Deed of right of way to railroad company.
85. Consolidation of religious societies.
86. Agreement to subscribe for stock in corporation not yet organized.

Form No.

87. Stock pooling agreement.
88. Voting trust agreement.
89. Consent to use of similar name by new corporation.
90. Deed of corporation, with certificate of acknowledgment.
91. Bill of sale by corporation of assets, with agreement of officers not to re-engage in business.
92. Option on manufacturing plant.
93. Option, by corporation, on manufacturing plant.
94. Option to purchase stock in corporation.
95. Option to purchase stock at "book value"; certificates to be deposited.
96. Option contract to purchase stock if vendee desire to resell.
97. Put.
98. Call.
99. Bond to corporation issuing new certificate of stock in lieu of lost or destroyed certificate.
100. Bond of treasurer of corporation.
101. Collateral note.
102. Collateral note. Another form.
103. Syndicate agreement.
104. Underwriting agreement.
105. Underwriting agreement. Another form.
106. Power of attorney to managing agent.

Bond Issues.

107. Resolution of directors authorizing.
108. Resolution of stockholders ratifying.
109. Written assent of stockholders to convertible bonds.
110. Deed of trust, or corporate mortgage, securing bonds.
111. Bond pooling agreement.
112. Bondholders' agreement, corporation in default for interest.

ARTICLES OF INCORPORATION.

NOTE.—The following forms are prepared for use under the general corporation law for manufacturing and business corporations. (G. C. §§ 8623 to 8743.) The special statutory provisions relating to the incorporation of banks, insurance, building and loan, and public utility corporations should be carefully followed; but the forms and procedure are generally similar to those here given.

No. 1.

Corporation for Profit, with Par Value Common Stock.

(G. C. § 8625.)

These Articles of Incorporation
of
The Company

Witnesseth, that we, the undersigned, all (or a majority) of whom are citizens of the State of Ohio, desiring to form a corporation, for profit, under the general corporation laws of said State, do hereby certify:

FIRST. The name of said corporation shall be The..... Company.

SECOND. Said corporation is to be located at in county, Ohio, and its principal business there transacted.

THIRD. Said corporation is formed for the purpose of (for statements of purposes of various corporations, see purpose clauses, form No. 9).

FOURTH. The capital stock of said corporation shall be ... dollars (\$.....), divided into (.....) shares of dollars (\$.....) each.

(If preferred stock is to be issued omit the foregoing "Fourth" and use Form No. 2.)

In witness whereof, we have hereunto set our hands this day of, A. D. 19....
.....
.....

ACKNOWLEDGMENT.

The State of Ohio, County of, ss.

Personally appeared before me, the undersigned, a *Notary Public*, in and for said county, this day of, A. D. 19.., the above named,,,, and, who each severally acknowledged the signing of the foregoing articles of incorporation to be his free act and deed, for the uses and purposes therein mentioned.

Witness my hand and official seal on the day and year last aforesaid.

.....,
Notary Public.

CLERK'S CERTIFICATE.

The State of Ohio, County of, ss.

I,, Clerk of the Court of Common Pleas, within and for the county aforesaid, do hereby certify that, whose name is subscribed to the foregoing acknowledgment as a *Notary Public*, was at the date thereof a *Notary Public*, in and for said county, duly commissioned and qualified, and authorized as such to take said acknowledgment; and further, that I am well acquainted with his handwriting, and believe that the signature to said acknowledgment is genuine.

In witness whereof, I have hereunto set my hand and affixed the seal of said court, at, this day of, A. D. 19.....

.....,
Clerk.

No. 2.

Preferred Stock Clause (Par Value Common Stock).

NOTE.—Substitute this form for the fourth clause of Form No. 1.

FOURTH. The capital stock of said corporation, common and preferred, shall be dollars (\$.....), consisting of (.....) shares of common stock of the par value of dollars (\$.....) each and (.....) shares of preferred stock of the par value of dollars (\$.....) each. The holders of the preferred stock shall be entitled to a dividend of percent per annum,¹ payable (*quarterly, semi-annually or annually*) out of the surplus profits of the corporation for each year in preference to all other stockholders, and such dividends shall be cumulative (*or noncumulative*), but deferred dividends shall not bear interest.

(Add such additional provisions from Form No. 5 as may be desired.)

¹ For approved form making divi-stock is issued in parts from time dend rate flexible, where preferredto time, see note to No. 8668.

No. 3.

Corporation for Profit, with No-Par-Value Common Stock.

(G. C. § 8728-1.)

These Articles of Incorporation
of
The Company

Witnesseth, that we, the undersigned, all (*or, a majority*) of whom are citizens of the State of Ohio, desiring to form a corporation, for profit, under sections 8728-1 et. seq. of the General Code, do hereby certify:

FIRST. The name of said corporation shall be The..... Company.

SECOND. Said corporation is to be located at, in County, Ohio, and its principal business there transacted.

THIRD. Said corporation is formed for the purpose of (*for purposes clauses, see Form No. 9*).

FOURTH. The total number of authorized shares of common stock without nominal or par value which may be issued by the corporation is shares.

(*If preferred stock is to be issued, omit the foregoing Fourth and use Form No. 4.*)

(*If the common stock is to be divided into classes, add Form No. 7.*)

FIFTH. The amount of common capital with which the corporation will begin to carry on business is Dollars (\$.....).

In witness whereof, we have hereunto set our hands, this day of, A. D. 19....

(Name)	(Address)
.....
.....
.....
.....

(*Add acknowledgment and clerk's certificate from Form No. 1.*)

No. 4.

Preferred Stock Clause, No-Par-Value Common Stock

(G. C. § 8728-1.)

NOTE.—Substitute this form for the fourth clause in Form No. 3.

FOURTH. The total number of authorized shares which may be issued by the corporation is shares, of which shares shall be common stock without nominal or par value, and shares shall be preferred stock of the par value of \$..... each.

(If the common stock is to be divided into classes, add Form No. 7.)

The terms and provisions under which the preferred stock shall be issued are as follows:

The holders of the preferred stock shall be entitled to a dividend of percent per annum, payable (*quarterly, semi-annually or annually*) out of the surplus profits of the corporation for each year in preference to all other stockholders, and such dividends shall be cumulative (*or, non-cumulative*), but deferred dividends shall not bear interest.

(Add such additional provisions from Form No. 5 as may be desired.)

No. 5.

Optional Preferred Stock Clauses.

NOTE.—The following optional clauses may be used, whether the common stock is par value or no-par-value stock, unless otherwise indicated. All of the optional clauses should not be used in one preferred stock issue, as some of the provisions are contradictory. When one clause is adopted, care should be exercised against the use of inconsistent provisions.

(a) PREFERRED STOCK LIMITED TO PREFERENTIAL DIVIDEND.¹

The holders of preferred stock shall not be entitled to any dividends in excess of percent per annum and the arrears thereof; nor shall they be entitled to stock dividends, nor otherwise to share in the profits of the corporation, nor to subscribe for any new issue of stock or increased stock, whether

¹ For form making dividend rate flexible when preferred stock issued in parts from time to time, see note to No. 8668.

common or preferred, nor shall any preferred stock be exchanged or in any manner converted into common stock.

(b) PREFERRED STOCK TO PARTICIPATE IN ADDITIONAL DIVIDENDS.

When dividends of percent have been paid for any fiscal year on the entire preferred and common capital stock, issued and outstanding, further dividends for that year shall be paid on all stock without distinction (*add, if desired*), until dividends of *twelve* (12) percent (including the preferential or priority dividend aforesaid) have been paid on said preferred stock. Thereafter during such year the holders of preferred stock shall not be entitled to any dividends.

(c) PREFERRED STOCK NOT ENTITLED TO VOTE.

The holders of preferred stock shall not be entitled to notice of meetings of the stockholders, nor to vote on the preferred stock at any such meetings, except meetings called to consider and act upon subjects or questions with respect to which voting rights are conferred by statute upon the holders of preferred stock.

(d) PREFERRED STOCK ENTITLED TO VOTE, EXCEPT AT ELECTIONS
OF DIRECTORS.

The holders of preferred stock shall have no voting rights or powers in the election of directors, but on all other subjects or questions submitted to the stockholders, the holders of preferred stock shall have equal voting rights with common stock.

(e) PREFERRED STOCK TO HAVE EQUAL VOTING RIGHTS, UPON
DEFAULT OF DIVIDENDS, ETC.

The holders of preferred stock shall not be entitled to vote thereon at meetings of the stockholders of said corporation, nor to receive notice of such meetings, unless *two consecutive quarterly (or, semi-annual)* dividends thereon shall be in default, or unless the corporation shall have made default with respect to any other of the provisions or terms of the preferred stock, but then, and in any such event, the holders of preferred stock

shall have full voting rights while such default continues, but no longer. During the period of such default, special meetings of the stockholders shall be called upon the written request of the holders of shares of the preferred stock.

(f) PREFERRED STOCK TO HAVE EXCLUSIVE VOTING RIGHTS, UPON
DEFAULT OF DIVIDENDS, ETC.¹

The holders of preferred stock shall have no voting rights or powers whatsoever, except such as are conferred by statute upon the holders of preferred stock; nor shall they be entitled to notice of meetings of the stockholders except meetings called to consider and act upon subjects or questions with respect to which voting rights are granted by statute to preferred stockholders; Provided, however, that if the corporation shall have made default in the payment of preferential dividends on the preferred stock for *two* consecutive *quarterly* (or, *semi-annual*) periods, or shall have violated, or made default in the performance or observance of any of the other provisions or terms of the preferred stock issue, then, and in any and every such event, during the continuance of such default or violation, but no longer, the holders of preferred stock shall be entitled to notice of all stockholders' meetings and shall have the sole and exclusive right to vote thereat, and the holders of common stock shall have no voting rights or powers whatever. During such period special meetings of the stockholders shall be called upon written request of the holders of shares of the preferred stock.

The voting rights herein conferred upon the holders of preferred stock shall not deprive the preferred stockholders of any rights to which they are or may be entitled at law or in equity or by statute to enforce any of the provisions or terms hereof with respect to preferred stock.

(g) PROVISION FOR REDEMPTION.

Such preferred stock may be redeemed, in whole or in part, at the option of the corporation, expressed by resolution of

¹ Preferred stockholders may be given exclusive voting rights while the corporation is in default for preferred dividends. Opins. Atty.

Gen. 1919, p. 138; 17 O. L. R. 208; Shinkle v. Dalton Co., 19 N. P. n. s. 104; Krell v. Piano Co., 23 N. P. n. s. 193.

the directors, at any time after, 19...., on the date when any preferred dividend is payable under the provisions hereof, by the payment of dollars (\$.....) per share and all accumulated dividends.

Upon any partial redemption, the shares to be redeemed may be selected by lot or pro rata, as the directors may determine, or, at the option of the board, the same may be purchased in the open market for a price not in excess of the redemption price above specified.

Notice of redemption shall be given by registered mail to each preferred stockholder whose stock is to be redeemed, at the address appearing on the corporate records, at least thirty days prior to the date fixed for redemption. All rights of the stockholders to whom notice shall be so given, by virtue of such stock ownership, except the right to receive the redemption value, shall cease and terminate on the date fixed for redemption, unless default shall be made in payment of the redemption price upon a tender of the certificates evidencing the stock.

All stock redeemed under the provisions hereof shall be cancelled and not reissued.

(h) SINKING FUND FOR REDEMPTION.

After providing for payment of the cumulative dividends on the preferred stock, and before any dividends are declared, paid or set aside to or for other stockholders, the directors shall set aside from the remaining surplus earnings for each year a sum equal to 10% of the par value of the entire preferred stock then outstanding, as a sinking fund to be held and used for the redemption of the preferred stock and for no other purpose. This sinking fund provision shall be cumulative, so that if in any year the surplus earnings shall be insufficient for the purpose aforesaid, then no dividends shall be paid to, or declared or set aside for, any stockholders other than preferred stockholders.

Moneys set apart for said sinking fund in any fiscal year may, during such year, be applied by the corporation to the redemption of preferred stock by purchase in the open market at a price not exceeding the redemption value herein specified.

If any moneys remain in said sinking fund *thirty* days after the close of any fiscal year, the corporation shall, not later than forty-five days from the close of such fiscal year, give notice by mail to the registered holders of preferred stock that sealed proposals will be received for the sale of preferred stock to the sinking fund, at a price not exceeding \$..... per share and accrued dividends (being the redemption value thereof) up to the amount of money in the sinking fund at the close of such fiscal year, and that such sealed proposals will be opened by the *treasurer* on a specified date, which shall be not less than *twenty* nor more than *thirty* days after the mailing of the notice. After the opening of the proposals the corporation shall immediately apply all moneys remaining in the sinking fund, at the close of such fiscal year, to the purchase of the preferred stock so offered, at the lowest prices bid, not exceeding the redemption value thereof, upon delivery of the certificates evidencing the same.

In the event that more preferred stock is offered at the same price than can be purchased, the directors may purchase *pro rata* or determine by lot which shares shall be purchased. In case no preferred stock shall be offered at or below the redemption value thereof, or if the bids shall be insufficient to exhaust the moneys in the sinking fund, then the corporation shall immediately proceed to redeem sufficient preferred stock to exhaust the same, in such manner as shall be determined by the directors. All preferred stock purchased or redeemed with moneys from the sinking fund shall be retired, cancelled and not reissued.

(i) NET ASSETS PROVISION.

The corporation shall at all times maintain net current assets at not less than one hundred percent (100%) and total net assets at not less than two hundred percent (200%) of the total par value of the preferred stock then outstanding.

(j) ANNUAL AUDIT.

The corporation shall, between January 1 and April 1 of each calendar year, until the preferred stock has been wholly

redeemed and retired, cause to be made an audit of its affairs and condition, by a certified public accountant, and a copy thereof to be mailed to each holder of preferred stock, at the address appearing on the company's records.

An annual inventory shall be taken, at cost or market value, whichever is the lower, and the annual audit shall be made upon the basis thereof.

(k) INSURANCE.

The corporation shall at all times carry fire insurance on all its buildings, fixtures and personal property to the amount of not less than 80 percent of the full insurable value thereof.

(l) CLAUSE PROHIBITING LONG TERM OBLIGATIONS, MORTGAGES, LIENS AND OTHER PREFERRED STOCK ISSUES.

The corporation shall not, without the affirmative vote or written consent of the holders of *seventy-five* percent (75%) or more of the preferred stock at the time outstanding, issue or create any prior preference stock or preferred stock having priority over, or parity with, the preferred stock, or issue or create any bonds, notes, debentures or other indebtedness or obligation maturing more than one year after its date, or any mortgage or lien other than a purchase money mortgage on newly acquired property (and then not in excess of *sixty* percent (60%) of the purchase price thereof), nor shall the corporation, without such affirmative vote or consent, become guarantor or surety for a subsidiary or affiliated corporation on any such obligation or indebtedness.

A transfer of assets or property by the corporation to a subsidiary, controlled or affiliated corporation, and the creation by the transferee of any mortgage or lien thereon (other than a purchase money mortgage to the transferrer corporation), and the issue or creation by the transferee of any indebtedness or obligation because of ownership of such assets or property, shall be deemed to be a violation of the terms of this preferred stock issue.

(m) SALE OF ENTIRE ASSETS AND BUSINESS PROHIBITED.

The corporation shall not sell or dispose of its entire plant, assets, business or good will or any real estate, without the affirmative vote or written consent of the holders of *seventy-five* percent (75%) or more of the preferred stock at the time outstanding.

(n) RESTRICTION ON COMMON STOCK DIVIDENDS.

No dividend shall be declared, set aside for, or paid to, the holders of the common stock, if the corporation is then in default for the payment of any dividend on the preferred stock, or has made default in the performance or observance of any of the provisions or terms thereof with respect to the preferred stock; nor if the payment of such common stock dividend will or may create a default therein; nor shall any dividend be declared, set aside or paid on the common stock unless and until the full preferential dividend on the preferred stock for the current year, and the full amount herein required to be set aside for the sinking fund for such year, shall have been set aside for such purposes out of its surplus profits.

In no event shall the dividends declared or paid in any year on the common stock exceed *eight* percent (8%) (*or, if the common stock is no-par-value stock, \$..... per share*) until the preferred stock shall have been redeemed in full.

(o) AUTHORIZING DIVIDENDS ON COMMON STOCK UNDER CERTAIN CONDITIONS

Whenever full cumulative dividends on the preferred stock for all previous years shall have been paid, or declared and set aside out of surplus profits of the corporation, and the entire preferential dividend on the preferred stock for the current year shall have been declared and set aside out of surplus profits of the corporation, and the corporation is not in default in the performance or observance of any of the terms or provisions hereof with respect to the preferred stock, then the directors may declare dividends on the common stock of the corporation, payable then or thereafter, out of the remaining surplus profits.

(p) PREFERRED STOCK NOT TO BE CONVERTED INTO COMMON STOCK.

None of the preferred stock shall be exchanged for common stock or in any manner converted into common stock.

(q) OPTION TO CONVERT PREFERRED INTO COMMON STOCK.

The holder of any number of shares of preferred stock may, at his election, on surrender of his certificates thereof, convert the same into common stock, in the ratio of shares of common stock for each share of preferred stock.

(r) RIGHTS OF PREFERRED STOCKHOLDERS LIMITED TO TERMS OF ISSUE.

The holders of preferred stock shall have no rights or powers except such as are herein expressly granted.

(s) RIGHTS OF PREFERRED STOCKHOLDERS INVIOLETE.

The rights and powers herein granted to the holders of preferred stock shall be inviolate and shall not be abridged, modified or changed without their consent.

(t) VOTING RIGHTS NOT EXCLUSIVE REMEDY OF PREFERRED STOCKHOLDERS.

The right to vote, herein conferred upon the preferred stockholders, shall not deprive the preferred stockholders of any remedy to which they may be entitled at law or in equity or by statute to enforce any of the provisions hereof with respect to the preferred stock.

(u) PRIORITY IN ASSETS.

In the event of any liquidation or dissolution of the corporation, whether voluntary or involuntary, the holders of the preferred stock shall be entitled to be paid in full the par value of their shares together with dividends accumulated and unpaid thereon, before any amount shall be paid to the holders of any other stock, but shall not be entitled to share further

in the assets of the corporation or the proceeds of liquidation. After the payment to the holders of the preferred stock of its par value and the unpaid accrued dividends thereon, the remaining assets of the corporation shall be distributed and paid to the holders of the common or other stock according to their respective rights.

(v) PRIORITY IN ASSETS—ANOTHER FORM.

Upon the *voluntary* liquidation, winding up or dissolution of the corporation, or *voluntary* distribution of its assets, the holders of preferred stock shall be entitled to the sum of *one hundred and ten dollars* (\$110) per share, together with all accumulated dividends, but no more, before any sum shall be paid, or assets distributed, to the holders of common stock; but after payment of the sum aforesaid to the holders of preferred stock, the remaining assets and funds shall be divided and paid to the holders of common stock according to their respective shares.

Upon any *involuntary* liquidation, winding up or dissolution of the corporation, the holders of preferred stock shall be entitled to the par value thereof together with all accumulated dividends, before any sum shall be paid, or assets distributed, to the holders of common stock; but after payment of the sum aforesaid to the holders of preferred stock, the remaining assets and funds shall be divided and paid to the holders of common stock according to their respective shares.

No. 6.

Preferred Stock Clause. First, Second and Third Preferred Stock with No-Par-Value Common Stock.

FOURTH. The total number of authorized shares which may be issued by the corporation is *six thousand* shares, of which *three thousand* shares shall be common stock, without nominal or par value, *one thousand* shares shall be first preferred stock of the par value of \$100 each, *one thousand* shares shall be second preferred stock of the par value of \$50 each,

and *one thousand* shares shall be third preferred stock of the par value of \$25 each.

The terms and provisions under which the preferred stock shall be issued are as follows:

The holders of first preferred stock shall be entitled to receive, when, if and as declared from the surplus profits of the corporation, annual dividends at the rate of 8% per annum payable *semi-annually on the first day of January and July*. Such dividends shall be in preference to and priority over all other stockholders, and shall be cumulative, so that if in any year dividends at the rate aforesaid shall not be paid thereon, the deficiency shall be payable before any dividends may be paid, declared or set apart for any other stock.

Whenever cumulative dividends on the first preferred stock shall have been paid in full for all previous years, and money sufficient to pay the dividend on the first preferred stock for the current *semi-annual* period shall have been set apart therefor, the holders of the second preferred stock shall be entitled to receive, when, if and as declared out of the surplus profits of the corporation, remaining after payment of the cumulative dividends on the first preferred stock as aforesaid, annual dividends at the rate of *eight* percent per annum, payable *semi-annually*. The dividends on the second preferred stock shall also be cumulative, and shall be payable before any dividend shall be declared, paid or set apart for third preferred stock or the common stock, so that if in any year dividends at the rate aforesaid shall not be paid thereon, the deficiency shall be payable before any dividends may be declared, paid or set apart for the third preferred stock or the common stock.

Whenever cumulative dividends on the first preferred stock and the second preferred stock shall have been paid in full for all previous years, and money sufficient to pay the current dividends thereon for the current *semi-annual* period shall have been set aside for the first preferred stockholders and the second preferred stockholders, the holders of the third preferred stock shall be entitled to receive, when, if and as declared out of the surplus profits of the corporation, remaining after payment of the cumulative dividends on the first preferred

and second preferred stocks as aforesaid, annual dividends at the rate of *eight* percent per annum payable semi-annually. The dividends on the third preferred stock shall also be cumulative and shall be payable before any dividend shall be declared, paid or set apart for the common stock, so that if in any year dividends at the rate aforesaid shall not be paid thereon, the deficiency shall be payable before any dividends may be declared, paid or set apart for the common stock.

Preference as to assets. In the event of any liquidation, dissolution or winding up of the corporation, voluntary or involuntary, or distribution of capital assets:

(a) The holders of the first preferred stock shall be first paid the full par value of their stock together with a sum equal to all accumulated and unpaid dividends, before any sums are paid, or assets distributed, to holders of other classes of stock, notwithstanding that the full sum shall not have been earned or dividends declared.

(b) After payment to the holders of the first preferred stock of par plus accumulated dividends as aforesaid, the holders of the second preferred stock shall be paid the full par value of their stock, together with a sum equal to all accumulated and unpaid dividends, before any sums are paid, or assets distributed, to the holders of the third preferred stock or the common stock, notwithstanding that the full sum shall not have been earned or dividends declared.

(c) After payment to the holders of the first preferred stock and the second preferred stock of par plus accumulated dividends as aforesaid, the holders of the third preferred stock shall be paid the full par value of their stock together with a sum equal to all accumulated and unpaid dividends before any sums are paid, or assets distributed, to holders of common stock, notwithstanding that the full sum shall not have been earned or dividends declared.

(d) After payment to the holders of the first preferred stock, second preferred stock and third preferred stock of par plus accumulated dividends as aforesaid, the remaining funds and assets of the corporation shall be distributed and paid to the holders of the common stock according to their respective rights.

(Other clauses, as to dividends on common stock, voting rights or restrictions, etc., may be adapted from the Optional Clauses in Form No. 5. One class of preferred stock is sometimes created for the benefit of employes and a provision similar to the following is added.

Employes stock clause. The second preferred stock shall be issued only to employes of the corporation, and no employe shall be entitled to purchase or acquire such stock, from the corporation, in excess of 500 shares. If any holder of the second preferred stock shall cease to be an employe of the corporation, the corporation may, at its option to be exercised within 90 days after the termination of such employment, redeem the second preferred stock of such holder, at the par value thereof plus all accumulated and unpaid dividends, whether or not declared, by giving notice to the holder in the manner herein provided for the redemption of preferred stock generally.

No. 7.

Division of No-Par-Value Common Stock Into Classes.

(G. C. § 8728-1.)

NOTE.—Insert in Fourth clause of Form No. 3.

The common stock shall be divided into classes as follows:
..... shares thereof shall be designated as "Class A"
common stock, which shall have the exclusive voting power.

The remaining shares of the common stock shall be designated as "Class B" common stock, which shall have no voting power whatever.

No. 8.

Provision in Articles of Incorporation Limiting Each Stockholder to One Vote Irrespective of Stock Owned.

(G. C. § 8638.)

NOTE.—The following may be added to the Fourth clause of Form No. 1.

Provided, that each stockholder, irrespective of the amount of stock he may own, shall be entitled to one vote, and no more,

at any election of directors, or upon any subject submitted at a stockholders' meeting.

No. 9.

PURPOSE CLAUSES. CORPORATIONS FOR PROFIT.

Abstract Company.

THIRD. Said corporation is formed for the purpose of making and furnishing abstracts and certificates of title to real property and to do a general searching of records.

Advertising Novelty Company.

THIRD. Said corporation is formed for the purpose of manufacturing, improving, buying, selling and dealing in, at wholesale and retail, calendars, signs and all kinds of advertising novelties, articles and devices, and the doing of all things necessary or incident thereto.

Agency Company. (Real Estate.)

THIRD. Said corporation is formed for the purpose of acting as agent or broker in negotiating sales, exchanges and leases of real estate, managing real estate, collecting rents, and the doing of all things necessary or incident thereto.

Agency Company. (Insurance.)

THIRD. Said corporation is formed for the purpose of conducting a general insurance agency business and the business of average adjusting and the doing of all things necessary or incident thereto.

Air-Cooling Company.

THIRD. Said corporation is formed for the purpose of ventilating, purifying and regulating the humidity of air and of manufacturing, selling and dealing in all kinds of apparatus, devices and inventions designed for said purposes.

Amusement Park Company.

THIRD. Said corporation is formed for the purpose of furnishing to the public facilities for holding musical, theatrical, athletic and other entertainments, providing social entertainments and other means of recreation and amusement; to acquire, lease, own and maintain such real estate, buildings and personal property as may be necessary or proper for the objects and purposes aforesaid, and the doing of all things necessary or incident thereto.

Architectural Company.

THIRD. Said corporation is formed for the purpose of making plans, specifications and drawings, making estimates, superintending work, designing and building all kinds of structures and of carrying on and conducting a general architectural business.

Audit Company.

THIRD. Said corporation is formed for the purpose of auditing accounts and books, and appraising and valuing the assets of individuals, firms and corporations, both public and private, and the doing of all things necessary or incident thereto.

Automobile Bus Company.

THIRD. Said corporation is formed for the purpose of operating and maintaining a municipal and interurban bus line for the transportation of passengers, baggage and freight by automobiles, busses, trucks and other vehicles, with power to acquire, lease, own, hold and maintain all real and personal property which may be necessary or proper for the objects and purposes aforesaid, and the doing of all things necessary or incident thereto.

Automobile Manufacturing Company.

THIRD. Said corporation is formed for the purpose of manufacturing, buying, selling and dealing in automobiles, trucks and other motor vehicles, and parts, accessories, supplies

and tools thereof and therefor; maintaining and operating automobile service stations, repair shops and garages; and the doing of all things necessary or incident thereto.

Baking Company.

THIRD. Said corporation is formed for the purpose of manufacturing, buying, selling and dealing in bread, crackers, cakes, biscuits, candies, confectionery and kindred products and all materials for the same, and doing all things necessary or incident thereto.

Band Company.

THIRD. Said corporation is formed for the purpose of furnishing band and orchestra music and generally to do and carry out all things incident to band and orchestra organizations, including the purchase of all necessary music and instruments, uniforms and other necessary paraphernalia.

Baseball Park Company.

THIRD. Said corporation is formed for the purpose of acquiring, owning, leasing, equipping, improving and maintaining suitable grounds for a baseball park, the exhibition of baseball games and the giving of other exhibitions therein, and the doing of all things necessary or incident thereto.

Building and Loan Association.

(G. C. § 9643 et seq.)

THIRD. Said corporation is formed for the purpose of raising money to be loaned to its members, and others, and generally the doing of all things and the transaction of all business authorized by the laws of Ohio to be done and transacted by building and loan associations.

Building Company.

(G. C. § 10210; Opins. Atty. Gen. 1916, p. 438.)

THIRD. Said corporation is formed for the purpose of constructing and maintaining buildings to be used for hotels,

storerooms, offices, warehouses and factories, and to acquire by purchase or lease and to hold, use, mortgage and lease all such real estate and personal property as may be necessary for such purpose, and the doing of all things necessary or incident thereto.

Business College.

THIRD. Said corporation is formed for the purpose of conducting a general business college, including instruction in bookkeeping, banking, penmanship, office practice, shorthand and typewriting, and all branches of study pertaining to a thorough business education, and the doing of all things necessary or incident thereto.

Butchering Company.

THIRD. Said corporation is formed for the purpose of carrying on a general wholesale and retail butcher, provision and food product business, manufacturing of meat foods and a general butcher business in all its branches.

Car Company.

THIRD. Said corporation is formed for the purpose of owning, leasing, operating and furnishing cars for the transportation of freight on and over railroad lines, within or without the state of Ohio, or partly within and partly without said state, and the transaction of such other business as is incident thereto.

Clay and Brick Company.

(See G. C. § 10137.)

THIRD. Said corporation is formed for the purpose of leasing, buying, owning, holding and operating clay, shale, limestone, coal and mineral properties; mining, selling and dealing in clay, shale, limestone, coal and other minerals, the manufacturing therefrom of brick, cement and other products, and the doing of all things necessary or incident thereto.

Coal Company.

(See G. C. § 10137.)

THIRD. Said corporation is formed for the purpose of leasing, buying, owning, holding and operating coal mines and coal properties in Ohio and other states, manufacturing coke, buying, selling and dealing in coal and coke and the products thereof, and the doing of all things necessary or incident thereto.

Coal Company, Another Form.

THIRD. Said corporation is formed for the purpose of mining coal and dealing in coal, coke and kindred products, by wholesale and retail, and the transaction of all business incidental thereto and connected therewith; with power and authority to purchase, sell or lease mineral lands and to purchase, own, lease or control suitable real estate for the transaction of its business.

Collateral Loan Company.

(G. C. § 9857 et seq.)

THIRD. Said corporation is formed for the purpose of making loans on pledges of goods and chattels, and upon mortgages thereof, and the doing of all things necessary or incident thereto.

Commercial School.

THIRD. Said corporation is formed for the purpose of carrying on the ordinary work of a business or commercial school, and of acquiring and holding the property, whether real or personal, necessary to carry on such work.

Common Carrier Company.

(G. C. § 10170.)

THIRD. Said corporation is formed for the purpose of making and performing contracts for the carriage of persons and the storage, forwarding, carriage and delivery of property, and doing all things incident thereto and necessary for the convenient dispatch of its business, and authorized by law.

Construction Company.

THIRD. Said corporation is formed for the purpose of carrying on the general work of a construction company, such as grading, laying track, ballasting, building bridges, and doing any and all work necessary in making and preparing roadbeds for steam, electric and other railroads, and all contract work relating thereto; also construction and contract work of every kind for cities and towns; also the construction and erection of buildings, and in general, doing construction and contract work of every kind.

Construction Company. Another Form.

THIRD. Said corporation is formed for the purpose of carrying on a general contracting, construction and building business with and for individuals, firms, private and public corporations and public authorities and bodies, and for that purpose to manufacture, buy, sell and deal in materials and furnish labor, and generally to do all things necessary or incident thereto.

Construction Company. Another Form.

THIRD. Said corporation is formed for the purpose of doing a general contracting and construction business, building, constructing, manufacturing, installing, operating and repairing power plants, bridges, dams, sewers, buildings, machinery and structures of all kinds; buying, selling and dealing in the materials therefor and the doing of all things necessary or incident thereto.

Cooperage Company.

THIRD. Said corporation is formed for the purpose of manufacturing, buying, selling and dealing in barrels, boxes and all kinds of cooperage stock and all things incident thereto.

Co-operative Store Company.

THIRD. Said corporation is formed for the purpose of conducting a general store, buying, selling and dealing in groceries, provisions, dry goods, clothing and general merchandise;

distributing merchandise to its stockholders at prices not greater than the cost thereof, with expense of distribution, and the doing of all things necessary or incident thereto.

Dairy Company.

THIRD. Said corporation is formed for the purpose of manufacturing, buying, selling and dealing in butter, cheese, cream and all other dairy products, and the doing of all things necessary or incident thereto.

Directory Company.

THIRD. Said corporation is formed for the purpose of printing and publishing city, county and state directories and of doing a general printing and publishing business.

Dock and Warehouse Company.

(See G. C. § 10207.)

THIRD. Said corporation is formed for the purpose of establishing, constructing, acquiring, owning, leasing and operating docks, wharves and warehouses in the city of and elsewhere in and adjacent to *Lake Erie*, and of receiving, shipping and forwarding merchandise and property of all kinds, issuing warehouse receipts therefor and the doing of all things necessary or incident thereto

Driving Park Company.

THIRD. Said corporation is formed for the purpose of erecting and maintaining a park and grounds, containing drive and speedways for the purpose of recreation and amusement and holding meets therein with horses and vehicles.

Drug Store Company.

THIRD. Said corporation is formed for the purpose of carrying on a wholesale and retail drug, cigar and tobacco business, buying and selling drugs, druggists' sundries, cigars and tobacco, and also for the purpose of manufacturing, compounding and selling pharmaceutical preparations.

Dry Goods and Notions Company.

THIRD. Said corporation is formed for the purpose of buying, selling and dealing in dry goods, notions, furnishing goods and general merchandise in all their varieties at wholesale and retail, also acquiring by purchase or lease such property, both real and personal, as may be deemed necessary or convenient for the aforesaid purposes; also doing all such other things and business as may be necessary, convenient or incident to the main purpose of such corporation.

Electric Light and Power Company.

THIRD. Said corporation is formed for the purpose of manufacturing, producing, transmitting, distributing, selling and supplying electricity to public or private consumers, for light, heat and power purposes; constructing, maintaining and operating all necessary plants, poles, wires, conduits and structures for the transmission and distribution of electricity in the counties of in the municipalities and townships of said counties, and for lighting the streets and public and private buildings therein and the doing of all things necessary or incident thereto

Elevator Company.

(G. C. § 10172.)

THIRD. Said corporation is formed for the purpose of purchasing and holding real and personal estate, erecting or purchasing and owning the necessary buildings, offices and machinery for the purpose of carrying on the business of receiving, storing, delivering and forwarding grain of all kinds, and the doing of the business of general storage, warehousemen and forwarders of all kinds of produce and merchandise. Said corporation shall not deal as buyer or seller, on its own account or for others.

Embalming Fluid Company.

THIRD. Said corporation is formed for the purpose of manufacturing, compounding, buying, selling and trading in embalming fluids, embalming instruments, embalming tables,

disinfectants, antiseptics, deodorizers and anything pertaining to the business of embalming, preserving and caring for the human dead.

Engineering and Construction Company.

THIRD. Said corporation is formed for the purpose of doing a general engineering and contracting business; grading, macadamizing and all other work connected with or incident to road and street building, ballasting, railroad construction and concrete work of all kinds, acquiring by lease, purchase or otherwise, real estate and other property necessary or convenient for such purposes and the doing of all things necessary or incident thereto.

Express Company.

THIRD. Said corporation is formed for the purpose of doing a general express business within said state, carrying and delivering express matter.

Fence Company.

THIRD. Said corporation is formed for the purpose of growing and manufacturing hedge and wire fences, dealing in wire, hedge plants, tools, fence machines, patents pertaining to the same, and such other business as may grow out or on account of the said business.

Foundry Company.

THIRD. Said corporation is formed for the purpose of carrying on the business of a foundry and machine shop, acquiring, by purchase or otherwise, owning and holding the necessary real estate, buildings, machinery, tools, fixtures, supplies, for manufacturing and selling the products of said foundry and machine shop, including iron and steel castings, machinery, and generally to carry on a manufactory in iron and steel products.

Fish Company.

THIRD. Said corporation is formed for the purpose of operating fisheries, buying, selling and dealing in, at wholesale and retail, fish, fisheries, materials and supplies; acquiring,

owning, holding and disposing of all necessary or convenient real estate, docks, wharves, tugs and other boats, and other property and equipment, and the doing of all things necessary or incident thereto.

Freight Loading Company.

THIRD. Said corporation is formed for the purpose of loading coal, iron ore, freight, merchandise, materials and property of all kinds from docks or cars to boats, scows, lighters or other vessels, or therefrom to docks, or cars, conducting a general stevedore business and the doing of all things necessary or incident thereto.

Furniture Company.

THIRD. Said corporation is formed for the purpose of manufacturing, leasing, buying, selling and dealing in house, store and other furniture and furnishings and cabinet work of all kinds and to do all things incident thereto, including selling said goods on installments.

Gas and Electric Company.

(See also Light, Heat and Power Company.)

THIRD. Said corporation is formed for the purpose of manufacturing, producing, distributing, furnishing and selling gas and electricity, or either, for light, heat, power and other purposes, and for doing all things incident to said purpose.

Natural Gas Company.

(See Oil and Gas Company.)

Artificial Gas Company.

THIRD. Said corporation is formed for the purpose of manufacturing gas for light, heat and power, to be made from any and all substances, or a combination thereof, from which gas can be obtained, and for the purpose of selling and disposing of the same in the city of and elsewhere, with full power to lay pipes and conductors therefor, through the avenues, streets, lanes and alleys thereof, and in such other places as may be necessary or convenient to supply said avenues,

streets, lanes and alleys, and any manufactories, public places, buildings, houses or any other place or building whatsoever with gas, for light, heat and power, together with the power to hold, occupy and employ such real and personal estate and to do such other things as may be necessary or convenient to carry out the objects of this corporation, and to manufacture and sell coke and all other products used in the manufacture of gas.

General Store Company.

THIRD. Said corporation is formed for the purpose of doing a general merchandise business at wholesale and retail and of buying, selling and dealing at wholesale and retail in dry goods, notions, clothing, gentlemen's furnishing goods, hats, caps, boots, shoes, carpets, groceries, queensware, glassware, wool, live stock, grain, butter, eggs and other country produce.

Glassware Company.

THIRD. Said corporation is formed for the purpose of manufacturing, selling, buying and dealing in, glass bottles, glass jars and all other forms and kinds of glassware; and of doing all other acts and things in any way incidental to or connected with such business.

Greenhouse and Nursery Company.

THIRD. Said corporation is formed for the purpose of growing, raising, buying, selling and dealing in any and all kinds of trees, shrubs, vines, plants, flowers, seeds, grains, roots, vegetables, bulbs and fruits; acquiring, holding, owning and selling all real estate and personal property necessary or convenient in carrying out of said purpose and the doing of all things necessary or incident thereto.

Heating Company.

THIRD. Said corporation is formed for the purpose of making and supplying steam and steam heat for both public and private consumption and use; also the supplying of hot water for said use; and the purchase and use of such tools,

engines, pipes and other apparati and equipment necessarily incident to said business; and to acquire franchises and privileges to so supply said steam, steam heat and hot water.

Hotel and Restaurant.

THIRD. Said corporation is formed for the purpose of doing a general hotel, restaurant and catering business, and the doing of all things necessary or incident thereto.

NOTE.—For hotel building company, see *Building Company*.

INSURANCE COMPANIES.

Life, Accident, etc., Insurance Company. (Corporation for Profit.)

(G. C. §§ 9339, 9385, 9340).

THIRD. Said corporation is formed for the purpose of making insurance on the lives of individuals, and every insurance appertaining thereto or connected therewith, in Ohio and elsewhere, *on the stock plan*, and granting, purchasing and disposing of annuities, and, further, of insuring against accidents to, and sickness, temporary or permanent physical disability, of, individuals, and the doing of all things necessary or incident thereto.

(As to the following special provisions, see G. C. § 9340.)

FOURTH. The corporate powers of said corporation are to be exercised according to the provisions of Chapter 1, Subdivision 1 of Division III, Title IX, Part Second, of the General Code of Ohio, and of the regulations and by-laws of said corporation.

FIFTH. The number of directors of said corporation shall be *twenty-one* (21) all of whom shall be stockholders and a majority of whom shall be citizens of the state of Ohio. The directors shall be elected at the annual meeting of the stockholders of the corporation on the *second Monday in January* in each year and shall hold office until the next annual meeting of the stockholders and until their successors are chosen and qualified. The other officers of said company shall be elected annually by the board of directors at the first regular meeting or

special meeting of the board after such annual election. In the event of a vacancy occurring in said board by death or otherwise, the same shall be filled by the affirmative vote of a majority of the members of the board of directors.

SIXTH. Regulations for the government of the business and affairs of the company, not inconsistent with law, may be adopted, changed or amended by a majority vote of the shareholders at any annual meeting or at any special meeting, provided notice of such special meeting shall show that an amendment of the regulations will be proposed. The board of directors of the corporation may from time to time adopt, change, amend or repeal by-laws not inconsistent with law, governing the transaction of its business and affairs.

SEVENTH. The capital stock of said company and the amount of capital to be employed shall be (\$.....) dollars divided into (.....) shares of dollars (\$.....) each.

Fire Insurance, Etc., Company.

(G. C. § 9607-2.)

THIRD. Said corporation is formed for the purpose of insuring, transacting and making insurance against loss or damage to property and loss of use and occupancy by fire, lightning, hail, tempest, flood, earthquake, frost or snow, explosion, fire ensuing and explosion, no fire ensuing, except explosion by steam boiler or flywheels; against loss or damage by water caused by the breakage or leakage of sprinklers, pumps or other apparatus, water pipes, plumbing, or their fixtures, erected for extinguishing fires, and against accidental injury to such sprinklers, pumps, other apparatus, water pipes, plumbing or fixtures; against the risks of inland transportation and navigation; upon automobiles, whether stationary or operated under their own power, against loss or damage by any of the causes or risks hereinbefore specified, including also transportation, collision, liability for damage to property resulting from owning, maintaining or using automobiles and including burglary or theft, but not including loss or damage by risk of bodily injury to the person.

Mutual Insurance Company. (Liability, Disability, Etc.)

(G. C. § 9607-2.)

(Insert in articles of incorporation of corporation not for profit.)

THIRD. Said corporation is formed for the purpose of insuring, transacting and making insurance and reinsuring and accepting reinsurance and protecting its members against risks as follows:

(a) Liability insurance. Against loss, expense or liability by risk of bodily injury or death by accident, disability, sickness or disease suffered by others for which the insured may be liable or have assumed liability not including workman's compensation.

(b) Disability insurance. Against bodily injury or death by accident and disability by sickness.

(c) Automobile insurance. Against loss, expense and liability resulting from the ownership, maintenance or use of any automobile or other vehicle, provided no policies shall be issued against the hazard of fire alone.

(d) Steam boiler insurance. Against loss or liability to persons or property resulting from explosions or accidents to boilers, containers, pipes, engines, flywheels, elevators and machinery in connection therewith and against loss of use and occupancy caused thereby and to make inspection and issue certificates of inspection thereon.

(e) Use and occupancy insurance. Against loss from the interruption of trade or business which may be the result of any accident or casualty.

(f) Miscellaneous insurance. Against loss or damage by any hazard upon any risk not before set forth which is not prohibited by statute or at common law from being a subject of insurance except life insurance.

Said insurance shall be on the mutual plan as authorized and regulated by the laws of the State of Ohio relating to mutual companies transacting said insurance business and the company shall have all the powers necessary and incident to carrying on said insurance upon said plan.

Mutual Protective Insurance Association.

(G. C. §§ 9593, 9594.)

(Insert in articles of incorporation of corporation not for profit.)

THIRD. Said corporation is formed for the purpose of enabling its members to insure each other against loss or damage by fire or lightning, cyclones, tornadoes or wind storms, hail storms and explosions from gas, on property in Ohio, and to enforce any contract not inconsistent with the insurance laws of Ohio which may be by them entered into whereby the contracting parties shall agree to be specifically assessed for the payment of incidental purposes and losses which may occur to its members.

FOURTH. Said corporation shall insure farm buildings, detached dwellings, schoolhouses, churches, township buildings, grange buildings, farm implements, farm products, live stock, household goods, furniture, pleasure and utility vehicles, motor vehicles; steam, gas, gasoline and oil engines; motor trucks and tractors, electric motors, electric appliances, lighting systems, and such other property as is authorized by Section 9593 of the General Code of Ohio, and shall be limited to property not classed as extra hazardous, and such property may be located within or without any municipality in the State of Ohio.

Accident, Etc., Company not for Profit.

(G. C. §§ 9445 to 9451.)

(Insert in articles of incorporation of corporation not for profit.)

THIRD. Said corporation is formed for the purpose of insuring against accidental personal injury and loss of life, sustained while traveling by railroad, steamboat or other mode of conveyance, and against accidental loss of life and personal injury, sustained by accident of any description whatsoever and against expenses and loss of time occasioned by injury or sickness and on such terms and conditions and for such periods of time, and confined to such counties and localities, and to such persons as may at any time be provided in the by-laws of the company. Said insurance to be conducted

under and in accordance with Title IX, Div. III, Subdiv. I, Ch. 3, Section 9445 to 9451, both inclusive, of the General Code of Ohio, and with power to do all other things incidental thereto or necessary to be done to carry out said purpose.

Mutual Protective Association. (Life and Accident.)

(G. C. § 9427 et seq.)

(Insert in articles of incorporation of corporation not for profit.)

THIRD. Said corporation is formed for the purpose of transacting the business of life (*and accident*) insurance, on the assessment plan, under sections 9427, 9428 and 9429 of the General Code of Ohio, and of doing all things necessary and incident thereto.

Live Stock Mutual Protective Association.

(G. C. §§ 9608, 9609.)

(Insert in articles of incorporation of corporation not for profit.)

THIRD. Said corporation is formed for the purpose of enabling its members to insure each other against loss from death of domestic animals, and to enforce any contract by them entered into, whereby they specifically agree to be assessed for the payment of losses and incidental expenses.

Credit Insurance Company.

(G. C. § 9621.)

THIRD. Said corporation is formed for the purpose of guaranteeing and indemnifying merchants, manufacturers, traders and those engaged in business, and giving credit, from loss and damage by reason of giving and extending credit to their customers and those dealing with them, and the doing of all things necessary and incident thereto.

FOURTH. (*Add paragraphs Fourth, Fifth, Sixth and Seventh, of Articles of Life, Accident, etc., Insurance Company, above.*) See G. C. Secs. 9621, 9340, 9341.

Interurban and Street Railway Company.

(G. C. § 9117.)

THIRD. Said corporation is formed for the purpose of constructing, building, acquiring, by purchase, lease or otherwise, and owning, maintaining and operating a line of railroad with rights of way, roadbed, single or double tracks, side tracks, switches, spurs, turnouts, branches, extensions, stations, depots, terminals, way stations, freight houses, power houses, lines for the transmission of electric power, telegraph and telephone lines, and all other necessary or convenient appurtenances and appliances incidental to the operation of a railroad; said railroad to be operated by electric or other motive power except animal power; of acquiring and holding real estate and personal property and all equipment and accessories necessary, convenient and proper to carry out the purposes herein mentioned, of constructing, owning and operating power plants for the generating of electricity by steam, water or other motive power, the same to be used in propelling its cars, rolling stock and machinery; of using, supplying and selling electricity so generated, for heat, light, power and other purposes, and receiving compensation therefor; for transporting passengers, packages, express matter, United States mail, baggage and freight, and engaging in the general business of a common carrier upon its railroad, or lines of railway, telegraph and telephone lines; and with full right to purchase, lease, sublease or otherwise acquire electricity or other motive power.

Said line of railroad shall have the city of, county of, state of Ohio, for one terminus, and the city of, county of, state of Ohio, for its other terminus, and shall pass through the following named counties in the state of Ohio, to wit:

Iron Company.

(G. C. § 10143.)

THIRD. Said corporation is formed for the purpose of manufacturing, buying, selling and dealing in iron and steel and the various products and forms thereof.

Light, Heat and Power Company.

THIRD. Said corporation is formed for the purpose of producing, acquiring, buying, leasing, using, furnishing, supplying, selling, transmitting, and distributing light, heat and power, generated by means of gas, electricity, steam or hot water, or any or all of them, and in connection therewith, of constructing, acquiring, purchasing, using, leasing or purchasing plants, works, constructions, or parts thereof for the production, use, transmission, distribution, regulation, control or application of gas, electricity, steam or hot water, and the doing of all things necessary or incident thereto.

Live Stock Company.

THIRD. Said corporation is formed for the purpose of buying, breeding, raising, selling and dealing in horses, cattle and all other kinds of live stock, vehicles, harness and other equipment therefor, and the doing of all things necessary or incident thereto.

Loan or Discount Company.

THIRD. Said corporation is formed for the purpose of loaning money upon, buying, dealing in, and selling, as principal or agent, bills of lading, warehouse receipts, commercial paper, book accounts, choses in action, contracts for the sale of real property, conditional contracts for the sale of personal property, and mortgages and pledges of personal property and the doing of all things necessary or incident thereto.

Lodge Building Company.

(G. C. § 10196.)

THIRD. Said corporation is formed for the purpose of erecting, equipping and maintaining a building, to be used and occupied by (*specify two or more lodges which will occupy the building*) as a lodge room and club house; of acquiring, owning, holding and disposing of real estate and personal property necessary or convenient to carry out the purpose aforesaid and the doing of all things necessary or incident thereto.

Lumber Company.

THIRD. Said corporation is formed for the purpose of doing a general manufacturing and wholesale lumber business; manufacturing wood products of every description; buying, selling and dealing in lumber, at wholesale or retail, in its own behalf and as agent, factor, or broker; acquiring, by lease, purchase or otherwise, and holding and disposing of such timber lands and other real and personal property as is necessary or convenient for carrying out the foregoing purpose and the doing of all things necessary or incident thereto.

Mail Order Company.

THIRD. Said corporation is formed for the purpose of conducting a mail order business in a general line of (*specify articles to be dealt in*) and the doing of all things necessary or incident thereto.

Mail Tube Company.

(See G. C. § 3645-1.)

THIRD. Said corporation is formed for the purpose of establishing and carrying on the business of transporting and delivering United States mail, messages, packages, commercial bundles, and merchandise; conducting a general forwarding business by and through subways, underground tubes, tunnels, conduits and other similar means, operated by air, electricity or other motive power, and also by vehicles, and motor vehicles; transmitting and supplying power along the line of its subways, mail tubes, tunnels, or conduits; acquiring, holding, owning, leasing, and disposing of inventions, letters patent and patent rights relating to such tubes, tunnels, or conduits and the motive power thereof, and the doing of all things necessary or incident thereto.

Manufacturing Company.

(G. C. §§ 10137 to 10141; Opins. Atty. Gen. 1916, p. 1497.)

THIRD. Said corporation is formed for the purpose of manufacturing, buying, selling and dealing in (*specify*

articles to be manufactured); of acquiring, owning, holding and selling real estate and personal property necessary or convenient to carry out the purpose aforesaid and the doing of all things necessary or incident thereto.

Market House Company.

(G. C. § 10151.)

THIRD. Said corporation is formed for the purpose of constructing and maintaining a market house in, Ohio, and exercising all the powers which may be exercised by such corporations under the laws of Ohio.

Mausoleum Company.

THIRD. Said corporation is formed for the purpose of erecting, maintaining, operating and selling mausoleums, crypts, vaults and burial places for the dead; caring for, preserving and protecting dead bodies and the doing of all things necessary or incident thereto.

Meat Market Company.

THIRD. Said corporation is formed for the purpose of buying, selling and dealing in meats, fish, fowl and provisions and the doing of all things necessary or incident thereto.

Men's Furnishing Company.

THIRD. Said corporation is formed for the purpose of dealing in woolens, trimmings and fabrics used in connection with the tailoring business; in the manufacture, purchase and sale of custom made and ready made clothing of every kind and nature and for the purpose of dealing in furnishing goods.

Mercantile Agency Company.

THIRD. Said corporation is formed for the purpose of compiling, collecting, publishing and selling commercial credit rating and other directories, collecting accounts, furnishing reports and abstracts and certificates of titles and the performing of such other business as usually pertains to the pub-

lishing of reference and other directories, making collections and furnishing financial reports and abstracts and certificates of titles with the right to acquire and hold by lease or purchase, such real and personal estate as may be necessary to the carrying on of said business.

Mercantile or Trading Company.

THIRD. Said corporation is formed for the purpose of buying, selling and dealing in, at wholesale or retail,
(specify kinds of merchandise to be dealt in, as "cigars, tobacco, pipes and smokers' supplies") and the doing of all things necessary and incident thereto.

Messenger Service Company.

THIRD. Said corporation is formed for the purpose of constructing, maintaining, leasing and operating lines of telegraph for the private use of individuals, firms, corporations, municipal and otherwise, for general business, for police, fire and burglar alarm telegraph service, and in connection therewith for constructing, owning and operating a general messenger, delivery and district telegraph service, a general collection, storage and delivery of packages, freight and other properties, for the constructing, owning and operating of a local system of electrical call-boxes for messages, messengers, fire and burglar alarm signals and signals for police and fire patrol and night watchmen, and for any other purpose or purposes in connection therewith or incident thereto; also the manufacture and sale of any and all electrical or other appliances, supplies and fixtures necessary or incidental to the carrying on of said business, and also to carry on a general electrical construction and supply business, and to generate and supply electricity for any and all purposes.

Said company may also act as advertisers, distributors and general agents for handling the business and collecting and remitting funds in connection therewith, of corporations, firms or individuals. It may engage in the business of furnishing stationery and advertising matter, devices and novelties of all kinds.

Millinery Company.

THIRD. Said corporation is formed for the purpose of manufacturing, importing, buying, selling, jobbing and dealing in millinery of every description and doing all things incident thereto, and for owning and holding such real and personal property as may be necessary or convenient therefor.

Milling Company.

THIRD. Said corporation is formed for the purpose of owning, controlling and operating flour and grist mills, and for buying and selling, at wholesale and retail, and dealing in, grain, seed, flour, feed and kindred merchandise, and for the purpose of owning all machinery, privileges, real estate and other property needed in carrying on such business, and for doing all things incident to such purposes and business.

Mineral Water Company.

THIRD. Said corporation is formed for the purpose of preparing, manufacturing, bottling, buying, selling, vending, dealing in and furnishing to dealers and consumers, drinking and table water; carbonated water, carbonated and other non-intoxicating beverages, and to do all things incident thereto, and for the further purpose of manufacturing, buying, selling and dealing in such machinery, tanks, fountains, bottles and other material as may be used in connection with or in or about the preparation, manufacture, dealing in or furnishing such water or beverages and to do all things incident thereto.

Mining Company.

(See G. C. §§ 10137, 10139, 10142 and 10143.)

THIRD. Said corporation is formed for the purpose of mining, manufacturing and dealing in (*specify* ores, minerals, etc.), and acquiring, by purchase, lease or otherwise, owning, holding and selling real estate and personal property in the State of Ohio and elsewhere necessary or convenient for the better transaction of the business of the company, and to

insure or aid in the carrying out of the general powers of the company, and the doing of all things necessary or incident thereto.

Mortgage Company.

(See Loan and Discount Company, above.)

Motion Picture and Vaudeville Theater Company.

THIRD. Said corporation is formed for the purpose of purchasing, renting and holding real estate and constructing buildings thereon for the purpose of operating and conducting motion picture and vaudeville entertainments and the doing of all things necessary or incident thereto.

Motion Picture and Vaudeville Theater. Another Form.

THIRD. Said corporation is formed for the purpose of buying, leasing or otherwise acquiring and owning, holding, operating and conducting motion picture and vaudeville theaters and the doing of all things necessary or incident thereto.

Musical Instrument Company.

THIRD. Said corporation is formed for the purpose of manufacturing, purchasing, selling and dealing in all kinds of pianos, organs, automatic pianos, instruments of all kinds, appliances, supplies and all things incident thereto.

Ohio River Bridge Company.

(G. C. § 9310 et seq.)

THIRD. Said corporation is formed for the purpose of constructing, owning, maintaining and operating a toll bridge over the Ohio River, with one or more tracks, for railway and highway traffic from a point in Township, County, Ohio, on the northerly side of said river to a point in Township, County, State of, on the southerly side of said river, with suitable avenues and approaches thereto, and for such purposes and objects to have

the powers enumerated and conferred on such companies by sections 9310 to 9313 of the General Code of Ohio and the doing of all things necessary or incident thereto.

Oil and Gas Company.

(See G. C. §§ 10137, 10139.)

THIRD. Said corporation is formed for the purpose of drilling for and accumulating petroleum oil and natural gas, buying and selling oil and gas rights, privileges and leases, and oil and gas and the products thereof, leasing oil and gas territory, refining, manufacturing and dealing in oil, dealing in land containing oil and other minerals and the doing of all things necessary or incident thereto.

Oil and Gas Company. Another Form.

THIRD. Said corporation is formed for the purpose of leasing, acquiring, holding, operating and disposing of petroleum oil and natural gas properties, drilling for petroleum oil and natural gas, producing, accumulating and disposing of petroleum oil and natural gas, and the products thereof; manufacturing, distilling, refining and otherwise converting such oil and gas and the products thereof, and marketing and disposing of the same, and the doing of all things necessary or incident thereto.

Orchard Land Company.

THIRD. Said corporation is formed for the purpose of buying, selling and dealing in orchard lands, and the products thereof, cultivating and maintaining orchards and nurseries, and the doing of all things necessary or incident thereto. Said corporation is formed subject to the provisions of section 8648 of the General Code of Ohio.

Patent Rights Company.

(Kardo Co. v. Adams, 231 Fed. 950; 14 O. L. R. 223.)

THIRD. Said corporation is formed for the purpose of purchasing, leasing or otherwise acquiring, and of registering,

owning and using inventions, improvements, trade secrets, processes or interests therein, and applying for and receiving, purchasing or otherwise acquiring, letters patent, or rights or interests under letters patent, for or upon *motor and other vehicles, or means of transportation, and traction and propelling machinery, and for or upon the mechanism, parts or equipment of the same, or the tools or machinery for the manufacture of the same*; and of selling, or granting licenses and rights under or in respect of such secrets, processes, inventions, improvements or patents, and otherwise dealing in respect of or with the same, or either of them; and of manufacturing, using and dealing in the vehicles, articles, machinery, equipment and parts covered by or provided for in said inventions, patents or improvements, and of doing all things necessary, proper and incidental to the transaction of said business, or any part thereof.

Patent Rights Company. Another Form.

THIRD. Said corporation is formed for the purpose of applying for, acquiring, leasing, purchasing, registering, holding, owning and using any and all trade secrets, processes, inventions and improvements whether secured by letters patent in the United States or elsewhere, or otherwise; operating, manufacturing and using the same; selling, assigning, granting of licenses in respect of, and otherwise disposing of the same and the doing of all things necessary or incident thereto.

Pipe Line Company.

(G. C. § 10128.)

THIRD. Said corporation is formed for the purpose of transporting oils and other fluids through tubing and pipes and for handling and storing the same in tanks or otherwise and exercising all the powers which may be exercised by such corporations under the laws of Ohio.

Pottery Company.

THIRD. Said corporation is formed for the purpose of manufacturing, buying and selling china pottery and earthen-

ware; to decorate and embellish the same; to mine and manufacture and deal in china clay, flint and feldspar and all materials of any nature used in the manufacture of said wares and to acquire, hold and possess and sell real estate and other property necessary for the proper and convenient conduct of said business for profit.

Printing and Publishing Company.

THIRD. Said corporation is formed for the purpose of doing a general printing, publishing, binding, engraving, electrotyping and lithographing business, and the doing of all things necessary and incident thereto.

Publishing Company.

THIRD. Said corporation is formed for the purpose of printing and publishing newspapers, magazines, periodicals; conducting a general advertising and printing business and the doing of all things necessary or incident thereto.

Railroad Company.

THIRD. Said corporation is formed for the purpose of building, constructing, acquiring by purchase, lease or otherwise, and owning, maintaining and operating a railroad with rights of way, roadbed, tracks, side tracks, spurs, switches, stations, depots, terminals, way stations, freight houses, power houses, lines for the transmission of electric power, telegraph and telephone lines, and all necessary, useful and convenient buildings and structures, having the city of, county of, state of Ohio, for one terminus and the city of, county of, state of Ohio, for its other terminus, and passing through the following named counties in the state of Ohio, to wit: and, and with branches from said main line to towns or places within the limits of said counties, or to connections with other railroads within the state, or to mines, clay banks, quarries, manufacturing establishments, elevators, warehouses and navigable waters; said railroad to be operated by steam, electric or other motive power;

and of building, constructing, manufacturing and acquiring, by purchase, lease or otherwise, the necessary engines, locomotives, motors, cars, coaches, rolling stock and equipment of all kinds necessary, sufficient and convenient for the proper and profitable operation of such railroad; of owning real estate in all the said counties sufficient and proper for maintaining such stations, depots, terminal facilities, way stations, freight houses, power houses and yards necessary, sufficient and convenient for the proper and profitable operation of a complete railroad system; of owning real estate, with buildings, structures, machinery, tools and other appliances sufficient for shops and repair shops, for the purpose of making, manufacturing, building and repairing engines, locomotives, motors, cars, coaches and rolling stock and equipment of all kinds.

Real Estate Company.

(G. C. §§ 8648-8650).

THIRD. Said corporation is formed for the purpose of buying, or otherwise acquiring, owning, selling and dealing in real estate and the doing of all things incident thereto, subject to the provisions of sections 8648, 8649 and 8650 of the General Code of Ohio.

Sales Agency Company.

THIRD. Said corporation is formed for the purpose of doing a general agency and commission business, buying, selling and dealing in (*specify articles*) for itself and as agent, factor and broker and the doing of all things necessary or incident thereto.

Sand and Gravel Company.

THIRD. Said corporation is formed for the purpose of acquiring, by dredging, purchase, or otherwise, selling and dealing in sand, gravel, crushed stone and building materials and supplies, and the doing of all things necessary or incident thereto.

Sanitorium Company.

(G. C. § 8624.)

THIRD. Said corporation is formed for the purpose of erecting, owning and conducting sanitoriums for the receiving of and caring for patients and for the medical, surgical and hygienic treatment of such patients, and for instruction of nurses in the treatment of disease and hygiene.

Sanitorium and Drug Company.

THIRD. Said corporation is formed for the purpose of manufacturing, compounding, using, buying, selling and dealing in drugs, medicines, surgical instruments, chemicals and formulae; erecting, owning and conducting sanitoriums or hospitals for the receiving and caring for patients, and for the medical, surgical and hygienic treatment of the diseases of such patients, and for the instruction of nurses in the treatment of disease and in hygiene, and of doing all things necessary to carry out, or incident to, said purpose.

Scenic Railway Company.

THIRD. Said corporation is formed for the purpose of manufacturing, operating and selling scenic and pleasure railways of improved construction covered by letters patent of the United States; to acquire the control of said and future patents upon or in relation to such railways; to introduce said structures into public use; and, in connection with said business, to manufacture, use and vend such articles as may be conveniently and profitably dealt with in that connection; and to acquire and use such property as may be necessary or convenient for the aforesaid business of the company.

Securities Company.

THIRD. Said corporation is formed for the purpose of acquiring, owning, holding and disposing of bonds, commercial paper, choses in action, mortgages, bills of lading, warehouse receipts and other securities, as owner, agent, factor or broker, and the doing of all things necessary or incident thereto.

Sewerage Company.

(G. C. § 10157 et seq.)

THIRD. Said corporation is formed for the purpose of constructing, maintaining and operating a sewer on Avenue, Ohio, draining the streets, alleys, buildings and grounds lying contiguous and adjacent to said avenue, and the doing of all things necessary or incident thereto.

Stock-Yard Company.

(G. C. § 10211).

THIRD. Said corporation is formed for the purpose of erecting and maintaining pens, buildings and other structures for the safe keeping of live stock intrusted to it on sale or otherwise, and to purchase or lease such real estate as may be necessary for the convenient prosecution of said business.

Taxicab and Garage Company.

THIRD. Said corporation is formed for the purpose of doing a general taxicab and automobile livery business, acquiring, owning, operating, letting and renting automobiles, taxicabs, motor and other vehicles for hire, in the transportation of persons and property; the conducting of a general automobile garage and repair business; buying, selling and dealing in automobile supplies, parts and accessories, and the doing of all things necessary or incident thereto.

Telephone Company.

THIRD. Said corporation is formed for the purpose of building, purchasing, or otherwise acquiring, equipping, maintaining and operating telephone exchange systems and furnishing telephone service in and neighboring townships and villages. One terminus of said improvement will be in county of, Ohio, and the other terminus will be in, county of, Ohio, with lines extending into (*specify route*).

Telephone Company. (Local.)

THIRD. Said corporation is formed for the purpose of constructing, maintaining and operating a telephone exchange system in the city of, Ohio, and in the county of, in said state.

Telephone Company. (Mutual.)

THIRD. Said corporation is formed for the purpose of giving its members, together with their families and help in business relations, free telephone service over any of its lines and to enforce any of its contracts which may be by them entered into by which those entering shall agree to be assessed specifically for incidental purposes and for the payment of exchange services.

Tennis Club Company.

THIRD. Said corporation is formed for the purpose of promoting the game of tennis; acquiring, by lease, purchase or otherwise, owning, holding and selling such real estate and personal property as may be necessary or convenient for constructing, equipping and maintaining tennis courts and club houses for its members and guests, and the doing of all things necessary or incident thereto.

Theater Company.

THIRD. Said corporation is formed for the purpose of operating theaters for the exhibition of motion pictures, shows and theatrical performances, the providing of other forms of public entertainment and amusement; of constructing, buying, leasing, owning, maintaining and selling such real estate, buildings and personal property as may be necessary or convenient to the carrying out of said purpose, and the doing of all things necessary or incident thereto.

Title Guarantee and Trust Company.

(G. C. § 9850.)

THIRD. Said corporation is formed for the purpose of preparing and furnishing abstracts and certificates of title to real

estate, bonds, mortgages and other securities; guaranteeing such titles, the validity and due execution of such securities, and the performance of contracts incident thereto; making and negotiating loans for itself and as agent or trustee for others, and guaranteeing the collection of interest and principal of such loans; taking charge of and selling, mortgaging, renting or otherwise disposing of real estate for others, and performing all the duties of an agent relative to property deeded or otherwise entrusted to it; owning real estate, as a place for carrying on its business, and to do any and all things necessary or incidental to an abstract, title guarantee and loaning business, and the transaction of any and all business incidentally or necessarily connected with each or all of the foregoing provisions.

Towel Supply Company.

THIRD. Said corporation is formed for the purpose of buying, selling, leasing and otherwise supplying white coats, aprons, towels, napkins and other linen, soap, combs, brushes and other toilet articles, with cabinets therefor, to persons, firms and corporations, in offices, stores, factories and other places, conducting a laundry, and the doing of all things necessary or incident thereto.

Transfer Company.

THIRD. Said corporation is formed for the purpose of transferring, moving and delivering baggage, household goods and other personal property, the carrying of passengers and property by automobiles, trucks and other vehicles in the city of, Ohio, and in the vicinity thereof and the doing of all things necessary or incident thereto.

Undertaking Company.

THIRD. Said corporation is formed for the purpose of engaging in the undertaking business; buying, selling, renting, supplying and furnishing caskets, coffins and burial and funeral supplies and furnishings; owning and operating an ambulance and coach service and the doing of all things necessary or incident thereto.

Union Interurban Depot and Terminal Company.

(G. C. § 9169-1 et seq.)

THIRD. Said corporation is formed for the purpose of constructing, owning, maintaining and operating a union electric interurban terminal depot and connecting tracks, with all necessary and proper yards, tracks, buildings and structures for the use of interurban and street railways, with all the rights, privileges and powers incident thereto or connected therewith, and with all the properties, rights, privileges and powers given or granted to such a corporation under any general or special law of the state of Ohio, including the power to purchase, appropriate or condemn private lands for the purpose aforesaid and to hold and improve the same, and also the power of acquiring all necessary, proper or desirable rights of way or franchises for electric interurban railways to enter said interurban terminal and depot buildings and grounds. Said union electric interurban terminal and depot and connecting tracks and the improvements connected therewith shall be located in the city of, county of, and state of

Vessel Company.

THIRD. Said corporation is formed for the purpose of purchasing, building, leasing, chartering, acquiring, owning, operating and selling steamboats and all other kinds of vessels and water craft, the doing of a general freight and passenger business, and towing; of acquiring, by purchase or otherwise, such real estate, docks, wharfs, equipment, appliances and other properties as may be necessary or convenient to carry out such purpose and the doing of all things necessary or incident thereto.

Warehouse Company.

THIRD. Said corporation is formed for the purpose of establishing, maintaining and conducting warehouses for the storage, receipt, custody, shipment and forwarding of personal property and chattels of all kinds; issuing warehouse receipts

therefor; acquiring, holding, owning and selling real estate and personal property, including trucks and moving vans, necessary or convenient in the carrying out of said purpose and the doing of all things necessary or incident thereto.

Waste Paper and Junk Company.

THIRD. Said corporation is formed for the purpose of buying and otherwise acquiring, selling and dealing in waste paper, rags, bottles, broken glass, zinc, iron, rubber, brass, junk and other kindred articles and the doing of all things necessary or incident thereto.

Water Transportation Company.

THIRD. Said corporation is formed for the purpose of purchasing, chartering, acquiring, owning, handling or operating steamships, vessels and other vessel property or interest therein; purchasing, constructing or owning all necessary or proper terminal facilities, including all real estate and personal property as may be suitable or necessary thereto and doing all such things as may be properly incident to the above enumerated purposes.

Water Transportation Company. Another Form.

THIRD. Said corporation is formed for the purpose of building, buying, selling, leasing and renting boats, barges and all kinds of water craft and operating the same in towing, freighting and transporting, by water, of any and all kinds of merchandise and property, and the doing of all things necessary or incident thereto.

Waterworks Company.

THIRD. Said corporation is formed for the purpose of supplying the city of and the inhabitants thereof and individuals, firms, corporations, townships and municipalities within said city and in the vicinity thereof with water for domestic, sanitary, manufacturing, fire and other purposes; of acquiring, erecting, maintaining, owning and operating all necessary, expedient or convenient pumping stations, settling basins,

filtering galleries, reservoirs, water towers, buildings, structures, engines, machinery, appliances and equipment; of acquiring, laying and maintaining in public streets, alleys, lanes, highways and public and private grounds, pipe lines, conduits and connections through which to distribute water; and of acquiring, by lease, purchase or otherwise, owning, selling and conveying all such real estate, water rights, easements and franchises as may be necessary or convenient to carry into effect the corporate purposes aforesaid and the doing of all things necessary or incident thereto.

Wrecking Company.

THIRD. Said corporation is formed for the purpose of erecting, purchasing, moving, wrecking, selling and erecting buildings and structures and building material and the doing of all things necessary or incident thereto.

No. 10.

Bank and Trust Company. Articles of Incorporation.

(G. C. §§ 710-41, 710-42.)

These Articles of Incorporation
of
The

Witnesseth, that we, the undersigned, all (*or*, a majority) of whom are citizens of the State of Ohio, desiring to form a corporation, to establish a bank under the banking laws of said state, do hereby certify:

FIRST. The name of said corporation shall be The.....

SECOND. Said corporation is to be located at, in County, Ohio, and its principal business there transacted.

THIRD. Said corporation is formed for the purpose of conducting a commercial bank, a savings bank, and a trust company; exercising all of the powers which may be exercised

by a corporation engaged in such business, and the doing of all things necessary or incident thereto.

(Complete as in Form No. 1, beginning at the Fourth clause.)

NOTE.—The above purpose clause combines the three classes of business authorized by G. C. §§ 710-41 and 710-42. Omit the classes of business which are not to be transacted, if any.

No. 11.

Farmer's Co-operative Association. Articles of Incorporation.

(G. C. § 10186-6.)

These Articles of Incorporation of

The X. Y. Co-operative Milk Producers' Association

Witnesseth, that we, the undersigned, all of whom are residents of the State of Ohio, desiring to form a co-operative *milk producers'* association under the laws of Ohio, do hereby certify:

FIRST. The name of the association shall be The X. Y. Co-operative Milk Producers' Association.

SECOND. Said association is formed for the purpose of collective processing, preparing for market, handling and marketing of *milk and all dairy products and by-products*, and the doing of all things necessary or incident thereto.

THIRD. Said association is to be located and its principal business is to be transacted at, Ohio.

FOURTH. The number of directors of said association shall be *five*. Directors shall hold office for one year or until their successors are elected and qualified. The names and addresses of the directors designated to serve until their successors are elected and qualified are as follows:

FIFTH. The capital stock of said association shall be dollars (\$.....), divided into shares of dollars (\$.....) each.

(For preferred stock clause, see page 108.)

In witness whereof, we have hereunto set our hands this
..... day of, 19.....

.....
.....

(Add acknowledgment and clerk's certificate from Form
No. 1.)

No. 12.

Union Depot Company. Articles of Incorporation.

(G. C. § 9160 et seq.)

The undersigned, A. B., president of The E. F. Railroad Company, and C. D., president of The G. H. Railroad Company, having been thereto duly authorized and directed by resolutions of the boards of directors of said railroad companies, respectively, duly passed, hereby associate said companies to become a body corporate, in accordance with the laws of the state of Ohio, under the following articles:

1. The name of said corporation shall be "The
Union Depot Company."

2. The names of said companies are The E. F. Railroad Company and The G. H. Railroad Company, and said corporation is formed for the purpose of purchasing or leasing depot grounds, and locating, constructing and maintaining a common or union station house, passenger and freight depot, and terminal and connecting tracks for the use of both steam and electric railroads; and of constructing, maintaining and operating in connection with its terminals and station a terminal railroad with two or more tracks connecting the railroads of one or more companies; and of constructing and maintaining warehouses, stores, office buildings, hotels and other structures for the accommodation of the public and of operating or leasing the same, or any part thereof; and exercising all the powers which may be exercised by such corporations under the laws of Ohio.

Said depot, terminals, connection tracks and structures to be operated in connection therewith are to be constructed in the city of, Ohio.

3. The amount of capital stock necessary to obtain a site, and construct, maintain and operate such depot, terminals, tracks and other structures is dollars (\$....).

In witness whereof, the presidents of said companies, on behalf of said companies, have hereunto set their hands and caused the seals of said companies, respectively, to be hereto affixed this day of, A. D. 19...

(Corporate seal.) The E. F. Railroad Company.

Attest, Secretary. By A. B., President.

(Corporate seal.) The G. H. Railroad Company.

Attest, Secretary. By C. D., President.

No. 13.

Record of Organization Proceedings of Corporations for Profit.

NOTE.—Every corporation should have a permanent record book containing a record of the proceedings of the incorporators, stockholders and directors. On the title page should be entered "Record of Proceedings of the Incorporators, Stockholders and Directors of The Company."

On the first page an entry substantially as follows should be made:

On the day of, 19....,,,,,,, the persons named below as subscribers of articles of incorporation, desiring for themselves, their associates, successors and assigns, to become a body corporate, in accordance with the general corporation laws of Ohio, under the name and style of The Company, and with all the corporate rights, powers, privileges and liabilities provided for by such laws, did subscribe and acknowledge, as required by law, articles of incorporation as follows, to wit:

(Copy in full the articles of incorporation, together with the certificate of acknowledgment and certificate of the clerk as to the official character of the officer taking the acknowledgment. A copy of the articles is furnished by the secretary of state, and the certificate of the secretary of state as to the filing and recording of the articles should also be copied into the record.)

(1) PROCEEDINGS OF INCORPORATORS.

On this day of, 19. . . . , all (or “a majority”) of the incorporators of The Company met at to order the opening of books of subscription to the capital stock of said The Company, and to do all things necessary or incident thereto or proper in connection therewith. Having agreed upon the form and contents of said order, the following was thereupon made, entered and signed in the corporate records by all the subscribers to the articles of incorporation.

(a)

ORDER FOR, AND WAIVER OF NOTICE OF, OPENING OF BOOKS OF SUBSCRIPTION.

., Ohio,, 19. . . .

The undersigned, being (all, *or*, a majority) of the subscribers to the articles of incorporation of The Company, do hereby order that books be opened for subscriptions to the capital stock of said Company at the office of, in the city of,, county, Ohio, on the day of, 19. . . , at o'clock .. M., and we do hereby in writing waive (*or* order) the notice by publication of the time and place of such opening of books of subscription, required by law.

(If the corporation is organized with no-par-value common stock, add the following):

We do hereby decide, determine and order that subscriptions for the common shares, without nominal or par value, of said company be received for the consideration of dollars (\$) per share.

.,
.,
.,
.,
.,

Incorporators.

NOTE.—If all the incorporators are not present to waive notice, or if publication is deemed best, the foregoing forms should be changed in such particulars and the following notice must be published at least thirty days before the time set for opening in a newspaper published or generally circulated in the county where the books of subscription are to be opened:

(b)

NOTICE OF OPENING BOOKS FOR SUBSCRIPTIONS TO CAPITAL STOCK OF THE COMPANY.

Pursuant to an order this day made by the undersigned, books for subscriptions to the capital stock of The Company will be opened at the office of, in the city of, county, Ohio, on, 19.., at o'clock .. M.

(If the corporation is organized with no-par-value common stock, add the following):

Subscriptions for the common shares, without nominal or par value, of said company will be received for the consideration of dollars (\$.....) per share.

.....,
.....,
.....,
.....,
.....,

Incorporators.

....., Ohio,, 19...

NOTE.—If the stock is not to be exempted under G. C. § 6373-2(f) omit Forms (c) and (d) following.

(c)

ORDER FOR FILING EXEMPTION OF STOCK UNDER BLUE SKY LAW.

....., Ohio,, 19....

The undersigned, being all the incorporators of The Company, do hereby order that a statement under Section 6373-2(f) of the General Code of Ohio be filed as required by said section before subscriptions for the capital stock of said company are received.

.....,
.....,
.....,
.....,
.....,

Incorporators

(d)

STATEMENT FOR EXEMPTION OF STOCK UNDER BLUE SKY LAW.

After the manuscript of this work was in press, the Department consolidated the form given on this page with the form given on page 193. Use the form on that page.

(e)

ORDER DESIGNATING ONE INCORPORATOR TO RECEIVE
PAYMENT OF INSTALMENTS OF SUBSCRIPTIONS.

We, the undersigned, do hereby designate and appoint
..... to receive payment, from the subscribers to the
capital stock of The Company, of the instalments
required by law to be paid on their respective subscriptions;
the same to be paid to the treasurer of said corporation as
soon as a treasurer is elected and qualified.

.....,
.....,
.....,
.....,
.....,
Incorporators.

(f)

SUBSCRIPTION BOOK.
Subscriptions to the Capital Stock
of
The Company.

We, the undersigned, do hereby severally subscribe for the
number of shares of the common stock of The Com-
pany set opposite our respective names, and do agree to pay
therefor the sum of dollars (\$.....) per share.

Names.	Shares.
.....
.....
.....
.....
.....

NOTE.—If preferred stock is provided for in the articles of incorpora-
tion, a form of subscription similar to the foregoing may be used, sub-
stituting the word “preferred” for the word “common.”

(g)

SEPARATE SUBSCRIPTION FOR STOCK.

Subscription for Stock.

The Company.

Suite, Building,, Ohio.

Capital Stock, \$.....

....., Ohio,, 19...

The undersigned applies for shares of the common (or, preferred) stock of The Company, of, Ohio, and hereby agrees to accept such portion thereof as may be allotted and to pay therefor the sum of Dollars (\$.....) per share.

Name

Address

Number of shares

(h)

CERTIFICATE OF SUBSCRIPTION (CORPORATION WITH PAR VALUE COMMON STOCK).

....., Ohio,, 19...

To the Secretary of State, Columbus, Ohio:

We, the undersigned incorporators of The Company, do hereby certify that on the day of, 19..., all the incorporators of said Company did order, in writing, that books be opened for subscriptions to the capital stock of said Company at, on the day of, 19..., at o'clock .. M. and, at the same time, did waive, in writing, the notice by publication of the time and place of such opening of books of subscription, required by law; and further, said books having been opened at the time and place ordered, that ten percent of the capital stock of said Company has been subscribed.

.....,

Incorporators.

NOTE.—If the notice by publication was not waived, the certificate should be changed accordingly, to show publication.

The incorporators are personally liable for any deficiency in the actual payment of ten percent of the stock subscribed for. G. C. § 8634.

It is imprudent for the incorporators to permit an election for directors to be held until such payment has been made. It is proper for the incorporators to designate one of their number to receive payments.

(i)

CERTIFICATE OF SUBSCRIPTION (CORPORATION ORGANIZED UNDER NO-PAR-VALUE LAW).

....., Ohio,, 19....

To the Secretary of State, Columbus, Ohio:

We, the undersigned incorporators of The Company, do hereby certify that on the day of, 19..., all the incorporators of said company did order, in writing, that books be opened for subscriptions to the capital stock of said Company, at [city], on the day of, 19..., at o'clock, M.; and, at the same time waive, in writing, the notice by publication of the time and place of such opening of books of subscription, required by law; and, further, said books having been opened at the time and place ordered, that not less than five persons subscribed for at least one share each of the capital stock, and paid ten percent on each share subscribed.

.....,
.....,
.....,
.....,
.....,

Incorporators.

(j)

ORDER FOR FIRST STOCKHOLDERS' MEETING

....., Ohio,, 19....

We, the undersigned, do hereby certify that the foregoing is a true and correct record of the proceedings by us had as subscribers to the articles of incorporation of The Company

in the organization of said corporation, and we do hereby ap-
point the office of in the city of, Ohio, as the
place, and, 19.., at o'clock .. M., as the time,
for holding the first meeting of stockholders of said corporation
for the election of directors and the transaction of such other
business as may come before said meeting.

.....,
.....,
.....,
.....,
.....,

Incorporators.

(2) PROCEEDINGS OF STOCKHOLDERS.

(a)

NOTICE OF FIRST MEETING OF STOCKHOLDERS.

Notice is hereby given that the first meeting of the stock-
holders of The Company will be held at the office of
..... in the city of, Ohio, on the day of,
19.., at o'clock .. M. for the election of directors and the
transaction of such other business as may come before said meet-
ing.

.....,
.....,
.....,
.....,
.....,

Incorporators.

NOTE.—The above notice should be published for at least thirty days
before the time set for the meeting. The notice, however, may be waived
in writing in case all subscribers to the capital stock are present in person
or by proxy.

(b)

WAIVER OF NOTICE OF FIRST MEETING OF STOCKHOLDERS.

....., Ohio,, 19...

We, the undersigned, being all of the subscribers to the capital
stock of The Company and being all this day, at

o'clock . . M., present, in person or by proxy, at the first meeting of stockholders of said Company, at the office of in the city of, Ohio, do hereby waive the notice of such meeting required by law, and agree that the same may be held forth with.

Stockholders.	Proxies.	Shares.
.....
.....
.....
.....
.....

(c)

MINUTES OF FIRST STOCKHOLDERS' MEETING.

....., Ohio,, 19..

Pursuant to the foregoing waiver and agreement the stockholders of The Company met at the time and place therein mentioned, being the time and place designated by the incorporators for the holding of the first meeting of stockholders.

On motion of, duly seconded and carried, Mr. was chosen chairman and Mr. secretary of the meeting.

Mr. presented and read the proposed code of regulations hereinafter set forth for the government of this corporation and moved their adoption. The motion was duly seconded and shares, being the entire subscribed capital stock of said corporation being voted in the affirmative and no shares of stock being voted in the negative, it was resolved that the code of regulations hereinafter set forth be adopted as the code of regulations governing this corporation, and that the written assent of the stockholders favoring the adoption of such resolutions be recorded in the minutes of the meeting.

NOTE.—Minutes of the first meeting of stockholders are continued on page 183. Provisions and suggestions for regulations are given in the intermediate pages

(d)

REGULATIONS OF A CORPORATION FOR PROFIT.

Regulations of The Company.

ARTICLE I. STOCK.

(a). *Certificates of stock.* Each stockholder of this Company, whose stock has been paid up, shall be entitled to a certificate or certificates showing the amount of stock registered in his name on the books of the Company. Each certificate shall be issued in numerical order from the stock certificate book, and be signed by the president and secretary. A full record of each certificate, as issued, shall be entered on the stub thereof.

(b). *Transfers of stock.* Transfers of stock shall be made only on the books of the Company, and must be accompanied by the surrender of the certificates, properly assigned, evidencing the stock so transferred. Certificates so surrendered shall be cancelled and attached to the stubs corresponding thereto in the stock certificate book.

(c). *Lost, destroyed or mutilated certificates.* If any certificate of stock in this Company becomes worn, defaced or mutilated, the directors, upon production and surrender thereof, may order the same cancelled and may issue a new certificate in lieu of the same. If any certificate of stock be lost or destroyed, the directors, upon the giving of a proper bond of indemnity with surety to their satisfaction, may issue a new certificate in lieu thereof to the person entitled to such lost or destroyed certificate.

ARTICLE II. MEETINGS OF STOCKHOLDERS.

(a). *Annual meeting.* The annual meeting of the stockholders of this Company shall be held at the principal office of the Company in, Ohio, on the first Monday in January of each year at 10 o'clock A. M., if not a legal holiday, but if a legal holiday, then on the day following at the same hour.

(b). *Special meetings* of the stockholders may be held at any time pursuant to a resolution of the board of directors, or by a call signed by *two* stockholders. Calls for special meetings shall specify the time, place and object or objects thereof, and no business other than that specified in the call shall be considered at any such meeting.

(c). *Notice of meetings.* A written or printed notice of every regular or special meeting of the stockholders, stating the time and place, and in case of special meetings, the objects thereof shall be given each stockholder appearing on the books of the company by mailing the same to his last known address at least ten days before any such meeting. Provided, however, no failure or irregularity of notice of any regular meeting shall invalidate the same or any proceeding thereat.

(d). *Quorum.* A majority in amount of stock issued and outstanding shall constitute a quorum for the transaction of business.

ARTICLE III. DIRECTORS.

The number of directors shall be *five*. The election of directors shall be held at the annual meeting of the stockholders, or at a special meeting called for that purpose. Directors shall hold office for one year, or until their successors are elected and qualified.

Directors chosen at the first election shall hold office until the time fixed for the next annual meeting, or until their successors are elected and qualified. All directors must be holders of at least one share of the capital stock of this Company.

A majority of the directors must be citizens of the state of Ohio.

ARTICLE IV. OFFICERS.

The officers of the Company shall be a president, vice-president, secretary, and treasurer. Two offices may be held by one person. Said officers shall be chosen by the board of directors by a majority ballot, and shall hold office for one year or until their successors are elected and qualified, except that officers elected at the first meeting of the directors shall hold office until the next annual meeting of directors, or until their successors are chosen and qualified, provided, however, any
REMOVAL. officer may be removed at any time by a vote of two-thirds of the members of the board of directors.

All officers must be holders of at least one share of the capital stock of this Company.

ARTICLE V. DUTIES OF OFFICERS.

(a). *President.* The president shall preside at all meetings of stockholders and directors, sign the records thereof, and, together with the secretary, shall sign all certificates of stock and all other written contracts and obligations of the Company except checks, and perform generally all the duties incident to the office, and such further and other duties as may be from time to time required of him by the stockholders or directors.

(b). *Vice-President.* The vice-president shall perform all the duties of the president in case of the absence or disability of the latter. In case both president and vice-president are absent or unable to perform their duties, the stockholders or directors, as the case may be, may appoint a president pro tempore.

(c). *Secretary.* The secretary shall keep minutes of all the proceedings of the stockholders and directors of this Company and make a proper record of the same, which shall be attested by him. He shall keep such books as may be required by the board of directors, and shall have charge of the seal and stock books of the Company and shall issue and attest all certificates of stock, and generally perform such duties as may be required of him by the stockholders or directors.

(d). *Treasurer.* The treasurer shall receive and have in charge all money, bills, notes, bonds, and similar property belonging to the Company, and shall do with the same as may be ordered by the board of directors. He shall sign all checks and shall keep such financial accounts as may be required, and shall generally perform such duties as may be required of him by the stockholders and directors. On the expiration of his term of office, he shall turn over to his successor, or to the board of directors, all property, books, papers and money of the Company in his hands.

ARTICLE VI. COMPENSATION OF OFFICERS.

The compensation of directors shall be such as the stockholders may from time to time determine. The compensation of other officers shall be fixed by the board of directors.

The treasurer and other officers, if required by the board of directors, shall furnish bonds for the faithful performance of

*their duties in such amount, and with such sureties, as may be fixed and required by the board of directors.

(NOTE.—For substitute Article VI, see *special provisions* following:)

ARTICLE VII. SEAL.

The corporate seal of this Company shall be circular with the words "The Company" and "....., Ohio," surrounding the word "seal."

ARTICLE VIII. ORDER OF BUSINESS.

Unless changed by a majority vote at all stockholders' meetings the order of business shall be as follows:

- (1) Reading of the minutes.
- (2) Reading of reports and statements.
- (3) Unfinished business.
- (4) Election of directors.
- (5) New or miscellaneous business.

ARTICLE IX. AMENDMENTS.

These regulations may be adopted, amended or repealed by the written assent of the owners of two-thirds of the stock of this Company, or by the vote of the owners of a majority of the stock at a meeting called and held for that purpose.

SPECIAL PROVISIONS.

NOTE.—The following provisions may be included in the regulations, if desired.

ARTICLE ——. WHO MAY VOTE AT STOCKHOLDERS' MEETINGS.

At all meetings of stockholders, only such persons shall be entitled to vote who appear as stockholders upon the books of the corporation for ten days next prior to such meeting.

ARTICLE ——. PROXIES.

The instrument appointing a proxy shall be in writing and subscribed by the person making the appointment.

No instrument appointing a proxy shall be valid after the expiration of six months from the date of its execution.

A vote in accordance with the terms of a proxy shall be valid, notwithstanding the previous revocation of the appointment, or the transfer of the share on which the vote was given, unless notice in writing of the revocation or transfer shall have been received at the office of the Company before the meeting.

ARTICLE ——. ADDITIONAL OFFICERS. DUTIES AND SALARIES.

(NOTE.—The following may be added to Article V of the Code of Regulations, *supra*. The titles of the offices should also be inserted in Article IV.)

(e). *General manager*. The general manager shall, under the supervision of the board of directors and the president, have charge of and manage the active business operations of the Company. He shall perform such further duties and make such reports as may be required of him by the board of directors, and shall receive such salary, not exceeding dollars per annum, as may be fixed by the board of directors.

(f). *Counsel*. Counsel of the company shall prepare all such contracts required in the business of the Company, and shall examine and pass upon all such instruments presented to the Company as may be referred to him by its officers. He shall advise with the officers of the Company in all such matters pertaining to its affairs as may require his consideration. He shall receive such annual retainer, not exceeding dollars per annum, as may be fixed by the board of directors.

(g) *Auditor*. The auditor shall have supervision over the account books, and over all books and papers relating thereto, and shall examine all vouchers and audit all accounts. He shall keep such records as will at all times show the condition of the business, finances and accounts of the Company. At least twice during each year he shall verify the assets of the Company, and shall make such reports and statements as may be required by the board of directors.

ARTICLE ——. COMPENSATION OF OFFICERS.

Note.—The following may be used as a substitute for Article VI of the Code of Regulations, *supra*.

Directors. Each director shall receive the sum of *ten* dollars as compensation for his attendance at any regular or special

meeting of the board of directors, and shall receive no other compensation for his services as a director of the Company.

The *president* shall receive such compensation, not exceeding dollars per annum, as may be fixed by the board of directors.

The *vice-president* shall receive no compensation whatever.

The *secretary* shall receive such salary, not exceeding dollars per annum, as may be fixed by the board of directors.

The *treasurer* shall receive such compensation, not exceeding dollars per annum, as may be fixed by the board of directors.

ARTICLE ——. DUTIES OF OFFICERS MAY BE DELEGATED.

In case of the absence of any officer of the corporation, or for any other reason which the directors may deem sufficient, the directors may delegate the powers or duties of such officer to any other officer, or to any director, for the time being, provided a majority of the entire board concur therein.

ARTICLE ——. REGULAR MEETINGS OF DIRECTORS.

The board of directors shall hold regular meetings at the office of the Company at two o'clock P. M. on the *first Tuesday* of each month, if not a legal holiday. If a legal holiday, then on the day following at the same hour.

ARTICLE ——. EXECUTIVE COMMITTEE.

The president, secretary and treasurer shall together constitute an executive committee which shall, in the interim between meetings of the directors, exercise all the powers of that body in accordance with the general policy of the Company and the instructions of the board of directors. Meetings of the executive committee shall be held on call of the president or of any two members of the committee. All members of the committee shall be notified of its meetings and a majority of its members shall constitute a quorum. The executive committee shall keep a record of its meetings and transactions which shall at all times be open to the inspection of any director.

ARTICLE ——. EXECUTIVE COMMITTEE. (ANOTHER FORM.)

The board of directors may appoint, at their discretion, an executive committee of not less than two members from their own number, who shall have charge of the management of the business and affairs of the Company in the interim between meetings of directors, with power to fix prices for the Company's products, determine credits, and generally to discharge the duties of the board of directors, but not to incur debts excepting for current expenses, and to replace stock or raw materials in the usual course of business, unless specially authorized. Such executive committee shall at all times act under the direction and control of the board of directors and shall make report of their acts and transactions to the board, which shall form part of the records of the Company.

ARTICLE ——. LIEN OF COMPANY ON STOCK.

(a) The Company shall have a first and paramount lien upon all shares registered in the name of each stockholder, whether held solely or jointly with others, for his debts, liabilities and engagements, solely, or jointly with any other person, to or with the Company, whether the period for the payment, fulfillment or discharge thereof shall have actually arrived or not. And such lien shall extend to all dividends declared on such shares. A memorandum of this article shall be printed on each certificate.

(b) *Sale to satisfy lien.* After default on any debt, liability or engagement above referred to, on ten days' notice by mail or publication, the directors may sell the shares of the stockholder so in default at either public or private sale and may purchase the same on behalf of the Company, if the same can not be otherwise satisfactorily sold. The net proceeds of any such sale shall be applied in or towards satisfaction of the debts, liabilities or engagements of such stockholder, and the residue, if any, paid to him or his executors, administrators or assigns.

ARTICLE ——. ANNUAL AUDIT AND APPRAISAL.

In the month of *December* of each year an audit of the books of account and an appraisal of all the property and assets of the

Company shall be made by a competent and responsible Audit Company or Accountant, selected by the board of directors.

The report of such Audit Company or Accountant shall be printed and a copy thereof mailed by the secretary to each stockholder appearing on the books of the Company at least *five* days before the date of the annual meeting of stockholders.

(e)

REGULATIONS OF A CLUB.

ARTICLE I. NAME AND LOCATION.

1. The name of this corporation shall be The Club Company.

2. It shall be located within the corporate limits of the city of, Ohio.

ARTICLE II. OFFICERS.

The officers of the Club shall be a president, a vice-president, a secretary and a treasurer.

ARTICLE III. DUTIES OF OFFICERS.

1. The president shall preside at all the meetings of the Club. He shall, with the secretary, sign all certificates of stock and all other written contracts and obligations of the Club, except checks, and in general perform all duties incident to the office. He shall be ex-officio president of the board of directors.

2. In the absence of the president, the vice-president shall perform all the duties of the president.

3. The secretary shall give notice of all meetings of the Club, and shall keep minutes of such meetings. He shall be ex-officio secretary of the board of directors. He shall keep a roll of members, and notify the treasurer of the election of new members. He shall conduct the correspondence of the Club and be the custodian of its records, documents and seal. Together with the president, the secretary shall sign all certificates of stock and all the written contracts and obligations of the Club, except checks, and in general perform all the duties incident to the office. He shall be exempt from payment of the annual dues.

4. The treasurer shall collect the assessments on stock, annual dues, and other sums due the Club. He shall sign all checks and pay the bills for authorized expenses when they are certified by the person empowered to make the expenditure. He shall keep the books of the Club. The treasurer shall be exempt from payment of the annual dues.

ARTICLE IV. DIRECTORS.

1. The board of directors shall consist of the president, vice-president, treasurer, secretary and chairman of the entertainment committee, all ex-officio, and *nine* others.

2. The board of directors shall have general charge of the affairs, finances and property of the Club and general control of all committees, and shall present a report at the annual meeting.

3. The board of directors shall be empowered to fill a vacancy in any office, or in any committee, or in its own body, by the appointment of a member to serve until the next annual election.

4. The board of directors shall hold stated meetings on the Monday following the annual election and on the third Monday of April, June, October, December and February, and such special meetings as may be called by the president or secretary.

5. Seven of its members shall constitute a quorum.

6. At its regular February meeting the board of directors shall appoint a nominating committee of five members, not more than two of whom shall be members of the board, which shall prepare and post on the bulletin in the club-house, not less than twenty days prior to said annual meeting, a list consisting of a candidate for each of the offices and places upon committees to be filled at such annual meeting. Other names may be proposed for any of the positions to be filled at such annual meeting by any twenty members of the Club causing the same, with their signatures, to be presented to the nominating committee not less than five days prior to such annual meeting, whereupon such committee shall post the same on the bulletin board as candidates. From the ticket proposed by such nominating committee, together with such other candidates, as shall be posted as

hereinbefore provided, shall be elected at such annual meeting the officers and members of committees for the ensuing year.

ARTICLE V. HOUSE COMMITTEE.

There shall be a house committee, consisting of three members, appointed for one year by the board of directors, at least one of whom shall be a member of such board. The committee shall have charge of the club-house, shall arrange for catering and have the oversight and control of the prices of the same; shall receive complaints, appoint and dismiss all employees, and in general have supervision over the internal economy and regulation of the club-house, its premises and other property, except such property as is assigned to the supervision of other officers or committees. The house committee shall provide rules, not inconsistent with these regulations, governing the use of the Club property.

ARTICLE VI. ENTERTAINMENT COMMITTEE.

1. There shall be an entertainment committee, consisting of a chairman and four others elected annually by the Club.
2. The committee shall arrange for such social and literary entertainment as in its opinion will promote best the interests and purposes of the Club.

ARTICLE VII. COMMITTEE ON LITERATURE AND ART.

1. There shall be a committee on literature and art, consisting of three members, elected annually by the Club.
2. The committee shall have charge of the acquisition of all books, periodicals and works of art; and no book, periodical or work of art shall be deposited in the club-house without the committee's approval.

ARTICLE VIII. AUDITING COMMITTEE.

1. There shall be an auditing committee, consisting of three members, elected annually by the club.
2. The committee shall audit the accounts of the treasurer at least once each year, shall report each audit to the board of directors and shall report at the annual meeting of the Club.

3. No officer, member of the board of directors, or of any other standing committee shall be eligible to membership.

4. The committee shall be empowered to engage the assistance of an expert bookkeeper.

ARTICLE IX. ATHLETICS COMMITTEE.

1. There shall be an athletics committee, consisting of three members appointed for one year by the board of directors, at least one of whom shall be a member of such board.

2. The committee shall have charge of all property of the Club used in connection with athletics and shall arrange all tournaments and interclub contests.

ARTICLE X. ADMISSION COMMITTEE.

1. There shall be an admission committee, consisting of nine members, to serve three years, three of whom shall be appointed annually by the board of directors at its first meeting. The names of the appointees shall not be posted or published.

2. The committee shall investigate the eligibility and act upon the names of all candidates for admission that shall be presented, as hereinafter provided. When the name of a person proposed for membership has been forwarded to the admission committee as provided in Article XIV, Section 1, the committee shall determine whether to post such name, and if it decides to post the same, the name shall then be posted as provided in said article.

3. Five members shall constitute a quorum of the admission committee.

ARTICLE XI. MEETINGS AND ELECTION OF OFFICERS.

1. The members of the Club shall meet annually at 8 P. M. on the third Monday of March for the election of officers, directors and elective committees and for the transaction of other business. Notice of such meeting shall be posted in the clubhouse and mailed to each member at least one week prior thereto. Officers and members of committees thus elected shall serve until their successors are elected and qualified.

2. All elections shall be by ballot. The ballots shall contain the names of all candidates regularly nominated. The ballots shall be prepared and furnished by the secretary.

3. At the annual meeting of the Club, the order of business shall be:

- (a) Reading of minutes of last meeting.
- (b) Report of the secretary.
- (c) Report of the treasurer and auditors.
- (d) Report of the board of directors.
- (e) Reports of the committees.
- (f) Election of officers.
- (g) General business.

4. Special meetings of the Club members may be called at any time by the board of directors and shall be called by them upon written request of twenty members or more. Notice of any special meeting and the object of the same shall be given in the same manner as for the annual meeting, and no business not thus announced shall be transacted at such special meeting.

5. A majority of the resident members, present either in person or by proxy, shall constitute a quorum at any meeting of the Club.

ARTICLE XII. MEMBERSHIP.

1. Any man residing or having a place of business in county shall be eligible to membership, subject, however to section 3 of this article.

2. The resident membership shall not be increased above hundred except by resolution of the board of directors, and shall in no case exceed hundred in number.

3. No person may become a resident member until he has become a stockholder in this corporation, and prior to final consideration of his application by the admission committee, he shall deposit with the treasurer a sum sufficient to meet any assessments on his stock then due.

4. The admission committee may extend the privileges of the Club to commissioned officers of the United States army and navy, and to such men of public distinction as the committee may designate; and those to whom privileges are so extended shall pay half resident dues.

ARTICLE XIII. NONRESIDENT MEMBERS.

1. Any person not residing, or having a place of business in county, who is eligible under the provisions of Article XII, may become a nonresident member, subject to the same conditions of proposal and election as obtain in the case of resident members, except that in lieu of the purchase of a share of stock, he shall be required to pay an initiation fee of dollars.

2. Nonresident members shall not be permitted to vote or to hold office in the Club.

3. A nonresident member becoming a resident of county may become a resident member if, or as soon as there is a vacancy, by becoming a stockholder and paying resident dues, and failing so to do, within three months after written notice of such vacancy has been given him by the secretary, his membership shall be terminated. When any resident member shall cease to have a residence or place of business in county, he may, upon written request to the secretary, become a nonresident member, and shall then pay nonresident dues.

ARTICLE XIV. ELECTION OF MEMBERS.

1. Candidates for membership must be proposed and seconded by members of the Club, by letters addressed to the admission committee. These letters must state the name, residence and present occupation of the candidate and they must set forth fully the grounds of recommendation. If the committee determines to post the name of the candidate as provided in Article X, Section 2, the facts constituting his eligibility, together with the names of his proposer and seconder, shall be posted on the bulletin board in the club-house and remain posted for at least two weeks before final action may be taken thereon by the committee. Letters, except those of the proposer and seconder, relating to candidates whose names have been acted upon finally shall forthwith be destroyed.

2. Two negative ballots shall be sufficient to reject, and at least five affirmative ballots shall be necessary to elect a candidate.

3. No member of the admission committee shall propose or second a candidate for admission.

ARTICLE XV. STOCK.

1. The capital stock shall consist of hundred shares of the par value of fifty dollars each, until the same be increased in the manner provided by law.

2. Each candidate elected to resident membership shall become a stockholder before he shall be entitled to the privileges of the Club, but no person shall be entitled to such privileges until he has been regularly elected to membership.

3. The Club shall have first lien on transferable shares of the stock to secure all indebtedness of a stockholder to the Club. This lien may be enforced after sixty days from the date at which the indebtedness became due, by the sale, in such manner as the board of directors shall determine, of such stock registered in the name of the debtor on the books of the Club. As much of the proceeds of such sale as may be required to liquidate such indebtedness shall be applied thereto, and any balance shall be paid by the treasurer to the former holder, or his legal representative.

4. All certificates of stock shall contain a statement that the same is issued to and held by such stockholder subject to the regulations and rules of the Club, together with a statement that such stock upon the resignation, expulsion or death of the holder, shall be forfeited to the Club, except that in the case of transferable shares, it shall be subject to the lien provided for in the preceding section.

5. Transfers of stock to be valid must be registered on the books of the Club, and no stock shall be transferred until all indebtedness of the former holder has been discharged.

ARTICLE XVI. DUES.

1. The annual dues of the Club shall be dollars, payable quarterly in advance on the first day of March, June, September and December. Any resident member intending to be absent from the city for twelve consecutive months, but intending to reside again in, may give notice of such intention to the treasurer and thenceforth he shall be exempt from the payment of dues for one year, provided his absence

continues for such period. If his absence continues beyond one year he may again give notice as above provided and again obtain exemption from the payment of dues for one year; but not longer except by vote of the board of directors.

2. Nonresident members shall pay an initiation fee of dollars, which, if the nonresident member becomes a resident of county, shall be applied upon the annual dues of such member for the next succeeding year after he becomes a resident member. If such member fails to become a resident member, as provided in Article XIII, Section 3, his initiation fee shall be forfeited to the Club.

3. The annual dues of nonresident members shall be dollars, payable on the first day of March.

4. Bills for supplies furnished by the Club to its members shall be presented before the fifth of each month.

5. If the quarterly dues or the bills for supplies of any member remain unpaid on the twentieth day of the month in which they become due, the treasurer shall notify the delinquent that, unless payment is made in the meantime, his name with the amount of his indebtedness will be posted in the club-house on the first day of the following month, and in due time the treasurer shall post the delinquent according to the notice given. No supplies shall be sold to delinquents while thus posted. If the debt remain unpaid for thirty days after such posting the membership of such delinquent member may be terminated, and his stock forfeited or sold as provided in Article XV, Sections 3 and 4.

On the written application of such delinquent and on the payment by him of all dues and other indebtedness to date, the board of directors may, upon such terms as it deems proper, remit the penalties of Articles XV and XVI.

ARTICLE XVII. RESIGNATION AND EXPULSION.

1. Resignation of membership shall be made in writing to the secretary and shall be accepted by the board of directors, provided the member resigning is not indebted to the Club.

2. Any member of the Club may be censured, suspended or expelled by a majority vote of the board of directors after opportunity for a hearing has been given. Notice of the hearing

and of the charges preferred shall be sent to the member against whom such action is proposed at least ten days before the date appointed for the hearing.

ARTICLE XVIII. VISITORS.

At the request of any member, the Club may give to any non-resident of county a visitor's card entitling the recipient to the privileges of the Club for a period of ten days, but no more than three such cards may be given to one recipient within any period of sixty days. The date of introduction and the name and residence of the visitor must be entered upon the visitor's book of the Club, together with the name of the introducing member, who will be held responsible for any debts to the Club incurred by the recipient of the card.

ARTICLE XIX. AMENDMENTS.

1. To make amendments to the regulations it shall be necessary to post the proposed amendment in the club-house and mail a copy of the same to each member at least thirty days before the meeting at which the amendment is to be voted upon; but nothing herein shall be construed to prevent the amending at such meeting of any such proposed amendment. A two-thirds vote of the members present shall be necessary to pass amendments.

2. Article XII, Section 2, of the Regulations, shall be amended only by a four-fifths vote of all the members of the Club present in person or by proxy.

ARTICLE XX. CONSTRUCTION OF THE REGULATIONS.

1. The construction of the regulations shall rest with the board of directors.

2. The board of directors shall determine also, *pro tempore*, any matters not provided for by these regulations, and shall have full power to appoint any special committee and approve its acts.

ARTICLE XXI. SEAL.

The seal of the corporation shall be circular, two inches in diameter, with the name of the corporation engraved around the

margin, and in the center the word "Seal," with such other device as may be adopted by the board of directors.

MINUTES OF STOCKHOLDERS' MEETING.

(Continued from page 166.)

NOTE.—The code of regulations as adopted should be copied in full on the minutes.

Thereupon the subscribers to the capital stock of The Company duly executed the following written assent to the adoption of the foregoing code of regulations as follows:

(f)

ASSENT TO ADOPTION OF REGULATIONS.

....., Ohio,, 19...

We, the undersigned, being the owners of the number of shares of the capital stock of The Company set opposite our respective names, do hereby assent in writing to the adoption of the code of regulations hereinbefore set forth, for the government of this corporation.

Stockholders.	Proxies.	Shares.
.....
.....
.....
.....
.....

(g)

MINUTES SHOWING ELECTION OF DIRECTORS.

Thereupon the chairman declared the election of a board of directors to be next in order. The incorporators of the Company

were requested by the chairman to act as inspectors of election. An election for directors was then held.

The names of,,,, and were placed in nomination as candidates for the office of directors. No other names were proposed. A ballot was then had with the following result, as announced by the inspectors of election.

.....	received	.....	votes.
.....	"	"
.....	"	"
.....	"	"
.....	"	"

Thereupon the following certificate of election was here made upon this record of proceedings by the inspectors of election, and appointing a time and place for holding the first meeting of directors:

(h)

CERTIFICATE OF ELECTION OF DIRECTORS.

....., Ohio,, 19...

We, the undersigned, being the only subscribers to the articles of incorporation of The Company present at the first meeting of the stockholders of said corporation, held at the office of in the city of, Ohio, on, 19.., at o'clock .. M., do hereby certify that at the election for directors held at such meeting, and at which we acted as inspectors of election, shares of the capital stock of said corporation were cast in favor of the election of,,, and, and no votes were cast in favor of the election of any other person. And we do further certify that at said election,,,,, and were each duly elected to the office of director of said corporation, to hold their said offices until the next annual election of directors, or until their successors are elected and qualified; and we do hereby appoint, the day of, 19.., at .. o'clock .. M., as the time,

Sworn to and subscribed before me this day of,
19...

.....,
Notary Public.

..... was chosen chairman and secretary of said
meeting.

On motion of, duly seconded, the following code of
by-laws was adopted:

(c)

BY-LAWS OF THE COMPANY.

ARTICLE I. MEETINGS.

(a) The directors shall meet *annually* at the office of the Company on the first Monday of January of each year at 9 o'clock A. M.

(b) *Regular monthly meetings* of the board of directors shall be held at two o'clock P. M. on the first Monday of each month, if not a legal holiday. If a legal holiday, then on the day following at the same hour.

(c) *Special meetings* of the board of directors may be held at the office of the company at any time pursuant to a written call by the president or by any two members of the board, or may be held at any time and place, without notice, by the unanimous written consent of all members, or by the presence of all members at such meeting.

(d) *Notice of meetings.* A written or printed notice of every regular or special meeting, stating the time and place, and in case of special meetings, the objects thereof, shall be mailed to each director at least three days before such meeting, or be telegraphed at least two days before the same. Provided, however, no failure or irregularity of notice of any regular meeting shall invalidate the same or any proceeding thereof. Only the business specified in such notice shall be transacted at any special meeting.

(e) *Quorum.* A majority of the board shall constitute a quorum at all meetings.

ARTICLE II. VACANCIES.

In case of any vacancy in the board of directors caused by death, resignation or otherwise, such vacancy shall be filled for the unexpired term by a majority of the board of directors.

ARTICLE III. EXECUTIVE COMMITTEE.

The management and conduct of the routine business of this company shall be vested in an executive committee composed of two members. The persons holding the offices of president and shall ex officio constitute such executive committee. Such executive committee is authorized to hire and discharge employes and make all contracts in the ordinary course of business, and to do all things necessary and incident thereto. In case of disagreement between the members of said committee as to the making or not making of a contract, such contract shall not be entered into without special authority from the board of directors. The executive committee shall make a full report at each regular meeting of the board of directors, and at other times when requested by the board, of all business transacted by it.

ARTICLE IV. BONDS.

The treasurer of this Company shall furnish a bond, conditioned for the faithful performance of his duties in the penal sum of \$. with sureties, to be approved by the board of directors.

ARTICLE V. BANK DEPOSITS.

All moneys of this Company shall be deposited by the treasurer, as the same are received by him, in the Bank of, Ohio, in the name of this Company, and shall be withdrawn only by check signed by the treasurer and countersigned by the president.

ARTICLE VI. AMENDMENTS.

These by-laws may be amended or repealed by a majority vote of the board at any regular meeting or at any special meeting called for that purpose.

MINUTES OF DIRECTORS' MEETING.

(Continued.)

An election of officers was then held by the board, resulting in the unanimous choice of the following:

....., president.
....., vice-president.
....., secretary.
....., treasurer.

The chairman thereupon declared said persons to be duly elected to said offices, and said persons thereupon entered upon the performance of their duties.

(d)

RESOLUTION AUTHORIZING COMPLIANCE WITH BLUE SKY LAW AND
DISPOSAL OF STOCK.

Mr. presented the following resolution:

Whereas, \$..... of the preferred stock and \$.....
(or, shares without nominal or par value) of the
common stock of this Company are unsubscribed and unissued,
and it is necessary to dispose of the same in order to provide
capital for the business of this Company.

Therefore be it resolved, that such unsubscribed and un-
issued stock be sold and disposed of as follows:

And be it further resolved, that the president and secretary
be authorized and instructed to take all steps and do all things
necessary in order to comply with the Blue Sky Law of Ohio,
and thereupon to proceed to dispose of said unsubscribed and
unissued stock pursuant to this resolution.

Mr. moved the adoption of said resolution.
The motion was duly seconded, put and unanimously carried.
Therefore the chairman declared said resolution duly adopted.

(e)

RESOLUTION OF DIRECTORS ACCEPTING PROPERTY IN PAYMENT
FOR STOCK.

The secretary read the following written proposition:

....., Ohio,, 19....

To The Company.

Gentlemen:

We hereby offer to sell to your Company the following property: (*description of property*)

(*If the stock is no-par-value common stock*) for shares of your Company, without nominal or par value, said shares to be issued as fully paid and non-assessable.

(*Or, if the stock is par value stock*) for the sum of \$....., payable in the stock of your Company, at par; said stock to be issued as fully paid and non-assessable.

Respectfully,

A. B.

C. D.

On motion of, duly seconded, it was resolved to accept said proposition, and that the president and secretary be instructed to issue certificates for shares of the common shares of this Company, without nominal or par value (*or, if par value stock* for shares of the [common] stock of this Company), to the said A. B. and C. D.; the same to be issued as fully paid and non-assessable; and to deliver such certificates to the said A. B. and C. D. upon the delivery of said property to the Company, free of incumbrances, with proper instruments of conveyance thereof. The vote of the directors on said resolution was as follows: Mr., yea; Mr., yea, etc.

NOTE.—Directors selling property to the corporation should not vote.

NOTE.—*If the corporation is organized with par value stock* omit Forms (f), (g), (h) and (i) following.

(f)

RESOLUTION FIXING THE PRICE OR CONSIDERATION TO BE RECEIVED
FOR THE NO-PAR-VALUE COMMON STOCK.

(G. C. § 8728-1.)

Mr. presented the following resolution:

“Resolved, that the unsubscribed and unissued common shares, without nominal or par value, of this Company be sold

for the consideration or price of \$..... per share, which is the fair value thereof payable in cash (or, upon the following terms of payment, to-wit:)."

Mr. moved the adoption of the foregoing resolution. The motion was duly seconded, put and unanimously carried by the affirmative vote of all the directors.

Thereupon a recess of fifteen minutes was taken. When the meeting reconvened the treasurer of the corporation reported to the board that the amount of common capital stated in the articles of incorporation with which the corporation will begin to carry on business, to-wit: the sum of \$..... had been paid in full in cash; in part to the incorporators, being the ten percent payable with each subscription to the common shares; and in part, during the recess of this meeting, by directors and others who had purchased common shares for the price or consideration this day fixed and authorized by the directors.

The treasurer further reported that the full sum of \$....., being the amount of said stated common capital, is now in his custody as such treasurer.

Thereupon, on motion duly made, seconded, put and unanimously carried, it was resolved to forthwith file with the secretary of the State of Ohio a certificate of payment of said stated common capital as required by Section 8728-2 of the General Code of Ohio.

(g)

CERTIFICATE OF PAYMENT OF STATED COMMON CAPITAL.

....., Ohio,, 19...

To the Secretary of State, Columbus, Ohio:

We, the undersigned, being at least a majority of the directors of The Company, a corporation formed pursuant to the act entitled "An Act to authorize the formation and reorganization of corporations with common stock without par value," do hereby certify that the amount of common capital stated in the Company's articles of incorporation

has been fully paid to the corporation in money or in property taken at its actual value.

.....

.....

.....

Directors.

State of Ohio, County of, ss.

Be it remembered, that on this day of, 19..., before me, the undersigned, a notary public in and for the county aforesaid, personally came,,, and, directors of The Company, named in the foregoing certificate, and acknowledged the signing of such certificate to be their voluntary act and deed.

In testimony whereof, I have hereunto subscribed my name and affixed my official seal on the day and year first above written.

.....,

Notary Public.

(h)

RESOLUTION AUTHORIZING A BONUS OF NO-PAR-VALUE COMMON STOCK TO PURCHASERS OF PREFERRED STOCK.

Whereas, it is necessary to dispose of at least \$...... par value of the authorized preferred stock of this corporation in order to provide capital for its business, and,

Whereas, in order to attract and interest investors and prospective purchasers of said preferred stock, it will be necessary to offer them a reasonable bonus of no-par-value common shares, and,

Whereas, in the opinion of the directors, a bonus of *one* share of no-par-value common stock with each share of the preferred stock of this corporation, purchased or subscribed for, and paid up in cash, is reasonable and proper;

Therefore be it resolved, that common shares without nominal or par value, of this corporation, be disposed of for the following consideration, which is the fair value of such shares, to-wit: one share of such common stock without nominal or par value to be issued, as a bonus with each \$100 par value

share of the preferred stock of this corporation subscribed for or purchased, and paid for at par, without other payment or liability on the part of the subscribers or purchasers.

(Conclusion of minutes of organization meeting of directors.)

Thereupon the board adjourned on motion duly seconded.

.....,
Chairman.

.....,
President.

Attest:

Attest:

.....,
Secretary pro tem.

.....,
Secretary.

We hereby approve the foregoing minutes.

.....,
.....,
.....,
Directors.

(i)

CONSENT OF STOCKHOLDERS TO CONSIDERATION RECEIVABLE FOR NO-PAR-VALUE SHARES.¹

....., Ohio,, 19....

We, the undersigned, being the owners of the number of shares of the common stock, without nominal or par value, of The Company, set opposite our respective names, do hereby consent in writing, that (..... shares of) the unsubscribed and unissued common shares, without nominal or par value, of said corporation be issued and sold for the following consideration, to-wit:

(Insert price or other consideration.)

(Add, if desired, being the consideration fixed by the directors of said corporation at a meeting held on the day of, 19....)

Stockholders	Number of Shares
.....
.....
.....
.....

¹ This consent must be signed by the holders of all outstanding common shares. A majority of common

stockholders may fix the consideration, at a meeting called for that purpose. G. C., § 8728-1.

I,, secretary of The Company,
do hereby certify that the foregoing consent has been signed
by the holders of all of its outstanding shares of common
stock.,
....., 19.... Secretary.

(j)

STATEMENT FOR EXEMPTION OF STOCK UNDER BLUE SKY LAW.
State of Ohio, Department of Commerce, Division of Securi-
ties—Form No. 1.
(G. C. § 6373-2, sub. F.)

To the Chief of Division of Securities:

Name of Company
Principal Business Office, No. Street
City of, State of
Branch Offices, No. Street
City of, State of

Incorporated on the day of, 19..., un-
der the general corporation laws of Ohio, with an authorized
capitalization of \$....., divided into shares of com-
mon stock with a par value of \$..... each and shares
of preferred, with a par value of \$..... each. Certificate
of increase filed this day of, 19..., chang-
ing the authorized capital to \$..... divided into shares of
common stock with a par value of \$..... each and
shares of preferred stock with a par value of \$..... each.

Incorporated or reorganized on the day of,
19..., under Section 8728-1 et seq. of the General Code of
Ohio, with an authority to issue shares of which

shares shall be common without nominal or par value, and
 shares shall be preferred stock of the par value of
 \$...... each. The amount of common capital with which
 the corporation will begin to carry on business will be
 (\$.....).

Certificate of increase filed the day of,
 19..., changing the authorized number of shares to
 shares, of which shares shall be common stock without
 nominal or par value, and shares shall be preferred
 stock of the par value of \$...... each.

The following is a full and correct statement of the capi-
 tal stock and securities on this date:

PAR VALUE		NON-PAR	
Authorized	{ Common Stock, \$....	Authorized	{ Common Stock, ....sh.
Capital	{ Preferred Stock, \$....	to issue	{ Preferred Stock, \$....
Subscribed	{ Common Stock, \$....	Subscribed	{ Common Stock, ....sh.
	{ Preferred Stock, \$....		{ Preferred Stock, \$....
Issued and	{ Common Stock, \$....	Issued and	{ Common Stock, ....sh.
Outsta'd'g	{ Preferred Stock, \$....	Outsta'd'g	{ Preferred Stock, \$....

Bonds authorized, \$......

Bonds issued \$......

Other securities called....., Authorized.. \$......

Other securities called....., Issued..... \$......

4th. That the follow-
 ing is a true and com-
 plete statement showing
 the consideration

{ to be received from the stock
 subscriptions to date:
 received from the issued and out-
 standing stock to date:

Common Stock.

	No. Shares	* Actual Value	Remarks
Actual Cash
Notes
Real Estate
Plant
Equipment
Dividends
.....
.....
.....
Totals			

* This column should specify the actual amount of cash or notes received, or the actual value of real estate, etc., received in exchange for stock issued, and should correspond with value at which these different items were given in to the company and carried on the books.

A statement of exemption filed under the provisions of Sec. 6373-2 F, General Code of Ohio, must be filed before issuance or disposal of securities.

If there be more than one increase in the capital stock attach a rider which will disclose the date, amount and nature of the stock.

Set forth the consideration as fixed by the incorporators or the resolutions of the Board of Directors fixing the consideration relative to the disposal of common stock without nominal or par value. (See Sec. 8728-1, General Code of Ohio.)

Preferred Stock.

	No. Shares	Actual Value	Remarks
Actual Cash
Notes
Real Estate
Plant
Equipment
Dividends
.....
Totals			

Bonds.

	No. Shares	Actual Value	Remarks
Actual Cash
Notes
Real Estate
Plant
Equipment
Dividends
.....
Totals			

This corporation formed and organized under the laws of the State of Ohio for the purpose of doing business in Ohio, in good faith and not for the purpose of evading the provisions of the Act of April 28, 1913, entitled "An Act to regulate the sale of bonds, stocks, and other securities, and of real estate not located in Ohio, and to prevent fraud in such sales," and as amended February 6, 1914, as amended May 20, 1915, and as amended March 21, 1917, and as amended May 17, 1921, and as amended April 30, 1923, purposes to dispose of shares of Preferred Stock of the par value of \$. and shares of common stock of par or declared

value of \$. No part of the issue of which this { No Par Common Shares.....
Common Stock \$.
Preferred Stock \$.

is a part, is or will be issued directly or indirectly in payment for patents, services, good will, or for property not located in Ohio, and the disposal has been and is to be made for the sole account of the issuer, without any commission, and at a total expense of not more than two per cent. of the proceeds realized therefrom, plus five hundred dollars.

State of, County of, ss.:

Personally appeared before me, a Notary Public in and for the above named county,, who being duly sworn say.. that the statements above set forth are true to the best of knowledge and belief.

*To be used before organization. To be used after organization.

.....,

.....,

.....,

.....,

.....,

Incorporators.

.....,

President.

.....,

Secretary.

Subscribed and sworn to before me thisday of
....., 19....

.....,

Notary Public.

My commission expires

*NOTE.—This form can be executed by the incorporators before organization provided that the Articles of Incorporation have been filed with the Secretary of State and he issues his certificate, or can be executed by the president and secretary after organization.

No. 14.

Reorganization Into No-Par-Value Corporation. Proceedings.

(G. C. § 8728-5.)

NOTE.—Unless the certificate of reorganization is signed by every stockholder of record, having voting power, reorganization must be authorized by the holders of two-thirds or more of all outstanding stock entitled to vote, at a stockholders meeting of which at least two weeks' notice has been given by mail to each stockholder of record, entitled to vote, and by publication once a week for at least two consecutive weeks in a newspaper of general circulation in the county.

(a)

NOTICE OF STOCKHOLDERS' MEETING.

Notice is hereby given that a meeting of the stockholders of The Company will be held at the office of said Company, No. Street, in the City of, County, Ohio, on the day of, 19..., at o'clock ... M., for the purpose of considering the reorganizing of said The Company, pursuant to Sections 8728-1 to 8728-12 of the General Code of Ohio, so as to permit the issuance of shares of stock without par value. The terms upon which it is proposed to exchange the outstanding shares of stock of said The Company for the new shares of stock are as follows:

.....,
President.

.....,
Secretary.

(b)

RESOLUTION FOR REORGANIZATION.

Resolved, that the president and secretary of The Company be and they are hereby authorized and directed to execute and file with the secretary of State of Ohio, pursuant to Sections 8728-1 to 8728-12 of the General Code of Ohio, a Certificate of Reorganization, textually as follows:

(Copy Certificate of Reorganization.)

(c)

CERTIFICATE OF REORGANIZATION.

(G. C. § 8728-5.)

Certificate of Reorganization of Corporation.

The Company hereby certifies as follows:

1. The name under which it was originally organized is The Company. Its present corporate title is The Company.

2. The date of its articles of incorporation is, and the same are recorded in volume, page, in the office of the secretary of state, and all amendments thereof, 19..., and, 19..., and the same are recorded in volume, page, and in volume, page, in the office of the secretary of state.

3. The place located or its principal place of business is

4. The amount of its capital stock is dollars (\$.....), consisting of (.....) shares of common stock of the par value of dollars (\$.....) each and (.....) shares of preferred stock of the par value of dollars (\$.....) each, and the terms and provisions of the preferred stock were as follows:

5. The number of shares of each class issued and outstanding is as follows: (.....) shares of common stock of the par value of dollars (\$.....) each, and (.....) shares of preferred stock of the par value of dollars (\$.....) each.

6. The number of shares that may henceforth be issued by the corporation shall be shares.

The classes into which such shares are to be divided, and the number of shares in each class are as follows: shares of common stock, without nominal or par value, and shares of preferred stock of the par value of dollars (\$.....) each.

The preferred stock will be issued under and subject to the following terms and provisions, viz:

(For preferred stock clauses, see Forms Nos. 4 and 5.)

7. The amount of common capital with which the corporation will begin to carry on business is dollars (\$.....).

8. The terms upon which the new shares of stock of said corporation shall be issued, in place of such of the outstanding shares of stock as are changed or affected by this certificate of reorganization are as follows:

In witness whereof,, president, and, secretary of The Company, acting for and on

behalf of said Company have hereunto set their hands this
day of, A. D. 19....

The Company,
By, President,
(Corporate Seal.), Secretary.

State of Ohio, County of, ss.

Personally appeared before me, the undersigned, a,
in and for said county, this day of, A. D.
19..., the above named, and, who
being first duly sworn depose and say that they are the presi-
dent and secretary, respectively of The Company,
and that they have been duly authorized and directed to exe-
cute and file the foregoing certificate by the votes, cast in per-
son or by proxy, of the holders of record of two-thirds or
more of each class of the outstanding shares of stock, entitled
to vote, at a meeting called and held upon written notice mailed
to each stockholder of record, entitled to vote, at least two
weeks before the date set for the meeting and published once a
week for at least two consecutive weeks in a newspaper pub-
lished and of general circulation in County of
Ohio, wherein the principal office of the corporation is located,
and that such notice did expressly state the purpose of the
meeting to be that of reorganizing the above corporation, pur-
suant to Sections 8728-1 to 8728-12 of the General Code, so as
to permit the issuance of shares of stock without par value and
stated the terms upon which the outstanding shares of stock
were to be exchanged for the new shares of stock.

.....
.....
Sworn to before me and subscribed in my presence this
day of, A. D. 19....

.....,
(Corporate Seal.) Notary Public.

State of Ohio, County of, ss.

I,, Clerk of the Court of Common Pleas, within
and for the county aforesaid, do hereby certify that,
whose name is subscribed to the foregoing affidavit as a

....., was, at the date thereof, a, in and for said county, duly commissioned and qualified; and further, that I am well acquainted with his handwriting, and believe the signature to said acknowledgment is genuine.

In witness whereof, I have hereunto set my hand and affixed the seal of said court, at, this day of, A. D. 19....

.....,
Clerk.

(Clerks are required to use this certificate and not attach their own.)

(d)

AFFIDAVIT OF PRESIDENT AND SECRETARY.

NOTE.—If the common capital stated in the certificate of reorganization as that with which the reorganized corporation will begin to carry on business, is less than the total par value of the previously issued and outstanding common stock, this affidavit must be attached to the certificate of reorganization and approval of the (Blue Sky) Commissioner of Securities must be endorsed on the Certificate of Reorganization. G. C. § 8728-6.

State of Ohio, County of, ss.

..... and, being first duly sworn, say that they are president and secretary, respectively, of The Company, and that the whole amount of the ascertained debts and liabilities of The Company is dollars (\$.....).

.....
.....

Sworn to before me and subscribed in my presence this day of, A. D. 19....

.....,
Notary Public.

(e)

APPROVAL OF COMMISSIONER OF SECURITIES TO BE ENDORSED ON
CERTIFICATE OF REORGANIZATION.

I,, Chief of the Division of Securities of the Department of Commerce of the State of Ohio, hereby certify

that I have received proof satisfactory to me that the amount of common capital stated in the certificate of reorganization as that with which the reorganized corporation, The Company, will begin to carry on business is sufficient for the proper purposes of the corporation, and that said corporation has tangible assets equal to or in excess of its ascertained debts and liabilities and the amount of said common capital as stated in the certificate of reorganization, and also, the par value of its preferred stock, outstanding, or to be issued in exchange for outstanding stock as provided in said certificate.

(f)

SWORN STATEMENT OF ASSETS.

(G. C. § 8728-7.)

....., Ohio,, 19....

To the Secretary of State, Columbus, Ohio:

State of Ohio, County of, ss.

....., and, being severally duly sworn, each for himself deposes and states, that said is the president and said is the treasurer of The Company, a corporation of the State of Ohio, reorganized under an Act to authorize the formation and reorganization of corporations with common stock without par value, filed in the office of the secretary of the State of Ohio, on February 21, 1920; that said corporation has not incurred any debts subsequent to the filing of its certificate of reorganization pursuant to said Act; that said corporation has assets of an actual value of dollars (\$.....), which is at least equal to the amount of its common capital stated in its certificate of reorganization as that with which it will begin to carry on business; and that said corporation files with the secretary of the State of Ohio this sworn statement of its president and treasurer in conformity with Section 7 of said Act.

.....,
President.

.....,
Treasurer.

Subscribed and sworn to before me this day of
....., 19....

(Seal.)

.....,
Notary Public.

No. 15.

Amendments to Articles of Incorporation; Proceedings For.
(G. C. §§ 8719 to 8723.)

(a)

WAIVER OF NOTICE OF STOCKHOLDERS' MEETING.

....., Ohio,, 19....

We, the undersigned, being all the stockholders [*or members*] of [*name of the corporation*], do hereby waive the giving of the notice required by law of the meeting to be held by the stockholders [*or members*] of said [*name of the corporation*], on [*time of the meeting*], at [*place of the meeting*], which meeting has been called by a majority of the board of directors [*or trustees*] of said [*name of the corporation*] for the purpose of considering the subject of amending the articles of incorporation of said [*name of the corporation*]. **[The proposed amendment may also be set forth in the waiver]; thus, beginning at the*, "so as to change the name of said corporation from [its present name], to [the name proposed]."*

Names.	Shares.
.....
.....
.....
.....
.....

NOTE.—If not waived by all the stockholders or members a notice substantially as follows must be published for at least thirty days prior to the meeting:

(b)

NOTICE OF STOCKHOLDERS' MEETING.

Notice is hereby given to the stockholders [*or members*] of [*name of the corporation*], that on, the day of, 19.., at [*the place of meeting*], there will be a meeting of the stockholders [*or members*] of [*name of the corporation*], to consider the subject of amending the articles of incorporation of said [*name of the corporation*]. [*The contemplated amendment may be set forth in the notice, but it is probably unnecessary*].

.....,

.....,

.....,

Directors (or Trustees).

(The notice must be given by a majority of directors or trustees.)

NOTE.—The waiver, or copy of notice with proof of publication, should be entered on the record.

(c)

MINUTES OF STOCKHOLDERS' MEETING.

....., Ohio,, 19...

A meeting of the stockholders (or members) of The Company was held at on, 19.., at o'clock .. M., the time and place specified in the foregoing waiver (or notice)., president of the Company, presided.

Mr. presented the following resolution:

(d)

RESOLUTION FOR AMENDMENT OF ARTICLES OF INCORPORATION.

"Resolved, that the articles of incorporation of The Company be, and the same are hereby amended, so that

(*Copy proposed amendment, as*

"the corporate name be changed from The Company to The Company,"

or "the place where said corporation is to be located, and its principal business transacted be changed from, county, Ohio, to, county, Ohio.")

Mr. moved the adoption of said resolution. The motion was duly seconded and a vote thereon was had by ballot. shares of the capital stock of said Company were cast in favor of the adoption of said resolution and shares were cast against its adoption. (*If the corporation has no capital stock, the minutes should be changed accordingly.*)

More than three-fifths of the capital stock (or members) of said corporation having *been* voted in favor of the adoption of said resolution the same was declared duly adopted. Thereupon the following written assent and waiver was executed by all the stockholders (*or members*) of said corporation, as follows:

(e)

WAIVER OF NOTICE OF AMENDMENT.

We, the undersigned, being all of the stockholders (or members) of The Company, do hereby consent in writing that the notice by publication, required by law, of the amendment made to the articles of incorporation of said The Company at a meeting of its stockholders (or members) held on, the day of, 19.., at the office of be and the same is hereby waived.

Names.	Shares.
.....
.....
.....
.....
.....

There being no further business, the meeting adjourned on motion.

Attest:
....., Secretary., President.

NOTE.—Unless waived by all stockholders or members, a notice substantially as follows should be published for three consecutive weeks.

(f)

NOTICE.

To whom it may concern:

Notice is hereby given that on, the day of, 19.., at a meeting of the stockholders (or members) of The Company, held at the office of, it was, by a vote of more than three-fifths of the stockholders (or members) resolved, that

(Copy resolution in full.)

....., Secretary of
(Name of Corporation.)

(g)

CERTIFICATE OF AMENDMENT TO BE FILED WITH THE
SECRETARY OF STATE.

(Copy of resolution in full.)

To the Secretary of State,
Columbus, Ohio.

The Company, acting by its president and secretary, hereby certifies that the foregoing is a true copy of the original amendment to the articles of incorporation of The Company which was adopted by the votes of the owners of more than three-fifths of its capital stock (or members) at a meeting thereof, held on, the day of, 19.., at, notice of which meeting was duly waived in writing as authorized by law (or, pursuant to notice duly given according to law).

In testimony whereof, the president and secretary of The Company, acting for and on behalf of said corporation, have hereunto set their hands and caused the seal of said corporation to be affixed (if the corporation has a seal) this day of, 19..

(Corporate seal.)

The Company.

By, President.

By, Secretary.

No. 16.

Increase of Capital Stock; Proceedings For.

(G. C. § 8698.)

(1) Before Organization.

(a)

CONSENT TO INCREASE OF CAPITAL STOCK.

We, the undersigned, being all the subscribers to the capital stock of The Company, all of the authorized capital stock having been subscribed and an installment of ten percent on each share of stock having been paid thereon, do hereby consent in writing that the capital stock of said Company be increased from \$....., its present capital stock, to \$....., consisting of shares of common stock of the par value of \$..... each (and shares of preferred stock of the par value of \$..... each);

And we hereby authorize the incorporators, or a majority of them, to file a certificate of such action with the secretary of state.

Names of Subscribers.	Shares.	
.....
.....
.....
.....
.....

(b)

CERTIFICATE OF INCREASE, BEFORE ORGANIZATION, TO BE FILED WITH THE SECRETARY OF STATE.

We, the undersigned, being all (or, a majority) of the incorporators of The Company, do hereby certify that on the day of, 19..., the original capital stock was fully subscribed for and an installment of ten percent on each share of stock was paid; and that on said day,

all of the original subscribers consented in writing that the capital stock of said Company be increased from \$....., its present capital stock, to \$....., consisting of shares of common stock of the par value of \$..... each (and shares of preferred stock of the par value of \$..... each), and authorized the undersigned to file a certificate setting forth such action with the secretary of state.

.....

Incorporators.

(2) After Organization.

(a)

WAIVER AND AGREEMENT TO INCREASE CAPITAL STOCK.

....., Ohio,, 19...

We, the undersigned, being the holders of all the capital stock of The Company, and being this day all present, in person or by proxy, at a meeting of the stockholders of said Company, do hereby waive in writing the notice by publication and by letter of the time, place and object of such meeting required by law; and we do also agree in writing:

(NOTE.—If the capital stock consists of par value common stock only and there is no preferred stock use I following.)

I. That the capital stock of said Company be increased from \$....., its present capital stock, to \$....., divided into shares of \$..... each.

(NOTE.—If the capital stock consists of preferred stock and par value common stock, disregard I and use II following.)

II. That the capital stock of said Company be increased from \$....., consisting of \$..... common stock in shares of \$..... each, and \$..... of preferred stock in shares of \$..... each to \$....., divided into \$..... common stock in shares of \$..... each and \$..... preferred stock in shares of \$..... each.

(NOTE.—If the capital stock consists of no-par-value common stock only, without preferred stock, disregard I and II and use III following.)

III. That the total number of authorized shares of common stock without nominal or par value which may be issued by the corporation be increased from shares to shares.

(NOTE.—If the capital stock consists of no-par-value common stock and preferred stock, disregard I, II and III and use IV following.)

IV. That the total number of authorized shares which may be issued by the corporation be increased from shares, consisting of shares of common stock without nominal or par value and shares of preferred stock of the par value of \$...... each, to shares, consisting of shares of common stock without nominal or par value and shares of preferred stock of the par value of \$...... each.

Name of Stockholder.	Name of Proxy.	No. of Shares.
.....
.....
.....
.....
.....

NOTE.—Preferred stockholders, if any, should sign the above waiver and agreement. All stockholders are entitled to vote on proposed increases of stock, regardless of any restrictions on voting power in the terms of its issue. G. C. § 8698.

If the notice of meeting is not waived, a notice substantially as follows must be given by publication, and by mail, to each stockholder at least thirty days before the time of the meeting.

(b)

NOTICE OF STOCKHOLDERS' MEETING.

Notice is hereby given that a meeting of the stockholders of The Company will be held at; on the day of, 19.., at o'clock .. M., for the purpose of considering a proposed increase of the capital stock

of said Company from (*insert details of the present capital stock and proposed increase, from I, II, III or IV of (a) above*).

....., Ohio,, 19...

.....

Directors.

NOTE.—At the meeting at which such increase is considered a resolution must be adopted. If notice of the meeting has been properly given, written consent of the stockholders is not required. A vote of the holders of a majority of all the capital stock is sufficient. G. C. § 8698. Written assent of the stockholders present, however, is useful for purposes of record.

(c)

RESOLUTION FOR INCREASE.

“Resolved, that the capital stock of said The Company be increased from (*insert details of present capital stock and proposed increase from I, II, III or IV of (a) above*), and further, that the president and secretary of said Company be instructed to file a certificate of such increase with the secretary of state.”

(d)

CERTIFICATE OF INCREASE OF CAPITAL STOCK.

....., president, and, secretary of The Company, duly authorized in the premises, and acting on behalf of said Company, do hereby certify, that on the day of, A. D. 19..., the authorized common capital stock of said Company was fully subscribed for, and an installment of ten percent on each share of such stock had been paid; that on said day, by a vote of the holders of a majority of all the stock of said Company, at a stockholders' meeting called by a majority of its directors, and held at the office of the Com-

pany, in the of County, Ohio, due notice of which was given according to law;

(NOTE.—If all the stockholders, including preferred stockholders, were present and waived notice, add the following:)

And at which meeting all the holders of the capital stock of said Company were present in person or by proxy, and waived in writing the notice by publication and by letter of the time, place and object of such meeting required by law, and also agreed in writing to the increase of capital stock hereinafter set forth;

It was on motion “Resolved that the capital stock of The Company be increased from (insert details of former capital stock and the increase, from I, II, III or IV of (a) above); and further, that the president and secretary of said Company be instructed to file a certificate of such increase with the secretary of state”; which is done accordingly.

In witness whereof, the aforesaid, president, and, secretary of The Company, acting for and on behalf of said Company, have hereunto set their hands this day of, A. D. 19...

(Corporate Seal)

The Company.
By, President.
....., Secretary.

Increase by Preferred Stock Only.

(e)

WRITTEN ASSENT OF STOCKHOLDERS TO INCREASE BY PREFERRED STOCK.

(G. C. § 8698.)

We, the undersigned, being the owners of the number of shares of the capital stock of The Company set opposite our respective names, hereby assent to the increase of the capital stock of said Company from \$...... to \$....., the whole of said increase to consist of preferred stock in shares of the par value of dollars (\$.....) each.

The holders of such preferred stock shall be entitled to a dividend, etc.

(Set out terms of preference, etc., for which see Preferred Stock Clauses, Forms Nos. 2, 4 and 5.)

Names.	Shares.
.....
.....
.....
.....
.....

NOTE.—The written assent of three-fourths of all the stockholders, representing three-fourths of both the subscribed and issued capital stock is required.

Where the articles of incorporation do not provide for preferred stock, the articles must be amended. G. C. § 8668.

(f)

CETIFICATE OF INCREASE OF CAPITAL STOCK (PREFERRED).

The Company hereby certifies that at a meeting of its directors, held at the office of said Company on the day of, A. D. 19..., the consent in writing of three-fourths of all of the stockholders, representing at least three-fourths of both the subscribed and issued capital stock of said Company, having been first previously obtained, the following resolution was adopted, viz:

“Resolved, that the capital stock of said, The Company, be and the same is hereby increased from dollars (\$.....) to dollars (\$.....), and that the whole of said increase be issued and disposed of as preferred stock, in (.....) shares of dollars (\$.....) each, and that the holders thereof be entitled to receive a dividend on said preferred stock of percent per annum, payable out of

the surplus profits of the Company for each year, in preference to all other stockholders, and such dividends shall be cumulative.

(Set out other terms of preference, etc.)

“And further, that the president and secretary of said Company be instructed to file a certificate of such increase with the secretary of state”; which is done accordingly.

In witness whereof, said The Company has
(Seal.) caused its corporate seal to be affixed and its president and secretary to subscribe this certificate, this day of, A. D. 19...

The Company.
By, President.
....., Secretary.

(g)

WAIVER BY STOCKHOLDERS OF RIGHT TO TAKE INCREASED STOCK

....., Ohio,, 19...

We, the undersigned stockholders of The Company, do hereby release and waive our right to subscribe for or purchase any part of the new or increased capital stock of said Company authorized by resolution of the stockholders passed 19.., and we hereby authorize the directors of said Company to sell or otherwise dispose of the same for the best interest of said Company, as in their discretion they may deem proper.

NOTE.—The directors may fix the time within which the stockholders may avail themselves of their subscription rights. G. C. § 8699.

(h)

CERTIFICATE OF INCREASE OF CAPITAL STOCK OF BUILDING AND LOAN ASSOCIATION.

(G. C. § 9664.)

To the Secretary of State, Columbus, Ohio:

The hereby certifies that, at a meeting of its directors, held on the day of, A. D. 19..., it was resolved by a majority vote of its board of directors that the capital stock of said corporation be increased from dollars (\$.....) to dollars (\$.....).

divided into shares of dollars (\$.) each.

In witness whereof, said corporation has caused its corporate seal to be hereto affixed, and this certificate to be executed by its president and secretary, this day of, A. D. 19....

The,

By,

President

(Corporate Seal.)

.....,

Secretary.

No. 17.

Reduction of Capital Stock; Proceedings For.

(G. C. § 8700.)

NOTE.—Amendment to the articles of incorporation is the proper method of reducing the number of authorized shares of no-par-value common stock. G. C. §§ 8728-4, 8719.

The number of authorized preferred shares of a no-par corporation, however, may be decreased by a proceeding to reduce. G. C. § 8728-4.

(a)

CONSENT OF STOCKHOLDERS TO REDUCTION OF CAPITAL STOCK.

....., Ohio,, A. D. 19...

The undersigned, in whose names a majority of the shares of the capital stock of The Company stands on the books of the Company, hereby consent that the

(If there is no preferred stock and the common stock is par value stock, use I, following.)

I. Capital stock of said Company be reduced from \$. to its present authorized capital, to \$., and the nominal value of each share from \$. to \$.

(If there is both preferred and par value common stock disregard I and use II, following.)

II. Capital stock of said Company be reduced from \$., consisting of \$. common stock, divided into shares, par value \$. each, and \$. preferred stock, divided into shares, par value \$. each; to \$., to consist of \$. common stock, divided into shares,

par value \$..... each, and \$..... preferred stock, divided into shares, par value each.

(If the corporation has no-par-value common stock and preferred stock, and it is desired to reduce the number of authorized number of shares of the preferred, disregard I and II, and use III, following.)

III. Number of authorized preferred shares be reduced from shares to shares.

(Conclude as follows): and that the board of directors may take such action as may be necessary to carry such reduction into effect.

Names of Stockholders.	No. Shares Owned.
.....
.....
.....

(b)

RESOLUTION OF BOARD OF DIRECTORS FOR REDUCTION OF CAPITAL STOCK.

“Resolved, that the *(insert details of reduction from I, II or III of (a) above)*; and further, that the president and secretary are hereby instructed, on surrender of the original certificates, to issue new certificates therefor, and also to file a certificate of such reduction in the office of the secretary of state, as required by law.”

(c)

CERTIFICATE OF REDUCTION TO BE FILED WITH THE SECRETARY OF STATE.

Certificate of Reduction of Capital Stock
of
The Company.

To the Secretary of State, Columbus, Ohio:

The Company hereby certifies that, at a meeting of the directors of said Company, held on, 19..., the writ-

ten consent of the persons in whose names a majority of the shares of the capital stock of said Company stood on the books of the Company having first been obtained, the
(insert details of reduction from I, II or III of (a) above),
and new certificates in accordance therewith directed to be issued on surrender of the original certificates.

In witness whereof, The Company
has caused its name to be hereto sub-
(Corporate Seal) scribed by its president and secretary and
its corporate seal to be hereunto affixed
this day of, A. D. 19...
The Company.
By, President.
....., Secretary.

(d)

CERTIFICATE OF CANCELLATION OF PREFERRED STOCK WHICH HAS
BEEN REDEEMED.

(G. C. § 8669.)

To the Secretary of State, Columbus, Ohio:

The Company hereby certifies that its authorized capital stock is \$....., consisting of \$..... common stock, divided into shares, par value \$..... each, and \$..... preferred stock, divided into shares, par value \$..... each;

That its board of directors on the day of, 19..., cancelled shares of the preferred stock, which had been redeemed by the corporation, and directed that the capital stock be reduced by such cancellation to \$....., to consist of \$..... common stock, divided into shares, par value \$..... each (***), and \$..... preferred stock, divided into shares, par value \$..... each;

(If all the preferred stock is cancelled, omit the words following the stars ***)

And further directed that the president and secretary of the Company execute and file with the secretary of state a certificate of such cancellation and action of the board of

directors as a certificate of reduction of the authorized capital stock of the corporation.

In witness whereof, The Company has caused its name to be hereto subscribed by its president and secretary and its corporate seal affixed this day of, 19....

The Company,
By,
President.
.....,
Secretary.

(Corporate Seal.)

No. 18.

Sale of Entire Property and Assets of Corporation; Proceedings For.

(G. C. §§ 8710 to 8718.)

(a)

MINUTES OF DIRECTORS' MEETING.

....., Ohio,, 19...

A meeting of the directors of The Company was held at the office of the Company at o'clock ..M.,, 19... Present, Messrs.,,, and

The meeting was called to order by, president of the Company.

Mr. presented the following resolution:

"Whereas, an offer of \$. has been made by, for the entire property and assets of The Company, and whereas, all the terms, considerations and conditions of said proposed sale are contained in the following proposed agreement, to wit:

(Copy proposed agreement in full.)

"Therefore be it resolved, that said offer be and is hereby accepted subject to the action thereon of the stockholders of this corporation; and that the president and secretary of this Company be and are hereby authorized and instructed to execute the foregoing agreement upon the adoption of the same by the stockholders; and that a meeting of the stockholders of this Company be called for the purpose of taking into consideration the execution of said proposed agreement to be held at the office of the

Company on, 19.., at o'clock .. M., and the secretary is hereby directed to give notice thereof to all the stockholders of this Company according to law."

Mr. moved the adoption of said resolution. The motion was duly seconded and was put by the president and the following was the vote:

Mr. yea.

Mr. yea.

Mr. yea.

Mr. yea.

Mr. yea.

Thereupon the president declared said motion duly carried and said resolution duly adopted.

There being no further business, the meeting adjourned on motion duly seconded.

Attest:

.....,

Secretary.

.....,

President.

We approve the foregoing minutes.

.....

.....

.....

.....

.....

Directors.

(Three-fourths of the directors must authorize a sale of the entire assets of a corporation.)

(b)

NOTICE OF STOCKHOLDERS' MEETING.

A meeting of the stockholders of The Company will be held at the office of said Company on, the day of, 19.., at o'clock .. M. for the purpose of considering and acting upon a proposed agreement for the sale of the entire property and assets of said The Company.

....., Ohio,, 19...

.....,

.....,

.....,

.....,

.....,

Directors.

NOTE.—Ten days' notice of the time and place of holding the meeting and the object thereof must be given by registered letter containing a written or printed notice addressed to each of the persons in whose names the capital stock stands on the books of the corporation; and also by like notice published in some newspaper in the city or town where the corporation has its principal office or place of business. The notice may, however, be waived in writing in case all the stockholders are present in person or by proxy.

(c)

WAIVER OF NOTICE OF STOCKHOLDERS' MEETING.

....., Ohio,, 19...

We, the undersigned, being the holders of all the capital stock of The Company and being all present, in person or by proxy as appears below, at a meeting of stockholders called by the board of directors for the purpose of considering a proposed agreement for the sale of the entire property and assets of said corporation, do hereby waive notice of said meeting required by law.

Stockholders.	Proxies.	No. of Shares.
.....
.....
.....
.....
.....

(d)

MINUTES OF STOCKHOLDERS' MEETING.

....., Ohio,, 19...

Pursuant to the foregoing notice (or waiver) a meeting of the stockholders of The Company was held at the office of the Company on, 19.., at o'clock .. M. Mr., president of the Company, presided.

Mr. presented the following resolution:

"Whereas, an offer of \$..... has been made by for the entire property and assets of The Company, payable in, and

Whereas, all the terms, considerations and conditions of said proposed sale are contained in the following proposed agreement, to wit:

(Copy proposed agreement in full.)

And whereas, the directors of this corporation at a meeting held, 19.., by a vote of more than three-fourths, authorized the execution of said agreement;

Therefore be it resolved, that the action of the board of directors be and is hereby ratified; and that said agreement be and is hereby adopted; and the president and secretary of this corporation are hereby authorized and directed to execute said agreement and all good and sufficient deeds and transfers of all the property and assets of this Company upon the terms and conditions in said agreement provided."

Mr. moved the adoption of said resolution and agreement. The motion was seconded by Mr. The president appointed and as tellers. The president thereupon put said motion and a vote by ballot was taken with the following results:

..... votes were cast for the adoption of said resolution and agreement.

..... votes were cast for the rejection of said resolution and agreement.

Thereupon the tellers announced the foregoing result of the vote and the president declared said motion duly carried and said resolution and agreement duly adopted, more than three-fourths of all the votes cast at the meeting having been cast in favor of such adoption.

There being no further business, the meeting adjourned on motion.

Attest:

..... Secretary. President.

No. 19.

Dissolution of Corporations.

(G. C. §§ 8738 to 8743.)

(a)

CALL FOR STOCKHOLDERS' MEETING.

(G. C. §§ 8738, 8740.)

....., Ohio,, 19...

To,

Secretary of The Company.

I (*or we*) (president *or* directors) of The Company do hereby call and order a meeting of the stockholders of said Company, to be held at, Street,, Ohio, on the day of, 19.., at o'clock .. M. for the purpose of considering and acting upon the proposed dissolution of said corporation and the surrender and abandonment of its corporate authority and franchises and for the transaction of any and all business necessary or incident thereto, and you are hereby instructed to give notice of such meeting to the stockholders pursuant to law.

(b)

NOTICE OF STOCKHOLDERS' MEETING

(G. C. § 8740.)

....., Ohio,, 19...

A meeting of the stockholders of The Company will be held at, Ohio, on the day of, 19.., at o'clock .. M. for the purpose of considering and acting upon the proposed dissolution of said corporation and the surrender and abandonment of its corporate authority and franchises, and the transaction of any and all business necessary or incident thereto.

.....,
Secretary.

NOTE.—The statute does not authorize a waiver of this notice by the stockholders. It must be given by publication for four weeks in a newspaper published and of general circulation in the county wherein the principal office of the corporation is located, and by mailing to each stockholder. Opins. Atty. Gen. 1915, p. 162.

(c)

CERTIFICATE OF DISSOLUTION OF A CORPORATION FOR PROFIT.

(Where installments of its capital stock have been paid.)

(G. C. §§ 8740, 8741.)

....., president, and, secretary, of The..... Company, duly authorized in the premises, and acting on behalf of said corporation, do hereby certify that said corporation has completely closed its business, and paid all its debts and liabilities; that a majority of the directors of said corporation, desiring to surrender its corporate authority and franchises, duly called a meeting of the stockholders of said corporation, by publication for four weeks in the, a newspaper of general circulation in county, and by written notice to each stockholder, whose residence is known of the object, time and place thereof, to be held at the office of said corporation, at, in county, Ohio, on the day of, A. D. 19..; that at said meeting of said stockholders held on said date, in pursuance of said notice, it was, by the vote of all of the stockholders of said corporation present, in person or by proxy.

“Resolved, that The Company, having completely closed its business, and paid all its debts and liabilities, hereby surrenders and abandons its corporate authority; and further, that the president and secretary of said corporation be instructed to file a certificate thereof with the secretary of state;” which is done accordingly.

In witness whereof, the aforesaid, president, and, secretary, of The Company, acting for and on behalf of said corporation, have hereunto set their hands, and caused the seal of said corporation to be affixed this day of, A. D. 19...

(Seal)

The Company.

By, President.

....., Secretary.

NOTE.—A certificate of dissolution must be accompanied by a certificate from the Tax Commission of Ohio to the effect that all reports, taxes and fees due from the corporation have been filed and paid. G. C. § 5521.

(d)

**CERTIFICATE OF VOLUNTARY DISSOLUTION OF A CORPORATION
FOR PROFIT.**

(Where no installments of its capital stock have been paid in.)

(G. C. §§ 8738, 8739.)

....., president, and, secretary, of The Company, duly authorized in the premises, and acting on behalf of said corporation, do hereby certify that no installments of the capital stock of said corporation have been paid in, no investments have been made, and no debts incurred which are unpaid, and that a majority of the directors of said corporation, having become satisfied that the objects of said corporation can not be accomplished, and desiring to abandon the corporate existence of said corporation, duly called a meeting of the stockholders of said corporation, by publication for two weeks in the, a newspaper of general circulation in county, to be held at the office of said corporation, at, in county, Ohio, on the .. .day of, A. D. 19..; that at said meeting of said stockholders held on said date, in pursuance of said notice, it was, by the vote of a majority in amount of the stockholders of said corporation present, in person or by proxy,

“Resolved, that The Company, having decided that the objects of said corporation can not be accomplished, and having fully paid all its debts and liabilities, hereby abandons and dissolves its corporate existence; and, further, that the president and secretary of said corporation be instructed to file a certificate thereof with the secretary of state;” which is done accordingly.

In witness whereof, the aforesaid, president, and, secretary, of The Company, acting for and on behalf of said corporation, have hereunto set their hands, and caused the seal of said corporation to be affixed this day of, A. D. 19...

(Seal)

The Company.

By, President.

....., Secretary.

(e)

CERTIFICATE OF VOLUNTARY DISSOLUTION OF A CORPORATION
NOT FOR PROFIT.

(G. C. § 8738.)

....., president, and, secretary, of The, duly authorized in the premises, and acting on behalf of said corporation, do hereby certify that no debts incurred by said corporation are unpaid, and that a majority of the trustees of said corporation, desiring to abandon the corporate existence of said corporation, duly called a meeting of the members of said corporation, by publication for two weeks in the, a newspaper of general circulation in county, to be held at the office of said corporation, at, in county, Ohio, on the day of, A. D. 19..; that at said meeting of said members held on said date, in pursuance of said notice, it was, by the vote of a majority of the members of said corporation present, at said meeting,

“Resolved, that The having decided that the objects of said corporation can not be accomplished and having fully paid all its debts and liabilities, hereby abandons and dissolves its corporate existence; and, further, that the president and secretary of said corporation be instructed to file a certificate thereof with the secretary of state;” which is done accordingly.

In witness whereof, the aforesaid, president, and, secretary, of The, acting for and on behalf of said corporation, have hereunto set their hands this day of, A. D. 19...

(Seal)

The

By, President.

....., Secretary.

(f)

CERTIFICATE BY INCORPORATORS OF ABANDONMENT OF PURPOSE TO
FORM CORPORATION.

(Opins. Atty. Gen. 1915, p. 137.)

We, the undersigned, being all the subscribers to the articles of incorporation of The Company, filed on, 19..., and recorded in volume, page,

in the office of the secretary of state, do hereby certify that no part of the capital stock of said corporation has been subscribed, no instalments of its capital stock paid, and no debts or obligations incurred which remain unpaid, and that all of the undersigned, being satisfied that the objects of the corporation can not be accomplished, desire to abandon their intention and purpose to form said corporation, and do hereby surrender and relinquish all authority to form said corporation, and hereby surrender said articles of incorporation and request that the same be cancelled.

In witness whereof, we have hereunto set our hands this
..... day of, 19....

.....
.....
.....

FOREIGN CORPORATIONS.

No. 20.

Statement by Foreign Corporation Entering State.

(G. C. §§ 178 to 182.)

(Attach copy of articles of incorporation here.)

To the Secretary of State,
Columbus, Ohio.

....., a corporation organized and existing under the laws of the state of, with its principal office located at, in County, (and having shares of capital stock without nominal or par value), desiring to conform to the laws of Ohio, regulating foreign corporations doing business therein, does hereby make the following statement:

FIRST. The amount of its authorized capital stock is \$.... (or, shares of preferred stock of the par value of \$..... each, and shares of common stock without nominal or par value).

SECOND. The business or objects of the corporation which it is engaged in carrying on, or which it purposes to engage in or carry on, in the state of Ohio is

THIRD. The principal place of business of said corporation in Ohio is to be located at, in county.

FOURTH. We hereby appoint, of, in county, Ohio, as the person upon whom process may be served in all actions that may be brought against this Company in any of the courts of the state, and designate his office, in said city, as the principal office of the Company in the state of Ohio.

In witness whereof, said corporation has caused its corporate seal to be hereto attached, and this certificate to be executed by its president and secretary, this day of, A. D. 19...

By, President.
....., Secretary.

State of, county, ss.

....., and, being first duly sworn, depose and say that they all did execute and sign the foregoing certificate for and on behalf of said corporation, and that the same is their free act and deed, and is the free act and deed of said, of which they are respectively the president and secretary; that the statements therein are true, and that the seal attached thereto is the genuine seal of said corporation; they further declare, on oath, that the charter or certificate of incorporation hereto attached is a true copy of the articles of incorporation or charter of said

.....
.....

Sworn to before me and subscribed in my presence, this day of, A. D. 19...

.....

(L. S.)

.....

State of, County of, ss.

I,, within and for the county aforesaid, do hereby certify that, whose name is subscribed to the foregoing acknowledgment as a Notary Public, was at the date thereof a Notary Public in and for said county, duly commissioned and qualified, and authorized as such to take said acknowledgment;

and further, that I am well acquainted with his handwriting, and believe that the signature to the same is genuine.

In witness whereof, I have hereunto set my hand and affixed the seal of said court, at, this day of, A. D. 19...

(L. S.)

Gentlemen: I hereby accept the appointment as the representative of your Company upon whom process may be served, and agree to the designation of my office, as your principal office in the state of Ohio.

State of Ohio, County of, ss.

Personally appeared before me, the undersigned, a notary public in and for said county, this day of, A. D. 19.., the above named, who acknowledged the signing of the foregoing to be his free act and deed for the uses and purposes therein mentioned.

Witness my hand and official seal on the day and year last aforesaid.

(Seal)

Notary Public in and for County, Ohio.

No. 21.

Statement by Foreign Corporation Entering State.

(G. C. §§ 183 to 192.)

To the Secretary of State,
Columbus, Ohio.

....., a foreign corporation organized and existing under and by virtue of the laws of the state of, with its principal office located at, in county,, in compliance with Sections 183 and 184 of the General Code of the state

of Ohio, passed February 14, 1910, approved February 15, 1910, requiring a foreign corporation organized for purposes of profit, and owning or using, or which proposes to own or use, a part or all of its capital stock or plant in said state of Ohio, before being permitted to do business, exercise its franchises, or maintain an action therein, under the oath of its president, secretary or other officer, to make and file with the secretary of state a statement of facts and pay a certain stipulated fee, hereby makes the following declaration:

FIRST. The authorized capital stock of said corporation is dollars (\$.....), divided into (.....) shares of the par value of dollars (\$.....) each.

SECOND. The value of the property owned and used in Ohio, situate at, is dollars (\$.....).

THIRD. The value of the property of the Company owned and used outside of Ohio is dollars (\$.....).

FOURTH. The proportion of the capital stock of the Company represented by property owned and used and by business transacted in Ohio is

FIFTH. The location of its office or offices in Ohio is at

SIXTH. The names and addresses of the officers or agents of the Company in charge of its business in Ohio are as follows:

Name of president,

Address,

Name of secretary,

Address,

Name of treasurer,

Address,

Names and addresses of managers or agents, other than as above enumerated:

In witness whereof, said has caused its corporate seal to be affixed and its corporate name to be hereunto attached by an officer thereof, to wit, its, this day of, A. D. 19...

.....
By,

(L. S.)

State of, County of; ss.

....., being duly sworn, deposes and says that he is an officer, to wit, the, of; that he executed the foregoing statement in the name and on behalf of said corporation and caused its corporate seal to be thereto affixed; that he was authorized to make such statement and to execute the same by authority of the corporation, and that the statements therein are true.

Sworn to before me and subscribed in my presence, this day of, A. D. 19...

(L. S.)

State of, County, ss.

I,, within and for the county aforesaid, do hereby certify that, whose name is subscribed to the foregoing acknowledgment as a was at the date thereof a in and for said county, duly commissioned and qualified, and authorized as such to take said acknowledgment; and further, that I am well acquainted with his handwriting, and believe that the signature to the same is genuine.

In witness whereof, I have hereunto set my hand and affixed the seal of said court, at, this day of, A. D. 19...

(L. S.)

OFFICE OF THE SECRETARY OF STATE.

Columbus, Ohio,, 19...

From the facts thus reported by the said I find the proportion of the capital stock of the Company represented by its property and business in Ohio to be percent of its authorized capital stock, to wit: the sum of dollars, on which I have assessed a fee of one-tenth of one percent, amounting to the sum of dollars.

(L. S.)

..... Secretary of State.

NOTE.—The franchise tax is based upon the proportion of the entire authorized capital stock represented by the property owned and used and business transacted in Ohio. The proportion which the property owned and used and business transacted in Ohio bears to the total property and business of the corporation is the proportion of the capital stock on which the tax is based. For instance, if the property owned and used and business transacted in Ohio is \$5,000, the total corporation property and business \$10,000, and the authorized capital stock \$20,000, the proportion (of the capital stock represented by Ohio property and business) required to be stated in the "Fourth" paragraph of the above form is one-half of the capital stock, or \$10,000, the Ohio property and business being one-half of the total corporate property and business. If all of the corporate property and business were in Ohio the tax would be based on the total authorized capital stock. *State v. Fulton*, 98 O. S. 350; see 5 O. L. R. 163 (Opinion by Wade H. Ellis, Atty. Gen.); *Aetna Iron & Steel Co. v. Taylor*, 13 C. C. 602; 5 C. D. 242, s. c. 3 N. P. 152; 4 L. D. 180.

No. 22.

Statement by No-Par-Stock Foreign Corporation Entering the State.

(G. C. §§ 184, 8728-11.)

....., 19....

To the Secretary of State, Columbus, Ohio:

....., a foreign corporation organized and existing under and by virtue of the laws of the State of, with its principal office located at, in County, having shares of capital stock without par value, in compliance with Sections 183, 184 and 8728-11 of the General Code of Ohio, applicable to foreign corporation organized for the purposes of profit, and owning or using, or which proposes to own, or use, a part or all of its capital stock or plant in said State of Ohio, and in compliance therewith, hereby makes the following declarations:

FIRST. The authorized capital stock of said corporation is: shares of preferred stock of the par value of \$. each and shares of common stock without nominal or par value.

SECOND. The value of the property owned and used in Ohio, situate at, is dollars (\$.....).

THIRD. The value of the property of the Company owned and used outside of Ohio is dollars (\$.....).

FOURTH. The amount of business transacted in Ohio is \$....., and the amount of business transacted out of Ohio is \$.....

FIFTH. The proportion of the authorized preferred capital stock of the Company represented by property owned and used and by business transacted in Ohio is

SIXTH. Number of shares of authorized common stock represented by property owned and used and business transacted in Ohio is

SEVENTH. The proportion of the number of shares of authorized common stock represented by property owned and used and business transacted is

EIGHTH. The location of its office or offices in Ohio is at

NINTH. The names and addresses of the office or agents of the Company in charge of its business in Ohio are as follows:

Name of president,
Address,
Name of secretary,
Address,
Name of treasurer,
Address,

Names and addresses of managers or agents, other than as above enumerated,

In witness whereof, said has caused its corporate seal to be affixed and its corporate name to be hereunto attached by an officer thereof, to-wit: its, this day of, A. D. 19....

(L. S.)
By

State of, County of, ss.

....., being duly sworn, deposes and says that he is an officer, to-wit: the, of, that he executed the foregoing statement, in the name and on behalf of said corporation, and caused its corporate seal to be thereto affixed; that he was authorized to make such statement and to

execute the same by authority of the corporation, and that the statements therein are true.

Sworn to before me and subscribed in my presence, this
..... day of, A. D. 19....

(L. S.)

State of, County, ss.

I,, within and for the county aforesaid, do hereby certify that, whose name is subscribed to the foregoing acknowledgment as a, was at the date thereof a, in and for said county, duly commissioned and qualified, and authorized as such to take said acknowledgment; and further, that I am well acquainted with his handwriting, and believe that the signature to the same is genuine.

In witness whereof, I have hereunto set my hand and affixed the seal of said court at, this day of, A. D. 19....

(L. S.)

OFFICE OF THE SECRETARY OF STATE.

Columbus, Ohio,, 19....

From the facts thus reported by the said, I find the proportion of the capital stock of the Company represented by its property and business in Ohio to be percent of its authorized capital stock, to-wit: the sum of dollars, on which I have assessed a fee of one-tenth of one percent, amounting to the sum of dollars.

Also find the proportion of the number of shares of authorized common stock (without par value) represented by property owned and used and business transacted in this state to be, on which I have assessed a fee of five cents a share amounting to the sum of dollars.

.....,
Secretary of State.

No. 23.

Certificate of Appointment of Agent for Foreign Corporation.

(G. C. § 181.)

....., 19....

To the Secretary of State, Columbus, Ohio:

We hereby appoint, of, in County, Ohio, as the person upon whom process may be served in all actions that may be brought against this Company in any of the courts of the state, and designate his office in said city as the principal office of the Company in the State of Ohio. All previous appointments are hereby revoked.

In witness whereof, said corporation has caused its corporate seal to be hereto attached, and this certificate to be executed by its president and secretary, this day of, A. D. 19....

.....,
By,
President.

(Seal.) Secretary.

....., Ohio,, 19....

.....,
.....

Gentlemen: I hereby accept the appointment as the representative of your Company upon whom process may be served, and agree to the designation of my office,, as your principal office in the State of Ohio.

State of Ohio, County of, ss.

Personally appeared before me, the undersigned, a notary public in and for said county, this day of, A. D. 19..., the above named, who acknowledged the signing of the foregoing to be his free act and deed for the uses and purposes therein mentioned.

Witness my hand and official seal on the day and year last aforesaid.

(Seal.)
Notary Public in and for County, Ohio.

No. 24.

Certificate of a Foreign Corporation Retiring From Business in This State.

(G. C. § 11976.)

....., president, and, secretary, of The Company, a corporation organized under the laws of the state of, having been duly authorized to do business in this state, in compliance with the provisions of sections 178 and 183 of the General Code of Ohio, do hereby certify that on the day of, 19..., the said corporation, by action of its board of directors, duly authorized, has fully retired from business in the state of Ohio, authorizing hereby the cancellation of the certificate of authority to do business in said state. heretofore issued in the office of the secretary of state.

In witness whereof, the aforesaid, president, and, secretary, of The Company, acting for and on behalf of said corporation, have hereunto set their hands and caused the seal of said corporation to be hereto affixed this day of, A. D. 19...

(Seal) The Company.
By, President.
....., Secretary.

(Certificate from tax commission under G. C. Section 5521 should be attached to the foregoing.)

No. 25.

Statement of Increase of Proportion of Capital Stock by Foreign Corporation.

(G. C. § 185.)

....., 19...
To the Secretary of State,
Columbus, Ohio:

....., a foreign corporation organized and existing under and by virtue of the laws of the state of, with its prin-

cipal office located at, in county,, in compliance with section 185 of the General Code of Ohio, requiring a foreign corporation, which has filed statements as required by sections 183 and 184 of the General Code of Ohio, and which has increased the proportion of its capital stock represented by property used and business done in Ohio, under the oath of its president, secretary or other officer, to make and file with the secretary of state an additional statement of facts and pay a certain additional fee, hereby makes the following declaration:

FIRST. The present authorized capital stock of said corporation is dollars (\$.....), divided into (....) shares of the par value of dollars (\$.....) each

SECOND. The value of the property owned and used in Ohio, situate at, is dollars (\$.....).

THIRD. The amount of business transacted in Ohio is dollars (\$.....).

FOURTH. The value of the property of the Company owned and used outside of Ohio is dollars (\$.....).

FIFTH. The amount of business transacted outside of Ohio is dollars (\$.....).

SIXTH. The increase in the proportion of the capital stock of the Company represented by property owned and used and by business transacted in Ohio is

SEVENTH. The location of its office or offices in Ohio is at

EIGHTH. The names and addresses of the officers or agents of the Company in charge of its business in Ohio are as follows:

Name of president,

Address,

Name of secretary,

Address,

Name of treasurer,

Address,

Names and addresses of managers or agents, other than as above enumerated:

In witness whereof, said has caused its corporate seal to be affixed and its corporate name to be hereunto attached

by an officer thereof, to wit: its, this day of
, A. D. 19...

(L. S.)

By

State of, County of, ss.

....., being duly sworn, deposes and says that he is an officer, to wit: the, of; that he executed the foregoing statement; in the name and on behalf of said corporation, and caused its corporate seal to be thereto affixed; that he was authorized to make such statement and to execute the same by authority of the corporation, and that the statements therein are true.

Sworn to before me and subscribed in my presence this
 day of, A. D. 19...

(L. S.)

State of, County of, ss.

I,, within and for the county aforesaid, do hereby certify that, whose name is subscribed to the foregoing acknowledgment as a, was at the date thereof a, in and for said county, duly commissioned and qualified, and authorized as such to take said acknowledgment; and further, that I am well acquainted with his handwriting, and believe that the signature to the same is genuine.

In witness whereof, I have hereunto set my hand and affixed the seal of said court, at, this day of, A. D. 19...

(L. S.)

OFFICE OF THE SECRETARY OF STATE.

Columbus, Ohio,, 19....

From the facts thus reported by the said, I find the proportion of the capital stock of the Company repre-

sented by its property and business in Ohio to be per-
cent of its authorized capital stock, to-wit: the sum of
dollars, on which I have assessed a fee of one-tenth of one
percent, amounting to the sum of dollars.

.....
(L. S.) Secretary of State.

No. 26.

Articles of Incorporation of Corporation not for Profit.

These articles of incorporation of

Witnesseth, that we, the undersigned (“all” or “a majority”)
of whom are citizens of the state of Ohio, desiring to form a
corporation, not for profit, under the general corporation laws of
said state, do hereby certify

FIRST. The name of said corporation shall be

SECOND. Said corporation is to be located at,
in county, Ohio, and its principal business there trans-
acted.

THIRD. Said corporation is formed for the purpose of (*for
statements of corporate purpose see the forms immediately fol-
lowing*).

In witness whereof, we have hereunto set our hands this
day of, A. D. 19..

.....,
.....,
.....,
.....,
.....

The State of Ohio, County of, ss.

Personally appeared before me, the undersigned, a notary pub-
lic in and for said county, this day of, A. D.
19.., the above named,,
and, who each severally acknowledged the signing of
the foregoing articles of incorporation to be his free act and
deed, for the uses and purposes therein mentioned.

Witness my hand and official seal on the day and year last
aforesaid.

.....,
.....

The State of Ohio, County of, ss.

I, Clerk of the Court of Common Pleas, within and for the county aforesaid, do hereby certify that, whose name is subscribed to the foregoing acknowledgment as a notary public, was at the date thereof a notary public, in and for said county, duly commissioned and qualified, and authorized as such to take said acknowledgment; and further, that I am well acquainted with his handwriting, and believe that the signature to said acknowledgment is genuine.

In witness whereof, I have hereunto set my hand and affixed the seal of said court at, this day of, A. D. 19.....

.....,
Clerk.

No. 27.

PURPOSE CLAUSES. CORPORATIONS NOT FOR PROFIT.

Associated Charities.

THIRD. Said corporation is formed for the purpose of investigating, assisting, providing relief and promoting the general welfare of the poor and needy, in the city of, Ohio, and including the establishment and maintenance of a registration bureau for fostering co-operation between all charitable organizations and agencies in said city; receiving funds by gift or bequest, disbursing the same and the doing of all things necessary or incident thereto.

Association for Apprehending Horse Thieves. Protective Association.

(G. C. § 10200.)

THIRD. Said corporation is formed for the purpose of the apprehension and conviction of horse thieves and other felons.

Athletic Club.

THIRD. Said corporation is formed for the purpose of providing means and facilities for exercise tending to promote physical culture, also rowing, football, baseball, foot racing, wrest-

ling, boxing and other athletic sports, for the recreation and amusement of the members and guests.

Athletic Club. Another Form.

THIRD. Said corporation is formed for the purpose of the mutual benefit of all its members by promoting an interest among themselves in all athletics, both indoor and outdoor athletics, and to promote social intercourse among its members. This association is formed not for profit.

Builders' Exchange.

THIRD. Said corporation is formed for the purpose of maintaining and conducting a society, the general object and design of which shall be to cultivate friendly, social and business relations among persons connected with building trades in the city of, Ohio, and vicinity; to provide facilities for the interchange of views, and the avoidance or amicable settlement of controversies and differences amongst its members and their employees; and, in general, to advance and promote all legitimate interests of the building trades of the city of, Ohio, and vicinity.

Canoe Club.

THIRD. Said corporation is formed for the purpose of encouraging and promoting an interest in canoeing and other aquatic and athletic sports, by providing means and facilities for the recreation, physical culture, amusement, and social intercourse of its members and their guests, and the acquiring by purchase, lease or otherwise, of club-house, club-rooms and other equipment.

This corporation is nonmutual in character.

Cemetery Association.

THIRD. Said corporation is formed for the purpose of acquiring land, by purchase or otherwise, for cemetery purposes; establishing and maintaining a cemetery for public burial; the sale of burial lots; accepting endowment funds by gift or bequest, investing the same, disbursing the income thereof in main-

taining and beautifying the lots and cemetery grounds; and the doing of all things necessary or incident thereto.

Chamber of Commerce.

(See G. C. § 10144 et seq.)

THIRD. Said corporation is formed for the purpose of collecting and circulating valuable and useful information relating to the manufacturing, industrial and mercantile interests of the city of, Ohio; to oppose the enactment of laws prejudicial to said interests; to encourage wise and useful legislation; to investigate transportation systems and endeavor to correct the abuses and evils existing therein; to secure reasonable and fair rates of freight to and from said city; to aid in the adjustment of controversies and misunderstandings between its members and others; and generally to promote and maintain the general welfare of the manufacturing, industrial and mercantile interests of said city.

To Administer Charitable Trust.

(G. C. § 10092-1.)

THIRD. Said corporation is formed for the purpose of administering a certain trust provided by the last will and testament of, deceased, which has been duly proven and recorded in volume, page, of the probate records of county, Ohio, a certified copy of which said will is filed herewith.

Chautauqua Assembly.

(G. C. § 5888.)

THIRD. Said corporation is formed for the purpose of holding annual Chautauqua assemblies, encouragement of religion, art, science and literature, the general dissemination of knowledge, and to provide social entertainments and other means of recreation and amusements.

Church or Religious Society.

(G. C. § 10010.)

THIRD. Said corporation is formed for the purpose of providing a place of worship for its members and conducting the

same according to the rules, regulations and customs of the Church; of promoting the cause of the Christian religion; and of receiving, holding and disbursing gifts, bequests and funds arising from other sources; of owning and maintaining suitable real estate and buildings, and the doing of all things necessary or incident thereto.

Club House Corporation.

THIRD. Said corporation is formed for the purpose of acquiring by purchase, lease or otherwise, real estate, for a club house, and owning, improving and holding the same for the accommodation, convenience and pleasure and entertainment of members of the Society.

College.

THIRD. Said corporation is formed for the purpose of establishing, maintaining and conducting an institution of learning for the purpose of promoting education in all departments of learning and knowledge, and especially in those branches usually comprehended in academic, collegiate and university courses; to acquire and hold for said purposes money, real estate and other property necessary or proper to carry out said objects; and to do any and all things reasonable and necessary to be done to carry out said purposes.

NOTE.—A schedule of property must be filed with the secretary of state. See G. C. § 9922.

Consumers' League. (Ruling Organization.)

THIRD. Said corporation is formed for the purpose of being a ruling or principal organization over subordinate organizations associated not for profit and located in municipalities in the state of Ohio. The purpose of this corporation, and of the subordinate and affiliated organizations is to further the welfare of persons engaged in the making and distribution of commodities, and of working women and children, by investigation, discussion, dissemination of information, legislation and appeal to public sentiment.

Deaconess Home.

THIRD. Said corporation is formed for the purpose of caring for the sick, the spiritually and physically destitute and needy and engaging in such other forms of charitable and benevolent work which may commend itself from time to time to the association; to promote the interests of the Christian religion; to receive and disburse donations, to receive and hold bequests and all funds arising from other sources for the benefit of said corporation.

Family Association.

THIRD. Said corporation is formed for the purpose of promoting and perpetuating the general welfare of the family of *John Doe*, mentally, physically, socially and morally, and of receiving and holding real estate and personal property by gift, devise or otherwise, and disposing of the same to carry out the purpose aforesaid, and the doing of all things necessary or incident thereto.

Farmers' Institute Society.

(G. C. § 9916.)

THIRD. Said corporation is formed for the purpose of teaching better methods of farming, stock raising, fruit culture and business connected with agriculture and the doing of all things necessary or incident thereto.

NOTE.—Twenty or more incorporators are required.

Farm Laborers' Association.

(G. C. § 10179.)

THIRD. Said corporation is formed for the purpose of promoting the interests of agriculture and for the relief of distressed farm laborers, or their orphans, whether such widows and orphans are members of the association or not, and the doing of all things necessary or incident thereto.

Free Loan Association.

THIRD. Said corporation is formed for the purpose of loaning money to poor and needy persons, without interest or compensation, and the doing of all things necessary or incident thereto.

Home for Indigent and Aged Women.

THIRD. Said corporation is formed for the purpose of establishing and maintaining a home for indigent and aged women; acquiring, by purchase, lease or otherwise, real estate necessary or convenient for said purpose, and constructing, improving and maintaining buildings thereon, disposing of the same; receiving, holding, investing and disbursing gifts and bequests and funds, and the doing of all things necessary or incident thereto.

Hospital.

THIRD. Said corporation is formed for the purpose of establishing, maintaining and conducting a hospital for medical and surgical treatment of persons, conducting a training school for nurses, the granting of diplomas to nurses graduating therefrom, engaging in research work in medicine, surgery and kindred subjects; receiving funds by donation, bequest or otherwise; holding, investing and disbursing the same; charging and receiving compensation for treatment, services and accommodations, all for the purpose of maintaining said hospital and not for profit; and the doing of all things necessary or incident thereto.

Improvement Association.

THIRD. Said corporation is formed for the purpose of promoting the general welfare of the *residence districts* of said city, by giving special attention to public improvements and all that relates to the betterment thereof and the convenience and comfort of the residents thereof, encouraging social intercourse among its members, and the doing of all things necessary or incident thereto.

Law and Order League.

THIRD. Said corporation is formed for the purpose of promoting the enforcement of laws *prohibiting the sale of intoxicating liquors*, and assisting, in all proper ways, the public authorities in the prevention, discovery and punishment of violations of such laws.

Merchants' Exchange. (Leaf Tobacco.)

(G. C. § 10144 et seq.)

THIRD. Said corporation is formed for the purpose of collecting and recording local and general statistical information relating to the tobacco trade; establishing uniformity in its usages and customs; adjusting and settling, in a proper and equitable manner, controversies, disputes and differences as to contracts, accounts, customs and usages that may arise; the appointment of inspectors and weighers of leaf tobacco; guarding, protecting and promoting the general interests of the tobacco trade and of its members, and the doing of all things necessary or incident thereto.

Musical Club.

THIRD. Said corporation is formed for the purpose of the study and culture of vocal and instrumental music, and the promotion of social intercourse of its members and all things incident thereto.

Musical Club. Another Form.

THIRD. Said corporation is formed for the purpose of the vocal study, the rehearsal and the private and public rendition of concerted music for male and mixed voices, also the employment and presentation of musical artists.

Mutual Benefit Association of Employees.

THIRD. Said corporation is formed for the purpose of mutual protection and relief of the employees of the Company, who become members, and their families and relatives, exclusively; receiving and raising funds by donation and by assessment on its members; giving financial aid to members when disabled by sickness or accident, and payment of benefits, on the death of members.

Benevolent Mutual Aid Association.

THIRD. Said corporation is formed for the purpose of assisting the members of said corporation in sickness or distress, by voluntary contributions of its members, and is organized strictly for charitable and benevolent purposes.

Political Club.

THIRD. Said corporation is formed for the purpose of organizing a political and social club; to promote the study of political institutions and the science of government and to provide a place where its members may enjoy the society of each other and their friends.

Public Library.

THIRD. Said corporation is formed for the purpose of owning, maintaining and conducting a public library in the village of, Ohio; to lease, purchase and maintain suitable real estate and buildings for said purpose; to receive, hold and disburse donations, bequests and other funds for the purposes of said corporation and to do all things necessary and incident thereto.

Retail Merchants' Association.

THIRD. Said corporation is formed for the purpose of fostering and extending the retail trade of said city; encouraging wise and needful legislation, and opposing the enactment of laws and ordinances prejudicial to the mercantile interests of said city; giving and exchanging information among its members; promoting the social intercourse among persons engaged in the retail trade and the doing of all things necessary or incident thereto.

Salvage.

(G. C. §§ 9873, 9875.)

SECOND. Said corporation is to be located at, in County, Ohio, and shall prosecute its business within the (*municipality or other subdivision*) of, Ohio.

THIRD. Said corporation is formed for the purpose of discovering and preventing fires and of saving property and life from conflagration and exercising all of the powers which may be exercised by such corporations under the laws of Ohio.

Social and Improvement Club.

THIRD. Said corporation is formed for the purpose of promoting friendly social intercourse and to encourage educa-

tion and investigation in matters pertaining to the *plumbing trade*; of providing social entertainment and amusement for its members and their families and friends and of providing a meeting place for its members.

Social Settlement Association.

THIRD. Said corporation is formed for the purpose of providing a place and facilities for social, physical, civic, educational and moral instruction and improvement, and for such work as is now, or may be hereafter, commonly associated with "settlement work;" and for such purpose of acquiring, by purchase, lease, or otherwise, necessary and convenient real estate, buildings and rooms; the holding, improving and disposing of the same; the receiving of funds by bequest or gift, disbursing the same and the doing of all things necessary or incident thereto.

Yacht Club.

THIRD. Said corporation is formed for the purpose of the encouragement of yachting, the designing and building of yachts, and the promotion of social relations of those interested in yachting.

Young Men's Christian Association.

(Must be approved by State Association: G. C. §§ 10031, 10024.)

THIRD. Said corporation is formed for the purpose of developing the Christian character and usefulness of its members and of promoting the spiritual, mental, social and physical welfare of young men.

No. 28.

Agricultural Society. Articles of Incorporation.

(G. C. §§ 9880, 9885.)

The undersigned, being residents of county (or of a district embracing the counties of and), Ohio, hereby organize themselves into a society for the improvement of agriculture within said county (or district), subject to the rules of the State Board of Agriculture, and in accordance with the laws of Ohio governing corporations so organized for said purpose.

The name of said society shall be Said society shall be located at

In witness whereof, we hereunto set our hands this day of, 19...

NOTE.—Thirty or more incorporators are necessary.

No. 29.

Township Agricultural Society. Articles of Incorporation.

(G. C. § 9911.)

The undersigned residents of Township, County, Ohio, hereby form a society for the promotion of agriculture in such township and, desiring to become incorporated under the laws of Ohio and the following agreement, do hereby certify:

- 1. The name of said society shall be
 - 2. The object of its formation is not for profit, but for the promotion of agriculture in said township.
 - 3. Said society shall be located in said township of
- In witness whereof, we hereunto set our hands and seals this day of, 19...

..... (Seal)
..... (Seal)
..... (Seal)
..... (Seal)
..... (Seal)

(Certificate of acknowledgment.)

NOTE.—The acknowledgment should be made before a justice of the peace.

No. 30.

Charitable Trust; Corporation to Administer.

(G. C. § 10086.)

These articles of incorporation of The

Witnesseth: That, executor of the last will and testament of, deceased, and, and, citizens and residents of county, Ohio, desiring to form

a corporation for the administration of a certain trust provided by the last will and testament of said decedent, hereby certify:

1. That the following is a copy of the last will and testament of said, deceased, which has been duly proven and recorded in volume, page, of the probate records of, county, Ohio.

2. The name of said corporation shall be (*name of testator should be included, unless the will otherwise provides*).

3. Said corporation shall be located at, in county, Ohio.

In witness whereof, we have hereunto set our hands this day of, A. D. 19...

.....,
.....,
.....,

(Add certificate of acknowledgment.)

No. 31.

Endowment Fund Corporation.

Board of Trustees. Articles of.

(G. C. § 10011.)

It is hereby certified by the undersigned that at a regular session of the Conference of the Conference, of the Church, held at, in county, Ohio, the following named persons, to wit:, members of said denomination, one or more of whom are resident freeholders in this state, were duly elected a board of trustees for, the Conference of the Church, and who are to serve as such until successors shall be elected and who with their said successors in office shall exist and become and be an incorporated board of trustees and a corporation not for profit for the purpose of acquiring in trust and of so controlling and disposing of all such real and personal property as from time to time the said society may deem it desirable to have acquired, controlled and disposed of for church and benevolent purposes. The said board of trustees, however, shall hold all such property in trust for said society and church at all times

and acquire, control and dispose of the same under the supervision and control of said church and subject to its directions and order.

That the uses to which the said property so to be acquired and holden shall be applied are all such uses as it may be and is lawful for the said church and society to apply the same as a religious organization and body under the laws of Ohio.

In witness whereof, we have hereunto set our hands this day of, A. D. 19...

....., and officer presiding over the said Conference.

....., secretary, of the said Conference.

The State of Ohio, County, ss.

On this day of, A. D. 19..., personally appeared before me, a notary public in and for said county and state, and, who acknowledged that they did make and sign the foregoing statement as and for the uses and purposes therein set forth, and that they are still satisfied therewith.

(Seal)

.....,
Notary Public in and for, Ohio.

No. 32.

Fraternal Benefit Society.

(G. C. § 9473.)

Articles of Association
of
The A. B. Society.

The undersigned persons, all of whom are citizens of the United States and a majority of whom are citizens of the state of Ohio, desiring to form a fraternal benefit society as defined by the Act of the General Assembly of the State of Ohio entitled "An act for the regulation and control of fraternal benefit societies, passed May 31, 1911, hereby certify:

1st. The proposed name of the society is *The A. B. Society.*

2d. The purpose for which the society is formed and the mode in which its corporate powers are to be exercised are as follows:

Said corporation is formed not for profit, but for the purpose of carrying on a fraternal benefit society for the mutual benefit of its members and their beneficiaries, having a lodge system with ritualistic form of work and representative form of government, and providing for the payment of benefits in accordance with section 9466 of the General Code of Ohio.

The corporate powers of said corporation are to be exercised according to the provisions of Chapter 4, Subdivision 1, of Division III, Title IX, Part second of the General Code of Ohio and of the constitution and laws, rules and regulations of said corporation.

Said corporation shall have no capital stock.

3. The names, residences and official titles of all the officers, trustees, directors and other persons who are to have and exercise general control and management of the affairs and funds of the society for the first year or until the ensuing election at which all such officers shall be elected by the supreme legislative or governing body are as follows:

4th. The place of the principal office of the society shall be, in the state of Ohio.

In testimony whereof, we have hereunto set our hands this day of, A. D. 19...

(Signatures and addresses of seven or more incorporators.)

The State of Ohio,, County, ss.

Personally appeared before me, the undersigned authority within and for said county, on this day of, A. D. 19.., the above named, all of whom I hereby certify are citizens of the United States, and of whom I hereby certify the following named are citizens of the state of Ohio, and each of them severally acknowledged the signing of the foregoing articles of association to be his free act and deed for the uses and purposes therein mentioned.

Witness my hand and official seal on the day and year last aforesaid.

.....,
.....

(Under the above heading an entry substantially as follows should be made:)

On this day of, 19...,,,, and, the persons named below as subscribers of articles of incorporation, desiring for themselves, their associates and successors, to become a body corporate, in accordance with the general corporation laws of the state of Ohio, under the name and style of (*name of corporation*), and with all the corporate rights, powers, privileges and liabilities enjoyed under or imposed by such laws, did subscribe, acknowledge and afterward, to wit: on the day of, 19..., file in the office of the secretary of state at Columbus, in the state of Ohio, articles of incorporation, as follows, to wit:

(Copy in full the articles of incorporation, with acknowledgment and certificate of the secretary of state.)

(Persons may become members by subscribing their names to a copy of the articles (G. C. § 8653), which may be done in the following form:)

We, the undersigned, having the qualifications prescribed by its regulations and desiring to become members of thereof, do hereby subscribe our names to the foregoing copy of the articles of incorporation of (*name of corporation*).

(Leave sufficient space for the signatures of all persons who are likely to become members.)

(b)

MINUTES OF MEETING OF INCORPORATORS FOR ELECTION OF FIRST TRUSTEES.

(G. C. § 8655.)

....., Ohio,, 19...

A meeting of the subscribers to the articles of incorporation of the (*name of corporation*) was held at, in, Ohio, on the day of, 19... Present: Messrs. Mr. was chosen chairman and Mr. secretary of said meeting.

An election for trustees, to hold their offices until the next annual meeting, or until their successors are elected and qualified,

was then held, resulting in the choice of the following:
(five or more trustees are required).

There being no further business, the meeting adjourned on motion.

Attest:

.....,

Secretary.

.....,

Chairman.

(c)

OATH OF TRUSTEES.

State of Ohio, County, ss.

We, the undersigned, being duly sworn, say that we will faithfully discharge our duties as trustees of *(name of corporation).*

.....,

.....,

.....,

.....,

.....

Subscribed and sworn to before me this day of,
 19...

.....,

Notary Public.

(d)

REGULATIONS OF CORPORATION NOT FOR PROFIT.

ARTICLE I. MEETINGS OF MEMBERS.

(a). *Annual meeting.* The annual meeting of the members of this association shall be held at on the first Monday in January of each year at o'clock .. M.

(b). *Periodical meetings.* — (monthly, quarterly, etc.), meetings shall be held at on the at o'clock .. M.

(c). *Special meetings* of the members may be called by the trustees, or by any two members, by giving notice in writing to each member by mail at his last known address, or by publication in some newspaper published in, Ohio, for days. At all meetings shall constitute a quorum.

ARTICLE II. TRUSTEES.

The number of trustees shall be The election of trustees shall be held at the annual meeting of members, or at a special meeting called for that purpose.

Trustees shall hold office for one year or until their successors are elected and qualified. Trustees chosen at the first election shall hold office until the time fixed for the next annual meeting, or until their successors are elected and qualified.

At all meetings shall constitute a quorum.

ARTICLE III. OFFICERS.

The officers of the association shall be a president, vice-president, secretary and treasurer. Said officers shall be chosen by the trustees by a majority ballot, and shall hold office for one year or until their successors are elected and qualified, except that officers elected at the first meeting of the trustees shall hold office until the next annual meeting of the trustees, or until their successors are elected and qualified.

NOTE.—The president must be chosen by the trustees; but the regulations may provide for the election of other officers by the members. G. C. § 8664.

ARTICLE IV. DUTIES OF OFFICERS.

(a). *President.* The president shall preside at all meetings of the members and trustees, sign the records thereof, and perform generally all the duties usually performed by presidents of like associations, and such further and other duties as may be from time to time required of him by the members or trustees.

(b). *Vice-president.* The vice-president shall perform all the duties of the president in case of the absence or disability of the latter. In case both president and vice-president are absent or unable to perform their duties, the members or trustees, as the case may be, may appoint a president pro tempore.

(c). *Secretary.* The secretary shall keep minutes of all the proceedings of the members and trustees of this association and make a proper record of the same, which shall be attested by him, and generally perform such duties as may be required of him by the members or trustees.

(d). *Treasurer.* The treasurer shall receive and have in charge all moneys belonging to the association and shall disburse the same as may be ordered by the board of trustees. He shall keep an accurate account of the moneys received and disbursed by him, and shall generally perform such duties as may be required of him by the members and trustees. On the expiration of his term of office he shall turn over to his successor, or to the board of trustees, all money and property of the association in his hands.

ARTICLE V. QUALIFICATIONS OF MEMBERS.

Any person may become a member of this association upon election by three-fourths of the members present at any regular meeting, and by signing the membership roll and agreeing to be bound by the regulations and by-laws of the association, and by payment of the initiation fee specified in these regulations.

ARTICLE VI. INITIATION FEE AND DUES.

Each member shall pay an initiation fee of dollars within days after election, and in case of failure so to do, said election shall be void. The annual dues of the members shall be dollars, payable semiannually. Failure to pay dues within thirty days after the same are due and payable shall be a cause for expulsion.

ARTICLE VII. SUSPENSION AND EXPULSION OF MEMBERS.

Any member may be suspended or expelled by the board of trustees for failure to pay dues, or for conduct unbecoming a member. Before any member is suspended or expelled he shall be notified in writing by mail at his last known address of the charges against him, and of the time and place of the trustees' meeting at which the same are to be considered, at least five days before said meeting; and shall be given an opportunity to defend, and shall have the right to appeal from the decision of the board of trustees to the members, and, at his request, the secretary shall call a special meeting of the members to consider said appeal.

ARTICLE VIII. ORDER OF BUSINESS.

Unless changed by a majority vote, at all members' meetings, the order of business shall be as follows:

- (1) Reading of the minutes.
- (2) Reading of reports and statements.
- (3) Unfinished business.
- (4) Election of trustees.
- (5) New or miscellaneous business.

ARTICLE IX. AMENDMENTS.

These regulations may be amended or repealed by the written assent thereto of the members of this association, or by a majority vote of the members at a meeting called for that purpose.

(e)

WRITTEN ASSENT TO ADOPTION OF REGULATIONS.

(G. C. § 8703.)

We, the undersigned, being more than two-thirds of the members of (*name of corporation*), do hereby assent in writing to the adoption of the foregoing code of regulations for the government of this association.

....., Ohio,, 19...

MISCELLANEOUS FORMS.

RELATING TO ORGANIZATION AND MANAGEMENT.

No. 35.

Resolution of Directors for Call or Assessment on Stock Subscriptions.

(G. C. § 8632.)

Upon motion of Mr., duly seconded, the following resolution was unanimously adopted:

"Resolved, that an assessment of percent on subscriptions to the capital stock of this Company be, and the same hereby is, called for and required to be paid to, the treasurer of this Company, at No. Street, Ohio, on or before the day of, 19..."

No. 36.

Notice of Call or Assessment on Stock Subscriptions.

The Company.

....., Ohio,, 19...

By resolution of the board of directors an assessment of percent on subscriptions to the capital stock of this Company is called for and required to be paid to, treasurer, at No. Street,, Ohio, on or before the day of, 19...

.....,
Secretary.

NOTE.—The manner of giving notice of calls is not provided by statute. Notice by registered mail is probably sufficient.

No. 37.

Notice of Sale of Stock for Nonpayment of Call.

(G. C. § 8675.)

Public notice is hereby given that shares of the capital stock of The Company will be sold at public auction by the directors of said Company at the office of said Company, No. Street,, Ohio, on the day of, 19..., at 10 o'clock A. M.

Said sale will be made pursuant to the statute in such case made and provided because of the nonpayment by, subscriber for said stock, of a call for the payment of an installment on the same for sixty days after said installment was required to be paid, due notice thereof having been given.

The Company.

By,
Secretary.

....., Ohio,, 19...

NOTE.—Publish as required by G. C. § 8675.

No. 38.

Receipt for Installment Payment on Stock.

Stub.	Receipt.
No.	No. \$..... Shares
Name	The Company,
Amount \$.....	..... Building,
Installment No.....	....., Ohio.
Number shares	Received of the sum of
Date	dollars, being installment payment No. ...
	of percent on his subscription for
	..... shares of the capital stock of The
	..... Company.
,
	Treasurer.
	....., 19...

No. 39.

Transferable Receipt for Installment Payment on Stock.

No. \$..... Shares.

Transferable Receipt.

The Company.

..... Building, Ohio.

Received of the sum of dollars on account of his subscription for shares of the *preferred* stock of The Company at the par value of *one hundred* dollars per share.

Upon payment of the balance of said subscription, in accordance with its terms, and upon surrender of this receipt, certificates for said shares of stock will be issued to the order of said subscriber (and for shares of no-par-value common stock, as a bonus).

....., 19...

....., Treasurer.

ASSIGNMENT OF SUBSCRIPTION, ENDORSED ON FOREGOING RECEIPT.

For value received, I hereby sell, assign and transfer to my subscription for shares of the *preferred* stock of The

..... Company, together with all payments made thereon, as shown by the within receipt, and I hereby direct and authorize said The Company, upon full payment of said subscription, to issue certificates for said stock to the order of said assignee.

....., 19... ..

In presence of

No. 40.

Certificate of Common Stock. (Par Value.)

(G. C. § 8672.)

Stub.	Certificate.
	Incorporated under the laws of the state of Ohio.
	No. Number of shares
Certificate No.	Capital stock, \$300,000.
For shares.	Common stock, \$200,000.
Issued to	Preferred stock, \$100,000.
.....	The Company.
Dated, 19...	This certifies that is the holder
Transferred from ..	of shares of <i>one hundred</i> dollars
.....	each, full paid and non-assessable, of the
Dated, 19...	common stock of The Company.
No. original certifi-	transferable only on the books of the cor-
cate.....	poration, in person or by attorney, on sur-
No. shares transfer-	render of this certificate, properly en-
red.....	dorsed.
Received certificate	
No. for	Witness the seal of the
shares this	(Corporate Seal) corporation and the sig-
....., 19....	natures of its duly au-
.....	thorized officers this ...
	day of, 19...
,
	Secretary. President.
	Shares, \$100 each.

ASSIGNMENT TO BE ENDORSED ON CERTIFICATE.

For value received, hereby sell, transfer and assign to (*all, or specify number of shares transferred*) of the shares of stock evidenced by the within certificate and hereby irrevocably constitute and appoint, attorney, with full power of substitution, to transfer the same on the books of the corporation.

Dated, 19... ..

In presence of

.....

NOTE.—The person to whom a certificate is issued, or his duly authorized agent or attorney, should sign the receipt on the corresponding stub.

No. 41.

Certificate of Common Stock. (No-Par-Value.)

(G. C. § 8728-1.)

Stub.	<p>No. Number of Shares</p> <p>The Company.</p> <p>Incorporated under the laws of the State of Ohio.</p> <p>Common stock, shares without nominal or par value.</p> <p>Preferred stock, \$.....</p> <p>This certifies that is the holder of shares without nominal or par value of the common stock of The Company, full paid and non-assessable, transferable only on the books of the corporation, in person or by attorney, on surrender of this certificate, properly endorsed.</p> <p>Witness the seal of the corporation and the signatures of its duly authorized officers this</p> <p>(Corporate Seal) day of</p> <p>.....,</p> <p>....., Secretary.</p> <p>....., President.</p>

No. 42.

Certificate of Preferred Stock.

(G. C. § 8667 et seq.)

Stub as in Form
No. 40, inserting
word "Preferred"
on top line.

Incorporated under the laws of the state
of Ohio.

No. Number of shares
Common stock, \$.... (or shares
without nominal or par value).
Preferred stock, \$.....

The Company.

This certifies that is the holder
of shares of one hundred dollars
each, fully paid, of the preferred stock of
The Company, transferable only
on the books of the corporation, in person
or by attorney, on the surrender of this
certificate properly endorsed. The holder
of this certificate is entitled to cumulative
(or *noncumulative*) dividends in each year
at the rate of *six* percent per annum, pay-
able out of the surplus profits of said Com-
pany, in preference to any dividend on
the common stock. (*Insert here the other
preferred stock clauses which appear in
the articles of incorporation.*)

Witness the seal of the corporation and
the signatures of its duly authorized offi-
cers at; Ohio, this day of
....., 19...

.....,
Secretary. President.

Shares, \$100 each.
(Corporate Seal)

No. 43.**Certificate of Stock Reserving Lien to Secure Indebtedness to Corporation.**

Stub as in preceding forms.

Incorporated under the laws of the state of Ohio.

No. shares.

The Company.

Capital stock \$.... Shares \$.... each.

This certifies that is the owner of shares of dollars each, fully paid, of the capital stock of The Company, transferable only on the books of the corporation, in person or by attorney, on surrender of this certificate and the payment of all indebtedness of the above owner to said The Company. The Company has a first lien on the shares of stock represented by this certificate to secure all indebtedness of the above owner to it.

In witness whereof, the duly authorized officers of this Company have hereunto subscribed
(Seal) their names and caused the corporate seal to be hereto affixed at, Ohio, this day of, 19...

....., President.

....., Secretary.

NOTE.—See G. C. §§ 8673-15, 710-114. *Stafford v. Produce Exchange Banking Co.*, 61 O. S. 160.

No. 44.**Corporation Calendar.**

NOTE.—During the course of a year many things require attention by the officers of a corporation on certain dates. The following specimen calendar, which is printed merely to suggest the general nature of the entries, is prepared for the year 1923 for a corporation of which the

annual meeting of stockholders is held on the first Monday in January, with monthly meetings of directors on the first Tuesday of each month. If any regular meeting day is a legal holiday, the meeting is held on the day following. Notice of stockholders' meetings of this corporation are required to be mailed ten days, and of directors' meetings at least three days, before the day of the meeting.

Calendar of The Company.
1923.

January

- 1 Personal property of corporations taxable as of this date.
- 2 Stockholders' annual meeting 10 A. M.
(If directors elected at this meeting are all present hold regular monthly meeting of directors immediately after adjournment of stockholders' meeting. All directors should sign a waiver of notice of this meeting.)
- 31 Send out notices of the directors' meeting of February 6.

February

- 6 Directors' meeting 2 P. M.
- 16 Federal income tax return due on or before March 15.
Send out notices of the directors' meeting of March 6.

March

- 6 Directors' meeting 2 P. M.
- 13 Send income tax return to Collector of Internal Revenue with one-fourth of tax.
- 29 Send out notices for directors' meeting of April 3.

April

- 3 Directors' meeting 2 P. M.
- 10 Property tax return to county auditor due by May 1.
- 27 Send property tax return to county auditor.
Send out notices for directors' meeting of May 1.

May

- 1 Directors' meeting 2 P. M.
- 15 Annual franchise report to state tax commission due May 31.
- 28 Mail franchise report to state tax commission.

June

- 1 Send out notices for directors' meeting of June 5.
- 5 Directors' meeting 2 P. M.
Get tax bills from county treasurer.
- 15 Second installment of federal income tax due.
- 20 Pay property tax to county treasurer (unless time is extended by the county commissioners).
- 29 Send out notices for directors' meeting of July 3.

July

- 3 Directors' meeting 2 P. M.
- 10 Federal capital stock tax return due July 31.
- 27 Send capital stock tax return to Collector of Internal Revenue.

August

- 2 Send out notices of the directors' meeting of August 7.
- 7 Directors' meeting 2 P. M.
- 30 Send out notices for the directors' meeting of September 4.

September

- 4 Directors' meeting 2 P. M.
- 15 Third instalment of federal income tax due.
- 27 Send out notices for directors' meeting of October 2.
Pay franchise tax to treasurer of state.

October

- 2 Directors' meeting 2 P. M.

November

- 1 Send out notices for the directors' meeting of November 6.
- 6 Directors' meeting 2 P. M.
- 28 Send out notices for the directors' meeting of December 4.

December

- 4 Directors' meeting 2 P. M.
Get tax bills from county treasurer.
- 15 Last instalment of federal income tax due.
- 20 Pay property taxes to county treasurer (unless time
is extended by county commissioners).
- 26 Send out notices for stockholders' annual meeting
January 7, 1924, at 10 O. M.

STOCK BOOKS.

NOTE.—By statute every corporation is required to keep a book in which it is the duty of the secretary to register all subscriptions and transfers of stock. G. C. § 8673.

The form of the book is not prescribed. *Harpold v. Stobart*, 46 O. S. 397 (400).

Many corporations keep no stock book, but attempt to keep on the stubs of the stock certificate book a record of the stock issued and transferred. This is not a compliance with the statute; although where the certificates representing transferred stock are cancelled and pasted on the stubs from which they were originally detached, and proper entries are made on such stubs showing the transfers and issue of new certificates, and where the outstanding certificates are properly receipted for on the stub, the certificate book undoubtedly contains a complete record. See, *Herrick v. Wardwell*, 58 O. S. 294 (311-312).

The better practice is to keep two books: (1) a stock transfer book and (2) a stock ledger. The following forms of stock books are suggested:

No. 45.
Stock Transfer Book.

Certificates Canceled				Certificates Issued					
Date	By whom transferred	Ledger folio	Number of certificate	Number of shares transferred	To whom transferred	Ledger folio	Number of certificate	Number of shares	Par value of shares
<p>We, the undersigned, acting by the undersigned attorney, do hereby sell, transfer and assign to the transferees named below, the number of shares of stock of The Company set opposite our respective names, all as set forth below.</p>									
1922									Signature of Attorney
Jan. 4	Original issue	..	..	..	William Brown	1	1	10	\$1,000
" 4	"	..	..	..	Thomas White	2	2	10	1,000
" 4	"	..	..	..	Franklin Green	3	3	10	1,000
" 4	"	..	..	..	George Black	4	4	20	2,000
" 4	"	..	..	..	Edward Johnson	5	5	50	5,000
Feb. 1	William Brown	1	1	5	{ Peter Smith	6	6	5	500
					{ William Brown (reissue)	1	7	5	500
Mar. 1	Thomas White	2	2	10	Joseph Miller	7	8	10	1,000
Apr. 1	Franklin Green	3	3	10	William Brown	1	9	10	1,000

No. 46.

Stock Ledger.

WILLIAM BROWN, CLEVELAND, OHIO.

Date	From or to whom transferred	Transfer book folio	Certificate numbers		Number of shares		Par value of shares		Balance	
			Can-celed	Issued	Re-ceived	Dis-posed of	Re-ceived	Dis-posed of	No. of shares	Par value
1922										
Jan. 4	Original issue	1	..	1	10	..	\$1,000	.....	10	\$1,000
Feb. 1	To Peter Smith	1	1	6	..	5	.....	\$500	..	.....
	To William Brown (reissue)	1	..	7	..	..	.....	.....	5	500
Apr. 1	From Franklin Green	1	3	9	10	..	1,000	.....	15	1,500

NOTE.—*Stock transfer book.* The hypothetical entries in the above form of stock transfer book represent the following transactions:

(1) An issue to the original subscribers of certificates representing 100 shares of stock, as follows:

To William Brown	10 shares
“ Thomas White	10 “
“ Franklin Green	10 “
“ George Black	20 “
“ Edward Johnson	50 “

(2) A transfer of five shares by William Brown to Peter Smith; the original certificate issued to William Brown being surrendered and cancelled and two certificates being issued in its stead; one to Peter Smith for five shares and one to William Brown (a reissue) for five shares.

(3) A transfer of ten shares by Thomas White to Joseph Miller.

(4) A transfer of ten shares by Franklin Green to William Brown.

Stock ledger. In the above form only one ledger account is given which will illustrate the character of entries required. When a certificate is issued to a new stockholder a new ledger account should be opened in his name. When all stock of a stockholder is transferred to other persons his account should be closed.

These forms may be changed to meet the individual taste of any bookkeeper; but whatever be the forms adopted, the facts set out in the last two forms should appear in some shape or other in the forms adopted.

No. 47.

Proxy. One Specified Meeting.

Know all men by these presents, that I, the undersigned stockholder in The Company, do hereby appoint my true and lawful attorney, substitute and proxy (with power of substitution) for me and in my name to vote at the annual meeting of stockholders of said Company, to be held on, the day of, 19.., or at any adjournment of said meeting, with all powers I should have if personally present, hereby revoking all proxies heretofore given.

Dated at, on this day of, 19...

Witness,

.....

No. 48.

Proxy. All Meetings Within a Specified Time.

Know all men by these presents, that I, of, hereby appoint to be my substitute and proxy, for me, and in my

name, place and stead, to vote at any election held by the stockholders of The Company for directors within months from the date hereof, and to vote on all matters considered at any stockholders' meeting, annual or special, held during said period, as fully as I might do if personally present.

In witness whereof, I have hereunto set my hand and seal at, this day of, 19...

Witness,

..... (Seal)

NOTE.—A seal is not required in Ohio but is required in some States. It is prudent to execute proxies under seal, when intended for use in another State, or when the corporation is organized under the laws of another State.

No. 49.

Proxy. General.

Know all men by these presents, that I,, do hereby constitute and appoint my attorney and substitute (with power of substitution) for me and in my name, place and stead, to vote as my proxy at any annual or special meeting of the stockholders of The Company for the election of directors, and upon such other questions as may come before any such meeting, according to the number of votes I should be entitled to cast if then personally present.

In witness whereof, I have hereunto set my hand and seal this day of, A. D. 19...

..... (L. S.)

Sealed and delivered in presence of

No. 50.

Revocation of Proxy.

Know all men by these presents, that, whereas, in and by my proxy dated, 19.., I, A. B., did constitute and appoint C. D. my attorney, substitute and proxy, for me and in my name, place and stead to vote at (*insert reference to meeting or meetings, and other authority, of any, given to proxy*) as will more fully appear by reference to said proxy.

Now I, the said A. B., do hereby revoke, countermand, annul and make void the said proxy above mentioned, and all power and authority thereby given, or intended to be given, to the said C. D.

Witness my hand this day of, 19...
In presence of
.....

A. B.

ANNUAL MEETINGS OF STOCKHOLDERS.

No. 51.

Notice of Annual Meeting.

The Company.
No. Building.

....., Ohio,19...

The annual meeting of the stockholders of The Company will be held in the office of the Company, No. Building,, Ohio, on, the day of, 19.., at o'clock .. M. for the election of directors for the ensuing year and for the transaction of such other business as may come before said meeting.

NOTE.—If the regulations provide that only those persons may vote who are stockholders of record a certain number of days before the annual meeting, add the following:

At said meeting only such persons shall be entitled to vote who appear as stockholders on the books of the Company on the day of, 19...

.....,

Secretary.

No. 52.

Minutes of Annual Meeting.

NOTE.—If the regulations of the corporation provide for notice of the annual meeting, it is good practice to insert a copy of the notice above the minutes of the meeting, with the following certificate appended:

I hereby certify that a true copy of the foregoing notice was, on the day of, 19.., by me mailed, postage pre-

paid, to each and every stockholder registered on the books of this Company.

.....,
Secretary.

Annual Stockholders' Meeting.

....., 19...

The stockholders of The Company met in annual meeting at the office of the Company in, Ohio, at o'clock .. M.,, 19...

The meeting was called to order by, president of the Company, who presided over the meeting., secretary of the Company, acted as secretary of the meeting.

The president directed the secretary to call the roll of the stockholders, and requested all persons holding proxies to deposit the same with the secretary, which was accordingly done. Thereupon the secretary announced that out of 500 shares of outstanding stock entitled to vote at the meeting, 450 shares were represented at the meeting; 300 shares by stockholders in person, and 150 shares by proxy.

The minutes of the preceding annual meeting of stockholders were read and approved. The minutes of special stockholders' meetings held, 19.., and, 19.., were read and approved.

The annual report of the president was then read by him, and, on motion duly made and seconded and unanimously carried, was ordered received and placed on file.

The annual report of the treasurer was then presented and, upon motion duly made and seconded and unanimously carried, was ordered received and placed on file.

There being no unfinished business, the president thereupon declared nominations of persons to serve as directors for the ensuing year to be in order.

The following persons were placed in nomination: Messrs.

(X) On motion duly made, seconded and carried, Messrs. and were appointed inspectors of election. Thereupon the secretary delivered to the inspectors of election the proxies on file and a list showing the stockholders entitled to vote at the meeting, and the number of shares owned by each.

Thereupon a ballot was had, and the inspectors of election presented a certificate of the result thereof, showing that Messrs. had received a majority of the votes cast.

NOTE.—If there is no contest, only the number of directors to be elected having been nominated, omit the foregoing paragraph beginning at (X) and insert the following:

“There being no other nominations, upon motion duly made, seconded and unanimously carried, the secretary was instructed to cast the ballot of all stockholders present for the candidates for directors so placed in nomination. The secretary accordingly cast said ballot.”

Whereupon said persons were declared by the president to be duly elected as directors for the ensuing year and until their successors are elected and qualified.

There being no further business, the meeting was duly adjourned on motion.

Attest:
Secretary. President.

No. 53.

Ballot.

The Company.
Annual meeting, 19...

The undersigned hereby votes the number of shares set opposite his signature below for the following persons to serve as directors for the ensuing year.

.....,
.....,

Name		Number of Shares.
	in person	
.....	or	.....
	proxy for	
.....		

No. 54.

Inspectors' Certificate of Election.

See G. C. § 8644.

We, the undersigned, duly appointed inspectors of election to conduct the election of directors of The Company, held, 19..., do hereby certify that we duly conducted said election by ballot, and received and counted the votes cast, with the result that the following named directors were elected by the majority vote set opposite their respective names:

Names.	Votes Received.	Majority.
.....
.....
.....
.....
.....

In witness whereof, we hereunto set our hands at, Ohio, this day of, 19...
.....
.....

SPECIAL MEETINGS OF STOCKHOLDERS.

NOTE.—The following forms are not applicable in all respects where a special meeting of the stockholders is held to act upon matters which are specially provided for by statute, such as a sale of the entire assets of the corporation, amendment of the articles of incorporation, increase of number of directors, increase of capital stock, amendment of the regulations, etc. In such cases the special statutory provisions, if any, for calling and giving notice of the meeting should be followed. Forms therefor, including motions and resolutions are included under the special titles.

No. 55.

Waiver of Call and Notice of Special Stockholders' Meeting.

....., Ohio,, 19...
We, the undersigned, being all the stockholders of The Company, of, Ohio, do hereby consent that a special

meeting of the stockholders of said corporation may be held at the office of the Company, No. Street,, Ohio, on the day of, 19.., at o'clock .. M. for the purpose of considering and acting upon (state object of meeting, as "a proposed increase in the number of directors of this company from five, the present number, to ten.")

We hereby waive any and all requirements of law, or of the regulations of said Company, as to the making of a call for, and the giving of notice of said meeting, and we hereby agree to the transaction at said meeting of any and all business within the powers of said Company.

Stockholders.	Proxies.	Shares.
.....
.....
.....
.....
.....

No. 56.

Call for Special Meeting of Stockholders.

....., Ohio,, 19...

To

Secretary of The Company.

We, the undersigned, (directors, or stockholders) of The Company, do hereby call and order a special meeting of the stockholders of said Company to be held in the office of the Company, No. Street,, Ohio, on the day of, 19.., at o'clock .. M. for the purpose of considering and acting upon (state object of meeting) and for the transaction of any and all business necessary or incident thereto, and we do hereby in-

struct you to give notice of such meeting to the stockholders pursuant to law and to the regulations of this Company.

.....,
.....,
.....

NOTE.—The foregoing call should be signed by the number of stockholders authorized by the regulations, or by all the directors. If not signed by all the directors, a director's meeting should be held and a resolution similar to the following should be adopted:

No. 57.

Call for Special Stockholders' Meeting by Resolution of Directors.

“Resolved, that a special meeting of the stockholders of this Company be and is hereby called and ordered, to be held in the office of the Company, No. Street,, Ohio, on the day of, 19.., at o'clock .. M. for the purpose of considering and acting upon (*state object of meeting*)..... and for the transaction of any and all business necessary or incident thereto; and the secretary is hereby instructed to give notice thereof to the stockholders pursuant to law and to the regulations of this Company.”

No. 58.

Notice of Special Meeting of Stockholders.

The Company.
Notice of Special Stockholders' Meeting.

....., Ohio,, 19...

A meeting of the stockholders of The Company will be held at the office of the Company, No. Street,, Ohio, on the day of, 19.., at o'clock .. M. for the purpose of considering and acting upon (*state object of meeting*) and the transaction of any and all business necessary or incident thereto.

.....,
Secretary.

No. 59.

Minutes of Special Stockholders' Meeting.

NOTE.—The call for the meeting should be copied or pasted into the minute book above the minutes of the meeting; followed by a copy of the notice of the meeting, with the certificate of the secretary thereto, for which see *Minutes of Annual Meeting*.

If notice is waived by all the stockholders, the waiver should be inserted in place of the call and notice.

Special Stockholders' Meeting.

..... 19...

Pursuant to the foregoing call and notice (*or waiver*) the stockholders of The Company met in the office of the company in, Ohio, at o'clock M.
..... 19...

The meeting was called to order by Mr., president of the company, who presided over the meeting. Mr., secretary of the company, acted as secretary of the meeting.

The president directed the secretary to call the roll of the stockholders and requested all persons holding proxies to deposit the same with the secretary, which was accordingly done. Thereupon the secretary announced that out of shares entitled to vote shares were represented at the meeting; shares by stockholders in person and shares by proxies.

The call for the meeting was then read by the secretary.

(The business transacted at the meeting should here be recorded. Only the business specified in the call and notice can be transacted at a special meeting of the stockholders, unless by consent of all the stockholders.)

The following form may be used in entering a resolution on the minutes:

Mr. presented, read and moved the adoption of the following resolution:

(*Copy resolution in full as*)

RESOLUTION FOR INCREASE IN NUMBER OF DIRECTORS.

"Resolved, that the number of directors of this Company be increased from *five*, the present number, to *ten*; that the five new directors shall be elected at this meeting and shall hold office until the next annual meeting."

The motion was seconded by Mr., and was duly carried (*by a unanimous vote, or, shares being cast in favor of said resolution and shares being cast against its adoption.*)

Whereupon the president declared said resolution duly adopted.

(For election of directors, see *minutes of annual meeting* above).

A motion may be entered on the minutes in the following form:

"Upon motion duly made and seconded and (unanimously) carried (*enter the substance of the motion, as, the president was authorized to appoint a committee composed of three stockholders, to examine the books and records of the company and to report to the stockholders at a subsequent meeting to be held, 19...., at o'clock ..M.*")

There being no further business the meeting was duly adjourned on motion.

Attest:

.....
Secretary.

.....
President.

AMENDMENT OF REGULATIONS.

NOTE.—The provisions of the regulations as to the manner in which amendments may be made should be carefully followed.

No. 60.

Assent of Stockholders to Amendment.

....., Ohio,, 19...

We, the undersigned, being the owners of the number of shares of the capital stock of The Company set opposite our respective names do hereby assent in writing that Article of the Regulations of said The Company be amended so that as amended it shall read as follows:

(*Insert article as amended*)

Stockholders.

Shares.

No. 61.

Resolution of Stockholders for Amendment.

Resolved that Article of the Regulations of The Company be amended so that as amended it shall read as follows:

(*Insert article as amended*)

No. 62.

DIRECTORS' MEETINGS.

Notice of Regular Meeting.

NOTE.—For record and minutes of first meeting of directors see page 185. That record is applicable to all first meetings held after annual elections.

The regular (*monthly*) meeting of the board of directors of The Company will be held in the office of the Company on Saturday,, 19.., at o'clock .. M.

.....,

Secretary.

No. 63.

Special Meeting of Directors. Call For.

....., Ohio,, 19...

To

Secretary of The Company.

The undersigned, president (*or, directors*) of The Company, does (*or, do*), hereby call a special meeting of the directors of said company, to be held at the office of the company on the day of, 19.., at o'clock ..M. for the purpose of considering and acting upon (*state object of meeting*) and for the transaction of any and all business necessary or incident thereto, and you are hereby instructed to give notice of such meeting to the directors pursuant to the by-laws of this Company.

.....

.....

No. 64.

Special Meeting of Directors. Notice.

....., Ohio,, 19...

A special meeting of the directors of The Company will be held at the office of the Company on the day of, 19.., at .. o'clock .. M. for the purpose of considering and acting upon (*state object of meeting*) and the transaction of any and all business necessary or incident thereto.

.....,

Secretary.

No. 65.

Special Meeting of Directors. Waiver of Notice.

....., Ohio,, 19...

We, the undersigned, being all the directors of The Company, do hereby consent that a special meeting of the directors of said Company may be held at the office of the Company on the day of, 19.., at o'clock, .. M. for the purpose of considering and acting upon (*state object of meeting*)

We hereby waive notice of said meeting and agree to the transaction at said meeting of any and all business within the powers of said board.

.....
.....

No. 66.

Directors' Meeting. Minutes.

NOTE.—The following form may be used for either a regular or special meeting. If a special meeting, the call and notice, or waiver, should be pasted or entered in the minute book above the minutes. The call, or waiver, may be originally entered and signed in the minute book.

DIRECTORS' MEETING.

....., 19...

SPECIAL MEETING.

Pursuant to the foregoing waiver (or call and notice) a special meeting of the board of directors of The Company was held at the office of the Company at o'clock, .. M.,, 19...

NOTE.—If a regular meeting, omit the foregoing statement and use the following:

REGULAR MEETING.

The regular (monthly) meeting of the board of directors of this Company was held at the office of the Company at o'clock, ..M., 19...

MINUTES CONTINUED.

Present, Messrs.

The meeting was called to order by the president, Mr., who presided. Mr., secretary of the Company acted as secretary of the meeting.

The business transacted at the meeting should be recorded here.
A motion may be entered in the following form:

"Upon motion duly made and seconded and (unanimously) carried (here enter *the substance* of the motion, as 'the treasurer was authorized and instructed to compromise the claim of John Doe against this Company by the payment to John Doe of \$500.')

A resolution may be entered as follows:

"Mr. presented, read and moved the adoption of the following resolution:

(*Copy resolution in full, as*)

RESOLUTION DECLARING DIVIDEND.

"Resolved, that the sum of dollars (\$.....) be and is hereby appropriated and set aside from the surplus profits arising from the business of this Company (during the calendar year, 19..), for the payment of a (*or the annual, semi-annual, or quarterly*) dividend of percent upon its issued and outstanding capital stock; the same to be due and payable on, 19.., to stockholders as shown by the books of the Company at the close of the business on the day of, 19..; and that the treasurer of this Company be directed and authorized to give notice of said dividend and to pay the same on said date."

The motion was seconded by Mr., and was duly carried (by a unanimous vote).

Whereupon said resolution was declared duly adopted.

There being no further business the meeting adjourned on motion.

Attest:

.....,

Secretary.

.....,

President.

We approve the foregoing minutes.

.....,

.....,

.....,

.....,

Directors.

No. 67.**Certificate to Transcript of Minutes.***(Copy of such portion of minutes as is desired.)*

We hereby certify that the foregoing is a true and correct transcript from the minutes of a meeting of the Board of Directors of The Company, duly called and held on the day of, 19..., and recorded on pages, of the minute book of said company.

In witness whereof we have hereunto set our hands and affixed the corporate seal of said Company this day of, 19...

..... ,
President.
..... ,
Secretary.

(Corporate seal)

No. 68.**Certificate by Secretary to Resolution.***(Copy of Resolution.)*

I hereby certify that the foregoing resolution was duly adopted at a meeting of the directors of The Company, duly called and held on the day of, 19..., at which a quorum was present.

In witness whereof I have hereunto set my hand and affixed the corporate seal of said company this day of, 19...

..... ,
Secretary of The Company.

(Corporate seal)

No. 69.**Resolution of Directors Filling Vacancy Caused by Disqualification of Director.**

Whereas, having ceased to be the holder of any share or shares of the capital stock of this corporation. is thereby

disqualified as a director, be it resolved that the office of said as such director be and the same hereby is declared to be vacant, and is, for the unexpired term, hereby appointed a director to fill the vacancy so caused and declared.

No. 70.

Resignation of Director (or Officer).

....., Ohio,, 19...

To the Board of Directors of The Company.
Gentlemen:

I hereby tender my resignation as a director (*or, president*) of The Company, the same to take effect immediately (*or, upon acceptance, or on the day of 19....*).

Yours respectfully,

.....,

NOTE.

How vacancy in board is filled.

(G. C. § 8662.)

A vacancy in the board of directors is filled, for the unexpired term, by appointment by the board of directors, and not by the stockholders, unless the regulations so provide.

Where owing to a change in the stock ownership and control, a new board of directors is to be elected, if accomplished by appointment by the board, a quorum of qualified directors must act in each case. Stock should be transferred to the new directors, before the meeting, if possible.

The resignations of the old directors should be presented and accepted one at a time, and a new director immediately elected, who should take his oath of office and immediately assume his duties and participate in accepting the next resignation and the filling of the vacancy, so that a quorum is constantly maintained.

If all the resignations are presented at one time, a stockholders' meeting should be held to elect the new board.

No. 71.

Resolution of Directors, Accepting Donation of Treasury Stock.

Mr. presented, read and moved the adoption of the following resolution:

"Whereas, A. B. has offered to assign and transfer to this Company, without consideration, shares of the full paid

common stock of this corporation, heretofore issued to him, to be deemed and regarded as treasury stock, and to be sold at such prices (whether above or below the par value thereof), as the directors in their discretion may deem best, or to be given as a bonus to purchasers of the bonds (or preferred stock) of this Company, or otherwise used for the benefit of this Company;

“Now therefore be it resolved, that this Company accept such assignment and transfer and that said shares be held in the treasury subject to further action of the directors.”

The motion was seconded by Mr., and was duly carried by a unanimous vote. Whereupon said resolution was declared duly adopted.

No. 72.

Donation of Stock to Treasury.

To the Board of Directors of The Company:

By duly assigned certificates, I herewith transfer to The Company shares of the full paid capital stock of said Company, to be deemed and regarded as treasury stock, and to be sold, in the discretion of the directors (for prices either above or below par), or to be given as a bonus to purchasers of the bonds (or preferred stock) of the Company, or otherwise used for the benefit of the Company, as the directors, in their discretion, may deem best.

Respectfully,
.....

....., Ohio,, 19...

No. 73.

Resolution of Directors Ratifying Unauthorized Act of Officer or Agent.

Resolved, that the act of, president (*or other officer or agent*) of this company in (*recite action of officer or agent*) be and the same is hereby ratified, approved and confirmed as the act of this corporation.

No. 74.

Resolution of Directors Declaring Stock Dividend.

(NOTE.—For resolution declaring cash dividend see page 278.)

Whereas, the surplus profits of this Company amounting to more than \$.. ..., have, from time to time, been invested in

extensions and betterments to the plant and property of the Company, and in providing additional facilities for its business, and in that manner a large addition has been made to the value of the assets of the Company by withholding from the stockholders moneys which have been fairly earned, and but for the above mentioned expenditures would have been paid to them; and

Whereas, upon a just and fair estimate, the assets of the Company have been in such manner increased in value over the amount of the capital stock, now issued and outstanding, by at least the said sum of \$.....; and (*if the dividend is to be in no-par-value common shares, the foregoing clause may be omitted.*)

Whereas, the stockholders desire to realize on profits which have been so invested, and to make the same more available, without impairing the property of the Company.

Now, therefore, be it resolved, that from the surplus profits so invested, a dividend of \$..... (*or, if the dividend is to be in no-par-value common shares, of shares of common stock without nominal or par value*) for each share of the present issued and outstanding common stock of this Company be and is hereby declared, payable, on the day of, 19..., in the capital stock of this Company, to stockholders as shown by the books of the Company at the close of business on the day of, 19...; and that the president and secretary be directed to issue proper stock certificates representing the same to such stockholders on said date.

NOTE.—See G. C. § 8728-1; *Adams v. Shields*, 17 C. C. 129; 9 C. D. 558 (*aff'd no report*, 61 O. S. 643).

If there is not sufficient unissued stock for the purposes of the stock dividend, the capital stock should be increased before the dividend is declared.

No. 75.

Order to Pay Single Dividend to Third Person.

(DIVIDEND ORDER.)

....., Ohio,, 19...

To the Treasurer of The Company.

Pay to, or order, dividend due, 19..., on shares of stock in your company, standing in my name, and this shall be your sufficient voucher.

No. 76.

Permanent Dividend Order.

....., Ohio,, 19...
To the Treasurer of The Company.

Until this order is revoked in writing please remit by mail to
....., (give mail address), all dividends now due or which
may hereafter be declared on all shares of the capital stock of
The Company, now or hereafter standing in the name
of

Witness

No. 77.

Application for Reinstatement.

(G. C. § 5511 [109 v. 94].)

The Company, by, president,
....., secretary, duly authorized in the premises, and
acting on behalf of said corporation, represents that on the
day of, a cancellation of the articles of incor-
poration was entered upon the margin of the records of said
incorporation in the office of the secretary of state, State of
Ohio, by and under the authority of Section 5509, General
Code of Ohio, and further that said Company has filed with
the tax commossion of Ohio all necessary reports and paid the
taxes assessed against said Company and hereby makes applica-
tion under Section 5511 of the General Code for reinstatement
as therein provided, and herewith attaches the tax certificate and
a fee of (\$.....) penalty as provided by law
and asks that the said corporation be reinstated as provided by
law.

In witness whereof, the aforesaid, president,
and, secretary, of The Company,
have hereunto set their hands, and caused the seal of said cor-
poration to be affixed this day of, 19....

The Company,
By,
President.
By,
Secretary

(Seal.)

No. 78.

Escrow Agreement Under Blue Sky Law.

Whereas, desires to dispose of certain securities, to-wit:, and has made application to the Division of Securities of the Department of Commerce of the State of Ohio, for a certificate, under Sections 6373-14 and 6373-16 of the General Code of Ohio, authorizing a sale thereof, and

Whereas, said Division of Securities has refused to issue said certificate unless and until all stock of said Company which has been issued for (*patents, services, good will, etc.*) shall have been deposited in escrow with said Division of Securities, irrevocably, under the provisions and terms of this agreement,

Now, therefore, in consideration of the benefits that will accrue to the issuer and to the undersigned by virtue of the granting of said application and the issue of said certificate, and in consideration of the grant of said certificate, the undersigned hereby deposits with the Division of Securities of the Department of Commerce of the State of Ohio (*or, with The Trust Company of), as depository, certificates of stock of said The Company, as follows:*

Certificate Number.	Number of Shares.
.....
.....
.....

To be held by said depository until satisfactory proof has been furnished to the "Commissioner" of Securities of Ohio, that the aggregate net profits of said The Company, exclusive of all taxes, both federal and state, amount to a sum equal to percent (...%) of its issued and outstanding *common* stock plus all accrued preferential dividends on its preferred stock.

The undersigned, upon the considerations aforesaid, further agree as follows:

1. That in the event of any liquidation or dissolution of said The Company, whether voluntary or involuntary,

no sums shall be paid or assets distributed to the undersigned on account of the securities hereby deposited until the holders of all preferred and other stocks of said The Company shall have received the full par value of their stock plus all accrued and unpaid preferential dividends thereon (and until the holders of no-par-value common stock of said The Company shall have received the sum of \$..... per share thereon) ;

2. That the undersigned will not dispose of the securities hereby deposited in any manner, either directly or indirectly, during the time said stock remains on deposit under the provisions and terms hereof;

3. That this agreement shall be binding on the executors, administrators, legatees and net of kin of the undersigned.

This deposit shall not affect or limit the voting powers or rights of the stock hereby deposited.

Executed at, Ohio, this day of, 19....

.....
.....

Receipt of the securities described in the foregoing agreement is hereby acknowledged, the same to be held under and in accordance with the provisions and terms of the foregoing agreement.

.....,
Chief of the Division of Securities,
Department of Commerce.

No. 79.

Railroad Consolidation Agreement.

(G. C. §§ 9028, 9121, 9127, 9190, 10139.)

Agreement of Consolidation
of
The A. B. Railroad Company
and
The C. D. Railroad Company.

This agreement made and concluded this day of, 19.., by and between The A. B. Railroad Company and The C. D. Railroad Company, witnesseth:

That whereas, both parties hereto are corporations duly organized and existing under the laws of the State of Ohio, and desire to consolidate;

Now therefore, said corporations, acting herein by authority of resolutions of their respective boards of directors, and subject to the ratification of their respective stockholders, as required by law, in consideration of their mutual agreements, covenants, provisions, and grants herein contained and of the benefits to accrue to the parties hereto, do hereby agree to consolidate their business, property, franchises and rights, so as to become one corporation, and, by these presents, do merge and consolidate their capital stock, franchises, and property into one corporation to be known by the name of The E. F. Railroad Company, upon the following terms and conditions, to wit:

FIRST. All the rights, franchises, privileges, property, and appurtenances of every kind and description, credits, choses in action, debts, claims and demands of each of the parties hereto shall vest in the consolidated Company.

SECOND. The consolidated Company shall assume and be bound by all the liabilities and obligations of each of the corporations, parties hereto.

THIRD. The capital stock of the consolidated Company shall be \$....., divided into shares of \$..... each.

FOURTH. The directors of the consolidated Company shall be in number, and the officers shall be a president, vice-president, secretary and treasurer.

The names and residences of the first directors of said consolidated Company are as follows:

Names.	Residences.
.....
.....
.....
.....

The names and residences of the first officers are as follows:

Names.	Residences.
President,	
Vice-president,	
Secretary,	
Treasurer,	

FIFTH. The manner of converting the capital stock of each of the constituent companies parties hereto shall be as follows:

(a) For each share of the capital stock of The A. B. Railroad Company surrendered to the consolidated Company shall be issued to the holder thereof shares of the capital stock of the consolidated company.

(b) For each share of the capital stock of The C. D. Railroad Company surrendered to the consolidated company shall be issued to the holder thereof shares of the capital stock of the consolidated Company.

SIXTH. Each of the constituent Companies, parties hereto, for itself and not for the other, in consideration of the premises, does hereby grant, convey, assign, set over and vest in the said consolidated Company for the purpose of such consolidation, all of the property, rights, franchises, privileges and powers by it now held or in or to which it has any right, title, interest, or claim in law or equity; and each of said constituent companies hereby agrees to execute and deliver all instruments of conveyance and assignment necessary to vest in said consolidated Company the legal title to all of said property, rights, franchises, and privileges.

In witness whereof, said The A. B. Railroad Company, by its board of directors, has caused its corporate seal to be hereunto affixed and these presents to be signed by its president and secretary and by a majority of its board of directors, the day and year first above written.

And said The C. D. Railroad Company, by its board of directors, has caused its corporate seal to be hereunto affixed and these presents to be signed by its president and secretary, and by a majority of its board of directors, the day and year first above written.

In presence of

.....

.....

The A. B. Railroad Company.

(Seal) President.

..... Secretary.

.....

.....

.....

.....

Directors

The C. D. Railroad Company.

(Seal) President.
 Secretary.

 Directors.

CERTIFICATE OF CONSOLIDATION.

I,, secretary of The A. B. Railroad Company duly authorized in the premises, do hereby certify that at a meeting of the stockholders of said Company, duly called and held at in the city of, county, Ohio, on the day of, 19.., at which meeting all the stockholders of said Company were present in person or by proxy and waived, in writing, the notice of the time and place of holding the same and consented in writing that said meeting should be then and there held, the original agreement of consolidation, of which the foregoing is a true copy, was submitted for consideration and considered, and on a vote by ballot being taken for the adoption or rejection of the same, all the issued and outstanding capital stock of said company, to wit: shares were cast in favor of the adoption of said agreement and no vote was cast for its rejection.

In witness whereof I have hereunto set my hand officially and affixed the corporate seal of said company this day of, 19... ..,

(Seal) Secretary of The A. B. Railroad Company.

NOTE. — Add similar certificate by secretary of the other constituent company. See G. C. § 9028.

No. 80.

Railroad Consolidation Agreement. Another Form.

Between
 The A. B. Railroad Company
 and
 The C. D. Railroad Company
 Under the name of
 The X. Y. Railroad Company.

Whereas, The A. B. Railroad Company, a corporation duly organized under the laws of Ohio, is the owner of a railroad constructed and in operation from, Ohio, to, Ohio, and

Whereas, The C. D. Railroad Company, a corporation duly organized under the laws of Ohio, is the owner of a railroad constructed and in operation from , Ohio, to , Ohio, and

Whereas, the lines of road of both of said Companies are so constructed as to admit the passage of passenger and freight cars over said railroads, continuously, without break or interruption, and the interest of both of said Companies will be promoted and their ability to perform their duty to the public as common carriers will be increased by a merger and consolidation of the capital stock, franchises, railroads and properties of the said two Companies into one consolidated Company, and

Whereas, said railroads are not parallel or competing and will, when consolidated as proposed, form a continuous line of railroad between and , all in the state of Ohio, and

Whereas, such merger and consolidation is authorized by the laws of the state of Ohio, in which said railroads are respectively situated and from which they respectively derive corporate powers;

Therefore, the boards of directors of said Companies, acting in pursuance of resolutions duly adopted by them respectively and subject to ratification by the stockholders of said Companies, as required by law, do hereby enter into the following agreement in respect to such merger and consolidation:

FIRST. The capital stock, franchises, railroads and estates, real, personal and mixed, of said The A. B. Railroad Company and said The C. D. Railroad Company, together with all the rights, privileges, exemptions and immunities owned or enjoyed by each of said Companies, shall be and they are hereby united, merged and consolidated, to be known, owned and controlled as and by one Railroad Company.

SECOND. The name of said Company shall be The X. Y. Railroad Company.

THIRD. The directors of the consolidated Company shall be in number, and the names and residences of the first directors are as follows:

Names.	Residences.
.....
.....
.....
.....
.....

Said first directors shall continue in office until the first election of the consolidated Company as provided by law.

The annual meeting of the stockholders of the consolidated Company shall be held at the principal office of the Company on the Tuesday in, of each year at o'clock ... M., at which time directors shall be elected by ballot and the officers shall be chosen by the directors as soon thereafter as possible; but the time and place of the annual meeting may be changed from time to time by the stockholders at any regular meeting thereof.

The officers of said consolidated Company shall consist of a president, vice-president, secretary and treasurer, and such other officers and agents as may be prescribed by the regulations, or by laws, or as in the judgment of the directors may from time to time be deemed necessary.

The name and residences of the first officers of the Company are as follows:

Names.	Residences.
President,
Vice-president,
Secretary,
Treasurer

FOURTH. The capital stock of the consolidated Company shall be \$...... divided into shares of \$...... each.

FIFTH. The capital stock of the consolidated Company shall be issued in exchange for the outstanding capital stock of the constituent Companies, on the following basis:

1. To the holders of the stock of The A. B. Railroad Company, shares of new stock for each share of old stock.

2. To the holders of the stock of the C. D. Railroad Company,..... shares of new stock for each share of old stock.

SIXTH. The consolidated Company shall assume and pay the bonded indebtedness, and all other lawful indebtedness, claims, charges and liens against the several constituent Companies as the same shall become due, without any extension of time.

SEVENTH. The principal office of said consolidated Company will be in, Ohio.

In witness whereof, each of said corporations has caused its respective seal to be hereunto affixed and its corporate name sub-

scribed, by its president and secretary, and a majority of the directors of each Company have hereunto set their hands, to duplicates hereof, this day of, 19...

The A. B. Railroad Company.

(Seal) By, President.

Attest, Secretary.

.....

.....

.....

.....

.....

Directors of The A. B. Railroad Company.

The C. D. Railroad Company.

(Seal) By, President.

Attest, Secretary.

.....

.....

.....

.....

.....

Directors of the C. D. Railroad Company.

CERTIFICATE OF CONSOLIDATION.

....., Ohio,, 19...

I,, secretary of The A. B. Railroad Company do hereby certify that the execution of the foregoing agreement of consolidation on the part of The A. B. Railroad Company was authorized by resolution, duly entered on its minutes, by its directors, at a meeting duly called and held at, on the day of, 19...; and also that said agreement was submitted to the stockholders of said Company, at a meeting called for the purpose of considering said agreement, on the day of, 19..., statutory notice of said meeting having been waived, in writing, by all stockholders of said Company, and all stockholders being present at said meeting in person or by proxy; that at said stockholders' meeting said agreement was adopted, approved, ratified and confirmed by unanimous vote of the holders of all the stock of said company.

In witness whereof, I have hereunto set my hand officially and affixed the corporate seal of said Company this day of, 19...

(Seal)

.....,
Secretary of the A. B. Railroad Company.

NOTE.—Annex corresponding certificate of the secretary of the other constituent company.

No. 81.

Lease of Railroad.

(G. C. §§ 8807-8814.)

This indenture of lease made this day of, 19..., by and between The A. B. Railroad Company, a corporation of the State of Ohio, party of the first part, and The C. D. Railroad Company a corporation of the State of, party of the second part, witnesseth:

Whereas, the party of the first part is the owner of the railroad property and franchises hereinafter mentioned and described, and whereas the railroad so owned by the party of the first part extends from, in the State of to in the State of, where it connects with the railroad of the party of the second part and includes various branches and leased lines, appurtenances, easements, rights of way, rolling stock, and all other equipment commonly possessed by railroad Companies, all of which is hereinafter more particularly described; and, whereas, the party of the second part owns and operates a railroad which together with leased lines and branches constituting what is known as the X. Y. system extends from in the City of to aforesaid where it connects with the railroad of the party of the first part, the said railroads being non-competitive, and with their connections constituting a through line from to;

And whereas, the stockholders of The A. B. Railroad Company at a meeting duly called for the purpose by its directors, and held on the day of, A. D. 19..., by resolution duly passed by the affirmative vote of the holders of more than two-thirds of the capital stock of said Company, instructed its directors to lease its said railroad to said The C. D. Railroad Company, in

the terms and form of this indenture, and duly assented to this lease, and whereas, the board of directors of said The A. B. Railroad Company, at a meeting duly held in the City of, Ohio, on the day of, 19.., at which all of its directors were present, duly resolved to lease its said railroad to said The C. D. Railroad Company, in the terms and form of this indenture and as instructed by the stockholders of said A. B. Railroad Company.

And whereas, the stockholders of The C. D. Railroad Company at a meeting duly called for the purpose by its directors and held on the day of, A. D. 19.., by resolution duly passed by the affirmative vote of the holders of more than two-thirds of the capital stock of said Company instructed its directors to lease the railroad of said The A. B. Railroad Company, in the terms and form of this indenture, and duly assented to this lease, and whereas the board of directors of said The C. D. Railroad Company, at a meeting duly held in the City of, Ohio, on the day of, A. D. 19.., at which all of its directors were present, duly resolved to lease said railroad from said The A. B. Railroad Company in the terms and form of this indenture and as instructed by the stockholders of said The C. D. Railroad Company.

Now, therefore, in consideration of the premises and of the rent to be paid and the covenants and undertakings to be performed by the party of the second part hereinafter set forth, the party of the first part doth hereby demise and lease unto the party of the second part, its successors and assigns, for the term of ninety-nine (99) years, commencing on the day of, 19.., the aforesaid railroad of the party of the first part extending from aforesaid to aforesaid, with all the tenements, hereditaments, and appurtenances, rights of way, easements and all other rights appertaining thereto, also the Branch and Branch together with all other branch roads of the party of the first part; also all telegraph lines and property and all rights of the party of the first part therein for the term of years for which they are respectively held by the party of the first part, and for any renewal or renewals of such term and terms, also the following leasehold interests and estates; that is

to say, the leasehold estate of the party of the first part in and to the railroads, property and franchises of The E. F. & G. H. Railway Company including all rights and property heretofore acquired by the last mentioned Company and the party of the first part under and through the following railroad Companies, to wit:

Also any and all other lands, docks or property now held by the party of the first part for any term of years, also all and singular the rolling stock and equipment of every kind and description in the possession of the party of the first part, wherever the same may be situated, also all the buildings, houses, machine shops, other shops, machinery, tools, implements and all other property of every kind and description in the possession of the party of the first part for use upon or in connection with the railroads aforesaid or any of them, also all the corporate franchises of the party of the first part necessary and proper to be held and enjoyed by the party of the second part to efficiently possess, enjoy and protect the premises and property herein and hereby demised. All railroad supplies on hand when this lease takes effect shall be turned over to the party of the second part and the party of the first part does hereby assign to the party of the second part all executory contracts held by the party of the first part relating to the use and operation of the railroad and property hereby leased.

In consideration of the premises, as rental of and for the premises hereby demised, the party of the second part covenants and agrees to assume the aforesaid leases under which part of the premises aforesaid are held and possessed by the party of the first part, and to perform all the obligations thereof according to their tenor; to assume and perform according to the tenor thereof the obligations of the following equipment trusts of which the party of the second part has and takes full notice, namely, the so-called Equipment trust of 19.., and the Equipment trust of 19..; to assume and pay the interest as and when it becomes payable upon the existing prior lien mortgage of and upon the above described premises to The Trust Company, Trustee, securing a bond issue of dollars (\$....): to maintain at its own expense the corporate organization of the

party of the first part, to pay all taxes due or to become due in respect to the herein demised premises, and to perform all the obligations now or hereafter imposed by law upon the party of the first part: to pay, in addition to the sums of money to be paid in fulfillment of the obligations assumed as aforesaid, the further sum of dollars (\$) in gold coin per annum, as net rental, payable semi-annually on the first day of January and July of each year. The party of the second part further covenants and agrees at its own expense to maintain, by all needful repairs and renewals, the plant, rolling stock and equipment of the demised premises up to its present standard of efficiency and repair, and to render to the trustees of the Equipment trusts hereinbefore mentioned an annual statement of the condition of the property included in the said trusts, with a detailed list of all property included therein, showing the cars, engines and hoists destroyed and replaced each year with the numbers of each affixed thereto, and generally in respect of all matters relating to the operation and maintenance of railroads to keep the demised premises up to the standard of efficiency generally prevailing from time to time on trunk lines in respect of roadbed, rolling stock and otherwise.

Provided, however, that if said rent, or any part thereof, shall at any time be in arrear and unpaid, and without any demand being made therefor, or if said party of the second part, its successors or assigns, shall fail to keep and perform any of the covenants, agreements or conditions of this lease, on its part to be kept and performed, said party of the first part, its successors or assigns, may enter into and upon said premises and again have, repossess and enjoy the same as if this lease had not been made, and thereupon this lease and everything herein contained on the part of said party of the first part to be done and performed shall cease, determine and be utterly void; without prejudice, however, to the right of said party of the first part to recover from said party of the second part, its successors or assigns, all rent due up to the time of such entry.

In witness whereof the said The A. B. Railroad Company and said The C. D. Railroad Company have caused their corporate seals to be affixed and their corporate names to be sub-

scribed to duplicates hereof by their respective presidents, the day and year first above written.

Signed, sealed and acknowledged

in presence of

The A. B. Railroad Company.

..... By, President.

..... (corporate seal.)

Attest, Secretary.

The C. D. Railroad Company.

By, President.

(corporate seal.)

Attest, Secretary.

(Certificates of acknowledgment.)

No. 82.

Release, by Property Owner to Railway Company, of Damages for Occupation of Street.

(G. C. § 8765.)

We, the undersigned A. B. and M. B., (husband and wife) of the City of, County of and State of Ohio, in consideration of one dollar (\$1.) received to our full satisfaction of The Railway Company, as well as in consideration of the benefits to be derived by us from the construction of *two* railroad tracks on the .. side of Street in said City of, Ohio, do, for ourselves and our heirs and assigns, hereby release and discharge the said Railway Company, its successors and assigns, and also said City of, Ohio, from any and all claims or demands which we may have against them, or either of them, for or on account of damages or injury to our adjoining premises, known as

(description of property)

or to our right of access to and from said premises, or in any manner growing out of the construction, maintenance or use of said tracks on said street; provided, however, that said tracks, including clearance, shall not occupy more than twenty-five feet in width of said street on said side thereof.

Witness our hands this day of, 19...

Signed and acknowledged

in presence of

..... A. B.

..... M. B.

(Certificate of acknowledgment.)

No. 83.

Deed of Land to Interurban Traction Company for Railroad Purposes.

Know all men by these presents, that whereas, The Railroad Company is now constructing an interurban railroad from, Ohio, to Ohio, which will pass through the land hereinafter described, and,

Whereas, the undersigned is desirous of assisting said railroad by furnishing to it a right of way through said property, in view of the benefits to be derived from its construction and operation.

Now therefore, A. B., the grantor, in consideration of dollars (\$....) and other valuable considerations paid to him by said The Railroad Company, the grantee, the receipt of which is hereby acknowledged, does hereby give, grant, bargain, sell, assign and convey unto said The Railroad Company, its successors and assigns, the following described premises, to wit: situated in the township of, county of and State of Ohio,

(description of property, as

and known as being a strip of land twenty (20) feet wide along the south side of road, extending from the land of on the east to the land of on the west, all of said lands being situated in original lot number of said township).

Should the above land cease to be used for railroad purposes it shall revert to said grantor.

To have and to hold said premises unto the said The Railroad Company, its successors and assigns forever, for railroad purposes only: and the said grantor does, for himself and his heirs, executors, administrators and assigns, covenant and agree with said grantee, its successors and assigns, that the said grantor is the true and lawful owner of said premises and is well

seized of the same in fee simple, and has good right and full power to bargain, sell, and convey the same in manner aforesaid, and that the same are free and clear from all incumbrances,

and that said grantor will warrant and defend the same against the claims of all persons whomsoever.

In witness whereof, the said A. B. has hereunto set his hand this day of, A. D. 19...

Signed and acknowledged

in presence of

.....

A. B.

.....

(Certificate of acknowledgment.)

No. 84.

Deed of Right of Way to Railway Company.

Know all men by these presents, that whereas, The Railroad Company is constructing a railroad from, to, which will pass through the land hereinafter described,

Now, therefore, A. B., the grantor, in consideration of dollars (\$....) and the advantages which may or will result to the public in general, and said grantor in particular, by the construction of said railroad as now surveyed, or as the same may be finally located, and for the purpose of facilitating the construction and completion of said work, does hereby, for himself, his heirs, administrators, executors, and assigns, grant and release unto said The Railroad Company, the grantee, its successors and assigns, the right of way for so much of said railroad as may pass through the following described real estate, to wit:

(description of way.)

Said right of way to be one hundred feet wide and to extend across the above described premises.

To have and to hold the same unto the said grantee, its successors and assigns, for a right of way for its tracks, side tracks, switches, and the operation of its railroad over the same.

(Add covenants, release of dower, etc., as usual form of deeds.)

NOTE.—See *Railway Co. v. Wachter*, 70 O. S. 113.

No. 85.

Consolidation of Religious Societies.

(G. C. § 10004 et seq.)

AGREEMENT.

Whereas, the Church of, Ohio, a corporation duly organized under the laws of Ohio, and the Church of, Ohio, a corporation duly organized under the laws of Ohio, both of which are religious societies and churches, recognizing the same ecclesiastical jurisdiction, form of faith, government and discipline, and desire to be consolidated or united as a single corporation:

Therefore we, the subscribers, *A. B., C. D., and E. F.*, elders, *G. H., H. I., and I. J.*, deacons, and *L. M., N. O., and P. Q.*, trustees, of the Church; and *Q. R., R. S., and S. T.*, elders, *T. V. and U. V.*, deacons, and *V. W., W. X., and Y. Z.*, trustees of the Church, have and do hereby enter into an agreement for such union or consolidation, and do hereby prescribe the following terms and conditions thereof, to wit:

FIRST. The property, real, personal and mixed, of the Church, and the Church shall become and be the property of the new corporation.

SECOND. The new corporation shall assume and pay all the debts and liabilities remaining unpaid by either or both of said churches.

THIRD. The corporate name of the united church shall be the Church of, Ohio.

FOURTH. The time for holding the first meeting of the new corporation shall be, 19.., at o'clock P. M., and the place shall be at No. Street, in the city of, Ohio.

FIFTH. The number of members of each constituent church to be chosen as elders, deacons and trustees of the new corporation, to succeed to the rights, trusts, duties and obligations of such officers of the constituent churches, shall be as follows:

From members of the Church *three* elders, *three* deacons, *three* trustees. From members of the Church *three* elders, *three* deacons, and *three* trustees.

Signed at, Ohio, this day of, 19...

.....

.....

.....

Elders of the Church. Elders of the Church.

.....

.....

.....

Deacons of the Church. Deacons of the Church.

.....

.....

.....

Trustees of the Church. Trustees of the Church.

To the Secretary of State,
Columbus, Ohio:

I,, Clerk of the first meeting of the united corporation, held in pursuance of the above agreement,, 19.., at o'clock P. M., at Street, in the city of, Ohio, to which meeting the foregoing agreement and the proceedings and acts of the several churches and parties thereto, were submitted, and at which meeting a board of trustees were duly elected in accordance with the terms of said agreement, do hereby certify that the foregoing agreement, or terms of union were by a unanimous vote at said meeting, duly approved, ratified and confirmed.

In witness whereof, I have hereunto set my hand this day of, A. D. 19...

....., Clerk.

No. 86.

Agreement to Subscribe for Stock in Corporation Not Yet Organized.

This agreement, made and concluded at, Ohio, this day of, 19.., witnesseth:

That, whereas, it is proposed to organize, under the laws of Ohio, a corporation under the name of The Company, or such other name as may be hereafter determined upon by the parties in interest, and

Whereas, it is proposed that said corporation shall have a capital stock of dollars (\$....) divided into shares of dollars (\$....) each, which corporation shall be organized for the purpose of

Now therefore the undersigned, in consideration of their mutual promises and agreements, do severally agree to and with each other, and with, the promoter of said corporation, that they will subscribe for and take and they do hereby severally subscribe for the number of shares of the capital stock of said Company set opposite their respective names.

This agreement is conditional upon the procuring by said of valid agreements of subscription to at least shares of dollars (\$....) each of said capital stock.

In witness whereof the parties have hereunto set their hands the day and year first above written.

Names.....	Number of shares.....
.....
.....

No. 87.

Stock Pooling Agreement.

Know all men by these presents, that the undersigned, the owners of the number of shares of the capital stock of The Company, a corporation organized and existing under the laws of Ohio, set opposite their names, respectively, hereby agree, one with the other, to place and deposit their certificates evidencing the number of shares of said stock set opposite their respective names, with of, to be kept, held and possessed by said for and during a period of years from and after, 19.., upon the following terms and subject to the following restrictions, to wit:

- (1) All certificates of said stock shall be endorsed in blank by the owners thereof prior to depositing the same as aforesaid, and the stock represented by the certificates so deposited shall, upon deposit as aforesaid, be pooled, and shall not be sold or in any manner disposed of, except as herein provided.
- (2) Each of the parties hereto does hereby promise and agree, one with the other, that if, during said period of years, he desires to sell or dispose of his shares of stock so deposited and pooled, he will give notice in writing of such desire to all of the

other parties hereto, whereupon all of said other parties hereto shall jointly have the option and right to purchase the same withindays after receipt of such notice for the price and upon the terms following, to wit: The amount to be paid for such shares under said option shall be the "book value" thereof at the time said notice is given, to wit: that proportionate value of the net assets of said corporation which the number of shares proposed to be sold bears to the entire issued capital stock of said corporation.

In determining the value of said net assets of the corporation, all patents or copyrights owned or held by the corporation and the good will of its business shall be excluded and not taken into consideration; all materials and stock, finished, semi-finished and raw, shall be valued at the actual cost thereof with suitable allowance for depreciation; and the plant, machinery, equipment, fixtures and furnishings, and all accounts, claims, notes and choses in action receivable shall be valued at their value in money. From the total of said tangible property, valued as aforesaid, shall be deducted the total amount of the indebtedness of the corporation.

The terms of sale under said option shall be as follows:

(3) It is mutually agreed that if all the parties hereto, to whom any notice of a desire to sell is given as hereinbefore provided, shall be unwilling to join in a purchase under said option, that said option may be exercised by such of the parties as may desire so to do, who shall make such purchase under such option jointly; but each and every party hereto shall be entitled to participate in such purchase if he desire so to do.

(4) Any and all stock purchased under the provisions of this agreement shall be owned jointly by the parties participating in its purchase; the same shall not be sold or disposed of except with the written consent of the parties owning eighty percent thereof and all dividends on the same shall be paid to, who shall distribute the same among the parties participating in its purchase.

(5) Upon the sale hereunder of all the stock belonging to any party hereto, this agreement shall terminate as to such party, and thereafter such party shall not be entitled to participate in any purchase.

(6) This pool and agreement may be terminated at any time upon the unanimous consent of the parties hereto.

In witness whereof the parties have hereunto set their hands this day of, 19..

.... owning shares of said stock

.... owning shares of said stock

NOTE.—An agreement between stockholders whereby they bind themselves not to dispose of any stock during a certain period without their joint consent has been held to be valid. *Hey v. Dolphin*, 92 Hun 230 (N. Y.). Also an agreement between two or more stockholders binding themselves to offer their stock to the other, in case they desire to sell. *Scruggs v. Cotterill*, 67 N. Y. App. Div. 583; *Jones v. Brown*, 171 Mass. 318; *Cook on Corporations*, § 622c.

No. 88.

Voting Trust Agreement.

NOTE.—For the validity of the following agreement, see *Railway Co. v. State*, 49 O. S. 668. Such an agreement, however, may be revoked by any one of the stockholders, although it is in terms irrevocable. *Griffith v. Jewett*, 15 W. L. B. 419. For voting trust agreement held invalid, see *State ex rel v. Standard Oil Co.*, 49 O. S. 137. See also, *Hafer v. Railway Co.*, 14 W. L. B. 68, and article by W. P. Rogers, 7 O. L. R. 561.

(a)

DEPOSIT BLANK.

The Trust Company,
.... Ohio.

Depository for A. B., C. D. and E. F., trustees for stockholders of The Company.

The undersigned, holder of the certificates of the capital stock of The Company listed below, hereby deposits the same with said trustees, duly assigned to said trustees, to be exchanged for certificates of deposit issued by said The Trust Company, on behalf of said trustees, for the purposes and subject to

the terms and conditions endorsed hereon, and also endorsed on said certificates of deposit.

Number of stock certificate.	Date of issue.	Name of person to whom issued.

(Signature of depositor)

(Address)

....., Ohio,, 19...

(b)

CERTIFICATE OF DEPOSIT.

No., Ohio,, 19...

The Trust Company of hereby certifies that it has received from certificate number for shares of \$100 each of the common stock of The Company, which certificate is deposited under and subject to the terms and conditions endorsed hereon, to which the holder hereof assents and agrees to be bound by receiving this certificate.

The interest represented by this certificate is transferable only on the books of said trustees in person or by attorney and the surrender of this certificate, under rules established by the trustees hereunder.

The Trust Company
By Secretary.

For A. B.

C. D.

E. F. Trustees.

(c)

TERMS AND CONDITIONS ENDORSED ON DEPOSIT BLANK, AND ON CERTIFICATE OF DEPOSIT.

(1) This deposit is made for the purpose of enabling widely separated stockholders of said The Company to actively and

effectively participate in the control and management of its affairs for the benefit of both said corporation and said stockholders.

(2) By the deposit of the within mentioned shares with said The Trust Company of, hereinafter termed the depository, the within named trustees are vested with the same powers, in all respects as to voting or otherwise, as if the trustees were the absolute owners thereof.

(3) The genuineness of the certificates of stock deposited, in respect to which this certificate of deposit is issued, is not guaranteed, and the trustees reserve the right to call in this certificate upon returning to the holder thereof the certificate so deposited by him in case the genuineness of such certificate is disputed or doubtful.

(4) All proceedings of the trustees shall in case of difference be decided by a majority of the votes of the trustees present at a meeting.

(5) In case of the death or resignation of any of the trustees, or in case of a vacancy through any cause, the remaining trustees are authorized to fill such vacancy or vacancies, and the person or persons so selected shall have the same powers as if he or they had been originally a trustee hereunder. Any trustee absent or incapacitated through illness may, with the consent of the other trustees, appoint a proxy or substitute who shall represent him and perform his duties hereunder.

(6) Said trustees shall not, without the consent of a majority of the certificate holders at a meeting called for that purpose, agree or vote at any stockholders' meeting in favor of increasing or reducing the capital stock of said The Company, or in favor of issuing preferred stock, or of executing any mortgage on the property of said corporation except as a renewal or refunding of the loans now secured by mortgage.

(7) Meetings of the certificate of deposit holders may be convened by the trustees on ten days' notice to each certificate holder mailed to his last known address. The place and time of meetings shall be fixed by the trustees and mentioned in such notice.

(8) Each trustee is responsible only for the bona fide exercise of his judgment on the matters and things done by said trus-

tee. No trustee shall be liable for the act or omission of any agent hereunder, nor by reason of any error of law or of any matter or thing done or omitted under this agreement, except for his own malfeasance.

(9) Any and all dividends declared and paid upon the shares deposited hereunder shall be paid to the persons appearing by the transfer books of said trustees to be the owners thereof.

(10) A charge of per share is to be paid to the depository on deposit of the within shares for the purpose of defraying the expenses of such deposit and of said trustees.

No. 89.

Consent by Corporation to Use of Similar Name by New Corporation.

(G. C. § 8628).

The *C. D. Company* consents to the use of the name, The *C. & D. Company*, by a corporation proposed to be formed by *A. B., E. F., G. H., I. J.,* and *L. M.*, whose articles of incorporation are filed herewith.

In witness whereof, said The *C. D. Company* has caused its seal to be hereto affixed and its name signed hereto this day of, 19...

The *C. D. Company*,
By *N. O.*, President.
P. Q., Secretary.

No. 90.

General Warranty Deed by a Corporation.

Know all men by these presents, that The *A. B. Company*, a corporation duly organized and existing under and by virtue of the laws of Ohio, the grantor, in consideration of dollars (\$.....) to it paid by *C. D.*, the grantee, the receipt of which is hereby acknowledged, does hereby grant, bargain, sell and convey unto the said grantee, his heirs and assigns forever, the following described real property, situated in the of, county of, and State of Ohio, and

(description of property)

and all the estate, title and interest of said grantor in and to said premises.

To have and to hold said premises, with the appurtenances thereunto belonging, to the said grantee, his heirs and assigns forever, subject, however, to all legal highways and subject to the conditions herein contained.

And the said grantor, for itself and its successors, hereby covenants with the said grantee, his heirs and assigns, that said grantor is the true and lawful owner of said premises, and is well seized of the same in fee simple, and has good right and full power to bargain, sell and convey the same in manner afore-said, and that the same are free and clear from all incumbrances (except taxes for the year 19.., etc.).

And further, that said grantor will warrant and defend the same against all claims of all persons whomsoever.

In witness whereof, said The A. B. Company has caused its corporate name to be subscribed, and its corporate seal to be affixed to these presents by its president and secretary this day of, in the year of our Lord, one thousand nine hundred and

Signed, sealed and acknowledged

The A. B. Company.

in presence of

By P. R., President.

I. J.

S. T., Secretary.

L. N.

(Seal)

ACKNOWLEDGMENT.

State of Ohio, County, ss.

Before me, a Notary Public, in and for said county, personally appeared, president (*or other officer*) of The Company, the corporation which executed the foregoing instrument, who acknowledged that the seal affixed to said instrument is the corporate seal of said corporation; that he did sign and seal said instrument as president (*or other officer*) in behalf of said corporation and by authority of its board of directors; and that said instrument is the free act and deed of said The Company.

In testimony whereof, I have hereunto subscribed my name
at, this day of, 19...

.....,

Notary Public.

NOTE.—See *Hays v. Galion Gas Light & Coal Co.*, 29 O. S. 330 (334). For execution of deeds by railway companies, see G. C. § 8761.

The officer of a corporation having authority to execute an instrument, is the proper person to acknowledge the same. *Sheehan v. Davis*, 17 Ohio St. 571.

In deeds to corporations the words "its successors" should be used, following the word "grantee" instead of the word "heirs" which is used in deeds to individuals and which is printed in most blank deeds.

No. 91.

Bill of Sale by Corporation of Fixtures, Lease, Good Will and Stock: (Book Accounts, Etc., Excepted), with Agreement of Officers not to Reengage in Business.

Know all men by these presents, that The Company, a corporation duly organized and existing under the laws of Ohio, the grantor, for the consideration of dollars (\$.....) paid by The Company, the grantee, the receipt of which is hereby acknowledged, does hereby grant, bargain, sell, transfer and deliver unto the said grantee, its successors and assigns, the following described goods, chattels and effects, to wit: all stock in trade, fixtures and property now owned and used by said The Company in connection with its business in the city of, including, and all contracts, excepting outstanding book accounts, bills receivable and claims for money.

Also the good will established by said grantor in connection with said business of in the city of Said grantor hereby agrees to assign and transfer to said grantee, by proper instruments of conveyance, all its interest as lessee in the premises occupied by it as

It is the purpose of this instrument to convey to said grantee all stock in trade, fixtures and personal property now owned and used by said grantor in connection with its business, whether or not specifically described herein, excepting the book accounts, bills receivable and claims for money.

In consideration of the foregoing, and of the sum of dollars (\$.....) received by *A. B.* and *C. D.* individually, the receipt of which is hereby acknowledged, and as an inducement to said grantee to pay the purchase price aforesaid, said grantor agrees that it will not as a corporation, and the said *A. B.* and *C. D.* hereby agree that they will not as individuals, either directly or indirectly, engage in the business of in the city of, for a period of years from and after the date hereof; and during said time said The (*grantor*) Company and *A. B.* and *C. D.* individually, agree that they will not, directly or indirectly, either in firms, corporations or as individuals, come into competition with said grantee, and will not interfere in any way or manner with the business, trade, good will or customers of said grantee.

To have and to hold the same unto the said grantee, its successors and assigns, forever. And the said grantor hereby covenants to and with the said grantee, its successors and assigns, that said grantor is the lawful owner of the above described goods, chattels and effects, and has good right to sell the same as aforesaid; that the same are free and clear from all incumbrances whatsoever; and that said grantor will warrant and defend the same against all lawful claims and demands whatsoever.

In witness whereof, the name of said grantor is hereunto subscribed and its corporate seal hereunto affixed by its president and secretary, and said *A. B.* and *C. D.* individually hereunto set their hands, at, Ohio, this day of, 19...

The Company.

By *A. B.*, President.

C. D., Secretary.

Signed, sealed and delivered

In presence of
(Corporate Seal.)

A. B.

C. D.

NOTE.—See *Davis v. Booth*, 2 O. L. R. 310 as to agreement of officers not to re-engage in business.

No. 92.

Option on Manufacturing Plant.

In consideration of *one dollar* and of other good and valuable consideration, the receipt of which is hereby acknowledged, the

undersigned hereby gives and grants unto C. D., of, the right and option to purchase, as a going concern, the (*paint, oil and varnish*) manufacturing business conducted by the undersigned, including all the real estate, machinery, fixtures, materials, both unfinished and finished, and supplies used in connection with said business, and also the good will, trade rights, trade marks, inventions, patents, formulae, recipes, trade names, patterns and all other property of every kind and nature used in connection with said business, excepting only money on hand and in bank and accounts and bills receivable, which are to be and remain the property of the undersigned. All of said property to be, at the time of such sale, free and clear of all liens and incumbrances whatsoever, including taxes and assessments.

The consideration for said sale to be dollars (\$....) and, in addition, the inventory value of stock on hand at the time of completion of the sale.

This option shall expire on the day of, 19..., unless the said C. D., or his assigns, shall on or before said day give notice in writing of his acceptance thereof, in which case the sale shall be completed, the purchase money paid, and said property delivered within days after the date of such acceptance.

The undersigned hereby agrees, upon receipt of notice of the exercise of this option, to furnish a full abstract of the title to all of said real estate, showing a good title thereto.

This option may be assigned by the said C. D., and in case of such assignment before acceptance, said C. D. shall be free from any liability hereunder, the same as if the assignee had originally been named herein.

Dated at, Ohio, this day of, 19...
.....

No. 93.

Option, by Corporation, on Manufacturing Plant.

For and in consideration of dollars (\$....) and of other good and valuable considerations, the receipt of which is hereby acknowledged, The Company, a corporation duly organized and existing under the laws of the State of Ohio, does hereby give and grant unto C. D. of, or assigns, the exclusive right

and option to purchase, as a going concern, the following property to wit:

All of the real estate, buildings, improvements, easements, plant and machinery belonging to it, and situated in the City of, County of and State of Ohio: also all of the railroad tracks, switches, boilers, engines, forges, steam and water pipes, tanks, trucks, cars, extra parts of machinery, shafting, belting, pulleys, gears, tools, dies, patterns, horses, wagons, implements, materials and property of every kind and nature now being used, or intended to be used, in connection with the manufacture and sale of: excepting raw and partly finished material and manufactured product hereinafter mentioned, and excepting cash on hand and in bank and bills and accounts receivable:

also, all the good will, trade rights, trade marks, brands, inventions, patents, formulæ, recipes and trade names now owned and used by it.

All of said property to be, at the time of said sale, free and clear from all liens and incumbrances whatsoever, including taxes and assessments.

The consideration for said sale to be dollars (\$), payable as follows: \$ on notice of the exercise of this option and the balance of \$ at the time of the completion of said sale.

This option shall expire on the day of, 19

Notice of the exercise of this option shall be in writing signed by said C. D., or assigns, and mailed to said The Company, or delivered to its president or secretary.

Said The Company further agrees, that, on notice of the exercise of this option and on payment of said sum of \$ to apply on said purchase price, it will, within days after said payment, furnish to said C. D., or assigns, for examination, full abstracts showing clear title of record to all of its said real estate.

Upon final consummation of said sale said The Company agrees to convey all of said real estate and appurtenances by good and sufficient deed or deeds of general warranty, and to execute and deliver such bills of sale and other instruments as may be necessary or proper for effectually conveying and trans-

ferring all of said property, both real and personal: and further, said The Company agrees to procure and cause to be executed and delivered, together with said instruments of conveyance, the agreement or agreements of said The Company, and of,, and, its president, secretary and treasurer, respectively, binding said The Company and said,, and, for a period of years after the completion of said sale, not to engage, or be interested, directly or indirectly, either individually, or in firms, corporations, or as stockholders, directors, officers, clerks, agents or employees, in the business of manufacturing, buying and selling or any kindred products, or by-products, in said City of or within miles therefrom.

By the exercise of this option, it is expressly agreed, on the part of said C. D., or assigns, that, in addition to the purchase of the property above mentioned, he, or they, will further purchase all raw and partly finished materials, on hand or in transit, at the cost thereof to said The Company, also all finished product at the inventory thereof; also all unexpired policies of fire, liability, or other insurance then in force, at the pro rata value thereof.

Payment for said raw and partly finished materials, finished, product and insurance policies to be made in cash upon completion of said sale.

It is further agreed on the part of said C. D., or assigns, by the acceptance of this option, that he or they will assume and be bound by all bona fide contracts theretofore made by said The Company for the purchase or sale of raw materials and supplies and finished product, a true and complete list of which is hereto annexed and made part hereof.

Said The Company agrees that this option may be assigned, and that the same shall inure to the assignee or assignees thereof, and that in case of such assignment before the exercise of this option, said C. D. shall be under no liability hereunder.

In witness whereof, said The Company has caused its corporate name to be signed hereto by its president by authority of its board of directors, duly ratified by its stockholders, as

required by law, and its corporate seal to be hereto affixed attested by its secretary this day of, 19...

The Company,

By, President.

(Corporate seal.)

Attest.

....., Secretary.

NOTE.—See G. C. §§ 8710 to 8718.

No. 94.

Option to Purchase Stock in Corporation.

....., Ohio,, 19...

In consideration of dollars (\$....), the receipt of which is hereby acknowledged, I hereby give to C. D. the right and option to purchase from me at any time within days from the date hereof shares of the (common or preferred) stock of The Company at \$.... per share, payable in cash.

All dividends, for which the transfer books close during said time, go with the stock. One day's notice of the exercise of this option is required, except on the last day.

A. B.

No. 95.

Option to Purchase Stock at "Book Value"; Certificates to be Deposited with a Trust Company.

NOTE.—This plan is sometimes adopted where the option covers a large block of stock and runs for a considerable period of time, the transferable receipts of the trust company enabling the person granting the option to use his stock as collateral, etc., meanwhile. For stock pooling agreement with option, see Form No. 80.

This agreement made this day of, 19..., by and between A. B. of, party of the first part; C. D. of, party of the second part, and The E. F. Trust Company, of, hereinafter called the Trustee, party of the third part, witnesseth:

(1) That in consideration of dollars (\$....), received to his full satisfaction of said party of the second part, said party of the first part hereby gives and grants to said party of the second part the exclusive right and option to purchase, at any time prior to, 19..., shares of the *common* stock

of The X. Y. Company, in the manner and for the price hereinafter set forth.

(2) Said party of the first part has this day deposited with said Trustee certificates for said shares of stock, duly endorsed in blank for transfer, to be held by that depositary as trustee for the purposes hereinafter set forth.

(3) The price to be paid for said stock under said option shall be an amount in cash equal to its "book" or "net" value at the time the notice hereinafter mentioned is given, to wit: that proportion of the value of the net assets of said corporation which the number of shares to be purchased bears to the entire issued *common* stock of said corporation. In determining the value of said net assets the merchandise, stock and materials shall be valued at the actual cost thereof with suitable allowance for depreciation; the plant, machinery, equipment and fixtures shall be taken at a fair inventory value, with a suitable allowance for depreciation, and the accounts and notes receivable shall be taken at their face value, less a suitable allowance for prospective losses. From the total value of all the assets of said corporation, ascertained as aforesaid, shall be deducted all debts and liabilities of the corporation (if preferred stock is outstanding add "and an amount in cash equal to the par value of the total issued preferred stock of said corporation,") and the remainder shall be divided by the total number of shares of the *common* stock of the Company, issued and outstanding, and the quotient shall be the "book" or "net" value per share of said stock, and the price per share at which said common stock under this option may be obtained.

(4) Said party of the second part, or his assigns, may exercise said option at any time during said period by notice in writing to the party of the first part by registered mail, at his last known usual place of residence and to the Trustee at its office. Within days after the date of the mailing of such notice, the party of the first part shall furnish, or cause to be furnished to the Trustee and the party of the second part, or his assigns, a statement of the net value of the *common* stock of said corporation, ascertained as aforesaid, certified to by the treasurer of said corporation.

If the party of the first part fails or refuses to furnish such statement of the net value of said stock, within the time herein limited, or in case the net value of such stock is, in the opinion of the party of the second part or his assigns, incorrect, then the net value of said stock shall be determined by arbitration as follows: The party of the second part shall choose an arbitrator, giving notice thereof by mail to the Trustee and to party of the first part.

Within *thirty* days after the mailing of said notice said party of the first part shall choose an arbitrator and give notice thereof by mail to the Trustee and to party of the second part. In case party of the first part shall fail to choose an arbitrator and give notice thereof within the time above limited the Trustee is hereby authorized and directed, upon the request in writing of the party of the second part, or his assigns, to choose a disinterested person as arbitrator in behalf of the party of the first part. The two arbitrators so chosen shall choose a third arbitrator and the three so chosen shall proceed to fix the value of said stock in the method hereinbefore prescribed. The award in writing signed by any two of said arbitrators shall be final and conclusive as to the net value of said stock. The expense of said arbitration shall be borne by the party of the part.

Unless arbitration be requested by party of the second part, as aforesaid, the statement furnished by party of the first part, certified by the treasurer of said corporation, shall fix the value of said stock. At any time within days after the net value of the stock is fixed by either of the aforesaid methods, the party of the second part may request of the Trustee, and the Trustee upon such request and upon receiving a certified copy of the certificate of said treasurer, or of the award of the arbitrators, is hereby authorized to deliver to said party of the second part, or his assigns, the certificates of stock deposited with the Trustee hereunder, upon payment in cash of the value of the stock, fixed as aforesaid. The Trustee shall pay the avails of said sale to said party of the first part, or to the holders of the transferable receipts of the Trustee hereinafter mentioned, but only upon surrender of said transferable receipts properly endorsed for cancellation.

(5) The Trustee shall issue to said party of the first part transferable deposit receipts in the following form:

No. Shares.

TRANSFERABLE DEPOSIT RECEIPT.

THE X. Y. COMPANY.

The E. F. Trust Company certifies that has deposited with it certificates for shares of the *common* stock of the X. Y. Company to be held subject to the terms of a certain agreement, dated, 19.., which said agreement provides that the holder hereof will be entitled to the return of said certificates or to payment of the avails thereof as therein provided, but only upon surrender of this receipt properly endorsed for cancellation.

The E. F. Trust Company,
By

....., 19...

(Endorsed)

....., 19...

For value received hereby sell, assign and transfer tothe within certificate and all rights and interests thereunder.

Witness:

.....

.....

(6) If said option shall not be exercised within the time and in the manner herein provided, then and in that event, the Trustee shall return the certificates to party of the first part, or to the holders of the transferable deposit receipts hereinbefore mentioned, but only on the surrender of said receipts properly endorsed for cancellation.

(7) Said Trustee shall be and is hereby appointed the true and lawful attorney of the party of the first part, in his name and stead, to make all necessary transfers of stock deposited hereunder and for him, the said Trustee may execute all necessary acts of assignment and transfer, the party of the first part hereby ratifying and confirming all that his said attorney shall lawfully do by virtue hereof.

(8) It is mutually agreed between the parties hereto:

(a) That all charges for the services and expenses of the Trustee hereunder shall be paid by the party of the *second* part:

(b) That this agreement shall inure to, and shall be binding upon, the executors, administrators, successors and assigns of the parties hereto;

(c) That this agreement is signed in triplicate, and any one copy may be used as an original;

(d) That the recitals in this agreement are not made by the Trustee and shall not be construed to impose any obligation or responsibility upon it in respect thereof; and that the Trustee shall not be liable in respect to any act performed or omitted to be performed by it hereunder save and except for its own wilful default.

(e) That unless written notice of a change of address be given any notice hereunder may be given to party of the first part by mailing the same to *A. B.* at; to party of the second part or his assigns, by mailing the same to *C. D.* at, and to the Trustee by mailing the same to it at its office in

In witness whereof the parties of the first and second parts have hereunto set their hands and said party of the third part has caused its corporate name to be signed and its corporate seal to be affixed hereto the day and year first above written.

Witnesses:

..... *A. B.*
..... *C. D.*

The E. F. Trust Company,
By

No. 96.

Option Contract to Purchase Stock, if Vendee Desires to Resell.

Whereas, *A. B.* has this day purchased shares of the (*common or preferred*) stock of The Company, for the price of dollars per share;

Now I, the undersigned, in consideration of said sale, and in consideration of one dollar (\$1) paid to me by said *A. B.*, the receipt of which is hereby acknowledged, do hereby agree that if, at the expiration of one year from the date hereof, the said *A. B.* shall desire to sell said stock at the price paid by him therefor, I will purchase the same and pay to him the

amount paid by him therefor, together with interest thereon at the rate of percent per annum.

....., Ohio,, 19...

.....

No. 97.

Option to Deliver Stock (A "Put").

....., Ohio,, 19...

For value received, the bearer may deliver me shares of the (common or preferred) stock of The Company at percent, at any time in days from date. The undersigned is entitled to all dividends or extra dividends declared during said time.

Expires, 19.., at P. M.

No. 98.

Option to Purchase Stock (A "Call").

....., 19...

For value received the bearer may call on me on one day's notice, except last day, when notice is not required, for shares of the (common or preferred) stock of The Company at at any time within days from date. All dividends, for which transfer books close during said time, go with the stock.

Expires, 19.., at 3 P. M.....

Note.—See *Treat v. White*, 181 U. S. 264.

No. 99.

Bond to Corporation Issuing New Certificate of Stock in Lieu of Lost or Destroyed Certificate.

(G. C. § 8673-17.)

Know all men by these presents, that we, A. B. as principal and E. F. as surety, are held and firmly bound unto The Company in the sum of dollars (\$....) for which payment well and truly to be made we bind ourselves firmly by these presents.

Dated this day of, 19...

The condition of this obligation is such, that whereas, a certificate for shares of the capital stock of said The Company, being certificate number, owned by and standing on the books of said corporation in the name of said A. B., has been lost or destroyed, and can not be produced by him, and whereas, at his request, and upon his promise to indemnify and save harmless said The Company in the premises and to surrender said certificate when found to said The Company, to be cancelled, said The Company has this day issued to said A. B. a new certificate for shares in lieu of said certificate so lost or destroyed:

Now if said A. B. shall well and truly indemnify and save harmless said The Company, its successors and assigns, from and against said certificate of stock and from and against any and all damages, costs, charges and expenses, including attorney's fees, and all actions and suits, whether groundless or otherwise, by reason of said certificate of stock, and shall surrender or deliver the same, as soon as the same shall be found, to be cancelled, then this obligation shall be void; otherwise to remain in full force and effect.

In presence of
.....

A. B.
E. F.

No. 100.

Bond of Treasurer of Corporation.

Know all men by these presents, that we, A. B. as principal and E. F. as surety, are held and firmly bound unto The C. D. Company, a corporation duly organized and existing under and by virtue of the laws of Ohio, with its principal office in the City of, Ohio, in the sum of dollars (\$....) for which payment well and truly to be made we do bind ourselves firmly by these presents.

Dated this day of, 19...

The condition of this obligation is such that, whereas, the said A. B. has been elected treasurer of said The C. D. Company for the period of one year from the day of, 19..., and thereafter until his successor is elected and qualified. Now if the said A. B. shall well, honestly and faithfully perform and discharge his duties as such treasurer and shall account to said

The C. D. Company, its successors or assigns, for all money and property that may come into his possession or under his control, and shall well and faithfully pay and deliver said money and property as required or directed by said corporation, then this obligation to be void, otherwise to remain in full force and effect.

Provided that any forbearance on the part of The C. D. Company toward the said A. B. in respect to his failure or neglect in the performance and discharge of his duties as such treasurer, or any extension or extensions by said corporation of the time or times of said payments of money or deliveries of property shall not in any manner operate to release or discharge the said E. F. from his liability under the foregoing obligation.

Signed and delivered

in presence of

.....

A. B.

E. F.

No. 101.

Collateral Note.

\$.....

....., Ohio,, 19...

.... days after date promise to pay to the order of Bank, dollars, for value received, at the office of said Bank with interest at percent per annum, having deposited with said Bank as collateral security for payment of this or any other liability or liabilities of to said Bank, due or to become due, or that may be hereafter incurred, the following property:

(description of property)

the market value of which is now \$....: in case of depreciation of the same, or of any other securities which may be hereafter pledged for this loan, a payment shall forthwith be made on account, or additional securities given, satisfactory to said Bank, so that the market value of the collateral shall always be at least percent in excess of the amount unpaid on this note. In case of failure so to do, this note shall be deemed to be due and payable on demand, with full power and authority to sell, assign and deliver the whole of said property, or any part thereof, at public or private sale at the option of said Bank, or its assigns, and with the right to themselves become the purchasers thereof at public sale, freed and discharged from any equity of redemp-

tion, on the nonperformance of this promise or the nonpayment of any of the liabilities hereinbefore mentioned, at any time or times thereafter, without advertisement or notice. All legal or other costs and expenses for collection, sale and delivery to be deducted from the proceeds of such sale, and the residue applied on any or all of the liabilities under this note and agreement: the overplus, if any, to be returned to the undersigned.

No. 102.

Collateral Note. Another Form.

\$....., Ohio,, 19....

.... days after date promise to pay to the order of Bank dollars, for value received, at the office of said Bank with interest at percent per annum, having deposited with said Bank as collateral security for payment of this or any other liability or liabilities of to said Bank, due or to become due, or that may be hereinafter incurred, the following property:

(description of property)

the market value of which is now \$.... with the right on the part of said Bank from time to time to demand such additional collateral security as it may deem sufficient should the market value thereof decline, and also give said Bank a lien for the amount of all said liabilities upon all the property or securities given unto or left in its possession by the undersigned, and also upon any balance of the account of the undersigned with it. Upon failure to comply with any such demand, this obligation shall forthwith become due, will full power and authority to it, or its assigns, in case of such default or of the nonpayment of any of the liabilities above mentioned at maturity, to sell, assign and deliver the whole or any part of such securities, or any substitutes therefor or additions thereto, at any brokers' board, or at public or private sale, at its option, at any time or times thereafter without advertisement or notice to the undersigned, and with the right on the part of said bank to become purchaser thereof at any public sale thereof or at any sale thereof at brokers' board, freed and discharged of any equity of redemption. And after deducting all legal or other costs and

expenses for collection, sale and delivery, to apply the residue of the proceeds of such sale or sales so made, to the payment of any, either or all of said liabilities, as it may deem proper, rendering the overplus, if any, to the undersigned: and the undersigned will remain liable for any amount remaining unpaid after such sale. The undersigned do hereby authorize and empower said Bank, at its option, at any time, to appropriate and apply to the payment and extinguishment of any of the above named obligations or liabilities, whether now existing or hereafter contracted, any and all moneys now or hereafter in its possession, on deposit or otherwise, to the credit of or belonging to the undersigned, whether said obligations or liabilities are then due, or not due.

.....
No. 103.

Syndicate Agreement.

A. & B. RAILWAY SYNDICATE.

An agreement made and entered into this day of
....., 19.., by and between L. M. and S. T., parties hereto of the first part, hereinafter sometimes called "Syndicate Managers," and the individuals, firms and corporations other than the Syndicate Managers subscribing hereto severally, parties hereto of the second part, hereinafter sometimes called "Syndicate Subscribers," and all of whom together with the Syndicate Managers constitute the "Syndicate."

Whereas, The O. & P. Traction Company is a corporation organized under the laws of the State of Ohio for the purpose of constructing and operating an electric street railroad property, to wit, from the City of in County, Ohio, to the City of in County, Ohio, with the right to make extensions and branches from said street railroad; and

Whereas, It is proposed by the Syndicate to acquire as large an amount as possible of the outstanding capital stock of said Traction Company, and also all outstanding claims against said Traction Company and the assets thereof, and after having acquired the same to construct certain electric street railways over the route authorized by the charter of said Traction Company, with extensions and branches therefrom; and

Whereas, For accomplishing said purposes and providing the necessary funds therefor, and for the other purposes herein set forth, the parties hereto desire to form a Syndicate, to be known as A. & B. Railway Syndicate.

Now, therefore, this agreement witnesseth: that in consideration of the premises and the mutual promises and agreements herein made, and the sum of one dollar (\$1.00) by each of the parties hereto in hand paid to the other, the Syndicate Managers and the Syndicate Subscribers hereto agree as follows:

FIRST. The parties hereto hereby form a Syndicate for the purpose of acquiring as large an amount as possible of the capital stock of said Traction Company, together with the claims against said Traction Company and the assets thereof, and after having acquired the same, of financing said Traction Company and constructing an electric street railroad, as authorized by the charter of said Traction Company, with extensions and branches therefrom, and of bringing the property of said Traction Company to successful operation and of doing and performing such other things as may, in the judgment of the Syndicate Managers, be necessary or proper in connection therewith.

SECOND. The Syndicate Managers are hereby authorized, as attorneys and agents for the Syndicate Subscribers severally, to purchase on their behalf and for them, as large an amount as possible of the capital stock of said Traction Company together with its assets, at such a price and upon such terms and conditions as may be deemed advisable by the Syndicate Managers.

THIRD. The Syndicate Managers, for the purposes contemplated by this agreement, are authorized to proceed with the construction of the street railway system of the Traction Company with extensions and branches therefrom, and for that purpose to have the capital stock of the said Traction Company increased or if deemed advisable to organize a corporation under the laws of the State of Ohio with such name and capitalization as may be designated by the Syndicate Managers, for the purpose of taking over the stock, property and assets of, and claims against, said Traction Company.

Wherever the designation "Traction Company" occurs in this agreement, the same shall be held and deemed to apply to

either The O. & P. Traction Company by the present corporate name or by any change of name, or to said new corporation to be organized as the context may require or indicate.

The Syndicate Managers are given full power, authority and discretion to determine all matters relating to the capitalization of The Traction Company, and of the stocks, bonds, or securities to be issued thereby, and are also authorized to acquire any or all of the stocks, bonds or securities issued by said Traction Company, for the benefit of the Syndicate.

FOURTH. The Syndicate Managers agree to proceed with reasonable diligence to carry out and consummate, in so far as they may be able to do so, the purposes for which this Syndicate is organized, in such manner as in their judgment may be best to that end, and to do all things and perform all acts which in their judgment shall be deemed for the best interests of the Syndicate.

FIFTH. Each Syndicate Subscriber shall set opposite his name as signed hereto or to any counterpart hereof, the amount of his subscription to the Syndicate, and shall pay as herein provided the amount thereof as called by the Syndicate Managers. All funds received by the Syndicate Managers from the Syndicate Subscribers shall be expended and disposed of in the following manner:

(a) The payment of all expenses of the Syndicate and the Syndicate Managers, including incorporation expenses and charges, counsel and attorney's fees, brokers' commissions, interest, charges, expenses and commissions on Syndicate loans, and other necessary and proper disbursements and expenses made or incurred in connection with the carrying out of this agreement.

(b) The payment of and for such amount of the capital stock of the Traction Company, and the assets thereof, as the Syndicate Managers may be able to acquire; the constructing, building and equipping of said street railway system, and the purchasing and acquiring of stocks, bonds and securities of said Traction Company, or any of said purposes which may be deemed advisable by the Syndicate Managers.

SIXTH. The Syndicate Subscribers irrevocably nominate and appoint the Syndicate Managers, and their survivors, as

their agents and attorneys, with full power to do any and all acts and to enter into and execute all agreements or other instruments **necessary or proper** or by the Syndicate Managers deemed expedient in the premises and for the purposes of this Syndicate Agreement, and to that end, to absolutely control the stock, claims and assets of the Traction Company so to be acquired, together with all stocks, bonds and securities of the Traction Company now or hereafter issued or authorized and acquired by the Syndicate, as fully in all respects as if the Syndicate Managers were the owners thereof, and to pledge any or all of said stocks, claims, assets, bonds and securities, or any portion thereof, or this contract and the several obligations of the Syndicate Subscribers hereunder, as security for the repayment of money borrowed on behalf of the Syndicate.

It is further agreed that if the Syndicate Managers pledge the stocks, bonds and securities of the Traction Company, or this agreement and the several obligations of the Syndicate Subscribers, as security for the payment of the Syndicate's obligations, the person, firm or corporation to whom the same are pledged shall have the right and power, in order to secure payment of such obligations, to make calls upon the subscriptions hereunder in case the Syndicate Managers neglect or refuse to make the same.

SEVENTH. The Syndicate Subscribers agree that they will from time to time, **and at any time on call of the Syndicate Managers**, and to the amount of such call or calls, make cash payments on account of their respective subscriptions hereunder, upon ten (10) days written notice by mail from the Syndicate Managers; all payments hereunder by the Syndicate Subscribers shall be made to The Trust Company,, Ohio, for the account of the Syndicate Managers. Each Subscriber shall, at the time of making each of the payments called hereunder, receive a certificate issued by said Trust Company, certifying to the amount of such payment and the interest of such Subscriber in said Syndicate, subject to the terms and conditions of this agreement; said certificate shall be in assignable form, and be transferable only on the books of said Trust Company by due assignment and surrender of such certificate, and upon due assignment and surrender thereof, a new certificate

may be issued in the name of the transferee. No such assignment or transfer or issue of a new certificate to a transferee shall release any Subscriber hereto from his obligations assumed hereunder. Every Syndicate Subscriber and any and all owners, holders, transferees or pledgees of said certificates, or of the bonds, stocks or securities represented thereby, or deliverable thereunder, hereby ratify and approve the action of the Syndicate Managers and of the officers and directors of said Traction Company in the matter of issuing, paying for and disposing of the stocks, bonds and securities issued by said Traction Company.

EIGHTH. The Syndicate Managers shall have the sole direction, management and the entire conduct of the Syndicate, and the enumeration of particular or specific powers in this agreement shall not be considered as in any way limiting or abridging the general power or discretion intended to be conferred upon and reserved to the Syndicate Managers in order to authorize them to do any and all things proper, necessary or expedient in their discretion to carry out the purposes of this agreement; neither shall they, or either of them, be liable under any of the provisions of this agreement, or in or for any matter connected therewith, except for want of good faith or malfeasance.

NINTH. The Syndicate Managers may be Subscribers to the Syndicate and to the extent of any subscription or reservation by them, they are to participate in the profits and losses and the securities purchased or acquired, to the same extent as the other Subscribers.

TENTH. Each Syndicate Subscriber hereby ratifies, assents to and agrees to be bound by any action of the Syndicate Managers taken under this agreement, and agrees to perform all of his undertakings hereunder from time to time, on call of the Syndicate Managers, to the full extent of the amount set opposite his name or allotted to him, but he shall be liable hereunder solely to the Syndicate Managers or their successors or assigns, or to the Traction Company issuing any bonds, stocks and securities purchased hereunder, or to the person owning the same, and only to the extent of his individual subscription to the Syndicate.

ELEVENTH. The failure of any Syndicate Subscriber to perform any of his undertakings hereunder shall not affect or release any other Subscriber. The Syndicate Managers may, in their discretion, by written consent, release any Syndicate Subscriber. In case any Syndicate Subscriber shall fail to perform any of his undertakings hereunder or be released by the Syndicate Managers, other Subscribers may be received by the Syndicate Managers and take the share of the Subscriber so failing to perform his undertakings or so released. Upon failure of any Syndicate Subscriber to perform any of his undertakings hereunder, the Syndicate Managers shall have the right at their option to exclude such Syndicate Subscriber from further interest and participation in the Syndicate, and to hold him liable for all damages caused by his failure.

Nothing contained in this agreement or otherwise shall constitute the Syndicate Subscribers partners with the Syndicate Managers or with one another, or render them liable to contribute more than the amounts of their subscriptions, as aforesaid, or entitle them to any participation in the results or profits of said Syndicate other than as specified in this agreement.

TWELFTH. This agreement shall bind and benefit ratably according to the amount of the several subscriptions, not only the parties hereto but their respective successors, survivors, assigns and personal representatives. Two originals hereof are to be signed by the Syndicate Managers and one original is to be deposited with The Trust Company, and counterparts may be signed by the Syndicate Subscribers and retained by the Syndicate Managers, or by said Trust Company, and all shall be taken and deemed to be one original instrument.

THIRTEENTH. All notices issued by the Syndicate Managers hereunder shall be mailed to the addresses of subscribers as given below opposite their respective names. The holding of certificates issued by said Trust Company in pursuance thereof, shall constitute such holders parties to this agreement, as fully to all intents and purposes as signing the same.

FOURTEENTH. It is mutually agreed that during the term of this agreement the Syndicate Managers shall have full power of sale, or exchange for other stocks and bonds, or either,

of any other Company or corporation, of all stocks, bonds and securities acquired and received by them on behalf of the Syndicate Subscribers, and also of any stocks, bonds or securities received in exchange therefor, upon sale to or consolidation with any other corporation upon such terms, prices and conditions as may be deemed by them to be for the interests of the Syndicate, and that until the distribution of said stocks, bonds, or securities to the Subscribers hereto, all stocks of said Traction Company, and all other stocks, bonds or securities belonging to the Syndicate, shall be held by and in the name of the Syndicate Managers, or their nominees, with full power in the Syndicate Managers or their nominees, to vote the same at any and all meetings of the stockholders of the corporation issuing said stocks, bonds or securities.

FIFTEENTH. Should the Syndicate Managers in carrying out this agreement sell and dispose of the holdings of the Syndicate hereunder for cash or securities, the Syndicate Managers shall be entitled to hold and retain (..) percentum of the profits of the Syndicate, either in cash or securities, the same to be in full as compensation to the Syndicate Managers for their services performed hereunder. After the deduction of the said (..) percentum of said profits as compensation to the Syndicate Managers as above, the balance of said profits shall be distributed pro rata to the Syndicate Subscribers from time to time, in the discretion of the Syndicate Managers.

Should the Syndicate Managers not sell or dispose of the holdings of the Syndicate hereunder, but distribute the same to the Syndicate Subscribers, the Syndicate Managers at the time of such distribution shall be entitled to hold and retain (..) percentum, in par amount, of any and all common corporate stocks at that time owned by the Syndicate, the same to be in full compensation to the Syndicate Managers for their services performed hereunder; and after the deduction of said (..) percentum of said common corporate stocks as aforesaid, the balance of said ordinary corporate stock, together with any bonds or other securities owned by the Syndicate shall be distributed pro rata, to the subscribers from time to time, in the discretion of the Syndicate Managers.

Whenever any partial distribution is made to the Syndicate Subscribers hereunder, said subscribers shall present the certificates, representing their interests, to said Trust Company, and have said distribution endorsed thereon, and upon such final distribution hereunder, the Syndicate Subscribers shall surrender their said certificates.

All expenses and obligations of the Syndicate shall be a charge against the cash, securities or property at any time owned by the Syndicate.

SIXTEENTH. In case of the death, resignation or inability to act of either of the Syndicate Managers, the survivor shall have power subject to the approval of The Trust Company, to designate, by writing, filed with the said Trust Company, a person to fill the place so made vacant; and in case said survivor fails to fill said vacancy within thirty (30) days after such death, resignation or inability to act, and to give a written notice of such designation to said Trust Company, and to secure the approval of said Trust Company, then the said Trust Company shall have power to designate a person to fill the place so made vacant.

In case of the death, resignation or inability to act of both of said Syndicate Managers, The Trust Company shall have power to designate persons to fill the places so made vacant. In case said Trust Company fails to fill said vacancy or vacancies within thirty (30) days after the date of the accruing of its right to fill said vacancy or vacancies, a majority in amount of the Subscribers hereto, who have paid the full amount of all calls made, shall have power to name and designate, in writing, a successor or successors, and such successor or successors chosen in any manner as above provided shall, upon acceptance in writing endorsed upon this agreement, be clothed with all the powers and be subject to all the duties conferred and enjoined upon the Syndicate Managers herein.

SEVENTEENTH. It is mutually agreed that the obligations of the Syndicate Subscribers under this contract are several and not joint, and that no one of said subscribers shall be liable for a breach of this contract by any other Subscriber than himself.

Each and every party hereto will, upon reasonable request, execute and deliver all further writings which may be necessary or proper to carry this agreement into effect.

EIGHTEENTH. No calls shall be made by the Syndicate Managers upon the subscriptions of the Syndicate Subscribers until the total subscriptions hereto shall equal the sum of dollars (\$....).

NINETEENTH. The Syndicate Managers shall have power to reduce the subscription or subscriptions of any or all of the Syndicate Subscribers for any reason deemed by the Syndicate Managers to be for the benefit of the Syndicate.

TWENTIETH. All action taken by the Syndicate Managers hereunder shall be in pursuance of unanimous agreement of the Syndicate Managers. In case the Syndicate Managers are unable to agree, either or both of the Syndicate Managers may make statements in writing to The Trust Company of the matters in dispute or the proposed action, and the said Trust Company is hereby given full power, right and authority to settle and determine the dispute submitted or the action proposed, and its decision of any such matters shall be final and binding on all the parties hereto, and the action of the Syndicate Managers shall in such event be in accord and compliance with the decision of the Trust Company.

Each of said Syndicate Managers hereby agrees to be bound by such decision of the Trust Company and to execute any and all deeds, transfers, contracts, or assignments as may by the Trust Company be deemed necessary, proper or convenient to carry out and make effective the decision of the Trust Company.

TWENTY-FIRST. This agreement shall continue in force and operation for a period of (..) years from and after, 19..; provided, however, that if the Syndicate Managers deem it to be for the best interests of the Syndicate to extend the term of the Syndicate for one (1) year from and after the expiration of said period of (..) years, they may do so, by giving notice in writing of such intention to the Syndicate Subscribers, at any time on or before thirty (30) days prior to the expiration of the said period of (..) years; and the Syndicate Managers may, if they deem best to do so,

terminate this Syndicate at any time, upon written notice of such intention to the Syndicate Subscribers.

IN WITNESS WHEREOF, the Syndicate Managers, parties hereto of the first part, and the Syndicate Subscribers, parties hereto of the second part, have subscribed an original or counterpart hereof, as of the day and year first above written.

L. M.....

S. T.....

Syndicate Managers.

Syndicate Subscribers.

Name	Address	Amount of Subscription
.....	\$.....
.....	\$.....
.....	\$.....

No. 104.

Underwriting Agreement.

We, the undersigned, each for himself severally and not jointly, do hereby agree to and with each other, and with the Trust Company of, for itself and The A. B. Company, to subscribe to, receive and pay for the amount of (*bonds or stock*) of The A. B. Company, set opposite our respective signatures below, at the price of dollars (\$.....) for each (*bond or share of stock*), percent of which price shall be payable upon allotment and the remainder on demand of The Trust Company.

We further agree to receive and pay for any smaller amount than that subscribed for which may be allotted to us.

The conditions of this underwriting agreement are as follows:

(1). This agreement shall not be binding upon the undersigned unless the entire amount of dollars (\$.....) of (*bonds or stock*) shall have been underwritten.

(2). Within such reasonable time as shall be fixed by The Trust Company, the entire amount of dollars (\$.....) of (*bonds or stock*), less any amount taken and withdrawn by the underwriters as hereinafter set forth, shall be offered to the public, through such brokers or bankers

as shall be designated by The Trust Company, for subscription at not less than the price of dollars (\$.....) for each (*bond or share of stock*).

(3). If the amount of (*bonds or stock*) subscribed and paid for, upon said public offering, shall be equal to, or exceed, the amount of (*bonds or stock*) so offered to the public, then all liability under this agreement shall cease.

(4). If the amount of (*bonds or stock*) subscribed for, upon said public offering, shall be less than the total amount of (*bonds or stock*) so offered to the public, or if the (*bonds or stock*) subscribed for, on such public offering, shall not be paid for in full at the minimum price above specified, then the deficiency in subscriptions and payments shall be made good by the underwriters, on demand of said The Trust Company, pro rata, in the proportion which the subscriptions of each underwriter, less any amount taken and withdrawn by him, shall bear to the total amount of (*bonds or stock*) so offered to the public.

(5). Each underwriter shall receive preferred and common stock of The A. B. Company, in an amount, at par, equal to percent of the par value of the (*bonds or stock*) hereby underwritten by him, in each class of stock, and all the proceeds, not exceeding *five* (5) percent, realized from the sale of (*bonds or stock*) at public issue in excess of *ninety* (90) percent, after deducting issue expenses, shall belong to the underwriters.

(6). Any underwriter shall have the option of withdrawing, from the public offering, any of the (*bonds or stock*) hereby underwritten by him, provided that he notify The Trust Company *five* days prior to the date fixed for the public issue, that he elects to purchase said (*bonds or stock*) and provided that, in the proportion of (*bonds or stock*) so purchased, he shall be deemed to have waived his right to participate in the cash proceeds realized from the public issue.

(7). No underwriter shall sell or offer for sale the (*bonds or stock*) so purchased, nor any of the bonus shares received by him, until months after the date of payment by him for the (*bonds or stock*) so purchased, without the consent of The Trust Company.

....., Ohio, 19...

Names.	Addresses.	Bonds (or stock) Underwritten.
.....
.....
.....
.....
.....

No. 105.

Underwriting Agreement. Another Form.

This agreement made at, Ohio, this day
of, 19.., Witnesseth:

Whereas, A. B., hereinafter sometimes called “promoter,”
proposes to organize a corporation under the laws of Ohio to be
called The Company, or such other name as may
hereafter be selected by the parties in interest, hereinafter some-
times called “the corporation” for the purpose of
(state purpose of new corporation).

The corporation shall have a capital stock of
dollars (\$.....) consisting of dollars (\$.....)
of preferred stock, divided into shares of the par value of
..... dollars (\$.....) each, the dividends on said pre-
ferred stock to be percent, cumulative; and
dollars (\$.....) of common stock, divided into shares
of the par value of dollars (\$.....) each, and

Whereas, the promoter has acquired options and contracts
for the purchase of certain properties, desirable for the busi-
ness of the corporation, at certain prices, to be paid for in
part in cash, and partly in stock of the corporation, and

Whereas, it will be necessary to raise at least
dollars (\$.....) in cash to complete said purchases and pro-
vide the necessary working capital for the corporation, and

Whereas, it is advisable to form a syndicate for the purpose
of furnishing the cash so required, by underwriting a subscription
to the preferred stock of the corporation, at par, such syndi-
cate to be composed of The Trust Company of
..... as “syndicate manager” together with the per-
sons, other than the promoter and The Trust

Company, subscribing hereto severally, hereinafter sometimes called "syndicate subscribers," and

Whereas, the syndicate, for underwriting said stock and furnishing said cash, is to receive, as a commission therefor from the promoter, dollars (\$....) par value of the common stock of said corporation, full paid and non-assessable, which commission, after paying the fees of The Trust Company, is to be divided among the syndicate subscribers, in proportion to the amount of their subscriptions.

Now, therefore, in consideration of the premises and of the mutual promises and agreements herein made, each syndicate subscriber, for himself, severally and not jointly, does hereby subscribe for the amount of the preferred stock of said corporation set opposite his signature below, and does hereby agree to pay to said The Trust Company therefor the full par value thereof, in cash, on days' notice from said TheTrust Company. On such payments said Trust Company shall issue transferable receipts therefor, which shall be exchangeable for certificates of said preferred stock.

This agreement shall not be binding upon any of the parties hereto unless the entire amount of \$..... of preferred stock shall have been underwritten hereunder, but shall immediately become operative when said amount is subscribed.

The Trust Company may enforce this agreement by suit on the subscriptions, or by forfeiting payments made thereon, by any other proper remedies.

The cash paid in by the subscribers hereto shall be, by said The Trust Company, paid over to the Treasurer of the corporation, upon his election and qualification as such officer.

....., Promoter.
The Trust Company.

Names	Addresses	Number shares of preferred stock
.....
.....
.....
.....
.....

No. 106.

Power of Attorney to Managing Agent.

Know all men by these presents: That The A. B. Company, a corporation duly organized under the laws of, and having its principal office in the City of, State of, does hereby make, constitute and appoint C. D., of, its true and lawful attorney, for it, and in its name, place and stead, to conduct and carry on its (*specify kind of business*) business in the city of, state of; to open a bank account in its name at some bank in said city; to endorse, for deposit to its credit in said bank, checks, drafts, notes and other evidences of value, to draw and sign checks in its name against said deposits for such moneys as may be necessary from time to time in the transaction of said business, or for remittance to its principal office in the city of; to hire and discharge employes; to purchase (*for cash*) goods, wares, merchandise, supplies and materials connected with its said business; to sell goods, wares and merchandise connected with its said business for cash or on credit, and generally to do all things necessary or proper in its interest in the usual course of its business in said city; giving and granting unto its said attorney full power and authority to do and perform all and every act and thing whatsoever, requisite, necessary and proper to be done in and about the premises, as fully, to all intents and purposes, as it might or could do, hereby ratifying and confirming all that its said attorney shall lawfully do, or cause to be done, by virtue hereof.

In witness whereof, said The A. B. Company has caused its corporate name to be subscribed hereto by its president, and its corporate seal to be affixed attested by its secretary, this day of, A. D. 19...

Signed, sealed and

acknowledged in presence of

.....

.....

The A. B. Company,

By, President.

(Corporate Seal)

Attest, Secretary.

STATE OF OHIO, }
County, } SS.

Before me, a notary public in and for said county, personally appeared, president and, secretary of The A.

B. Company, the corporation which executed the foregoing instrument, who acknowledged that the seal affixed to said instrument is the corporate seal of said corporation; that they did sign and seal said instrument in behalf of said corporation and by authority of its board of directors; and that said instrument is the free act and deed of said corporation.

In testimony whereof I have hereunto subscribed my name and affixed my seal at, this day of, 19...

BOND ISSUES.

NOTE.—G. C. § 8705, as amended 109 v. 231, authorizes corporations to borrow money and issue bonds “at such rates of interest as may be provided in such issue,” and further provides that the limitations of G. C. § 8303 shall not apply to such “borrowing, maturing and payable one year or more after the date thereof, and no corporation, wherever organized, nor any one in its behalf, shall interpose the defense or make the claim of usury in any suit or proceeding upon or with reference to any such corporate borrowing.”

No. 107.

Resolution of Directors Authorizing Bond Issue and Corporate Mortgage or Deed of Trust.

Mr. presented and read the following resolution:

“Whereas, it is necessary to provide for the procuring of funds for the purpose of (*insert purpose of bond issue*, as “providing for the redemption of its outstanding obligations, the acquisition of additional property, the making of additions, extensions and betterments to the plant and property now owned or hereafter acquired by it, and for its other proper corporate uses and purposes”)

Therefore be it resolved, that the president and secretary of this Company be and are hereby authorized to execute and deliver to The Trust Company of, Ohio, ready for certification by it, the coupon bonds of this company to an aggregate amount not exceeding dollars dated the day of 19.., maturing on the day of, 19.., bearing interest at rates not exceeding *five* per centum per annum, payable semi-annually on the first day of January and the first day of July in each year evidenced by coupons attached to said bonds executed by the engraved fac-

simile of the signature of the Treasurer of this company, all of said bonds to be of like date, tenor and effect, and are to be in the principal sum of \$1,000, each, and to be subject to redemption on, 19.., and at any interest date thereafter at 105% plus accrued interest, said bonds to be issued from time to time as may be determined by the Board of Directors and in the manner set forth in the mortgage or deed of trust herein-after mentioned; and be it further resolved, that to secure said bonds and interest the President and S cretary of this company be and they are hereby authorized and directed to execute, acknowledge and deliver to said The Trust Company of, Ohio, a mortgage, or deed of trust, upon all of the property, plant, rights, franchises and privileges of this company, now owned or hereafter acquired, which said mortgage is submitted herewith, and a copy thereof is on file with the secretary of this company, together with the form of bonds and coupons to be executed, all the provisions, terms and conditions of which said mortgage or deed of trust and bonds and coupons are hereby approved and authorized.

And be it further resolved that a meeting of the stockholders of this company be and is hereby called and ordered to meet at the office of the company on the day of, 19.., at o'clock ..M., for the purpose of considering and acting upon said proposed issue of bonds, secured by mortgage or deed of trust as aforesaid, and the transaction of any and all business necessary or incident thereto, and the secretary is hereby instructed to give notice thereof to the stockholders pursuant to law and to the regulations of this company."

Mr. moved the adoption of the foregoing resolution.

The motion was duly seconded by Mr. Thereupon the president put said resolution and the following was the vote of the directors thereon.

-, yea.
-, yea.
-, yea.
-, yea.
-, yea.

No director voted nay. Thereupon said resolution was declared carried.

No. 108.

Resolution of Stockholders Ratifying Bond Issue, Etc.

NOTE.—Action by stockholders is not required except (a) in the case of certain building companies, mortgages by which companies must be consented to by a vote of the holders of two-thirds of the stock (G. C. § 10210) and (b) except where convertible bonds are to be issued, in which case the written assent of three-fourths of the stockholders representing three-fourths of the paid up stock is required. (G. C. § 8709.)

In any case, however, ratification by stockholders will estop those voting.

For notices and minutes of meeting, see forms for special meetings of stockholders, *supra*.

“Whereas at a meeting of the Board of Directors of this company duly called and held on the day of, 19.., the following resolution was duly adopted:

(Copy directors’ resolution in full.)

Now therefore be it resolved that said action of the Board of Directors and the issue of said bonds, secured by mortgage or deed of trust, be and the same is hereby consented to, ratified, approved and confirmed in all respects.”

No. 109.

Written Assent of Stockholders to Issue of Convertible Bonds.

(G. C. § 8709.)

We, the undersigned stockholders of The Company, do hereby assent in writing to the issue of convertible bonds as provided by the resolution of the board of directors of this company adopted the day of, 19..

Names.	Shares.
.....
.....
.....
.....
.....

NOTE.—Three-fourths of the stockholders and three-fourths of the stock must be represented in the written assent.

No. 110.

Deed of Trust, or Mortgage, by Corporation to Secure Bonds.

The A. B. Electric Light Company

to

The C. D. Trust Company

and

E. F. Trustees.

Indenture dated for convenience this day of, A. D. 19.., but actually made and entered into this day of, A. D. 19.., by and between The *A. B.* Electric Light Company, a corporation duly organized and existing under and by virtue of the laws of the state of Ohio, hereinafter called the "Company" party of the first part, and The *C. D.* Trust Company, a corporation duly organized and existing under and by virtue of the laws of the state of Ohio, and *E. F.*, of the city of, as Trustees, the said The *C. D.* Trust Company, Trustee, being sometimes hereinafter referred to as the "Corporate Trustee," and the said *E. F.*, Trustee, being sometimes hereinafter referred to as the "Individual Trustee," parties of the second part.

Whereas, under the laws of the state of Ohio, the Company is authorized to borrow money and issue its negotiable bonds therefor and secure the payment thereof by mortgage upon its property, rights, franchises and privileges; and whereas the Company, desiring to provide for the redemption of its outstanding obligations, the acquisition of additional property, the making of additions, extensions and betterments to the property now owned or hereafter to be acquired by it, and money for its other proper corporate uses and purposes, the Board of Directors of the Company at their meeting duly called and held in the city of, Ohio, on the day of, A. D. 19.., duly authorized its President, or Vice-President, and Secretary, or Assistant Secretary, to execute and deliver to the Corporate Trustee, ready for certification by it, the coupon bonds of the Company to an aggregate amount not exceeding *Five Million* dollars, dated the day of, 19.., maturing on the day of, 19.., bearing interest at rates not exceeding five per centum per annum, payable semi-annually on the first day of *January* and the first day of *July* in each year,

evidenced by coupons attached to said bonds, executed by the engraved fac-simile of the signature of the Treasurer of the Company, all of which bonds are of like date and except as to the rate of interest thereon, of like tenor and effect and are to be in the principal sum of \$1,000 each and consecutively numbered from one upwards, and shall be subject to redemption on, 19.., and on any interest date thereafter, at 105 percent plus accrued interest, said bonds to be issued from time to time for the purposes and in the manner hereinafter set forth, but at no time to exceed in the aggregate *Five Million* dollars of principal, and for the purpose of securing the prompt and punctual payment of the principal and interest of said bonds as the same become due, said Board of Directors at their said meeting so called and held as aforesaid, duly authorized and directed the President, or Vice-President, and Secretary, or Assistant Secretary, of the Company to execute, acknowledge and deliver to the Trustee a mortgage or deed of trust upon all of the property, plant, rights, franchises and privileges of the Company, whether now owned or hereafter acquired; and whereas the stockholders of the Company at a meeting duly called and held on the day of, 19.., by resolution duly passed by the vote of the holders of a majority of the capital stock consented to, ratified, approved and confirmed the aforesaid action of the Board of Directors and authorized the issue of said bonds and the securing of the same by mortgage as aforesaid, and whereas, pursuant to said action of said Directors and said stockholders so had and taken as aforesaid, the President, or Vice-President, and Secretary, or Assistant Secretary, of the Company have executed and delivered to the *C. D. Trust Company*, the Corporate Trustee, for authentication, as hereinafter provided, *one million five hundred thousand dollars*, of principal of said bonds, which said *one million five hundred thousand dollars* of bonds bear interest at the rate of five per centum per annum, payable semi-annually as aforesaid, and said officers will from time to time hereafter, in accordance with the provisions hereinafter set forth, execute and deliver to the Corporate Trustee, ready for authentication, as hereinafter provided, bonds of the issue hereinafter described, bearing a rate or rates of interest not exceeding five per centum per annum, payable semi-annually as aforesaid, and including

said \$1,500,000 of bonds aggregating an amount not exceeding *five million* dollars (\$5,000,000) each of which said bonds shall be in substantially the words and figures following, subject only to the necessary variations in the distinguishing numbers and rates of interest thereon, to wit:

No. \$1,000.
United States of America,
State of Ohio.
The A. B. Electric Light Company,
First Mortgage Gold Bond.

Know all men by these presents, that the A. B. Electric Light Company, a corporation duly organized and existing under the laws of the state of Ohio, for value received, promises to pay to bearer, or, if registered, to the registered holder hereof, the sum of one thousand dollars, in gold coin of the United States of America of the standard of weight and fineness existing on the day of, 19.., at the office of The C. D. Trust Company, in the city of, Ohio, on the day of, 19.., with interest thereon at the rate of per centum per annum, payable semiannually on the first day of *January* and the first day of *July* in each year until said principal sum is paid, in like gold coin at the office of said Trust Company or at its fiscal agency in the city of New York, New York, upon the presentation and surrender of the coupons evidencing the same, hereto attached, as they respectively become due and payable as provided therein. In case of default in the payment of any of said coupons attached to this bond, in the manner provided in the trust deed or mortgage hereinafter mentioned, or in the performance of certain covenants and agreements as contained in said trust deed or mortgage, then the principal sum of this bond shall become due in the manner and with the effect provided in said trust deed or mortgage. This bond is one of an authorized issue of bonds, the amount whereof is limited so that there shall never be at any one time outstanding bonds of said issue for an aggregate principal sum exceeding *five million* dollars, all of which bonds are of like date, and except as to the rate of interest thereon, of like tenor and effect, may bear interest at rates not exceeding *five* per centum per annum, and are numbered from one upwards. All of said bonds are

issued or are to be issued under and are equally and ratably secured, without priority or preference by reason of priority of date of issue, or otherwise, by a trust deed or mortgage, dated the day of, 19.., duly executed, acknowledged and delivered by the Company, and recorded in the office of the Recorder of County, Ohio, conveying to said Trust Company and *E. F.*, of the city of, in trust, all of the corporate property, real and personal, rights, franchises and privileges, as described in said mortgage, now owned by the Company or hereafter acquired by it. This bond is subject to all and every the provisions, conditions and agreements and entitled to all and every the benefits and privileges in said trust deed or mortgage recited and set forth. The Company reserves to itself and its successors the right to pay and retire this bond on the day of, 19.., and on any interest date thereafter at 105% and accrued interest, upon giving *eight* weeks' notice by publication of its desire to so pay and retire this bond, as provided in said trust deed or mortgage, and notice of such desire to so pay and retire this bond having been given in the manner provided in said trust deed or mortgage, this bond shall cease to draw interest from the date of retirement fixed in said notice, unless upon such date, this bond being presented for payment, default in payment be made. This bond, unless registered, shall pass by delivery, but may be registered, and such registration certified hereon upon presentation to said Trust Company, at its office in the city of, as provided in said mortgage. After registration certified hereon, no transfer hereof, unless made on the books of the Trust Company at said office in said city, shall be valid, unless the last registration shall have been to bearer, and this bond shall be subject to successive registration and transfers to bearer at the option of each holder. After such registration only such registered holder, or the legal representatives of such holder, shall be entitled to receive the principal hereof, but the registry of this bond shall not restrain the negotiability of the coupons by delivery merely, but the coupons may be surrendered and the interest made payable only to the registered owner hereof. No recourse shall be had for the payment of the principal and interest of this bond against any incorporator, stockholder, officer or director of the Company, past, present or

future, either directly or through the Company, by virtue of any statute or constitution, or by the enforcement of any assessment of any penalty or otherwise howsoever, any and all liability of such incorporators, stockholders, directors and officers of the Company being hereby released. This bond shall not become obligatory until it shall have been authenticated by the execution by either one of the said trustees of the certificate endorsed hereon.

In witness whereof, said The A. B. Electric Light Company has caused these presents to be signed by its president and secretary, and its corporate seal to be hereto affixed and the coupons hereto annexed to be executed by the fac-simile of the signature of its treasurer, as of the day of, 19...

The A. B. Electric Light Company,
By, President.
Attest, Secretary.

Coupon. \$.....

The A. B. Electric Light Company will pay to bearer at the office of The C. D. Trust Company, in the city of, Ohio, or at its fiscal agency in the city of New York, on the day of, 19..., dollars, in United States gold coin, being six months' interest then due on its First Mortgage Gold Bond No.

....., Treasurer.

TRUSTEE'S CERTIFICATE.

It is hereby certified that the within bond is one of the series and issue described in the trust deed or mortgage therein mentioned.

The C. D. Trust Company, Trustee.
By, President.

Now, therefore, this indenture, witnesseth: The A. B. Electric Light Company, for and in consideration of the premises and of the sum of one dollar, lawful money of the United States of America, to it in hand paid by said The C. D. Trust Company, and E. F., Trustees, at or before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, and in pursuance of the direction and authority of its directors and stockholders, given as above recited, and in order to

secure equally and ratably the prompt and punctual payment of the principal and interest of all its bonds aforesaid at any time outstanding, and the fulfillment of the promises, covenants and agreements herein and in said bond so contained, hath granted, bargained, sold, aliened, conveyed, assigned, transferred, set over, released and confirmed, and by these presents doth grant, bargain, sell, alien, convey, assign, transfer, set over, release and confirm unto said The *C. D.* Trust Company and *E. F.*, Trustees, and to their successors in the trust hereby created, and assigns forever, the following described property, rights, franchises and privileges; to wit:

I.

(Description of Real Estate.)

II.

(Description of Personal Property.)

General Description.—Also all other property, real, personal and mixed, of the Company, wheresoever situate, now owned by the Company, and all which it may hereafter acquire, excepting money, bills and accounts receivable, stock supplies and securities, all of which are expressly reserved by the Company, and excepted from the lien of this mortgage. Provided, however, and it is expressly agreed, that upon the entry and possession by the trustees or by a receiver all money, bills and accounts receivable, stock supplies and securities shall thereupon become and be subject to the lien of this mortgage, and shall on demand be delivered to the trustees or to such receiver. And also all corporate property, rights, franchises and privileges of the Company now owned or controlled, or that may be hereafter owned or acquired by it. And also all present and after acquired rights of way, licenses, easements, leases, leasehold interests, buildings, erections, superstructures, machine shops, tools, implements and machinery and all contracts. And also all property, real, personal or mixed, chattels, fixtures, rights, franchises and privileges of whatsoever nature or description, hereafter acquired by the Company. And also all and singular the tenements, hereditaments and appurtenances now or hereafter belonging, or in any wise appertaining unto the aforesaid property, rights, franchises and privileges and

the reversions, remainders, rents, issues and profits, income, revenues and proceeds thereof.

And also all the present and hereafter acquired estate, right, title, interest, property, possession, claim and demand, whatsoever, as well in law as in equity of the Company, of, in and to the above described premises, property, rights, franchises and privileges, and every part thereof, with the appurtenances. All of the foregoing property, rights, franchises and privileges mentioned and described under headings I and II constitutes and is hereafter referred to as the "trust estate."

To have and to hold the above described premises, property, rights, franchises and privileges with the appurtenances thereunto belonging or in any wise appertaining, unto the said trustees, their successors and assigns, for its, his and their own use, but in trust, nevertheless, for the equal pro rata benefit and security of any and all persons and parties and their respective successors, executors, administrators or assigns, who may at any time hold any of the bonds or coupons to be issued hereunder, without any discrimination, preference or priority in favor of any one bond over any other by reason of priority in time of issue thereof, or otherwise, and with the powers and upon the terms, conditions and covenants hereinafter expressed and declared of and concerning the same, that is to say:

ARTICLE I. AUTHENTICATION AND ISSUE OF BONDS.

Section 1. The amount of bonds hereby secured which may be executed by the Company and which may be authenticated by the *corporate trustee*, is limited, so that never at one time shall there be outstanding bonds of the issue hereby secured for an aggregate principal sum exceeding *five million* dollars, but no bonds shall be authenticated and delivered hereunder at any time in excess of the issued or authorized capital stock of the Company, so long as the laws of the state of Ohio impose such limitation.

Section 2. All bonds issued hereunder shall be signed by the president or one of the vice-presidents and secretary or an assistant secretary of the Company and the corporate seal of the company shall be affixed thereto. In case the officers who shall sign and seal any of such bonds as aforesaid shall cease to be such officers of the Company before said bonds so signed and

sealed shall have been actually authenticated and delivered by the corporate trustee, as hereinafter provided, such bonds may nevertheless be issued, authenticated and delivered as though the persons who signed and sealed such bonds had not ceased to be officers of the Company. The coupons attached to said bonds shall be authenticated by the engraved signature of the present treasurer or any future treasurer of the Company, it being intended that the Company may adopt and use for that purpose the engraved signature of any such treasurer, notwithstanding that he may have ceased to be the treasurer of the Company at the time that such bonds shall be actually authenticated and delivered.

Section 3. Said bonds when executed by the Company shall be delivered to the corporate trustee to be authenticated by it and the corporate trustee shall authenticate and deliver the same only as provided in this article. Only such bonds as shall bear thereon a certificate substantially in the form hereinbefore recited, duly executed by the corporate trustee, shall be secured by this indenture or be entitled to any lien or benefit hereunder, and every such certificate of the corporate trustee upon any bond executed by the Company shall be conclusive and only evidence that the bond so authenticated was duly issued hereunder and is entitled to the benefit of the trust hereby created. Before authenticating and delivering any bonds hereby secured the corporate trustee shall detach and shall cancel all coupons thereon then matured.

Section 4. No bonds shall be authenticated and delivered by the corporate trustee hereunder until this instrument shall have been filed for record in the office of the recorder of County, Ohio.

Section 5. Upon compliance with the provisions of section 4, the corporate trustee shall be, and is hereby authorized and directed to authenticate and deliver, upon the order of the board of directors of the Company, and to such person or persons as the said board may direct from time to time any of the bonds authorized hereunder. Each and every of such orders shall be evidenced by a duly attested copy of the resolutions of the board of directors made in that behalf, and such resolutions shall recite the disposition to be made of the bonds so ordered to be

delivered, which shall be for some or all of the purposes hereinafter set forth. Such authentications and deliveries shall be made as follows:

(a) \$500,000 principal of said bonds forthwith upon compliance with said section 4 and \$500,000 principal of said bonds from time to time thereafter as the board of directors may by resolution request.

(b) \$1,000,000, principal of said bonds for the purpose of paying or redeeming the certain bonds of the Company issued under its first mortgage to The X. Y. Trust Company of, Ohio, as trustee, dated *January 1, 1895*, under which there are now outstanding \$1,000,000 of bonds under a total authorized issue of \$1,500,000, and which bonds are subject to redemption on the day of, 19.., or at any time thereafter, upon payment of the principal thereof and a premium of 5% thereon. And whenever and as often as the Company shall deliver to the corporate trustee any one or more of said bonds of *January 1, 1895*, with all coupons thereto belonging then in the future to become due, the corporate trustee shall authenticate and deliver an amount of bonds of the issue in this instrument described equal in principal to 105% of the principal of such bonds of *January 1, 1895*, so surrendered to the corporate trustee, or the corporate trustee shall, on the request of the Company authenticate and deliver in lots of \$5,000 of principal, or in some multiple thereof, upon the receipt of par and interest accrued since the last interest paying date, to the Company or its nominee, any of the bonds mentioned in this subdivision. The corporate trustee shall hold the money so received by it, and allow interest thereon at the same rate and upon the same terms as it allows on like deposits in its trust department and shall use said money in or toward the retirement of the first mortgage bonds in this subdivision mentioned at the maturity thereof or when said bonds are presented to it therefor. In the event said fund is insufficient to pay in full said first mortgage bonds so maturing or presented, the Company agrees, upon demand of the corporate trustee, to pay to it sufficient money to complete the retirement of said first mortgage bonds. In the event of any surplus remaining after the payment of said first mortgage

bonds the corporate trustee shall pay over such surplus to the company.

(c) The remainder of said bonds for the purpose of paying for, or providing in advance the means to pay for, or reimbursing the Company for moneys expended for, additional property (not including capital stock or securities of any corporation) the making of extensions, additions, improvements or betterments to the property now owned or hereafter acquired by the Company, but the Company covenants and agrees that no bond shall be certified for any of the purposes mentioned in this subdivision (c) of section 5 except upon the following terms and conditions and the facts required to be shown by the resolutions, certificates and statements hereinafter set forth shall exist at the time of the passage or making thereof: The board of directors of the Company shall adopt a resolution requesting the corporate trustee to authenticate the bonds which the Company desires to be issued, stating, 1. The officer of the Company, or the person, or persons, to whom the same are to be delivered. 2. The purpose or purposes for which the bonds or their proceeds are to be used, which shall be one or more of the purposes named in this subdivision (c). 3. That no bonds have been issued in respect to such particular property, extensions, additions, improvements or betterments. 4. The estimated (or, if such property, extensions, additions, improvements or betterments have been theretofore acquired or made, the actual) cost thereof to the Company in money. 5. The gross income of the property of the Company for one year of *three hundred and sixty-five days out of the thirteen calendar months* immediately preceding the date of the adoption of such resolution. 6. The expense of manufacture and distribution, including such expense for repairs, maintenance and replacements as are incurred or made in the ordinary course of business, and the general expenses of management incurred or made in the ordinary course of business, together with all taxes and assessments of the Company or upon the property thereof, and all premiums for insurance for such period, not including in the foregoing any item for amortization or property or capital. 7. The net income after deducting from such gross income such expenses, taxes, assessments and insurance premiums. 8. The principal amount of the issue of bonds hereby secured at the

time outstanding. 9. The principal amount of any bonds or secured debt which this Company has assumed or become obligated to pay and which are secured by lien upon property acquired subsequent to the date of this indenture, prior to the lien hereof; and the rate of interest upon such bonds or debt; provided, however, that in the event any property to be acquired by the Company and in respect to which bonds are requested to be authenticated and delivered, or any property hereafter acquired by the Company shall have had an earning capacity for such period, such property, and its income and expenses as above defined, shall be treated for such period as if the same had been owned by the Company for the purpose of determining the net earnings of the Company as the basis for the authentication and delivery of bonds as herein provided. Said resolution shall be certified by the secretary of the Company and delivered to the corporate trustee. There shall also be delivered to the corporate trustee a certificate by the president or chief engineer of the Company, showing the truth of the facts set forth in said directors' resolution. There shall also be delivered to the corporate trustee a certificate of counsel, believed by said trustee to be competent, that the good and unincumbered title to any real property for the acquisition of which bonds are to be issued has been vested in the Company and subjected to the terms and conditions of this mortgage. And the foregoing having been done, if it shall appear that the net income ascertained in the manner aforesaid shall equal or exceed twice the interest charge for one year upon the bonds of the Company at the time outstanding and on the bonds requested to be authenticated pursuant to the foregoing provisions, and on the bonds and debt which the Company has assumed or become obligated to pay and which are secured by lien upon property acquired subsequent to the date of this indenture prior to the lien hereof, then the corporate trustee shall authenticate and deliver to the person or party named in said resolution of said board of directors, bonds of the issue herein described of an amount of principal equal to 80% of such cost of such additional property, additions, extensions, improvements or betterments. Provided, however, if any such bonds are issued upon the basis of estimated cost of such property, extensions, additions, betterments or improvements, prior to the acquisition or making

thereof, then, in making delivery of such bonds the corporate trustee shall only deliver such bonds from time to time, at the rate aforesaid, as such property, extensions, additions, betterments or improvements are paid for, as shown by certificate of the president or chief engineer or other officer of the Company believed by the corporate trustee to have knowledge of the facts, and in the event the actual cost shall be less than such estimated cost, any balance of said bonds in the hands of the corporate trustee undelivered shall be held by it subject to future delivery hereunder the same as the remainder of the unauthenticated bonds authorized to be issued hereunder: All or any part of such estimated amount of bonds may be sold by the Company at a price for any one bond or lot of bonds which will result in the loan thereon costing the company a rate of interest not exceeding *six* percentum per annum for the remainder of the term of such bond or bonds, and the proceeds from such sale shall be deposited with the corporate trustee. The corporate trustee shall pay over said proceeds to or upon the order of the Company upon receipt of a statement sworn to by an officer of the Company showing expenditures made or indebtedness incurred and then due on account of property, extensions, additions, betterments or improvements for the purchase or making of which said bonds were issued and said money deposited, to an amount not exceeding 80% of the amount of such indebtedness or expenditures. Or, at the election of the Company it may make and deliver drafts upon the corporate trustee each of which drafts shall be given for the purpose and shall show upon the face that the same is given for the purpose of paying not exceeding 80% of the indebtedness incurred or created on account of such property, extensions, additions, betterments or improvements, or some portion thereof. The Company reserves the right to deposit the proceeds of the sale of any of said bonds in some bank or banks of good standing in the city of, Ohio, or in the city of New York, N. Y., in the name of the corporate trustee, in which event said proceeds shall be payable for the purposes hereinbefore set forth only upon the order of the corporate trustee, and the corporate trustee shall make such payments from time to time upon delivery to it of sworn statements as hereinabove mentioned. If the estimated cost of such property, exten-

sions, additions, betterments or improvements shall exceed the actual cost thereof in money and a balance of the proceeds of the sale of bonds shall remain on deposit with said corporate trustee or said bank, or banks, the same shall be thereafter paid out only in the manner and at the rate hereinbefore provided, for some one or more of the purposes for which bonds may be issued as in this article provided, or at the request of the company, may be used in or towards the retirement and cancellation of the bonds issued under this indenture. The corporate trustee shall be under no obligation to see to the application of said bonds or their proceeds to the purpose or purposes for which they are authenticated and delivered and shall be entitled to rely upon any resolution of said board of directors, statements and certificates of said officers and counsel and vouchers of the Company with reference to the authentication and delivery of bonds, payment of money, title of property and lien of this instrument and shall be absolutely protected in so doing; provided, however, that the corporate trustee may, at the expense of the Company, require additional evidence of the facts set forth in such resolution, certificates, vouchers or statements, but is not obligated so to do; and that the trustees, or either of them, if they deem best so to do, may, at the expense of the Company, require an examination, by a competent person satisfactory to the trustees, of the books and accounts of the Company and of any such additional property, additions, extensions, betterments or improvements, and shall be absolutely protected in relying upon any report which such person shall make to them.

Section 6. In case any bond issued hereunder, with the coupons thereto appertaining, shall become mutilated, or be lost or destroyed, the Company, in its discretion, may execute, and thereupon the corporate trustee shall authenticate and deliver a new bond of like tenor and date, including the unmatured coupons thereon, bearing the same serial number, in exchange and substitution for, and upon cancellation of the mutilated bond and its coupons, or in lieu of or substitution for said bond or its coupons, upon receipt of satisfactory evidence of the destruction or loss of such bond and its coupons and upon receipt also of satisfactory indemnity.

Section 7. In the event of the resignation, removal, dissolution or unfitness to act of the corporation trustee, or any corporation successor to it, all of the powers and authority vested by this article in the corporate trustee may be exercised by the individual trustee hereinbefore named, or his successor.

ARTICLE II. COVENANTS BY THE COMPANY.

The Company hereby covenants as follows:

Section 1. That it has a good and indefeasible estate in fee simple or in possession absolute, according to the nature of the property conveyed, in and to all of the property and rights hereinbefore described as being now owned by it; that the franchises hereinbefore described as now owned by it are valid and subsisting franchises, and that it has good right and lawful authority to convey, assign and transfer said premises, rights and franchises as provided in and by this indenture.

Section 2. That it will punctually pay the principal and interest of every bond issued hereunder and secured hereby, in gold coin of the United States of America of the present weight and fineness, or its equivalent, at the date and place and in the manner specified in said bonds, and in the coupons thereto belonging, according to the true intent and meaning thereof, without deduction from either principal or interest for any tax or taxes imposed by the United States of America or by any state, territory, county, city or other municipality or governmental subdivision, and which the Company may be required to pay thereon and deduct or retain therefrom under or by reason of any present or future law, the Company hereby agreeing to pay all such taxes. That after coupons evidencing interest are paid said coupons shall be forthwith cancelled. The principal of each bond shall be payable only upon the presentation and surrender of the bond and the principal of registered bonds shall be payable only to the registered holders thereof. Each bond when paid shall forthwith be duly cancelled.

Section 3. That it will not issue, sell or dispose of any bonds issued hereunder in any manner other than in accordance with the provisions of this indenture and the covenants and agreements in that behalf herein contained and that it will in good faith use or expend said bonds or their proceeds only for

the purposes provided in this indenture, according to the true intent and meaning thereof.

Section 4. That at all times until the full payment of the principal of the bonds secured by this indenture, the Company will keep an office in the city of; Ohio, where bonds and interest coupons may be presented for payment and where notices and demands with respect to said bonds and coupons or other notices and demands hereunder may be served, and an office or agency in the city of New York where coupons may be presented for payment and from time to time the Company will give written notice to the trustees of the location of such offices or agencies. In case the Company shall fail to do so, presentation and demand may be made, and notices may be served at the office of the corporate trustee or its successors;

Section 5. That at the office of the corporate trustee, or at some Bank or Trust Company in the city of, Ohio, it will keep books for registration of bonds issued hereunder (which books at all reasonable times shall be open to the inspection of the trustees) under such reasonable regulations as the Company may prescribe. The ownership of any bond issued under this indenture, which shall be presented for that purpose, may be registered in such book or books free of charge by the Company. Upon presentation to the bond registrar or transfer agent, at the place where such books of registry are kept, of any bond which shall have been registered as aforesaid and delivery of a written instrument of transfer, in form approved by the Company, executed by the registered holder for the time being, such bond shall be transferred upon such registry. The registered holder shall also have the right to cause the same to be registered as payable to bearer, in which case transferability by delivery shall be restored, and thereafter the principal of such bond shall be payable to any person presenting the same, but any such bond registered as payable to bearer may be registered again in the name of the holder with the same effect as in the case of the first registration thereof. Successive registrations and transfers as aforesaid may be made from time to time as desired. Each registration shall be noted by the bond registrar or transfer agent of the Company upon the bond. The *C. D.* Trust Company, the corporate trustee hereinbefore mentioned, is

hereby constituted and appointed the bond registrar and transfer agent of the Company for the purpose of registration as hereinbefore set forth. The registration of any bond, however, shall not restrain the negotiability of any coupon thereto belonging, but every such coupon shall continue to pass by delivery merely and shall remain payable to bearer. The holder of any bond may, however, register the same and surrender the coupons thereto belonging to the corporate trustee, who shall forthwith cancel such coupons, and thereafter the interest on such bond shall be payable only to the registered holder thereof.

Section 6. The Company will, from time to time, duly and punctually pay and discharge all real estate, personal, franchise and other taxes, water rates, assessments, imposts and governmental and other charges, lawfully imposed upon the property now or hereafter subject to the lien and operation of this indenture, and also upon all other property at any time subject to this indenture, and upon each and every part thereof, and upon the income and profits thereof and with respect to the carrying on or doing business by the Company, so that the lien and priority of this indenture shall be fully preserved in respect to the real and personal property, rights, franchises and privileges now or hereafter subject to the lien and operation of this indenture; provided, however, that nothing in this section shall require the Company to pay any such taxes, assessments, imposts or other charges so long as the Company shall in good faith and by proper legal proceedings contest the validity thereof or its being a charge upon the property covered by this indenture. If the Company shall fail to keep this covenant, the trustees, in addition to any other remedy or remedies which they may have hereunder, and without prejudice to any rights of the trustees by reason of any such default and upon request of one or more of the holders of said bonds secured hereby, and upon being provided with adequate funds for that purpose and ample indemnity in the premises, shall pay such taxes, assessments and charges, and all amounts so paid, with interest thereon at the rate of six per centum per annum shall be a charge upon the trust estate prior to the bonds hereby secured, and the trustees may forthwith sue for and re-

cover from the Company any such amount in a proper action therefor.

Section 7. That it will not create or suffer to be created any lien or charge having priority to or preference over the lien of this indenture upon the trust estate, or any part thereof, or upon the income thereof, and that within three months after the same shall have accrued it will pay or cause to be discharged or will make adequate provision for the satisfaction and discharge of all lawful claims and demands of mechanics, laborers and others which might by law be given precedence as a lien or charge upon the trust estate, or any part thereof or the income thereof; provided, however, that nothing in this instrument contained shall require the Company to pay any claim or demand so long as the Company shall in good faith and by proper legal proceedings contest the validity thereof, provided however, that nothing in this section contained shall apply to purchase money, or other assumed liens upon after acquired property.

Section 8. That it will from time to time upon written demand of the Trustees and at its own expense record and re-record, file and refile these presents, whether as a chattel mortgage or a mortgage on real estate, and make, do, execute, acknowledge and deliver, or cause to be made, done, executed, acknowledged and delivered all such other acts, deeds, transfers, assignments, conveyances and assurances in the law as may by said Trustees or their counsel be reasonably advised or required for effectuating the intention of these presents or for the better assuring and confirming unto the Trustee upon the trusts and for the purposes herein expressed, of the trust estate and any part or parts thereof, and also all and singular the property, rights, franchises and privileges which may hereafter be acquired by the Company.

Section 9. That it will, except as herein otherwise provided, at all times actively conduct and carry on the business for which it was incorporated and which it is now or may hereafter be carrying on or conducting; that it will maintain and keep in good repair and condition its plants and properties, make all necessary renewals and replacements thereof or therein, diligently preserve, observe and protect all licenses under patents or otherwise owned or held, and will at all times, so long as the

bonds issued hereunder or any of them remain outstanding and unpaid, diligently preserve and maintain its corporate existence and all franchises now or hereafter granted to it, and do or cause to be done all other acts and things necessary or proper to maintain and keep in full force and effect the lien and incumbrance hereby created.

Section 10. The Company shall also furnish to the trustees, at any time that they may in writing so request, a written statement containing a summary of all its then assets and liabilities, its gross receipts, expenses and net income, determined as hereinbefore provided and shall permit the Trustees or their agents, upon like request at any time to examine its premises, property or books of account; provided, however, that the Company shall not be obliged to furnish such statement or permit such examination unless it is furnished with satisfactory evidence by the trustees that the holders of not less than 15 per centum of the bonds secured hereby at any time outstanding demanded that they request such statement or make such examination.

Section 11. The Company shall and will at all times, so long as any of the bonds issued hereunder remain outstanding and unpaid, at its own cost and expense, insure and keep insured against loss or damage by fire, in responsible insurance Companies, all its property usually insured by like Companies similarly situated and in the same manner and to the same extent. Said policies for such insurance shall be made payable, in case of loss, to the trustees as their interest may appear, provided, however, that the Company may, if it elects so to do, pay to the corporate trustee the sum of dollars (\$....) in money or, in lieu thereof, deliver to the corporate trustee bonds of the issue herein provided for equal in principal sum to said amount, or part thereof in said bonds at par and the remainder in money, in which event it shall not be required to insure its property as hereinabove provided, unless said deposit (herein after called "insurance fund") shall be depleted by payment of losses to less than \$..... The money in said fund shall, at the request of the Company, be invested in the bonds of the Company of the issue hereby secured or in other securities in which Trust Companies organized under the laws of the State of

Ohio may invest money or property received by them in trust, or in such other interest bearing securities as may be approved by the Company and the trustees. The securities in which such investment may be made shall, except as hereinbefore provided, be chosen by the Company. The corporate trustee agrees to allow interest upon moneys remaining on deposit with it in said insurance fund, at the same rate and upon the same terms that it allows upon like deposits in its trust department. Until default the Company shall be entitled to all income earned by the insurance fund or the securities in which the same is invested, whether the same be bonds of the Company, or otherwise. In the event of loss occurring by fire, the corporate trustee shall from time to time at the request of the Company pay over to it such amount of money out of the insurance fund as shall be necessary to repair, restore or replace such lost or destroyed property; such payments to be made from time to time upon receipt of vouchers showing the expenditure by the Company of the amount called for in any such vouchers, or that an indebtedness has been incurred for such purposes of repair, restoration or replacement equal to the amount called for by such vouchers. In the event sufficient moneys are not on hand in the insurance fund to pay any such loss, the corporate trustee shall, on request of the Company, sell sufficient of the securities belonging to said fund to provide for the payment of said loss. In the event said fund is reduced below the sum of \$75,000 by the payment of any such loss, the Company shall make good such deficiency by making payments to the corporate trustee for the account of said fund at the rate of \$5,000, per annum until said fund and the accumulations thereof shall again equal the sum of \$75,000. In the event said insurance fund is depleted by payment of losses to less than \$75,000, then the Company shall effect and maintain insurance as hereinabove first provided, until said fund shall again equal \$75,000. Upon the maturity of the bonds issued hereunder, any bonds of the issue hereby secured then remaining in said fund shall be cancelled, and any other securities and moneys then in said fund shall be applied toward the payment of the bonds issued hereunder at the time outstanding and unpaid. The Company covenants to at all times keep the corporate trustee informed

as to the amounts of insurance carried by it, when it is required to carry insurance, furnishing said corporate trustee with lists of the Companies, policy numbers and amounts, and in the event the Company shall fail at any time when required by the terms hereof to carry insurance deemed by the trustees to be sufficient, the trustees may, but shall be under no obligation to, insure the property of the Company as they may deem best for the benefit of the bondholders, and the cost of the same, with five percent interest thereon from the date of payment of the respective premiums, shall be repaid to them by the Company on demand, and until so paid shall be a charge upon the trust estate prior in lien to the bonds issued hereunder.

Section 12. That the Company will duly call for redemption and retire all bonds issued and outstanding under the mortgage described in Section 5 of Article 1 hereof, as soon as the same may be redeemed under the terms of said respective mortgages, and will, as soon as all of the bonds issued under said respective mortgages have been paid, cause said mortgages to be duly cancelled of record.

ARTICLE III. RETIREMENT OF BONDS.

Section 1. The Company reserves to itself, its successors and assigns, the right at its or their election to retire the whole or any part of the bonds issued hereunder, on the day of, 19..., and on any interest maturing date thereafter, at 105% of par plus accrued interest. In the event the Company elects to retire the whole or any part of said bonds on any such interest maturing date, it shall at least *ten weeks* prior to the date of retirement notify the corporate trustee of such election and the corporate trustee shall, if the amount of bonds to be retired be less than the entire amount outstanding, choose the bonds to be retired by lot and notify the Company of the numbers of the bonds so chosen within one week after receipt of such notice. The Company shall in all cases of retirement of bonds hereunder give notice by publication in some newspaper of general circulation published in the City of, Ohio, and in some newspaper of general circulation published in the City of New York, N. Y., which notice shall state that the Company will retire the bonds chosen for retirement, on the

date fixed therefor, naming the price at which same are to be retired, upon presentation and surrender of such bonds, with all unpaid coupons thereto belonging, at the office of the corporate trustee in the City of, Ohio. Such notice shall be published once each week for eight weeks prior to the date fixed for such retirement. In all cases in which less than the entire amount of bonds are chosen for retirement the published notice of retirement shall contain the numbers of the bonds so chosen. In all cases of retirement of bonds the Company shall, on or before the date fixed for retirement, deposit with the corporate trustee sufficient money to pay the retirement price of said bonds and accrued interest on the principal thereof to date of retirement. Said notice having been given in the manner aforesaid and sufficient money to retire all bonds called for retirement at the rate specified having been deposited with the corporate trustee, if the holder or holders of any bond or bonds so called for retirement fails to present the same for retirement at the time and place in said notice specified, such bond or bonds shall thereafter cease to bear interest and the corporate trustee shall credit to each of such bonds as may not be so presented, designated by the number thereof, a sum of money equal to such retirement price plus the interest accrued thereon to the date fixed for retirement as aforesaid and remaining unpaid and said credit shall be treated as full payment for each such bond and the coupons thereto belonging as between the Company and the holder thereof, and said sum so credited by the corporate trustee to bonds which have not been presented for retirement shall bear no interest, and thereupon and thereafter said bonds and all coupons thereto belonging shall be excluded from participation in the lien and security afforded by these presents and the holder thereof shall look for the payment of such bonds and accrued interest only to sums so credited thereto in the hands of the corporate trustee and in no event to the Company, and the Company shall, as to all such bonds be released from liability in respect thereof, but said sums so deposited shall be held by the corporate trustee to the credit and for the payment of said bonds and the interest thereon and shall be paid by the corporate trustee to the holders thereof on pre-

sensation and delivery to it of said respective bonds, together with all outstanding coupons thereto belonging.

Section 2. Upon presentation to the corporate trustee, cancelled, of all said authorized issue of bonds and coupons which at the time shall have been issued and outstanding, or upon presentation of a portion thereof, cancelled, all of said bonds having been called for retirement under the provisions of this article and the corporate trustee having credited to all such bonds as have not been presented for retirement the retirement price thereof and the interest thereon, the trustees shall cancel and discharge this mortgage or deed of trust as fully and to the same effect as if the total issue of said bonds and coupons had been duly paid by the Company at maturity thereof. All bonds retired under this article, together with the coupons thereto belonging, shall be forthwith cancelled by the corporate trustee. All costs, charges and expenses incurred by the corporate trustee hereunder with respect to the retirement of bonds shall be paid by the Company.

ARTICLE IV. REMEDIES OF TRUSTEES AND BONDHOLDERS.

Section 1. The Company covenants and agrees that it will not directly or indirectly extend, or consent to the extension of, the time of payment of any coupon or claim for interest upon any of the bonds issued hereunder and that it will not directly or indirectly be a party to or approve any arrangement therefor by purchasing or funding the same in any other manner. In case the payment of any such coupon shall be extended by or with the consent of the Company, such coupon or claim for interest so extended shall not be entitled, in case of default hereunder, to the benefit or security of this indenture except subject to the prior payment in full of the principal of all outstanding bonds, and of all coupons of such bonds the payment of which has not been so extended, the intention being to prevent any accumulation after maturity of coupons upon the bonds issued hereunder.

Section 2. In case default shall be made (a) in the payment of any interest upon any bond or bonds secured hereby, and outstanding, and such default shall continue for the period of three months, or (b) in the performance or observ-

ance of any other covenant or condition herein contained to be performed or observed by the Company and such default shall have continued for a period of four months after demand by the trustees of performance or observance, then and in either such case the trustees may, and upon the written request of the holders of 35% of the bonds hereby secured and then outstanding, shall, by notice in writing delivered to the Company declare the principal of all the bonds secured hereby and then outstanding to be due and payable immediately, and upon any such declaration the same shall become and be due and payable immediately, anything in this indenture or in said bonds to the contrary notwithstanding. This provision, however, is subject to the condition that if at any time after the principal of said bonds shall have been declared due and payable, the default for which such declaration was made and all other defaults, if any, shall be cured, before any sale of the trust estate, then and in every such case the holders of a majority in value of bonds hereby secured and then outstanding, by written notice to the Company and to the trustees, may waive such defaults and their consequences, but no such waiver shall extend to or affect any subsequent default or impair any right consequent thereon. In case the trustees shall have proceeded to enforce any right under this indenture by foreclosure or otherwise, and such proceedings shall have been discontinued or abandoned because of such waiver or for any other reason, or shall have been determined adversely to the trustees, then and in every such case the Company and the trustees shall be restored to their former position and rights hereunder in respect to the trust estate and all rights, remedies and powers of the trustees shall continue as though no such proceeding had been taken.

Section 3. In case (1) default shall be made in the payment of any principal of any bonds hereby secured, or in case (2) default shall be made in the due and punctual payment of interest upon any bonds secured hereby, and such default shall continue for the period of three months, or in case (3) default shall be made in the due observance or performance of any other covenant or condition hereby required to be observed or performed by the Company and such default shall continue for four months after written demand by the trustees, then and in

every such case the trustees, personally or by attorneys, in their discretion may (a) enter in, into and upon and take possession of the trust estate and every part thereof, and may exclude the Company therefrom, and have and hold the same and use, operate, manage and control the trust estate, and manufacture, supply and sell electricity and all articles, things, and products manufactured, produced or supplied by the Company in its business, execute any and all contracts, leases and undertakings, and in general conduct and carry on the business of the Company as fully as it could do if in possession thereof, and exercise all lawful franchises and powers of the Company, and upon every such entry the trustees at the expense of the trust estate from time to time, by purchase, repair or construction, may maintain, restore and repair the trust estate, and any part or parts thereof and in the same manner and to the same extent as is usual with Companies of like character similarly situated, and make all necessary and proper renewals, replacements, alterations, additions, betterments and improvements thereto and thereon as to the trustees may seem judicious or convenient, and in such case the trustees shall be entitled to collect and receive all tolls, earnings, incomes, revenues, rents, issues and profits of the trust estate and of every part thereof and of the business thereof and after deducting the expenses of operating the trust estate and conducting the business thereof and of all repairs, renewals, replacements, alterations, additions, betterments and improvements, and all payments which may have been made for taxes, assessments and other prior or proper charges upon the trust estate, or any part thereof, and all liability incurred by the trustees hereunder, as well as just and reasonable compensation for the services of said trustees, and for the services of their attorneys and all agents, clerks, servants and other employees by them engaged and employed, they shall apply the moneys arising as aforesaid as follows: In case the principal of the bonds hereby secured shall not have become due by declaration or otherwise, then to the payment of the accrued and unpaid interest upon said bonds in the order of the maturity of the respective installments thereof, with interest thereon at the same rate of interest as borne by the bonds upon which such interest shall be in default, such payments to be made ratably to the

persons entitled thereto without distinction or preference; in case the principal of the bonds hereby secured shall have become due by declaration or otherwise, then to the payment of the principal and accrued interest in the manner provided in Section 12 of this Article, and upon the payment of whatever may be due for principal and interest upon such bonds and payment of other charges required to be paid by the Company under the terms of this indenture, the premises shall be returned to the Company, subject however to the lien, covenants and conditions of this mortgage, in all respects, as if said entry had never been made. This power of entry may be exercised as often as occasion therefor may arise during the continuance of the trust created hereby; or (b) sell to the highest bidder all or any part of the trust estate, and all right, title, interest, claim and demand therein and right of redemption thereof in one lot as an entirety or in separate lots as the trustees may deem best, and in one sale or in any number of separate sales, held at one time or any number of times, which said sale or sales shall be made at public auction at such place in the City of, Ohio, and at such time or times and upon such terms as the trustees may fix and briefly specify in the notice of sale to be given as herein provided, or as may be provided by law, provided, always, that such sale or sales may be at such place or places and in such other manner as may be authorized or required by law; or (c) and upon request of the holders of 35% in value of the bonds outstanding hereunder shall proceed to protect and enforce their rights and the rights of the bondholders under this indenture but a suit or suits in equity or at law, whether for specific performance of any covenant or agreement contained herein, or in aid of the execution of any power herein granted, or for any foreclosure hereunder, or for the enforcement of any other proper legal or equitable remedy as the trustees, being advised by their counsel learned in the law, shall deem most effectual to protect and enforce the rights aforesaid.

Section 4. Nothing in this indenture contained, or otherwise, shall be construed as requiring the trustees or bondholders to resort to any particular property mortgaged hereunder or to waive any particular remedy for the purpose of procuring the satisfaction of the indebtedness hereby secured, but the

trustees and the bondholders may resort to all or any part of the trust estate, or enforce all or any of the rights herein provided or which may be given by statute, law or equity or otherwise, in the absolute discretion of the trustees or the bondholders as the case may be.

Section 5. Notice of any sale by the trustees pursuant to any provision of this indenture shall state the time when and place where the same is to be made and shall contain a brief general description of the property to be sold and shall be sufficiently given if published once each week for six consecutive weeks prior to such sale in one daily newspaper published in the City of . . . , Ohio, and once each week for six consecutive weeks in one daily newspaper published in the City of New York, N. Y.; provided that if other or different notice shall be provided by law the notice thus required shall be given.

Section 6. The trustees from time to time may adjourn any sale or sales to be by them made under any provision of this indenture by announcement at the time and place appointed for such sale or adjourned sale or sales, and without further notice or publication they may make such sale or sales at the time and place to which the same may be adjourned.

Section 7. Anything in this indenture contained to the contrary notwithstanding, the holders of a majority in value of the bonds hereby secured and then outstanding, from time to time, shall have the right to direct, subject to the limitations above described, the method and place of conducting any and all proceedings for the sale of the trust estate, or for the foreclosure of this indenture or for the appointment of a receiver, or the taking of any other proper action hereunder.

Section 8. Upon the completion of any sale or sales under this indenture the trustees shall execute and deliver to the accepted purchaser or purchasers all such deeds, conveyances, bills of sale or other instruments in writing as may be requisite, convenient, necessary or desirable to vest in the purchaser or purchasers the complete title to the property sold. The trustees and their successors are hereby appointed the true and lawful attorneys irrevocable of the Company, in its name and stead, or otherwise, to make, execute, acknowledge and deliver all such deeds, conveyances, bills of sale and other written instruments

as may in the judgment of the trustees be necessary or proper to vest title in such purchaser or purchasers, the Company hereby ratifying and confirming all that its said attorneys shall lawfully do by virtue hereof.

Section 9. Any such sale or sales made under or by virtue of this indenture, whether under the power of sale hereby granted and conferred, or under and by virtue of judicial proceedings, shall operate to divest all right, title, interest, claim and demand whatsoever either at law or in equity of the Company of, in and to the property so sold and shall be a perpetual bar both at law and in equity against the Company, its successors and assigns, and against any and all persons claiming or to claim the property sold or any part thereof by, from, through or under the Company, its successors or assigns.

Section 10. The receipt of the trustees shall be a sufficient discharge to any purchaser of the trust estate, or any part thereof, sold as aforesaid, for the purchase money, and no such purchaser, or his representatives, grantees or assigns, after paying such purchase money and receiving such receipt, shall be bound to see to the application of such purchase money upon or for any trust or purposes of this indenture, or in any manner whatsoever be answerable for any loss, misapplication or nonapplication of such purchase money, or any part thereof or be bound to inquire as to the authorization, necessity, expediency or regularity of any such sale.

Section 11. In case of any such sale, whether under the power of sale hereby granted or pursuant to judicial proceedings, the principal sums of all bonds hereby secured, if not previously due, immediately thereupon shall become due and payable anything in said bonds or in this indenture contained to the contrary notwithstanding.

Section 12. The purchase money, proceeds and avails of any such sale, whether under the power of sale hereby granted or pursuant to judicial proceedings, together with all other sums which may then be held by the trustees as part of the trust estate or the proceeds thereof shall be applied as follows: (1) To the payment of the costs and expenses of such sale including the reasonable compensation of the trustees, their agents, attorneys and counsel, and all expenses, liabilities and advances made or

incurred by the trustees, and all other charges which by the terms hereof, are prior to the bonds hereby secured; (2) to the payment of the whole amount then owing and unpaid upon the bonds hereby secured for principal and interest, with interest at the respective rates borne by the principal debt on the overdue installments of interest, and in case such proceeds shall be insufficient to pay in full the whole amount then due and unpaid upon said bonds, then to the payment of such principal and interest without preference or priority of principal over interest or of interest over principal or any installment of interest over any other installment of interest ratably to the aggregate amount of such principal and the accrued and unpaid interest subject, however, to the provisions of Section 1 of this Article; (3) to the payment of the surplus, if any, to the Company, its successors or assigns, or to whomsoever may be lawfully entitled to receive the same.

Section 13. At any sale or sales of the trust estate, or any part thereof, any purchaser, for the purpose of making settlement or payment for the property purchased shall be entitled to turn in any bond and any unmatured and unpaid coupons hereby secured in order that there may be credited as paid thereon the sums payable out of the net proceeds of such sale to the holder of such bonds and coupons as his ratable share of such net proceeds after allowing for the proportion of the total purchase price required to be paid in cash to pay the costs and expenses of the sale or otherwise, and any such purchaser shall be credited on account of the purchase price of the property so purchased with the sums payable out of such net proceeds on the bonds and coupons so turned in, and in the event such net proceeds are less than the amount due on such bonds and coupons, such credit shall be made by stamping on each bond the amount to be credited thereon, and the said bonds shall thereafter be returned to such purchaser. And at any such sale the trustees or any of the bondholders may bid for and purchase said property and may make payment therefor as aforesaid, and upon compliance with the terms of sale may hold, retain and dispose of such property without further accountability therefor.

Section 14. In case the Company shall make an assignment for the benefit of creditors, or in case in any judicial proceeding

by any party other than the trustees, a receiver, assignee or trustee in bankruptcy shall be appointed by or for the Company, or a judgment or order entered for the sequestration of its property, or the greater part of its property be seized under any writ of attachment or other legal process, and it shall not cause said property to be released or discharged therefrom by giving bond or otherwise within twenty days after being requested so to do by the trustees, then and in every such case the trustees shall be entitled forthwith to exercise the right of entry and sale herein conferred, without awaiting the prescribed default period and may also and upon the request of the holders of 35% in value of the bonds at the time outstanding hereunder shall proceed to exercise any of the rights and powers herein conferred and provided to be exercised by the trustees upon the occurrence and continuance of default as hereinbefore provided, including the right to declare the principal of the bonds hereby secured to be due and payable and as matter of right the trustees shall thereupon be entitled to the appointment of a receiver, or receivers, of the trust estate, and of the earnings, income, rents, issues and profits thereof, with such powers as the court making such appointment shall confer.

Section 15. The Company covenants that (1) in case default shall be made in the payment of any interest upon any of the bonds at any time outstanding and secured by this indenture, and such default shall continue for the period of three months, or (2) in case default shall be made in the payment of the principal of any such bonds when the same shall become due and payable whether at the maturity of said bonds or by declaration as authorized by this indenture, or by a sale of the trust estate, as herein provided, then upon demand of the trustees, the Company will pay to the trustees for the benefit of the holders of the bonds and coupons hereby secured and then outstanding, the whole amount due and payable on all such bonds and coupons then outstanding for interest or principal or both, as the case may be, with interest at the respective rates borne by the principal obligations upon the overdue installments of interest, and in case the Company shall not pay the same forthwith upon any such demand the trustees, in their own names and as trustees of an express trust, shall be entitled to recover judgment for the whole

amount so due and unpaid. The trustees shall be entitled to recover judgment as aforesaid either before or after or during the pendency of any proceedings for the enforcement of the lien of this indenture upon the trust estate, or any part thereof, and the right of the trustees to recover any such judgment shall not be affected by any sale hereunder or by the exercise of any other right, power or remedy or for the enforcement of the provisions of this indenture for the foreclosure of the lien hereof, and in case of a sale of the trust estate, or any part thereof, and of the application of the proceeds of the sale to the payment of the debt, the trustees in their own names and as trustees of an express trust shall be entitled to enforce payment of and to receive all amounts then remaining due and unpaid upon any and all of the bonds issued hereunder and then outstanding for the benefit of the holders thereof and shall be entitled to recover judgment for any portion of the debt remaining unpaid, with interest. No recovery of any such judgment by the trustees and no levy under any execution upon any such judgment upon the property subject to the lien of this indenture, or upon any other property, shall in any manner or to any extent affect the lien of the trustees upon the trust estate or any part thereof or any rights, powers or remedies of the trustees hereunder or any rights, powers or remedies of the holders of the bonds hereby secured, but such lien, rights, powers and remedies shall continue unimpaired as before. Any moneys collected by the trustees under this section shall be applied by the trustees toward the payment of the amounts then due and unpaid upon such bonds and coupons respectively, without any preference or priority of any kind except as provided in Section 1 of this Article, but ratably according to the amounts due and payable upon such bonds and coupons respectively, on the date fixed by the trustees for the distribution of such moneys.

Section 16. The holders of a majority in value of the bonds issued and outstanding hereunder at any time shall have and are hereby given the absolute right to direct the action of the trustees in and about the enforcing or waiving of any of the provisions of this indenture except the payment of the principal and interest of such bonds at the time when they become due, and the holders of a majority in value of such bonds shall have the right to direct the trustees to waive any default which may

occur in the performance of any of the covenants and conditions herein contained except the payment of the principal and interest of the bonds secured hereby at the time and place provided therein, and the holders of a majority in value of said bonds shall further have the right to direct the trustees to discontinue any proceedings which they may have taken to foreclose this mortgage or deed of trust or to enforce in any way the provisions hereof, or to direct the trustees to restore to the Company the trust estate, in the event the said trustees shall have taken possession thereof, or to waive any other act or thing done or omitted to be done by the Company in violation of the terms hereof, or of any covenant on the part of the Company, under this indenture, except the payment of the principal and interest of the bonds secured hereby at the time and place provided herein. Such request of the holders of a majority in amount of bonds issued and outstanding shall be made in writing, and upon the same being made in accordance with the provisions hereof, any action by said trustees in declaring the principal of said bonds due and payable for any default so waived, shall forthwith cease and determine and become null and void and any and all proceedings commenced by said trustees to foreclose this indenture shall forthwith abate and said trustees shall forthwith surrender and redeliver to the Company the trust estate, or such part thereof, if any, as said trustees shall have become possessed of, by reason of such default, and to the extent expressed in said request any and all acts done or omitted to be done by the Company in violation hereof shall be waived and the right to take any action hereunder by reason thereof shall immediately cease and determine, but no such waiver shall extend to or affect any subsequent default or impair any right consequent thereon.

Section 17. The Company will not at any time insist upon or plead or in any manner claim or take the benefit of any stay of execution or extension law now or at any time hereafter in force, nor will it take or insist upon any benefit or advantage of any law now or hereinafter in force providing for the valuation or appraisalment of the trust estate, or any part thereof, prior to any sale or sales thereof to be made pursuant to any provision herein contained or to the decree of any court of competent jurisdiction nor, after any such sale or sales, will it claim or exercise

any right under any statute or otherwise to redeem the property so sold or any part thereof, and it hereby expressly waives the benefit and advantage of any such law or laws, and it covenants that it will not hinder, delay or impede the execution of any power herein granted and delegated to the trustees and that it will suffer and permit the execution of every such power as though no such law or laws had been made or enacted.

Section 18. In the event the trustees shall commence any proper proceedings at law or in equity for the purpose of foreclosing the security of this mortgage or deed of trust, or the enforcement of any right or remedy hereunder, the said trustees shall as a matter of right be entitled to the appointment, *ex parte* and without notice, of a receiver or receivers, of and for all and singular the trust estate and by and through said receiver or receivers, to take possession thereof, and of the business of the Company, and operate the same and receive the tolls, rents, revenues, issues and profits thereof.

Section 19. No holder of any bond or coupon hereby secured shall have any right to institute any suit, action or proceeding in equity or at law for the foreclosure of this indenture, or for the execution of any trust hereof, or for the appointment of a receiver or for any other remedy hereunder, unless such holder shall have previously given to the trustees written notice of such default and of the continuance thereof as hereinbefore provided, nor unless the holders of 35% in value of the bonds hereby secured and then outstanding shall have made written request upon the trustees and shall have offered them a reasonable opportunity either to proceed to exercise the powers hereinbefore granted or to institute such action, suit or proceeding in their own names, nor unless they shall have offered to the trustees adequate security and indemnity against the costs, expenses and liabilities to be incurred therein or thereby, and such notification, request and offer of indemnity are hereby declared, in each and every such case, at the option of the trustees, to be conditions precedent to the execution of the powers and trusts in this indenture and to any action or causes of action for foreclosure, or for the appointment of a receiver, or for any other remedy hereunder, it being understood and intended that no one or more of the holders of the bonds and coupons hereby secured shall have

any right in any manner, by his or their action, to affect, disturb, or prejudice the lien of this indenture or to enforce any right hereunder except in the manner herein provided, and that all proceedings at law or in equity shall be instituted, had and maintained in the manner herein provided and for the equal proportionate benefit of all holders of such outstanding bonds and coupons.

Section 20. Except as herein expressly provided to the contrary, no remedy herein conferred upon or reserved to the trustees, or to the holders of bonds hereby secured, is intended to be exclusive of any other remedy, but each and every such remedy shall be cumulative and shall be in addition to every other remedy given hereunder or now or hereafter existing at law, in equity or by statute.

Section 21. No delay or omission of the trustees, or of any holder of bonds hereby secured, to exercise any right or power accruing upon any default continuing as aforesaid shall impair any such right or power or shall be construed to be a waiver of any such default, or acquiescence therein; and every power and remedy given by this article to the trustees or to the bondholders may be exercised from time to time and as often as may be deemed expedient by the trustees or by the bondholders.

ARTICLE V. IMMUNITY OF INCORPORATORS, OFFICERS, DIRECTORS AND STOCKHOLDERS.

No recourse under or upon any obligation, covenant or agreement of this indenture, or upon any bond or coupon hereby secured, shall be had against any incorporator, stockholder, director or officer of the Company, past, present or future, or of any successor corporation, or any corporation in which the Company may be merged or consolidated, either directly or through the Company, or any other such corporation, by the enforcement of any assessments, penalty or contractual obligation, or by any legal or equitable proceedings by virtue of any statute or otherwise, it being expressly agreed and understood that this indenture and the obligations hereby secured are solely corporate obligations and no personal liability whatsoever shall attach to or be incurred by the incorporators, stockholders, directors or officers of the Company, past, present or future, or of any successor corporation, or

corporation in which the Company may be consolidated or merged, or any of them, because of the incurring of the indebtedness hereby authorized or under or by reason of any obligations, covenants or agreements contained in this indenture or in any of the bonds or coupons hereby secured or implied therefrom, and that any and all personal liability of every name and nature, either at common law or in equity, or by statute or constitution, of every such incorporator, stockholder, director or officer is expressly waived, as a condition of and in consideration for the execution of this indenture and the issuing of such bonds and coupons.

ARTICLE VI. SALE OF MORTGAGED PROPERTY.

Section 1. In case any real property, part of the trust estate, can not be advantageously used in the proper and judicious operation of the business of the Company, or if the sale, exchange or disposition thereof has become necessary or advisable for any cause, the same, or any interest therein, may be sold or exchanged for other property; and upon request of the Company, expressed by resolution of its Board of Directors, the trustees shall have authority to release said property from the lien and effect of this indenture upon the following terms and conditions: (a) This section shall not be construed as authorizing the trustees to release the trust estate as an entirety or the substantial or greater part thereof. (b) In case of any such sale of any part of the trust estate, the price or proceeds of sale, if in excess of \$1,000, or a sum equal to such price or proceeds, shall be deposited with the corporate trustee, to be held for the further security of the bonds hereby secured until paid over or applied as hereinafter provided. (c) In case of any exchange, the property received in exchange for that released shall be forthwith subjected to the lien of this indenture. (d) The consideration received for the property released shall be substantially equal to the value of the released property and whenever the trustees shall be requested to release any property pursuant to this article, the Company shall deliver to them a certified copy of the resolution of the Board of Directors above mentioned, and a written instrument, signed by the president, vice-president, secretary or treasurer of the Company, certifying that the consideration to be received

for such property is substantially equal to the value thereof as above provided in this subdivision, and such resolution and instrument shall be conclusive in favor of the trustees. (e) In the event any portion of the trust estate shall be taken by the exercise of the right of eminent domain, the trustees shall, upon payment to the corporate trustee of the entire compensation awarded to the Company and the trustees, release the same from the lien and operation of this indenture. (f) All moneys received by the corporate trustee upon any such sale or release shall be applied as and when directed by the Company as follows: (1) Said corporate Trustee shall pay over to the Company out of any such proceeds sums equal to any expenditures that shall have been made by the Company for any of the purposes for which the Company is authorized to issue additional bonds as specified in Section 5 of Article 1 hereof, and all such property so purchased shall forthwith become subject to the lien of this indenture, or (2) at the option of the Company, the corporate trustee shall apply such proceeds, or any part thereof, to the purchase and retirement of bonds secured by this mortgage, and such bonds so purchased and retired shall thereupon be cancelled and delivered to the Company. (g) The resolutions, certificates, reports, and statements referred to and provided for by this section shall be full warrant to the trustees for their action on the faith thereof, and they shall incur no liability for anything done pursuant to this article; but the trustees may in their discretion, at the expense of the Company, make such other and further investigation of the facts as they may deem advisable, and may rely, and shall be absolutely protected in acting upon the results of such investigation in releasing or refusing to release any property under the provisions of this article.

Section 2. While in possession of the mortgaged premises the Company shall also have full power, in its discretion from time to time, to dispose of, free from lien of this indenture, any portion of the implements, machinery, tools, appliances, furniture and other movable property embraced within the trust estate which may have become unfit for use, replacing the same by, or substituting for the same, new implements, machinery, tools, appliances, furniture and property, which shall become subject to the lien of this indenture; provided, however, that no such

sale shall substantially impair the security afforded by these presents, and that if the proceeds of such sales shall in any one year ending December 31, amount to \$15,000, or more, the excess over \$15,000, shall be paid to the corporate trustee and applied by it as provided in Section 1 of this Article. Settlement and payment for any such excess shall be made as of the 31st day of December on or before the 20th day of January of the ensuing year. The trustees shall have the right to require the Company at any time to furnish them satisfactory evidence of the compliance by the Company with the covenants and agreements of this and the preceding section contained.

ARTICLE VII. EFFECT OF MERGER, CONSOLIDATION, ETC.

Section 1. Nothing in this indenture shall prevent any consolidation or merger of the Company with or into, or any conveyance, transfer or lease (subject to this indenture) of the trust estate as an entirety to any corporation lawfully entitled to acquire or lease and operate the same, provided, however, and the Company covenants and agrees that such consolidation, merger, conveyance, transfer or lease shall be upon such terms as fully to preserve, and in no respect to impair the lien, security or efficiency of this indenture, or any of the rights or powers of the trustees, or the bondholders hereunder, and provided further that any such lease shall be made expressly subject to immediate termination by the Company or by the trustees at any time during the continuance of any default hereunder, and also by the purchaser of the property so leased at any sale thereof hereunder, whether such sale be made under the power of sale herein conferred or under judicial proceedings, and provided further that upon any such consolidation, merger, conveyance, transfer or lease, the due and punctual payment of the principal and interest of all said bonds according to their tenor, and the due and punctual observance and performance of all of the covenants and conditions of this indenture to be kept and performed by the Company, shall be assumed by the corporation formed by such consolidation or into which such merger shall have been made, or to which the trust estate as an entirety as aforesaid shall be so conveyed, transferred or leased.

Section 2. In case the Company, pursuant to Section 1 of this Article, shall be consolidated with or merged into any other corporation or shall convey or transfer (subject to the lien of this indenture) the trust estate as an entirety, the corporation formed by such consolidation or into which the Company shall have been merged or which shall have received a conveyance or transfer as aforesaid, upon executing and causing to be recorded an indenture with the trustees, satisfactory to the trustees, whereby such consolidated, merged, or vendee corporation shall assume and agree to pay duly and punctually the principal and interest of the bonds issued hereunder and secured hereby in accordance with the provisions of said bonds and coupons and this indenture, and shall agree to perform and fulfil all the covenants and conditions of this indenture binding upon the Company, shall succeed to and be substituted for the Company with the same effect as if it had been named herein as party of the first part, and such consolidated, merged or vendee corporation thereupon may cause to be signed, issued and delivered, either in its own name or in the name of The A. B. Electric Light Company any and all such bonds which shall not theretofore have been signed by the Company and authenticated by the corporate trustee, and upon the order of such consolidated, merged or vendee corporation, in lieu of the Company, subject to the terms, conditions and restrictions of this indenture prescribing and touching the authentication and issuance of bonds, the corporate trustee shall authenticate and deliver any of such bonds which shall have been previously signed and delivered by the officers of the Company to the corporate trustee for authentication, and any of such bonds which such consolidated, merged or vendee corporation shall thereafter in accordance with the provisions of this indenture cause to be signed and delivered to the corporate trustee for such purpose shall have the same legal right and security as the bonds theretofore or thereafter issued in accordance with the terms of this indenture and as though all of said bonds had been issued at the date of the execution hereof; provided, however, that as a condition precedent to the execution of such consolidated, merged or vendee corporation and the authentication by the corporate trustee of any such additional bonds in respect to the purchase of additional prop-

erty, or the making by such consolidated, merged or vendee corporation of any betterments, improvements, extensions or additions to or about its plant and property, the indenture with the trustees to be executed and caused to be recorded by the consolidated, merged or vendee corporation as in this section provided, shall contain a conveyance or transfer and mortgage in terms sufficient to include such additional property. betterments, improvements, extensions, or additions, and provided further that the lien created thereby shall have similar force, effect and standing as the lien of this indenture would have if the Company had not been consolidated with or merged into such other corporation, or had not conveyed or transferred, subject to the lien of this indenture, the trust estate as an entirety as aforesaid to such vendee corporation and had itself purchased such additional property or had made such betterments, improvements, additions or extensions and requested the authentication and delivery of bonds under the provisions of this indenture in respect thereof. The trustees may receive the certificate of any counsel selected by them as conclusive evidence that any such indenture complies with the foregoing conditions and provisions of this section.

Section 3. In case the Company pursuant to Section 1 of this Article shall be consolidated with or merged into any other corporation or shall transfer or convey, subject to the lien of this indenture, the trust estate as an entirety as aforesaid, neither this indenture nor the indenture with the trustees to be executed and caused to be recorded by such consolidated, merged or vendee corporation as in Section 2 of this Article, provided, shall become or be a lien upon any of the property or franchises of such consolidated, merged or vendee corporation, except that acquired by it from the Company and any additional property, betterments, extensions or additions thereto, and the betterments, improvements, extensions or additions to or about the plant and property of such consolidated, merged or vendee corporation made and used by it as the basis for additional bonds under this indenture, as herein provided, and such franchises, repairs and additional property as may be acquired by such consolidated, merged or vendee corporation in pursuance of the covenants herein contained, to maintain, renew and preserve the franchises covered

by this indenture and to keep and maintain the property covered by this indenture in good repair or working order or in pursuance of some other covenant or agreement hereof to be kept and performed by the Company.

Section 4. The word "Company" as used in this indenture shall include such consolidated, merged or vendee corporation so complying with the provisions hereof and in such case the certificates or resolutions of the Board of Directors or officers of the Company required by Article 1, may be made by like officials of such consolidated, merged or vendee corporation.

Section 5. At any time prior to the exercise of any power by this article reserved to the Company or to a consolidated, merged or vendee corporation, the Company may surrender any power reserved to the Company, or to such consolidated, merged or vendee corporation, by delivering to the trustees an instrument in writing, executed by its president or vice-president, under its corporate seal, attested by its secretary or assistant secretary, accompanied by the affidavit of its secretary or assistant secretary, that the execution of such instrument was authorized by the vote of a majority of its entire Board of Directors at a meeting duly called and held, and thereupon the power so surrendered shall cease.

ARTICLE VIII. CONCERNING BONDHOLDERS.

Any request or other instrument required by this indenture to be signed and executed by the bondholders may be in any number of concurrent instruments of similar tenor, and may be signed or executed by such bondholders in person or by agent appointed in writing. Proof of the execution of any such request or other instrument, or of a writing appointing any such agent, and of the holding by any person of bonds transferable by delivery, shall be sufficient for any purpose of this indenture, if made in the following manner: (a) The fact and date of the execution by any person of any such request, or other instrument in writing, may be proved by the certificate of any notary public or other officer authorized to take acknowledgment of deeds, that the person signing such request or other instrument acknowledged to him the execution thereof, or by an affidavit of a witness of such execution. (b) The amount and issue numbers

of bonds transferable by delivery, held by any person executing any such request or other instrument as a bondholder, and the date of his holding the same, may be proved by a certificate executed by any trust company, bank, banker, or other depository, wherever situated, if such certificate shall be deemed by the trustees to be satisfactory, showing therein that at the date therein mentioned, such person had on deposit with such depository the bonds described in such certificate. The ownership of registered bonds shall be proved by the register of such bonds, as provided in Section 5 of Article II hereof. Such proof shall be conclusive in favor of the trustees with regard to any action taken by them under such request or other instrument. (c) The bearer of any bond hereby secured at the time which shall not be registered as hereinbefore authorized, and the bearer of any coupon for interest on any bond, issued hereunder, whether the same shall be registered or not, may be deemed and treated by the Company and the trustees as the absolute owner of such bond or coupon, as the case may be, for the purpose of receiving payment thereof and for all other purposes, and no notice to the contrary shall affect the Company or the trustees.

ARTICLE IX. POSSESSION OF PROPERTY AND DEFEASANCE.

Section 1. Until some default shall have been made in the due and punctual payment of the interest or of the principal of the bonds hereby secured, or of some part of such interest or of the principal of the bonds hereby secured, or of some part of such interest or principal, or in the due and punctual performance or observance of some covenant or condition hereof obligatory upon the Company, and until such default shall have continued beyond the period of grace herein provided, if any, the Company shall be suffered and permitted to retain the actual possession of the trust estate and to manage, operate and enjoy the same and every part thereof, with the rights and privileges thereunto belonging, and to collect, receive, take, use and enjoy the tolls, revenues, rents, incomes, issues and profits thereof as if this indenture had not been made.

Section 2. If, when the bonds hereby secured shall have become due and payable, whether by lapse of time or by reason of the same being called for retirement, the Company shall

well and truly pay or cause to be paid the whole amount of the principal moneys and interest due upon all of the bonds and coupons for interest thereon hereby secured then outstanding, or shall provide for such payment by depositing with the corporate trustee hereunder the entire amount then due thereon for principal and interest, and shall also pay or cause to be paid all other sums payable hereunder by it, and shall well and truly keep and perform all things required hereunder to be kept and performed by it according to the true intent and meaning of this indenture, then and in that case all right, title and interest of the trustees in and to the trust estate, and each and every part thereof, shall thereupon cease and determine and become void, and the trustees in such case upon demand of the Company and at the Company's cost and expense, shall execute and deliver to the Company proper instruments acknowledging satisfaction of this indenture and such deeds of release or conveyance as shall be necessary, proper or requisite to revest the Company with the trust estate, as it then exists, free and discharged from the lien of this indenture.

ARTICLE X. CONCERNING THE TRUSTEES.

Section 1. The trustees, for themselves and their successors hereby accept the trusts and assume the duties, herein created and imposed, upon the terms and conditions following, to wit: (a) The trustees, and each of them, shall be protected, in any action taken by them, or either of them, upon any notice, resolution, vote, request, consent, certificate, affidavit, statement, bond, or other paper or document believed by the trustees, or either of them so acting, to have been passed or signed by the proper parties. (b) The trustees shall have no responsibility for the validity of this instrument or for the execution or acknowledgment thereof or for the validity of any bond issued hereunder, nor shall they, or either of them, be in anywise responsible for the breach of any covenant hereof by the Company. (c) The trustees, or either of them acting, may select and employ in and about the execution of this trust, suitable agents and attorneys, whose reasonable compensation shall be paid by the Company, or in default of such payment shall be a charge upon the trust estate and the income and proceeds thereof paramount to said bonds. (d) It shall be no

part of the duty of the trustees, or either of them, to file or record this indenture as a mortgage or conveyance of real estate, or as a chattel mortgage, or as a conveyance or transfer of personal property, or to renew such mortgage or to procure any further or additional instruments of further assurance, or do any other act which may be necessary to be done for the continuance of the lien hereof, or for the giving of notice of the existence of any such lien, or for extending or supplementing the same. Neither of the trustees shall be liable for the exercise of any discretion or power hereunder or mistake or errors in judgment, nor shall any trustee be answerable for the acts or defaults of any other trustee or trustees, or otherwise in connection with this trust, except for its or his own wilful misconduct or gross negligence. (e) The trustees shall have a first lien upon the trust estate and the income and proceeds thereof for their reasonable compensation, expenses, counsel fees and compensation, and for all liabilities incurred in and about the execution of the trusts hereby created, and the exercise and performance of their powers and duties hereunder, which expenses, counsel fees and compensation the Company covenants and agrees to pay. (f) The trustees shall be under no obligation or duty to perform any act hereunder or to defend any suit in respect hereof unless reasonably indemnified, nor to take notice of any default, until they receive notice thereof, request and indemnity in the manner provided in Section 19 of Article IV hereof. The trustees shall not be bound to recognize any person as a bondholder unless and until his bonds are submitted to the trustees for inspection if required, and his title satisfactorily established, if disputed. (g) The recitals of fact herein and in said bonds contained shall be taken as statements made by the Company and shall not be construed as made by the trustees, or either of them. (h) The trustees shall not be personally liable for the debts contracted by them or either of them, nor for damages to person or property injured, nor for salaries or non-fulfillment of contracts, during any period in which the trustees shall manage or operate the trust estate upon entry as herein-before provided. (i) The trustees shall not be required at any time, before or after proceedings, to sell any part of the trust estate or take any action which they or either of them may be

authorized to take hereunder, whether pursuant to the terms of this instrument, or otherwise, to give or file any bond as such trustee or trustees, the Company for itself, its successors and assigns, and the holders of any and all bonds at any time to be issued hereunder hereby forever waiving and releasing any and all right to require the trustees, or either of them, to give any such bond. (j) In case at any time it shall be necessary or proper for the trustees, or either of them, or any successor or successors of them, or either of them, to make any investigation respecting any fact preparatory to taking or not taking action or doing or not doing anything under this indenture as such trustees or trustee, the certificate of the Company over its corporate seal, sworn to by its president, vice-president, secretary or treasurer, shall, except as herein otherwise expressly provided, be sufficient evidence of such facts to protect the trustees, or either of them, or their successor or successors in any action, such trustees, or either of them, or their successor or successors, may take or refrain from taking by reason of the supposed existence of such fact, but the trustees may nevertheless, make such other or further investigation as they may deem proper.

Section 2. The trustees, or either of them, or any successor or successors hereafter appointed, may resign and be discharged of the trusts hereby created by written notice to the Company and by publication at least once each week for four successive weeks in a daily newspaper published in the City of . . . , Ohio, and for a like number of times in a daily newspaper published in the City of New York, N. Y., and by due execution of the conveyance herein required.

Section 3. The trustees, or either of them, or any trustee hereafter appointed, may be removed at any time by an instrument, or concurrent instruments, in writing, signed by the holders of not less than a majority in value of the bonds hereby secured and then outstanding, upon payment of the trustees compensation and expenses to the date of such removal.

Section 4. In case at any time the trustees, or either of them, or any trustee hereafter appointed, shall resign or shall be removed or otherwise shall become incapable of acting, a successor shall be appointed by the holders of a majority in value of the bonds hereby secured, and then outstanding, by an instru-

ment, or concurrent instruments, signed by such bondholders, or their attorneys in fact duly authorized. Provided, nevertheless, and it is hereby agreed and declared that in case at any time there shall be a vacancy in the office of any trustee hereunder, the Company, by an instrument executed by order of its Board of Directors, may appoint a trustee to fill such vacancy until a new trustee shall be appointed by the bondholders as herein authorized. The Company shall publish notice of any such appointment by it made once a week for four consecutive weeks in a daily newspaper published in the City of, Ohio, and for a like number of times in a daily newspaper published in the City of New York, N. Y., and any new trustee appointed by the Company shall immediately and without further act be superseded by a trustee appointed by the bondholders in the manner above provided. During any such vacancy, the remaining trustee shall have full power and authority to act and to perform all duties of the trustees hereunder, and be entitled to all their rights, authority and remedies. Any successor to the corporate trustee may be an individual, anything herein contained to the contrary notwithstanding.

Section 5. Any new trustee appointed hereunder, shall execute, acknowledge and deliver to the retiring trustee, and also to the Company, an instrument accepting such appointment and thereupon such new trustee without any further act, deed or conveyance, shall become vested with all of the estates, property, rights, powers, trusts, duties and obligations as if originally named as trustee herein; but the trustee ceasing to act shall nevertheless upon the written request of the Company or any new trustee, execute and deliver an instrument transferring to such new trustee, upon the trusts herein expressed, all of the estates, property, rights, powers and trusts of the trustee ceasing to act, and shall duly assign, transfer and deliver all properties and moneys held by it or him to the new trustee. Should any deed, conveyance or instrument in writing from the Company be required by any new trustee for more fully and certainly vesting in and confirming to such new trustee such estate, rights, powers and duties, any and all such deeds, conveyances and instruments in writing shall upon request be made, executed and delivered to it.

ARTICLE XI. SUNDRY PROVISIONS AND DEFINITIONS.

Section 1. Nothing in this indenture expressed or implied is intended or shall be construed to confer upon any person, firm or corporation, other than the parties hereto and the holders of the bonds issued under and secured by this indenture, any right, remedy, or claim, legal or equitable, under or by reason of this indenture or any covenant, condition or stipulation thereof, this indenture, and all of its covenants, conditions and stipulations being intended to be and being for the sole and exclusive benefits of the parties hereto and of the holders from time to time of the bonds hereby secured.

Section 2. All of the covenants, stipulations, terms, undertakings and agreements herein contained by or on behalf of the Company shall bind its successors and assigns whether so expressed or not.

Section 3. For every purpose of this indenture, including the execution, issue and use of any and all bonds hereby secured, the term "Company" includes and means not only the party of the first part hereto, but also its successors and assigns and any corporation into which it may be consolidated or merged.

Section 4. The word "trustee" or "trustees" means the trustee or trustees for the time being, whether original or new.

Section 5. The word "trustee," "bond" and "bondholder" shall include the plural as well as the singular number, unless otherwise expressly indicated. The word "coupon" refers to the interest coupons attached to the bonds secured hereby. The word "person" used with reference to a bondholder shall include associations or corporations owning such bonds. Whenever any officer of the Company is referred to herein it shall be taken and held to mean the person who shall hold such office for the time being. The words "trust estate" shall be held to mean and include all of the property, rights, franchises and privileges at any time subject to the lien and operation of this indenture, whether the same be now owned or hereafter acquired.

In witness whereof The A. B. Electric Light Company by its president and secretary, thereunto lawfully authorized by action of its directors and stockholders, has hereunto set its corporate name and seal, and The C. D. Trust Company, by its president and secretary, thereunto lawfully authorized by action of its

directors, has hereunto set its corporate name and seal, and the said E. F. has hereunto set his hand and seal, as of the day and year aforesaid.

The A. B. Electric Light Company,

Signed, sealed, acknowledged By, President.
and delivered in presence, Secretary.
of (Corporate seal)

.....
As to The A. B. Electric Light
and Power Company.

The C. D. Trust Company,

..... By, President.
....., Secretary.
As to The C. D. Trust
Company. (Corporate seal)

.....
..... E. F.
As to E. F.

State of Ohio, County, ss.

Personally appeared before me a notary public in and for said county and state, president, and, secretary, of The A. B. Electric Light Company, the corporation which executed the foregoing instrument as party of the first part, to me known, and known to me to be such president and secretary, who severally acknowledged that they did sign and seal the foregoing instrument as such president and secretary for and on behalf of said corporation, and that the same is their free act and deed individually, and as such president and secretary, and the free and corporate act and deed of said The A. B. Electric Light Company. In testimony whereof I have hereunto set my hand and official seal at, Ohio, this day of, A. D. 19...

(Notarial seal),
Notary Public.

State of Ohio, County, ss.

Personally appeared before me, a notary public in and for said county and State,, president, and, secretary, of The C. D. Trust Company, the corporation which executed the foregoing instrument as a party of the second part, to me known and

known to me to be such president and secretary, who severally acknowledged that they did sign and seal the foregoing instrument as such president and secretary for and on behalf of said corporation and that the same is their free act and deed individually and as such president and secretary and the free and corporate act and deed of The C. D. Trust Company.

In testimony whereof I have hereunto set my hand and official seal at, Ohio, this day of, A. D. 19...

(Notarial seal)

.....,
Notary Public.

State of Ohio, County, ss.

Personally appeared before me, a notary public in and for said county and State, the above named E. F. who acknowledged that he did sign the foregoing instrument as a party of the second part, and that the same is his free act and deed.

In testimony whereof I have hereunto set my hand and official seal at, Ohio, this day of, A. D. 19...

(Notarial seal)

.....,
Notary Public.

No. 111.

Bond Pooling Agreement, Authorizing Managing Committee to Sell.

Agreement made under date of, 19.., by and among A. B., C. D. and E. F. first parties, hereinafter sometimes called the "Managing Committee;" the signers hereof (other than the first parties, as such Managing Committee, and the Depositary hereinafter named), and any first mortgage bondholders of The Railway Company who may hereafter deposit their bonds and accept the certificates of deposit hereinafter provided for, second parties, hereinafter sometimes called the "Bondholders," and The Trust Company, third party, hereinafter sometimes called the "Depositary."

Whereas, the undersigned second parties are, severally, owners of first mortgage bonds of The Railway Company, of the par amount set opposite their respective names as said Bondholders as signed hereto; and,

Whereas, said Bondholders are desirous of disposing of said bonds on the terms hereinafter set forth, and to accomplish said result desire to confer and vest power and authority with reference thereto upon the Managing Committee; and,

Whereas, G. H. and Company, of, Ohio, have requested that they be given an option for the purchase of the bonds owned by the bondholders as hereinafter set forth, at the price of (..) percent of the par value of said bonds, plus accrued interest;

Now, therefore, this agreement witnesseth, that the parties hereto, for and in consideration of the premises and of the sum of one dollar (\$1.00) to each in hand paid by the other, the receipt whereof is hereby acknowledged, do hereby promise and agree to and with each other as follows:

FIRST. The Bondholders do hereby deposit with the Depositary first mortgage bonds of The Railway Company, of the par value set opposite the name of each of the Bondholders as their signatures appear hereto, said bonds being a part of a total authorized issue of million dollars (\$....), par value, and secured by a first mortgage or deed of trust dated, 19.., to The Trust Company, of, as Trustee, said bonds so deposited to be by said Depositary held to and for the uses and purposes, and with the powers and duties in relation thereto as follows:

(a) To hold the same until, 19.., unless sooner sold by the Managing Committee as hereinafter provided at a price not less than, (..) percent of the par value of said bonds, plus accrued interest to date of sale.

(b) To distribute the proceeds thereof upon the receipt of the same, in the event of a sale by said Managing Committee, among the persons and parties entitled thereto, in accordance with the provisions of this agreement.

(c) To distribute the interest collected upon said bonds among the persons and parties entitled thereto, in accordance with the provisions of this agreement.

SECOND. It is mutually understood and agreed that said Managing Committee shall have power and authority, during the term of this agreement, to sell said bonds, or any or all thereof, so delivered to said Depositary, at a price not less than

(..) percent of the par value of said bonds, plus accrued interest to date of sale, by the unanimous agreement of the members of said Managing Committee, and in the event of a sale being made as aforesaid, the proceeds thereof shall be paid to the said Depositary.

The Managing Committee shall have authority and power to enter into contracts or to give options for the sale of said bonds, at not less than the price aforesaid, during the term of this agreement.

• THIRD. The Depositary, upon the deposit of bonds hereunder, agrees to issue to said Bondholders certificates showing the interest of said Bondholders in and to said bonds, or the proceeds thereof, and the said certificates to be issued by the Depositary shall be in such form and contain such terms as the Depositary shall decide, subject at all times to the terms of this agreement. Said certificates, however, shall be in assignable form, subject to such rules with reference thereto as the Depositary may establish.

FOURTH. It is further understood and agreed that the Depositary shall have authority, during the term of this agreement, to collect and receive all moneys due and paid upon said interest coupons attached to said bonds aforesaid, and as and when such interest is paid to it, shall distribute the same, within ten (10) days after the receipt thereof by the Depositary, to the persons entitled thereto, as evidenced by said certificate of deposit aforesaid. The persons entitled to such interest, or to the proceeds of the sale of said bonds in case of their sale as herein provided, or to any bonds in the possession of the Depositary remaining unsold at the expiration or termination of this agreement, shall be the certificate holders of record at the date of the maturity of said coupons, or of the sale of said bonds, or any part thereof, or of the expiration or termination of this agreement.

FIFTH. It is further understood and agreed that the said Depositary shall not, until the expiration or termination of this contract, deliver any of the bonds so placed in its hands, or any part thereof, to any of the parties hereto, except to said Managing Committee, and to said Managing Committee only for the purpose of sale as herein provided, and then only upon receipt

by said Depositary of the proceeds of the sale of said bonds, in the event of any such sale, and that in case said bonds, or any thereof, are sold as herein provided, said Depositary shall deliver the same to the Managing Committee, upon receiving the proceeds of the sale of said bonds; and that in case said bonds are not sold on or before the expiration or termination of this agreement, the said Depositary shall deliver said bonds to the holders entitled thereto, according to the provisions of this contract and the certificates issued in pursuance hereof, upon the surrender of said certificates by the holders thereof.

SIXTH. In case of the death, resignation or inability to act of either or any of said members of the Managing Committee during the term hereof, the surviving member or members of said Managing Committee shall have the power to appoint a successor or successors; and in case of the death, resignation or inability to act of all the members of said Managing Committee, the said Depositary shall have authority to choose and appoint a Managing Committee.

SEVENTH. The certificates of deposit to be issued under this agreement shall be transferable only by assignment in writing on the back thereof, which assignment shall be witnessed, and shall transfer all interest in said certificate so assigned, which assignment may be transferred subject to the rules and regulations of the Depositary and registered on its books, and a new certificate or certificates evidencing a like interest in said bonds, may be issued by the Depositary in lieu of the certificate so assigned.

EIGHTH. It is expressly understood and agreed that there shall be no charge made against the depositing Bondholders hereunder for any costs, expenses or services of the Depositary or the Managing Committee.

NINTH. This agreement shall be binding upon the heirs, executors, administrators and assigns of the parties hereto, and as to the said Bondholders, the agreement of each is several and individual, and shall be binding upon such of said Bondholders as sign this agreement, without regard to the fact that the same may not be signed by all the owners of the first mortgage bonds of The Railway Company. The deposit of bonds or the acceptance, by assignment or otherwise, of certificates of deposit

as herein provided, shall constitute the persons, firms or corporations depositing said bonds or so accepting such certificates of deposit, parties hereto for all purposes, as fully as though such persons, firms or corporations had signed this agreement, or a duplicate hereof.

TENTH. The Managing Committee agrees to act as such, and to faithfully discharge the duties imposed upon them as such Managing Committee; and the Depositary agrees to perform the duties herein delegated to it; it being understood and agreed, however, that no liability hereunder shall attach to the Managing Committee, or either member thereof, or to said Depositary, on account of any representation, statement or recital herein contained or made, or for the genuineness, regularity or authenticity of the bonds deposited hereunder, or for the lien or interest created thereby, and that beyond the obligation to perform their direct obligations assumed hereunder, said Managing Committee and the Depositary shall be liable to the Bondholders only for want of good faith or failure to exercise reasonable care.

ELEVENTH. All actions to be taken hereunder by the Managing Committee shall be in pursuance of the unanimous agreement of the members of said Committee.

TWELFTH. This agreement shall be in force and effect until, 19.., but may be terminated at any time by the Managing Committee, by written notice thereof signed by the Managing Committee and by the Depositary, and upon the expiration or termination of this agreement the bonds, or the proceeds thereof, or both, represented by the certificates of deposit issued hereunder, shall then be distributed to the persons entitled thereto, as herein provided.

THIRTEENTH. It is further agreed that, for convenience in executing the same, several copies of this agreement may be made, each of which shall be treated as an original, and that the signing of any of said copies shall constitute an execution of this contract by the person, firm or corporation signing the same, to the same extent as if all the signatures made in the execution of this agreement were affixed to a single copy thereof.

In witness whereof, the Managing Committee and the Depositary have subscribed to an original hereof, and the said Bond-

holders, parties of the second part, have subscribed said original or a counterpart thereof, all as of the day and year first above written.

A. B.

C. D.

E. F.

Managing Committee.

The Trust Company,

Depository,

By, Treasurer.

Bondholders.

Par Amount of Bonds.

.....
.....
.....
.....

No. 112.

**Bond Holders' Agreement; Corporation in Default for
Interest on Mortgage Bonds.**

(See Sharp v. Oil Co., 232 Fed. 703.)

This agreement made and concluded at this day of, 19.., by and between A. B., C. D. and E. F., hereinafter termed the "Committee" parties of the first part, and such holders of the first mortgage bonds of The Electric Railway Company secured by its mortgage dated, 19.., as shall become parties hereto in the manner hereinafter provided, hereinafter termed "Bondholders," parties of the second part, witnesseth, that

Whereas, said The Electric Railway Company issued its first mortgage bonds dated, 19.., secured by a mortgage executed by said Electric Railway Company to The Trust Company of as trustee and recorded, and said Electric Railway Company has made default in the payment of certain of its obligations, including the interest due on said bonds, 19.., and receivers have been appointed for the property of said Electric Railway Company, and it is necessary that the holders of said bonds unite for the protection of their common interests: Now, therefore, the depositing bondholders, said par-

ties of the second part, do hereby severally agree, each with the other and others and with the committee, as follows, to wit:

FIRST. This agreement shall be signed by the members of said committee and deposited with The Trust Company of, hereinafter termed the "Depository." The holders of any of such mortgage bonds may become parties to this agreement and obtain the benefits thereof by depositing, on the terms of this agreement, on or before such date as the committee may fix or limit, their bonds with the coupons for interest thereon due, 19.., and subsequent thereto. Registered bonds must be accompanied by suitable transfers thereof.

Such depositing bondholders shall receive certificates of deposit issued by said depository for the bonds and coupons deposited, which certificates shall be in such form, and shall be transferable, subject to this agreement, in such manner as the committee shall approve. Upon the transfer of any certificate the transferee shall for all purposes be substituted for the prior holder under this agreement. Each depositor hereunder, and each holder of a certificate of deposit issued hereunder, and each transferee of any such certificate, shall be bound by all the provisions of this agreement as fully as if he had signed the same. The committee and the depository may treat each certificate of deposit as a negotiable instrument and the holder for the time being as the absolute owner thereof, and shall not be affected by any notice to the contrary.

The committee in its discretion, with or without prior publication of notice, may fix or limit a date after which holders of such bonds shall not be entitled to deposit their bonds hereunder: and any such holders who fail to deposit their bonds and coupons on or before any date so fixed or limited will not be entitled to deposit the same or to become parties to this agreement or to share in the benefits thereof, and shall acquire no rights hereunder; but the committee, in its discretion, either generally or in special instances, and on such terms and conditions as it shall prescribe, may, by a written direction filed with said depository, extend the time for receiving deposits or authorize the receipt of any deposit at a later date, or waive any default.

Each depositing bondholder, for himself, but not for the others, by the deposit of his bonds, assigns and transfers the bonds and

coupons deposited by him, to the committee and their survivors and their successors, as joint tenants, and agrees that the committees shall be vested with all the rights and powers of owners thereof; and all bonds and coupons deposited shall be received and held by the depository subject to the order of the committee.

SECOND. The depositing bondholders authorize and request the committee in its discretion, as owners and holders of said deposited bonds, to demand, receive and collect the interest and principal of the deposited bonds; to declare due the principal of said bonds, and to revoke any such declaration; to request the trustee of said mortgage to institute foreclosure or other proceedings; to institute or become parties to any legal proceedings which any of the depositing bondholders may institute or become parties to, and to become parties to, or exercise control over, all legal proceedings now pending or hereafter instituted in which the holders of said bonds are or may be interested, including the right to apply for receivers or for the removal of receivers and the substitution of other receivers; to exercise every right and power conferred upon owners or holders of said bonds by the terms thereof, or by the mortgage securing the same or otherwise; and generally to do any and all things which the committee in its discretion may deem necessary or expedient for any of the foregoing purposes, or for the protection of the interests of the depositing bondholders, or of the holders of the certificates issued hereunder, or for the purpose of carrying out any of the provisions of this agreement; it being hereby expressly declared that the specification of particular powers shall not be construed as limiting any of the general powers hereby conferred.

THIRD. The committee may borrow such sums of money not exceeding in the aggregate three percent of the par value of the bonds which shall be deposited hereunder, as may be required for the purpose of paying the expenses incurred by the committee hereunder, and the reasonable compensation of the committee, and it may charge or pledge the deposited bonds pro rata for the redemption of any sums borrowed; and if any sum shall be collected by the committee upon the deposited bonds and coupons the committee may apply such moneys to the payment of any sums so borrowed, and to the payment of such expenses and compensation.

FOURTH. The committee is hereby authorized and empowered to adopt, or approve of, a plan or agreement for the reorganization or readjustment of the interests of all or any of the bondholders and other creditors and parties interested in said railway company, which plan or agreement may provide for the purchase of all or any of the property of said railway company at any foreclosure or other sale and for the organization of a new Company to acquire such property and for the issue, disposition and distribution of all or any of the stock and bonds of such new Company, and for raising any sums in cash deemed necessary for improvements, working capital, expenses and other purposes. Any such plan or agreement may contain any terms and provisions and may confer upon the committee, or upon any other committee designated in such plan or agreement any powers which the committee hereunder may deem reasonable and proper; and full power and discretion in that behalf is hereby conferred upon the committee, subject to the right of dissent and withdrawal next hereinafter referred to. When the committee shall have adopted or approved of any such plan or agreement, a copy thereof shall be lodged with the depositary hereunder, at its office in the city of, with the written adoption or approval thereof endorsed thereon by majority of the members of the committee, and thereupon a brief notice of the fact of the adoption or approval of a plan or agreement of reorganization or readjustment shall be published by the committee at least twice in each week for two successive weeks in two newspapers published in the city of, and such lodgement of said plan or agreement and publication of notice thereof shall be conclusive notice to all depositing bondholders and to all holders of certificates of deposit of the adoption or approval of such plan or agreement by the committee. Any then holders of certificates of deposit, who, within thirty days after the first publication of such notice, shall surrender their certificates and pay a ratable amount of the obligations and expenses and reasonable compensation of the committee to the date of such surrender (not exceeding in the aggregate three percent of the par value of the deposited bonds), shall thereupon be entitled to withdraw from such plan or agreement and to receive from the depositary the respective bonds in respect of which such certificates were issued (or a like amount of bonds

of the same issue) and any sums realized thereon remaining in the hands of the committee and such certificate holders by such withdrawal shall thereupon and without any further act be released from this agreement and cease to have any rights hereunder or under such plan or agreement. All holders of certificates who shall not exercise such right within said thirty days after such first publication to withdraw the bonds in respect of which their certificates were issued shall be conclusively deemed to have finally assented to and adopted such plan or agreement (whether they had actual notice or not), and shall be bound by all the terms and provisions thereof without further act or notice and the committee shall be fully authorized to carry out such plan or agreement irrespective of the parties withdrawing, and shall have full power and authority to use, transfer or deliver, under or in accordance with such plan or agreement, the deposited bonds and coupons, which shall not have been withdrawn as aforesaid, as fully as though such plan or agreement were a part hereof and had been expressly assented to by the depositing bondholders and the holders of the certificates of deposit issued hereunder.

FIFTH. The committee undertakes in good faith to endeavor to protect the interests of the depositing bondholders under this agreement, but the members of the committee assume no further responsibility. In case the committee for any cause should deem it inexpedient to proceed further under this agreement, it shall cause notice thereof to be published at least twice in two newspapers in the city of, and shall return to the holders of certificates of deposit issued hereunder the bonds represented by such certificates (or like amount of bonds of the same issue) and any sums realized thereon remaining in the hands of the committee, upon surrender of the respective certificates of deposit and payment of ratable amounts of the obligations, expenses and reasonable compensation of the committee.

SIXTH. The committee may employ such counsel, attorneys and agents as it may deem necessary and may fix the compensation for their services and may make such other expenditures as it shall deem necessary for any of the purposes of this agreement, and it may procure the performance of any of the matters herein provided for by agents, trustees or substitutes.

In all cases a majority of the members of the committee, present in person or by proxy, shall constitute a quorum, but no action shall be taken except with the assent of the majority of the whole committee, such assent being given in person or by proxy at a meeting, or in writing without a meeting. Such action of a majority shall constitute the action of the committee, and shall have the same effect as if assented to by the whole committee.

The committee shall keep a record of its acts and proceedings. Any member of the committee, by written appointment, may empower any other member of the committee, or any person approved by a majority of the remaining members of the committee, to vote and to act as his proxy with all the powers of the member making the appointment. Any member of the committee may at any time resign by giving notice in writing to the chairman or secretary of the committee, and the committee may settle any account or transaction with such member or with the personal representatives of a deceased member and give a full release and discharge upon any such resignation. Any vacancy in the committee caused by resignation, death, or otherwise, may be filled by appointment in writing by a majority of the remaining members; and the committee may in like manner add to its number by appointing an additional member or additional members. All title, rights, duties and powers vested in the committee hereunder shall from time to time vest in the members of the committee for the time being without any further appointment, transfer or assignment whatsoever. The present or future members of the committee may be or become pecuniarily interested in any of the bonds or matters which are the subject of this agreement including the right to become members of any syndicate formed in connection therewith.

SEVENTH. No member of the committee shall be liable in any case for the acts of the other members or of the depositary, nor for the acts of any attorney, trustee or agent selected in good faith, nor shall any member be personally liable for any error of judgment, or mistake of law, but each shall be liable for his own willful malfeasance. The members of the committee shall be entitled to receive reasonable compensation for their services. The holders of certificates of deposit, by receipt of any securities or cash distributed by the committee and surrender of

their certificates, release and discharge the committee from all liability.

This agreement shall extend to and be obligatory upon the respective heirs, executors, administrators, successors and assigns of the parties hereto.

In testimony whereof, the members of the committee have hereunto set their hands the day and year first above written and the parties of the second part have executed this agreement by depositing their bonds and coupons and accepting certificates of deposit therefor.

PART III.

CONSTITUTION OF OHIO.

PROVISIONS AFFECTING CORPORATIONS.

Article VIII, § 4.	Credit of state. The state shall not become joint owner or stockholder.	Article XIII, § 1.	Corporate powers.
§ 5.	No assumption of debts by the state.	§ 2.	Corporations, how formed.
§ 6.	Counties, cities, towns or townships not authorized to become stockholders.	§ 3.	Dues from corporations, how secured.
		§ 4.	Taxation of corporations.
		§ 5.	Right of way.
		§ 7.	Associations with banking powers.

Art. VIII. § 4. Credit of state. The state shall not become joint owner or stockholder.—The credit of the state shall not, in any manner, be given or loaned to, or in aid of, any individual association or corporation whatever; nor shall the state ever hereafter become a joint owner, or stockholder, in any company or association in this state, or elsewhere, formed for any purpose whatever.

Under the constitution of 1802 the general assembly was authorized to aid in the construction of internal improvements by subscriptions to the stock of corporations created for such purpose, and to levy taxes to pay therefor; and to authorize political subdivisions of the state to subscribe to such stock, and to levy taxes to pay therefor. *Cincinnati, etc., R. R. Co. v. Commissioners*, 1 O. S. 77 (1852); *Steubenville, etc., R. Co. v. Trustees*, 1 O. S. 105 (1852); *Loomis v. Spencer*, 1 O. S. 153 (1853); *Cass v. Dillon*, 2 O. S. 607 (1853); *Thompson v. Kelly*, 2 O. S. 647 (1853); *State ex rel. v. Commissioners*, 6 O. S. 280 (1856); *State ex rel. v. Van Horne*, 7 O. S. 327 (1857); *State ex rel. v. Trustees*, 8 O. S. 394 (1858); *Weaver v. Cherry*, 8 O. S. 564 (1858); *State ex rel. v. Commissioners*, 11 O. S. 183 (1860); *State ex rel. v. Commissioners*, 12 O. S. 596 (1861); *Trustees v. Springfield, etc., R. R. Co.*, 12 O. S. 624 (1861); *Commissioners v. Nichols*, 14 O. S. 260 (1863); *Fosdick v. Perrysburg*, 14 O. S. 472 (1863); *Walker v. Cincinnati*, 21 O. S. 14 (1871).

An agricultural society is of a public character, not for profit, and public aid is not prohibited by this section. *State ex rel. v. Kerns*, 104 O. S. 550 (1922); *Commissioners v. Brown*, 1 N. P. n. s. 357; 14 L. D. 241 (1903).

§ 5. No assumption of debts by the state.—The state shall never assume the debts of any county, city, town, or township, or of any corporation whatever, unless such debt shall have been created to repel invasion, suppress insurrection, or defend the state in war.

See *Walker v. Cincinnati*, 21 O. S. 14, 52 (1871).

§ 6. Counties, cities, towns or townships not authorized to become stockholders.—No laws shall be passed authorizing any county, city, town or township, by vote of its citizens, or otherwise, to become a stockholder in any joint stock company, corporation, or association whatever; or to raise money for, or to loan its credit to, or in aid of, any such company, corporation, or association; provided, that nothing in this section shall prevent the insuring of public buildings or property in mutual insurance associations or companies. Laws may be passed providing for the regulation of all rates charged or to be charged by any insurance company, corporation or association organized under the laws of this state or doing any insurance business in this state for profit. (As amended 1912, in effect January 1, 1913.)

This section prohibits business partnership with private corporations, but does not prohibit the state or its subdivisions from making improvement on its or their sole account. *Walker v. Cincinnati*, 21 O. S. 14, 54, 55 (1871).

Acts held invalid under this section. Authorizing counties, etc., to levy certain taxes to build a railroad, to be used as a part of the system of a private corporation (69 v. 84). *Taylor v. Commissioners*, 23 O. S. 22 (1872). See *Wyscaver v. Atkinson*, 37 O. S. 80 (1881).

Authorizing municipalities to contract with a private corporation to build a waterworks and lease it back to the municipality. *Alter v. Cincinnati*, 56 O. S. 47 (1897).

A municipal grant to a street railway company of the right to operate a subway or street railway, owned by the municipality, jointly with a system of railways owned by the company, which provides that the gross receipts from operation of the properties shall be used for the payment of existing and future issued securities of the railway company. *State v. Railway*, 97 O. S. 283 (1918).

Use, by street railway company, of municipal water pipes for return circuit of electric current. *Dayton v. Railway*, 12 L. D. 258.

Authorizing a municipality to use money, raised by the sale of its bonds, in renewing or reconstructing the tracks and equipment of a street railway company. *Cincinnati v. Harth*, 101 O. S. 344 (1920).

Board of education paying mutual telephone company assessments. *Opins. Atty. Gen.* 1922, p. 620.

A municipality can not purchase land for the purpose of donating it to a corporation or person as an inducement to build and operate a manufacturing plant therein. *Markley v. Mineral City*, 58 O. S. 430 (1898); *Rep. Atty. Gen.* 1911-1912, p. 388.

A municipal ordinance providing for a supply of free electric current from the municipal lighting plant to aid a corporation in rebuilding a plant destroyed by fire, is in violation of this section. *Rep. Atty. Gen.* 1913, p. 1484.

Laws and transactions held valid under this section. Authorizing county commissioners to purchase toll roads (G. C. § 7405). *Ferris v. Commissioners*, 9 C. C. n. s. 169; 19 C. D. 622 (1907); *affd. no rep.* 80 O. S. 755.

Authorizing county commissioners to construct roads (64 v. 80). *State v. Commissioners*, 17 O. S. 558 (1867).

Ordinance authorizing appropriation of land, to enable county commissioners to build an avenue thereon. *Purcell v. Riverside*, 1 C. C. 12; 1 C. D. 7 (1885).

Authorizing municipalities to build railroads within their municipal limits (66 v. 80). *Walker v. Cincinnati*, 21 O. S. 14 (1871). See *Cincinnati v. Taft*, 63 O. S. 141 (1900); *Trustees v. Insurance Co.*, 138 U. S. 69; 6 O. F. D. 686 (1891).

Providing for the sale of a railroad owned by a municipality. *Cincinnati v. Dexter*, 55 O. S. 93 (1896).

A lease by a municipality of terminal facilities of a railroad owned by it. *Cincinnati v. Ferguson*, 12 L. D. 439 (1902); *affd.* no rep. 66 O. S. 658.

Operation by private company of municipal owned railroad, under a lease. *Railway v. Railway*, 3 N. P. n. s. 109; 16 L. D. 777 (1904).

Deposit of public funds in public depositories. *State v. Bowers*, 4 C. C. n. s. 345; 16 C. D. 326 (1903); *affd.* no rep. 70 O. S. 423.

Public aid to agricultural societies. *Commissioners v. Brown*, 1 N. P. n. s. 357; 14 L. D. 241 (1903).

Application of certain fines and penalties to the aid of a law library association not for profit, whose library is open for use by judicial and other public officials. *State v. Sayre*, 90 O. S. 215 (1914).

Art. XIII. § 1. Corporate powers.—The general assembly shall pass no special act conferring corporate powers.

Scope of section. No distinction can be made between private and municipal corporations, and the inhibition extends as well to the conferring of additional powers on an existing corporation as to the creation of a new one. *State ex rel. v. Mitchell*, 31 O. S. 592, 607 (1877).

Sections are prospective only. The sections of Art. XIII are prospective and not retrospective in their intent and application. *Citizens Bank v. Wright*, 6 O. S. 318 (1856); *State ex rel. v. Roosa*, 11 O. S. 16 (1860); *State ex rel. v. Trustees*, 8 O. S. 394 (1858).

Acts held to be in violation of this section. Authorizing the reorganization of one corporation. *Atkinson v. M. C. R. R. Co.*, 15 O. S. 21 (1864).

Authorizing one municipality to issue bonds for repair of a hospital and to levy a tax for their payment. *Cincinnati v. Trustees*, 66 O. S. 440 (1902). See also *State ex rel. v. Cincinnati*, 23 O. S. 445 (1872); *State ex rel. v. Davis*, 23 O. S. 434 (1872).

Dividing cities, having substantially the same conditions and characteristics, into classes and grades so that each city is placed in a class or grade by itself, and conferring corporate power on a single city by such classification. *State ex rel. v. Jones*, 66 O. S. 453 (1902); *State ex rel. v. Beacom*, 66 O. S. 491 (1902).

Acts held not to violate this section. Permission to surrender corporate powers. *P. & O. Canal Co. v. Commissioners*, 27 O. S. 14 (1875).

An ordinance of a municipality permitting a street railway company to extend its tracks. *Sims v. Street Railroad Co.*, 37 O. S. 556 (1882).

A fair and reasonable classification of street railway corporations, to which an extension of franchises might be granted by municipalities. *Railway v. Horstman*, 72 O. S. 93, 105-107 (1905).

Permission to building and loan associations to receive, under some

circumstances, usurious rates for loans. *Brooklyn, etc., Co. v. Desnoyers*, 4 C. C. n. s. 337, 343; 16 C. D. 352 (1904); *Cramer v. Loan & Tr. Co.*, 72 O. S. 395 (1905).

Providing for the abandonment of a state canal and for leasing it to a specified railroad company. *Vought v. Railroad Co.*, 58 O. S. 123 (1898).

§ 2. Corporations; how formed.—Corporations may be formed under general laws; but all such laws may, from time to time, be altered or repealed. Corporations may be classified and there may be conferred upon proper boards, commissions or officers, such supervisory and regulatory powers over their organization, business and issue and sale of stocks and securities, and over the business and sale of the stocks and securities of foreign corporations and joint stock companies in this state, as may be prescribed by law. Laws may be passed regulating the sale and conveyance of other personal property, whether owned by a corporation, joint stock company or individual. (As amended 1912, in effect January 1, 1913.)

This section must be construed in connection with section 2, article 1, which provides that "no special privileges or immunities shall ever be granted that may not be altered or repealed." *Shields v. State*, 26 O. S. 86, 94 (1875).

What are general laws. See *State ex rel. v. Sherman*, 22 O. S. 411 (1872).

Consolidated companies subject to this section. Consolidated companies organized in pursuance of the general laws are subject to this section. *Shields v. State*, 26 O. S. 86 (1875); (affirmed 95 U. S. 319).

Power to regulate rates of fare. Under this section the general assembly has power to alter and regulate rates of fare chargeable by common carrier companies. *Shields v. State*, 26 O. S. 86 (1875); (affirmed 95 U. S. 319).

Right to alter or repeal. The property of a corporation can not be taken without due process of law under authority of this section. *State v. Lake Erie Iron Co.*, 33 W. L. B. 6; 51 O. S. 632 (1894).

A corporation is a "person" within the 14th amendment of the federal constitution forbidding the deprivation of property without due process of law. *Covington, etc., Co. v. Sandford*, 164 U. S. 578 (1896).

Vested rights. The inalienable right to acquire, hold and dispose of property, and to make contracts relating thereto, appertains to corporations as well as to individuals. *Stewart v. Gardner*, 10 C. C. n. s. 408; 20 C. D. 218 (1907); *affd. no rep.* 78 O. S. 451; *Shaw v. Railway Co.*, 173 Fed. 746, 751; 8 O. L. R. 43, 49 (C. C. A. 1909); *Ohio ex rel. v. Neff*, 52 O. S. 375 (1895).

§ 3. Dues from corporations; how secured.—Dues from private corporations shall be secured by such means as may be prescribed by law, but in no case shall any stockholder be individually liable otherwise than for the unpaid

stock owned by him or her; except that stockholders of corporations authorized to receive money on deposit shall be held individually responsible, equally and ratably, and not one for another, for all contracts, debts, and engagements of such corporations, to the extent of the amount of their stock therein, at the par value thereof, in addition to the amount invested in such shares. No corporation not organized under the laws of this state, or of the United States, or person, partnership or association shall use the word "bank", "banker" or "banking", or words of similar meaning in any foreign language, as a designation or name under which business may be conducted in this state unless such corporation, person, partnership or association shall submit to inspection, examination and regulation as may hereafter be provided by the laws of this state. (As amended September 3, 1912, in effect January 1, 1913.)

Prior to 1903 a double liability was imposed on stockholders of all corporations. In 1903 the double liability was abolished, but was restored as to bank stockholders in 1912.

The amendment of 1912, restoring the double liability as to state bank stockholders, is self-executing. *Lang v. Osborn Bank*, 100 O. S. 51 (1919) s. c.; 17 N. P. n. s. 236, 25 L. D. 246 (1914).

But in respect to the restriction of the use of the word "bank" the amendment became effective only upon the enactment of laws. Rep. Atty. Gen. 1912, p. 710. See § 710-3.

The liability of bank stockholders is for double the amount of their subscription, and not merely double the amount paid in. Rep. Atty. Gen. 1912, p. 708.

Stockholders in a bank organized after 1903 and prior to January 1, 1913, who acquired their stock during the same period, are liable for debts incurred subsequent to January 1, 1913. The constitutional amendment of 1912 does not violate Art. 1, Sec. 10 of the Federal Constitution. *Allen v. Scott*, 104 O. S. 436 (1922) affirming, 15 Ohio App. 251; *State v. Putnam County Banking Co.*, 22 N. P. n. s. 201 (1919).

The stockholders of a bank organized in 1889 are liable to a double assessment for debts now existing which were incurred prior to November 23, 1903, and subsequent to January 1, 1913, but not for debts incurred between November 23, 1903, and January 1, 1913. *State v. Osborn Bank*, 17 N. P. n. s. 236; 25 L. D. 246 (1914); Opins. Atty. Gen. 1915, p. 127; *Lang v. Osborn Bank*, 100 O. S. 51 (1919).

The amendment of 1903 (see 95 v. 961) was held to be self-executing so as to repeal by implication the statutes then in force and to relieve stockholders from double liability for debts incurred by the corporation subsequent to November 23, 1903. *Sheets Mfg. Co. v. Neer Mfg. Co.*, 4 N. P. n. s. 201; 17 L. D. 119 (C. P. 1906).

The former provision imposing a double liability on stockholders in all corporations has been held not to be self-executing so as to sustain an action to enforce liability in federal courts against nonresidents, where no proceeding had been brought in Ohio under G. C. § 8690 et seq. *Middletown N. B. v. Railway Co.*, 197 U. S. 394 (1905); *Irvine v. Elliott*, 203 Fed. 82 (D. C. 1913);

For decisions under this section prior to amendment of 1903 see:

State ex rel. v. Sherman, 22 O. S. 411 (1872); Kreisser v. Ashtabula, etc., Co., 2 C. C. n. s. 597; 14 C. D. 313 (1901).

§ 4. Corporate property subject to taxation.—The property of corporations, now existing or hereafter created, shall forever be subject to taxation, the same as the property of individuals.

Double taxation prohibited. The limitation in this section and in article 12, section 3 of the constitution prohibit the double taxation of corporations. *Cleveland Trust Co. v. Lander*, 62 O. S. 266, 280 (1900).

But such limitations apply only to the taxation of property, not of privileges and franchises. An additional tax may be imposed upon franchises. *Southern Gum Co. v. Laylin*, 66 O. S. 578, 596 (1902).

Property. What constitutes. A corporate franchise is not property. *Exchange Bank v. Hines*, 3 O. S. 1, 7 (1853); *Baker v. Cincinnati*, 11 O. S. 540 (1860); *Ashley v. Ryan*, 49 O. S. 525.

§ 5. Right of way.—No right of way shall be appropriated to the use of any corporation, until full compensation therefor be first made in money, or first secured by a deposit of money, to the owner, irrespective of any benefit from any improvement proposed by such corporation; which compensation shall be ascertained by a jury of twelve men, in a court of record, as shall be prescribed by law.

See Const., article I, § 19. G. C. §§ 8759, 8760, 11038 et seq.

§ 7. Associations with banking powers.—No act of the general assembly, authorizing associations with banking powers, shall take effect until it shall be submitted to the people, at the general election next succeeding the passage thereof, and be approved by a majority of all the electors, voting at such election.

The words "banking powers" in this section relate only to the power to issue notes and bills intended to circulate as money. The incorporation of banks of deposit and discount may be authorized by the legislature without a referendum. *Dearborn v. Bank*, 42 O. S. 617 (1885); *Bates v. Peoples, etc., Assn*, 42 O. S. 655 (1885). See also *Forest City, etc., Ass'n v. Gallagher*, 25 O. S. 208, 216 (1874).

PART IV.

MISCELLANEOUS STATUTORY PROVISIONS.

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| § 32. Seal; of what it may consist.
§ 121. Bankers ineligible to act as notaries in certain cases.
§ 154-39. Department of commerce, powers and duties. | § 176. Fees to be collected by secretary of state.
§ 177. Fees to be paid before filing or record. |
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Section 32. (Seal; of what it may consist.) Where an official or a corporate seal is required to be affixed to an instrument of writing, an impression of such seal upon either wax, wafer or other adhesive substance, or upon the paper or material on which such instrument is written, shall be alike valid and sufficient. Private seals are abolished, and the affixing of what has been known as a private seal to an instrument shall not give such instrument additional force or effect, or change the construction thereof. (R. S. Sec. 4; April 14, 1884, 81 v. 198; 80 v. 79; Rev. Stat. 1880; 29 v. 349, § 1; S. & C. 1385.)

Section 121. (Bankers, etc., ineligible to act as notaries in certain cases.) No banker, broker, cashier, director, teller or clerk of a bank, banker or broker, or other person holding an official relation to a bank, banker, or broker, shall be competent to act as notary public in any matter in which such bank, banker, or broker is interested. (R. S. Sec. 111; March 23, 1893, 90 v. 119; April 11, 1876, 73 v. 206, § 7; S. & S. 498; S. & C. 873.)

Liability of bank for default of notary. Bank v. Butler, 41 O. S. 519 (1885); s. c., 153 U. S. 436.

DEPARTMENT OF COMMERCE.

Section 154-39. (Department of commerce, powers and duties.) The department of commerce shall have all powers and perform all duties vested in the inspector of building and loan associations, the state fire marshal, the superintendent of insurance, the state inspector of oils, and the commissioner of securities; and said department shall have all powers and perform all duties vested by law in any and all officers, deputies and employes of such offices and departments. Wherever powers are conferred or duties imposed upon any

of such departments, offices or officers, such powers and duties shall be construed as vested in the department of commerce.

(Division of banks.) There is hereby created in the department of commerce a division of banks which shall have all powers and perform all duties vested by law in the superintendent of banks. Wherever powers are conferred or duties imposed upon the superintendent of banks, such powers and duties shall be construed as vested in the division of banks. The division of banks shall be administered by a superintendent of banks, who shall be appointed by the governor by and with the advice and consent of the senate, and hold his office for a term of two years, unless sooner removed at the will of the governor. A vacancy in the office of superintendent of banks shall be filled by appointment for the unexpired term. All provisions of law governing the superintendent of banks shall apply to and govern the superintendent of banks herein provided for; all authority vested by law in the superintendent of banks with respect to the management of the department of banks heretofore existing shall be construed as vested in the superintendent of banks hereby created with respect to the division of banks herein provided for; and all rights, privileges and emoluments conferred by law upon the superintendent of banks shall be construed as conferred upon the superintendent of banks as head of the division of banks herein provided for. The director of commerce shall not impose upon the division of banks any functions other than those specified in this paragraph, nor transfer from such division any of such functions.

(Public utilities commission a part of the department of commerce for administrative purposes.) The public utilities commission of Ohio shall be a part of the department of commerce for administrative purposes, in the following respects: The director of commerce shall be ex officio the secretary of said commission, shall succeed to and perform all of the duties of the secretary of said commission, and shall exercise all powers of said secretary as provided by law; but such director may designate any employe of the department as acting secretary to perform the duties and exercise the powers of secretary of the commission. All clerical, inspection and other agencies for the execution of the powers and duties vested in the said public utilities commission shall be deemed to be in the department of commerce, and the employes thereof shall be deemed to be

employees of said department and shall have and exercise all authority vested by law in the employees of such commission. But the public utilities commission shall have direct supervision and control over, and power of appointment and removal of, such employees whose positions shall be designated by the governor as fully subject to the authority of such commission. (109 v. 117.)

Section 176. (Fees to be collected by secretary of state.)

The secretary of state shall charge and collect the following fees for official services:

1. For filing articles of incorporation of a corporation whose capital stock is ten thousand dollars or under, ten dollars; of a corporation whose capital stock is over ten thousand dollars, one-tenth of one per cent upon the authorized capital stock of such corporation.

2. For filing certificate of increase of capital stock of a corporation, if the increase is ten thousand dollars or under, ten dollars; if the increase is over ten thousand dollars, one-tenth of one per cent upon the proposed increase of capital.

3. For filing articles of agreements of consolidation of corporations having a capital stock, one-tenth of one per cent upon the authorized capital stock of the new corporation, created by such articles of agreements of consolidation, but not less than ten dollars in any case; but no credit shall be allowed for fees previously paid by any of the constituent corporations, parties to such consolidation.

4. For filing articles of incorporation of a mutual life insurance corporation having no capital stock, or of other mutual corporations not organized strictly for benevolent or charitable purposes and having no capital stock, twenty-five dollars, except as hereinafter provided.

5. For filing articles of incorporation formed for religious, benevolent or literary purposes; or of corporations not organized for profit and not mutual in their character, or of religious or secret societies; or societies or associations composed exclusively of any class of mechanics, express, telegraph, railroad or other employes, and formed exclusively for the mutual protection and relief of members thereof and their families, two dollars.

6. For filing articles of incorporation of a building and loan association, ten dollars; for filing certificate of increase of the capital stock of such a corporation, five dollars.

7. For filing certificate of reduction of capital stock of a corporation, five dollars.

8. For filing certified copy of the acceptance of any

provision of existing law by a corporation incorporated prior to the adoption of the present constitution, five dollars.

9. For filing an amendment to articles of incorporation, twenty cents for each hundred words, but in no case less than five dollars.

10. For filing certificates of extension of line of a railroad corporation, certificate of change of termini, certificate of intention of a corporation to construct a branch line, or certificate of change of route, twenty cents for each one hundred words, but in no case less than five dollars.

11. For filing certificate of extension of purpose, or change of domicile of a corporation, five dollars.

12. For filing certificates not herein enumerated, twenty cents for each one hundred words, but in no case less than five dollars, except certificates of election for which no charge shall be made.

13. For filing copy of papers evidencing the incorporation of a municipal corporation, or of annexation of territory by a municipal corporation, five dollars, to be paid by the corporation, the petitioners therefor, or their agent.

14. For filing certificate of subscription to ten per cent of the capital stock of a corporation, two dollars.

15. For filing name, or names or initials filed by manufacturers, bottlers and dealers in ginger ale, seltzer-water, soda water, mineral water and other beverages, as provided by law, five dollars.

16. For making certificates under the great seal of the state, one dollar.

17. For recording miscellaneous records, papers, or other documents, required by law to be recorded in the office of the secretary of state, twenty cents for each one hundred words.

18. For making copies of articles of incorporation, and for making copies of a document or a part thereof, ten cents for each one hundred words; for affixing seal of office to copies, fifty cents, except copies of documents required by state officers for official purposes, for which no charge shall be made. (R. S. Secs. 148, 148a. February 12, 1889, 86 v. 33; March 14, 1888, 85 v. 80; May 15, 1886, 83 v. 165; March 18, 1884, 81 v. 52; April 18, 1881, 78 v. 186; 73 v. 227, § 2; 44 v. 65, § 4; S. & C. 1394.)

This act is constitutional, and applies to a consolidation of an Ohio and a foreign corporation, as well as to consolidation of Ohio corporations. *Ashley v. Ryan*, 49 O. S. 504 (1892); 153 U. S. 436.

Where the business of a corporation substantially amounts to insurance, the filing fee for its articles is \$25.00. Such a corporation is not a society organized for benevolent purposes under § 176. *Rep. Atty. Gen.* 1911-1912, pp. 57, 88, 90, 112; 3 *Opins. Atty. Gen.* 504.

The word "mutual" in paragraphs 4 and 5 of this section has been considered in several opinions of the attorney general, and its meaning is not entirely clear. It has been suggested that the word contemplates a corporation whose members are mutually liable for its debts, unlike an ordinary corporation not for profit, whose trustees and not its members are liable for debts (§ 8666). A corporation formed for the purpose of the "entertainment, recreation and social betterment of its members and all others", is not "mutual", in character. Rep. Atty. Gen. 1912, p. 51.

Where a corporation not for profit has a capital stock, the filing fee is based on such capital stock as in the case of a corporation for profit. Opins. Atty. Gen. 1918, p. 206; Opins. Atty. Gen. 1915, p. 719.

Section 177. (Fees to be paid before filing or record.)

The secretary of state shall not file or record articles of incorporation or consolidation, certificates or other papers referred to in the preceding section, unless the fee therein prescribed has been paid. (R. S. Sec. 148a; February 12, 1889, 86 v. 33; March 14, 1888, 85 v. 80; May 15, 1886, 83 v. 165; March 18, 1884, 81 v. 52.)

PART V.

FOREIGN CORPORATIONS.

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| § 178. Certificate of admission. | § 188. Certain corporations ex- |
| § 179. Statement required before | cepted. |
| admission. | § 189. Right of hearing before |
| § 180. Fees to be paid before de- | secretary of state. |
| livery of certificate. | § 190. Right of appeal. |
| § 181. Person upon whom process | § 190-1. Certificate of compliance |
| served. | with laws prima facie evi- |
| § 182. Penalty for non-compliance. | dence of incorporation. |
| § 183. Statement required from cor- | § 191. Actions against foreign cor- |
| poration, before doing busi- | porations; remission of |
| ness. | penalties. |
| § 184. Payment of franchise fee | § 192. Shares of stock in certain |
| and certificate. | corporations not taxable. |
| § 185. Fee for increase of capital | § 193. Record of fees. |
| stock. | § 194. Fees paid under protest. |
| § 186. Exemption from penalty. | Note as to foreign corpora- |
| § 187. Must comply before certain | tions generally. |
| actions brought. | |

Section 178. (Certificate of admission of foreign corporation.) Before a foreign corporation for profit transacts business in this state, it shall procure from the secretary of state a certificate that it has complied with the requirements of law to authorize it to do business in this state, and that the business of such corporation to be transacted in this state, is such as may be lawfully carried on by a corporation, organized under the laws of this state for such or similar business, or if more than one kind of business, by two or more corporations so incorporated for such kinds of business exclusively. No such foreign corporation doing business in this state without such certificate shall maintain an action in this state upon a contract made by it in this state until it has procured such certificate. This section shall not apply to foreign banking, insurance, building and loan, or bond investment corporations. (R. S. Sec. 148d; April 23, 1898, 93 v. 227; May 19, 1894, 91 v. 355; April 25, 1893, 90 v. 261.)

Cross references. Noncompliance with act, effect of: note to § 194.
 Right to maintain action: note to § 187.
 Retirement from state, certificate, etc., on: §§ 5521, 11976 to 11978.
 Foreign corporations generally: note to § 194.

Classification of foreign corporation acts. There are two laws imposing conditions upon foreign corporations entering the state to transact business: (1) the license fee law (G. C. § 178 to 182) which applies to all corporations except the classes specified in § 178, and (2) the franchise tax law (G. C. § 183 to 192) which (except as to the classes specified in § 188) applies to corporations which own or use a part or all their

capital or plant in Ohio. §§ 178-182 may apply to some corporations to which §§ 183-192 do not apply. But every corporation which is subject to § 183 is necessarily subject to §§ 178-182.

A foreign corporation which voluntarily complied with § 178, but which in fact transacted no business in Ohio is not liable for the annual franchise tax. Rep. Atty. Gen. 1912, pp. 59, 569; Rep. Atty. Gen. 1914, p. 1172.

"Retirement from business" under §§ 5520 and 11976 refers to retirement from the exercise of the privilege covered by § 183 et seq. When a corporation retires from business in the state it may have its registration under § 178 et seq. continued. Rep. Atty. Gen. 1914, p. 1172.

A foreign corporation engaged in purchasing mortgages through a local agent (who is not authorized to approve mortgages or consummate a purchase) and making collections on mortgage notes through local agents, should comply with § 178, but need not comply with § 183. Opins. Atty. Gen. 1918, p. 417.

An annual franchise tax is imposed by G. C. § 5503.

Constitutionality. The foreign corporation acts are constitutional. *Aetna Iron & Steel Co. v. Taylor*, 3 N. P. 152; 4 L. D. 180; s. c., 13 C. C. 602; 5 C. D. 242 (1896); *Express Co. v. State*, 55 O. S. 69 (1896); *Southern Gum Co. v. Laylin*, 66 O. S. 595 (1902).

Corporations engaged in interstate commerce. This section does not exempt foreign corporations engaged in interstate commerce, from its requirements, as in § 188. Rep. Atty. Gen. 1910-1911, p. 240.

See note to § 194. *Right of state to exclude or impose conditions upon foreign corporations.*

Single purpose rule. Foreign corporations are expressly excepted by this section from the single purpose rule which applies to Ohio corporations. A foreign corporation may be admitted to do business in Ohio although its articles of incorporation provide for several unrelated corporate purposes. Rep. Atty. Gen., 1912, pp. 15, 44.

Foreign corporations may enter Ohio only to do such business as may be lawfully carried on by Ohio corporations. A foreign corporation organized for the purpose of carrying on professional business is not entitled to a certificate authorizing it to do business in Ohio, such business being prohibited to corporations by G. C. § 8623. *State v. Laylin*, 73 O. S. 90 (1905); 5 Opins. Atty. Gen. 975.

A foreign corporation authorized to acquire and deal generally in the stock of other corporations can not be admitted to do business in Ohio, since under § 8683 a corporation may acquire stock in kindred and not competing corporations noly. 5 Opins. Atty. Gen. 924, 969 (1903); Rep. Atty. Gen. 1910-1911, p. 246; Rep. Atty. Gen. 1911-1912, p. 61; Rep. Atty. Gen. 1913, p. 68.

Unless it expressly renounces the right to exercise such corporate power in Ohio. Rep. Atty. Gen. 1911-1912, p. 78; Rep. Atty. Gen. 1912, pp. 44, 46.

A corporation organized to deal in real estate may be admitted to do business in Ohio but the articles should expressly limit its life in Ohio to twenty-five years. 5 Opins. Atty. Gen. 1002.

What corporate powers may be exercised in Ohio.

See note to § 194, *powers of foreign corporations.*

Acting as a stockholder in an Ohio corporation, or giving assent to changes in its regulations, is not "doing business" in Ohio within the meaning of G. C. §§ 178 or 5508. *Toledo Co. v. Smith*, 205 Fed. 643 (D. C. 1913).

Banking corporation. A foreign corporation, having in its name the words "bank" or "trust company", but not intending to do such business in Ohio, should be refused authority to do business in the state, as its name would be misleading to the public. Rep. Atty. Gen. 1912, p. 706.

Foreign joint stock association. A foreign partnership or common-law joint stock association is not authorized or required to comply with § 178 et seq. The secretary of state is not authorized to file a certificate from such a firm or association. Opins. Atty. Gen. 1915, p. 2270.

Federal governmental agency. A District of Columbia corporation to which the president has delegated certain authority granted him by congress, and which transacts no other business, is an agency of the federal government and need not comply with the foreign corporation laws. Opins. Atty. Gen. 1917, p. 2175.

Section 179. (Statement required before admission.) Before granting such certificate, the secretary of state shall require such foreign corporation to file in his office a sworn copy of its charter or certificate of incorporation, and a statement under its corporate seal setting forth the following: The amount of capital stock of the corporation, the business in which it is engaged or in which it proposes to engage within this state; the proposed location of its principal place of business within this state; and the name of a person designated as provided by law, upon whom process against the corporation may be served within this state. The person so designated must have an office or place of business at the proposed location of the principal place of business of the corporation. (R. S. Sec. 148d; April 23, 1898, 93 v. 227; May 19, 1894, 91 v. 355; April 25, 1893, 90 v. 261.)

Whether jurisdiction over a foreign corporation, in a suit on a cause of action arising in another state, may be acquired by service on the designated agent, is a question on which there has been some difference of opinion. The United States Supreme Court has expressed the view that § 181 limits the jurisdiction to liabilities "incurred within the state". *Robert Mitchell Furniture Co. v. Selden Breck Construction Co.*, 257 U. S. 213 (1921), 66 L. Ed. 102; *Missouri Pac. R. Co. v. Clarendon Boat Oar Co.*, 257 U. S. 533 (1922), 66 L. Ed. 354.

In earlier cases, common pleas courts in Ohio had held that such jurisdiction could be acquired, in a suit by a resident of Ohio, by service on the designated agent. *Burke v. McClintic-Marshall Co.*, 9 N. P. n. s. 577 (1910); *Madison v. Pittsburg Construction Co.*, 11 N. P. n. s. 634 (1911). See *Handy v. Insurance Co.*, 37 O. S. 366 (1881).

Jurisdiction over a foreign corporation may be acquired in federal court by service of process on the agent designated in its statement. *Runkle v. Insurance Co.*, 2 Fed. 9; 5 W. L. B. 217; 4 O. F. D. 620 (C. C. 1880); *Barrow Steamship Co. v. Kane*, 170 U. S. 100, 107 (1898).

Process issued from one county may be served upon the designated agent in another county. *Blanton v. Burroughs, etc., Co.*, 13 N. P. n. s. 423 (C. P. 1912).

For service of process on foreign corporations see also notes to G. C. § 11290 and § 10244.

Section 180. (Fees to be paid before delivery of certificates.) For issuing such certificate the secretary of state shall be entitled to receive from a foreign corporation the following fees:

A corporation having an authorized capital stock of one hundred thousand dollars or less, fifteen dollars.

A corporation having an authorized capital stock of more than one hundred thousand dollars, and not exceeding three hundred thousand dollars, twenty dollars.

A corporation having an authorized capital stock of more than three hundred thousand dollars, and not exceeding five hundred thousand dollars, twenty-five dollars.

A corporation having an authorized capital stock of more than five hundred thousand dollars, and less than one million dollars, thirty dollars.

A corporation having an authorized capital stock of one million dollars, or more, fifty dollars.

Whereupon such foreign corporation shall be entitled to receive from the secretary of state the certificate provided in the second preceding section. (R. S. Sec. 148d; April 23, 1898, 93 v. 227; May 19, 1894, 91 v. 355; April 25, 1893, 90 v. 261.)

Compliance with §§ 178 and 179 and the payment of a fee under § 180 do not constitute a contract which will prevent the state from thereafter imposing other fees. *Aetna Iron & Steel Co. v. Taylor*, 3 N. P. 152; 4 L. D. 180; 13 C. C. 602; 15 C. D. 242 (1896). Compare *American, etc., Co. v. Colorado*, 204 U. S. 103 (1906); *Southern Railway Co. v. Greene*, 216 U. S. 400 (1910).

The secretary of state has no discretionary power to investigate and determine the legality of the manner in which a foreign corporation is conducting its business, with a view to rejecting the application, where the application is in proper form and shows the business to be legal. Rep. Atty. Gen. 1910-1911, p. 202.

Fee for foreign corporation having no par value stock. § 8728-11.

Section 181. (Person upon whom process to be served.)

If a person designated by a foreign corporation as its agent within this state dies or removes from the principal place of business of the corporation within this state, the corporation, within thirty days after such death or removal, shall designate in like manner another person upon whom process may be served within this state. On failure so to do, the secretary of state shall revoke the authority of the corporation to do business within this state and process against such corporation in an action upon the liability incurred within this state before such revocation may be served upon the secretary of state after such death or removal and before another designation is made. At the time of such service the plaintiff shall pay to the secretary of state a fee of two

dollars, which shall be included in the taxable costs of the action, and the secretary of state shall forthwith mail a copy of the service to the corporation if its address or the address of any officer is known to him. (R. S. Sec. 148d; April 23, 1898, 93 v. 227; May 19, 1894, 91 v. 355; April 25, 1893, 90 v. 261.)

See note to § 179.

Where the agent removes from the state, the duty of the secretary of state to revoke the authority of the corporation is mandatory. Rep. Atty. Gen. 1910-1911, p. 264.

Service of process by mail. Mohr Distilling Co. v. Fireman's Ins. Co., 12 Am. L. R. 168 (1883); Heart v. Lycoming Ins. Co., 26 O. S. 594 (1875); s. c., 2 Am. L. R. 355.

Section 182. (Penalty for noncompliance with previous section.) Whoever solicits or transacts business in this state for a foreign corporation which is subject to the provisions of the preceding four sections, before it has complied with the provisions of such sections, shall be fined not less than ten dollars nor more than five hundred dollars, or imprisoned not less than ten days nor more than six months, or both. Upon direction of the attorney general, the prosecuting attorney shall prosecute any person charged with a violation of the provisions of such section. (R. S. Sec. 148d; 93 v. 227; 91 v. 355; 90 v. 261.)

See §§ 5523, 5524, 191.

Section 183. (Statement required before doing business.) Before doing business in this state, a foreign corporation organized for profit and owning or using a part or all of its capital or plant in this state shall make and file with the secretary of state, in such form as he may prescribe, a statement under oath of its president, secretary, treasurer, superintendent or managing agent in this state, containing the following facts:

1. The number of shares of authorized capital stock of the corporation and the par value of each share.

2. The name and location of the office or offices of the corporation in Ohio and the names and addresses of the officers or agents of the corporation in charge of its business in Ohio.

3. The value of the property owned and used by the corporation in Ohio, where situated, and the value of the property of the corporation owned and used outside of Ohio.

4. The proportion of the capital stock of the corporation represented by property owned and used and by business transacted in Ohio. (R. S. Sec. 148c; April 27, 1904, 97 v.

496; May 10, 1902, 95 v. 539; April 14, 1900, 94 v. 225; April 23, 1898, 93 v. 225; May 16, 1894, 91 v. 272.)

What constitutes "doing business". See note to §§ 194 and 188. Effect of noncompliance, see note to § 194.

Corporations which are not subject to this section are not required to make reports and pay annual franchise taxes, although they may be subject to § 178 et seq. Rep. Atty. Gen. 1912, pp. 569, 59; Rep. Atty. Gen. 1914, p. 1172.

Property in Ohio held by a trustee for a corporation should be reported, if the corporation enjoys the entire use and benefit. Opins. Atty. Gen. 1916, pp. 740, 1061.

The word "business" in this section is synonymous with the same word as used in § 5502. Opins. Atty. Gen. 1915, p. 460.

Neither "good will" nor "patent rights", separately considered, constitute "property" within the meaning of this section. Opins. Atty. Gen. 1919, p. 358.

Section 184. (Payment of franchise fee and certificate.)

From the facts thus reported and any other facts coming to his knowledge, the secretary of state shall determine the proportion of the capital stock of the corporation represented by its property and business in this state, and shall charge and collect from such corporation for the privilege of exercising its franchise in this state, one-tenth of one per cent upon the proportion of its authorized capital stock represented by property owned and used and business transacted in this state, but not less than ten dollars in any case. Upon the payment of such fee the secretary of state shall make and deliver to such foreign corporation a certificate that it has complied with the laws of Ohio and is authorized to do business therein, stating the amount of its authorized capital stock and the proportion of such authorized capital stock represented in this state. (R. S. Sec. 148c; April 27, 1904, 97 v. 496; May 10, 1902, 95 v. 539; April 14, 1900, 94 v. 225; April 23, 1898, 93 v. 225; May 16, 1894, 91 v. 272.)

The secretary of state has no discretionary power to investigate and determine the legality of the manner in which a foreign corporation is conducting its business, with a view to rejecting the application, where the application is in proper form and shows the business to be legal. Rep. Atty. Gen. 1910-1911, p. 202.

Method of computing tax. This tax is not based upon the *property* owned and used and *business* transacted in Ohio, but is based upon the *proportion of the total authorized capital stock* represented by such property and business. The proportion which the property owned and used and business transacted in Ohio bears to the entire property and business of the corporation is the proportion of the capital stock upon which the tax is based. If the property owned and used and business transacted in Ohio is \$10,000, the entire corporate property and business \$20,000, and the authorized capital stock \$50,000, the tax would be based upon one-half of its authorized capital stock (\$25,000) the Ohio property and business being one-half of the total property and business.

If the entire corporate property and business is in Ohio the tax would be based upon the entire authorized capital stock, although all of the authorized capital stock has not been subscribed for or issued. *State v. Fulton*, 98 O. S. 350 (1918); 5 O. L. R. 163 (Atty. Gen. 1907); *Aetna, etc., Co. v. Taylor*, 13 C. C. 602; 5 C. D. 242 (1896); 4 Opins. Atty. Gen., 621-24 (1894); Rep. Atty. Gen. 1910-1911, p. 600.

Payment of the fee under protest does not render it an involuntary payment, unless the other circumstances under which it is paid would justify its recovery back. *Aetna Iron & Steel Co. v. Taylor*, 3 N. P. 152; 4 L. D. 180 (1896).

For annual franchise tax, see § 5499 et seq.

Fee for foreign corporation having no par value stock. § 8728-11.

Section 185. (Fee for increase of capital stock.) A corporation which has filed its statement and paid the fee prescribed by the preceding two sections and which thereafter shall increase the proportion of its capital stock, represented by property used and business done in this state, shall file within thirty days after such increase an additional statement with the secretary of state, and pay a fee of one-tenth of one per cent upon the increase of its authorized capital stock represented by property owned and business transacted in this state. (R. S. Sec. 148c; April 27, 1904, 97 v. 496; May 10, 1902, 95 v. 539; April 14, 1900, 94 v. 225; April 23, 1898, 93 v. 225; May 16, 1894, 91 v. 272.)

Where the capital stock of a foreign corporation is increased, a statement thereof must be filed with the secretary of state. Rep. Atty. Gen. 1909-1910, p. 101.

Although the proportion of its business and property in Ohio has not increased. Opins. Atty. Gen. 1915, p. 1454. But see Opins. Atty. Gen. 1915, p. 2132.

The additional statement should show the amount of the corporation's Ohio business and property and its business and property outside of Ohio. It is not sufficient merely to state that no part of the increase of capital stock has gone into Ohio property and business. Opins. Atty. Gen. 1915, p. 2132.

Where a foreign corporation paid the minimum fee under § 184 at a time when it had no property in Ohio, and it subsequently desires to use property in the state, the whole of the property to be used constitutes an "increase" under this section, and the fee previously paid cannot be credited toward the fee for the increase. Opins. Atty. Gen. 1915, p. 1768.

Whether or not the proportion of capital stock represented by Ohio property and business has been increased is a question of fact to be determined by mathematical calculation. It is not indispensable that the corporation shall have increased its authorized capital stock, and an increase in the authorized capital does not necessarily result in an increase of the proportion. The statutory test is, has the corporation increased the proportion of its capital stock represented by property used and business done in Ohio. Opins. Atty. Gen. 1919, p. 1123; 17 O. L. R. 371.

In determining whether the proportion has been increased, the statements to be considered are the last one filed with the secretary

of state and the new statement proposed to be filed. Opins. Atty. Gen. 1919, p. 1140.

Section 186. (Exemption from penalty.) If a foreign corporation complies with the provisions of the preceding three sections, it shall not be subject to process of attachment under any law of this state upon the ground that it is a foreign corporation, or non-resident of the state. A foreign corporation subject to the provisions of such sections which shall neglect or refuse to comply with the requirements thereof shall forfeit and pay one thousand dollars and an additional penalty of one thousand dollars for each month that it continues to transact business in this state without complying with such sections, to be recovered by an action in the name of the state, and on collection paid into the state treasury to the credit of the general revenue fund. (R. S. Secs. 148c, 148d; April 27, 1904, 97 v. 496; May 10, 1902, 95 v. 539; April 14, 1900, 94 v. 225; April 23, 1898, 93 v. 225, 227; May 16, 1894, 91 v. 272; April 15, 1893, 90 v. 261.)

Cross references. Remission of penalty, §§ 191, 5523.

Attachment and garnishment of foreign corporations.

In court of common pleas, § 11819 et seq.

Before justice of the peace, § 10253 et seq.

Attachment. The exemption from attachment provided for in this section is constitutional. Puerrung v. Carter Crume Co., 16 C. C. 629; 9 C. D. 411 (1898); s. c., 35 W. L. B. 2.

Affidavit for (a) Before justice of the peace. An affidavit for attachment under G. C. § 10253 need not aver noncompliance with foreign corporation laws. Rosenham Co. v. Cohen & Mack, 13 C. C. n. s. 102 (1910).

— **(b) In court of common pleas.** An affidavit for attachment under G. C. § 11819 should allege noncompliance. Edwards Mfg. Co. v. Ashland Sheet Mill Co., 6 N. P. n. s. 1; 18 L. D. 413 (1907); affirmed 11 C. C. n. s. 479; 20 C. D. 414; Leavitt, etc., Co. v. Rosenberg, etc., Co., 83 O. S. 230 (1910); Dillon v. Garment Co., 5 Ohio App. 347 (1915); Boiler Works v. Machine Co., 17 C. C. n. s. 605 (1910).

Transportation company. A foreign transportation corporation engaged in interstate commerce does not, by a voluntary compliance with G. C. § 183, become exempt from attachment. G. C. § 188. Bigalow v. Armour, 74 O. S. 168 (1906), reversing 5 C. C. n. s. 161; 16 C. D. 496.

A sleeping car is an instrumentality of interstate commerce, and when actually employed in interstate transportation is immune from attachment under process from a state court. A sheriff who seizes such immune property is liable as for conversion. An attaching creditor and his attorney who actively assist in the seizure may also be liable. Pullman Co. v. Linkey, 11 O. L. R. 63; 203 Fed. 1017 (D. C. 1913).

Foreign corporation as garnishee. A foreign corporation which neither transacts business nor exercises its corporate powers within the state can not be made a garnishee in an action against another foreign corporation. But a corporation which has complied with the foreign corporation acts, and is capable of suing and being sued in the state, may

be made a garnishee in such an action. *Ritter-Conley Mfg. Co. v. Mzik*, 3 C. C. n. s. 125; 13 C. D. 164 (1901); *Compare, Kelley Co. v. Garvin Machine Co.*, 6 N. P. 350; 4 L. D. 374 (1896).

Section 187. (Must comply herewith before certain actions can be brought.) A foreign corporation which has violated such preceding sections shall not maintain an action in this state upon contract made by it in this state, until it has complied with the requirements of such sections and procured the requisite certificate from the secretary of state. (R. S. Sec. 148c; April 27, 1904, 97 v. 496; May 10, 1902, 95 v. 539; April 14, 1900, 94 v. 225; April 23, 1898, 93 v. 225; May 16, 1894, 94 v. 272.)

See § 178.

Before the enactment of § 5508 (May 31, 1911) it was held that a contract made by a foreign corporation, without complying with §§ 178 to 192, was not void. *Fergus v. Columbus*, 6 N. P. 82; 8 L. D. 290 (1898); *Union, etc., Ins. Co. v. McMillan*, 24 O. S. 67 (1873).

But the right of action on such contract in the state courts was suspended until the conditions of the law were complied with. *Simplex Dairy Co. v. Cole*, 86 Fed. 739 (1898); *Crefeld Miller v. Goddard*, 69 Fed. 141 (1895).

Suit thereon might be brought in federal court. *Johnson v. Breweries Co.*, 178 Fed. 513 (1910).

By § 5508 a contract made by a foreign corporation, before compliance with § 178 is void in its behalf, but is enforceable against it.

Construction of section. The inhibition of this section is as to actions upon contracts, and not transactions, and as to maintaining actions and not the institution of actions. It is a technical defense and should be technically considered. An answer setting up a defense under this section should show that the plaintiff corporation came within the provisions of the act at the time of the filing of the answer, and was not included in any of its exceptions. *Automatic, etc., Co. v. Schlemmer Co.*, 6 O. L. R. 72; 18 L. D. 788 (C. P. 1908).

Noncompliance with laws, no defense to prosecution for crime against property of foreign corporation. On the trial of an indictment for embezzlement of funds coming into the possession of the defendant as agent for a foreign corporation, it is no defense that the corporation has not complied with these acts. *State v. Pohlmeier*, 59 O. S. 491 (1898). See *Starkey v. State*, 6 O. S. 266 (1856).

Pleading compliance or noncompliance. A foreign corporation bringing suit need not allege compliance with laws. Want of compliance is a matter of defense. The answer of the defendant must set forth specifically facts bringing the foreign corporation within the provisions of the statute, and show that it is not among the classes exempted by §§ 188 and 178. *Brady v. Palmer*, 19 C. C. 687; 10 C. D. 27 (1899); *affd.* 64 O. S. 267 (1901); *Toledo Commercial Co. v. Glen Mfg. Co.*, 55 O. S. 217 (1896); *affmg.* 11 C. C. 153; 5 C. D. 131; *Automatic, etc., Co. v. Schlemmer Co.*, 6 O. L. R. 72; 18 L. D. 788 (1908); *Illinois, etc., Co. v. Whitman*, 13 N. P. n. s. 362; 23 L. D. 12 (1911).

Pleading corporate capacity and powers. A foreign corporation bringing suit need not aver in its petition that it is a corporation, or the terms of its charter showing its capacity to maintain the action. If such

avermment is made, it will be held to be immaterial and mere surplusage. A general denial to a petition containing such averment will not raise an issue as to corporate capacity.

To raise the issue of corporate capacity of the plaintiff, it must be specially pleaded by the defendant. *Brady v. National Supply Co.*, 64 O. S. 267 (1901); affirming 19 C. C. 687; 10 C. D. 27; *Smith v. Weed Sewing Machine Co.*, 26 O. S. 562 (1875); *Elektron Mfg. Co. v. Jones Bros. Elec. Co.*, 8 C. C. 311; 4 C. D. 555 (1894); *Staley v. Cusack Co.*, 23 N. P. n. s. 209.

A person who has dealt with a foreign corporation and received the benefits of the contract, is estopped to deny its legal existence and power to make the contract. *Newburgh Petroleum Co. v. Weare*, 27 O. S. 343 (1875).

But where a foreign corporation seeks to appropriate private property, the rule is otherwise. The corporation must allege in its petition and prove its incorporation according to law, including the due and legal election of directors, and its charter power to appropriate property. *Central Union Tel. Co. v. Columbus*, 8 C. C. n. s. 81; 28 C. D. 131 (1905); *Queen City Tel. Co. v. Cincinnati*, 73 O. S. 64 (1905).

And where a corporation is made a defendant, and its charter, powers or franchise become the foundation of the action, they must be specially pleaded in the petition, including the name of the state of incorporation, and the substantial terms in which the charter, powers and franchises were granted. *Devoss v. Gray*, 22 O. S. 159 (1871); *Brady v. National Supply Co.*, 64 O. S. 267 (1901).

Proof of legal existence and powers. The law of the state under which a foreign corporation is organized constitutes a part of its charter. Courts of this state do not take judicial notice of the laws of other states. To establish the legal existence and powers of a foreign corporation it is necessary to prove the laws of its home state conferring its powers, as well as the articles of incorporation, subscriptions to capital stock, election of officers, etc. *Niagara County Bank v. Baker*, 15 O. S. 68 (1864); *James v. C. H. & D. R. R.*, 2 *Disney* 261, 266 (1858). See notes to § 11046.

Section 188. (Certain corporations excepted.) The preceding five sections shall not apply to foreign insurance, banking, savings and loan, building and loan, or bond investment corporations, or to express, telegraph, telephone, railroad, sleeping car, transportation, or other corporations engaged in Ohio in inter-state commerce; or to foreign corporations entirely non-resident soliciting business or making sales in this state by correspondence or by traveling salesmen. (R. S. Sec. 148c; April 27, 1904, 97 v. 496; May 10, 1902, 95 v. 539; April 14, 1900, 94 v. 225; April 23, 1898, 93 v. 225; May 16, 1894, 91 v. 272.)

Section 178, unlike this section, does not exempt foreign corporations engaged in interstate commerce. Rep. Atty. Gen. 1910-1911, p. 240.

Interstate commerce "strictly considered, consists in intercourse and traffic, including in these terms navigation and the transportation of persons and property, as well as the purchase, sale and exchange of commodities." *Mobile County v. Kimball*, 102 U. S. 691, 702 (1881).

An incorporated correspondence school which maintained in another

state an office with a resident agent in charge for the purpose of soliciting students, and collecting and forwarding their payments, for instruction sent by mail, was held to be engaged in interstate commerce upon which no license tax or conditions could be imposed by a state. *International Text Book Co. v. Pigg*, 217 U. S. 91 (1910); reversing 76 Kans. 328.

Property used in interstate commerce may be taxed by the state in which it is situated, although the business of, or the right to engage in, interstate commerce may not. *Adams Express Co. v. Ohio State Auditor*, 165 U. S. 194, 220 (1896); affirming 51 O. S. 492.

Contracts for advertising in periodicals do not constitute interstate commerce, although the circulation and distribution of the periodicals would be interstate commerce. *Blumenstock v. Curtis Publ. Co.*, 252 U. S. 436 (1920).

The issuing of a policy of insurance is not interstate commerce. *Insurance Co. v. Deer Lodge County*, 231 U. S. 495 (1913).

The fact that the business of a foreign corporation is entirely interstate in its character does not render it immune from process in a state court. *International Harvester Co. v. Kentucky*, 234 U. S. 579 (1914). See also note to § 194, "doing business" in state.

Transportation company. A foreign corporation engaged in furnishing refrigerator cars and ice therefor, for transportation purposes partly within and partly without and across Ohio, is, under this section, not subject to § 183 et seq. *Begalow v. Armour*, 74 O. S. 168 (1906); reversing 5 C. C. n. s. 161.

Insurance corporation. A foreign corporation which sells to physicians a contract whereby it agrees to defend any malpractice suits brought within a specified time, but which does not agree to assume or pay any judgments, is not engaged in the business of insurance. *State v. Laylin*, 73 O. S. 90 (1905). See also, *State v. Railway Co.*, 68 O. S. 9 (1903).

Federal governmental agency. A District of Columbia corporation to which the president has delegated certain authority granted him by congress, and which transacts no other business, is an agency of the federal government and need not comply with the foreign corporation laws. *Opins. Atty. Gen.* 1917, p. 2175.

Telephone company. A foreign corporation which purchases the plant of a domestic telephone company and thereafter engages in both interstate and intrastate business need not comply with § 183 et seq. *Opins. Atty. Gen.* 1918, p. 707.

Section 189. (Right of hearing before secretary of state.)

On application, a foreign corporation shall have the right to be heard by the secretary of state in the matter of the determination of the proportion of its capital stock represented by property used and business done in this state. (R. S. Sec. 148c; April 27, 1904, 97 v. 496; May 10, 1902, 95 v. 539; April 14, 1900, 94 v. 225; April 23, 1898, 93 v. 225; May 16, 1894, 91 v. 272.)

Section 190. (Right of appeal.) A corporation aggrieved by the decision of the secretary of state under the preceding section may, within ten days, appeal to the auditor of state, the treasurer of state and the attorney general, whose deci-

sion shall be final. (R. S. Sec. 148c; April 27, 1904, 97 v. 496; May 10, 1902, 95 v. 539; April 14, 1900, 94 v. 225; April 23, 1898, 93 v. 225; May 16, 1894, 91 v. 272.)

Where the facts are not in dispute and the only question is one of law, a foreign corporation may proceed in mandamus against the secretary of state, without pursuing the remedy provided by §§ 189 and 190. *State v. Fulton*, 98 O. S. 350 (1918).

In earlier cases it had been held by lower courts that the remedy provided by this section must be exhausted. *Aetna Iron & Steel Co. v. Taylor*, 3 N. P. 152, 155; 4 L. D. 180; *sa. c.*, 13 C. C. 602; 5 C. D. 242 (1896). See also, *State ex rel. v. Jones*, 51 O. S. 492 (1894); affirmed 165 U. S. 194.

Section 190-1. (Certificate of compliance with laws prima facie evidence of incorporation.) The certificate of compliance with the laws of this state issued to a corporation, not organized under the laws of this state, or a copy of such certificate duly certified to by the state officer issuing same, or his successors in office, shall be prima facie evidence of the due incorporation and existence of the corporation therein named. All officers authorized to issue certificates of compliance with the laws of this state, to corporations not organized under the laws of this state, shall keep a record of such certificates issued by them. (108 (Pt. 1) v. 44.)

Pleading and proof of corporate existence in general, see notes to §§ 187 and 8629.

Section 191. (Actions against foreign corporation; remission of penalties.) On request of the secretary of state, the attorney general shall prosecute an action against a foreign corporation under the provisions of this chapter in the court of common pleas of Franklin county or in any county in which the corporation has an office or place of business. On good cause shown, the governor and secretary of state may remit the penalty or part thereof incurred by a foreign corporation under this chapter. (R. S. Sec. 148c; 97 v. 496; 95 v. 539; 94 v. 225; 93 v. 225; 91 v. 272.)

Section 192. (Shares of stock of certain corporations not taxable.) No person shall be required to list for taxation a share of the capital stock of an Ohio corporation; or a share of the capital stock of a foreign corporation, the property of which is taxed in Ohio in the name of such corporation; or a share of the capital stock of any other foreign corporation, if the holder thereof furnishes satisfactory proof to the taxing authorities that at least two-thirds of the property of such corporation is taxed in Ohio and the remainder is taxed in another state or states, pro-

vided such corporation, as a fee for the privilege of exercising its franchise in Ohio, pays annually the same percentage upon its entire authorized capital stock that is required by law to be paid by a domestic corporation on its subscribed or issued capital stock. (R. S. Sec. 148c; April 27, 1904, 97 v. 496; May 10, 1902, 95 v. 539; April 14, 1900, 94 v. 225; April 23, 1898, 93 v. 225; May 16, 1894, 91 v. 272.)

Doubt has been expressed as to the constitutionality of this section, under Const. Art. 12, Sec. 2. Opins. Atty. Gen. 1919, p. 165.

This section was enacted as a part of the Willis law, and should be interpreted as such. For the purpose of this section a corporation organized under the laws of Ohio and also of another state is not an Ohio corporation unless it is subject to the franchise tax imposed by other sections of the Willis law. Opins. Atty. Gen. 1919, p. 165.

Taxation of property of foreign corporation. Choses in action, whether book accounts, promissory notes, or the like, of foreign corporations that are kept in this state and arise out of the corporate business transacted here are subject to taxation under the provisions of G. C. §§ 5404, 5405 and 5406. Hubbard v. Brush, 61 O. S. 252 (1899); Scottish, etc., Ins. Co. v. Bowland, 196 U. S. 611, 627 (1905); Western Assur. Co. v. Halliday, 126 Fed. 257 (C. C. A. 1903); Sims v. Best, 1 C. C. n. s. 41; 15 C. D. 149 (1903).

Deposits of insurance companies, made as required by law, see § 5437.

Taxation of stock in Ohio corporations. Prior to the amendment of this section in 1904 (97 O. L. 496) stock in an Ohio corporation was exempt from taxation only when the property of the corporation was taxed in its name in Ohio. Lander v. Burke, 65 O. S. 532 (1901).

But since the amendment, such stock is not taxable, although part of the corporate property is located in other states and is not taxed in Ohio. Opins. Atty. Gen. 1916, pp. 1739, 1443.

Stock in a railroad company formed by consolidation of an Ohio company with a foreign corporation is exempt under this section. Opins. Atty. Gen. 1917, p. 542.

Taxation of stock in foreign corporations. If any part of the corporate property is taxed in a foreign country, the stock is not exempt in Ohio. The words "taxed in another state or states" in § 192 mean a state of the United States. Rep. Atty. Gen. 1914, p. 1561. Opins. Atty. Gen. 1915, p. 387.

Stock in a foreign corporation, owned by a resident of Ohio (when not exempted under §§ 192 or 5372), is taxable in Ohio, although the certificates evidencing such stock are in the possession of an agent in another state where taxes are paid thereon. Rep. Atty. Gen. 1906, p. 257.

A statute imposing a tax on stock in foreign corporations held by residents of Ohio is constitutional. Worthington v. Sebastian, 25 O. S. 1 (1874); Bradley v. Bauder, 36 O. S. 28 (1880); Sturges v. Carter, 114 U. S. 511 (1885).

A state may tax stock in a foreign corporation, whose capital consists wholly of patent rights, which are exempt under federal laws. Scott v. Smith, 2 N. P. n. s. 617; 15 L. D. 590 (1905).

Where the foreign corporation is an insurance company or a public utility, and as such is required to pay an excise tax on its gross receipts, instead of a franchise tax on its capital stock, the requirement

of this section as to privilege tax is satisfied. Rep. Atty. Gen. 1912, p. 2037.

Stock in a foreign corporation held by a trustee residing in Ohio in trust for a nonresident beneficiary is taxable in Ohio. Rep. Atty. Gen. 1912, p. 596; Opins. Atty. Gen. 1914, p. 1277.

But stock in a foreign corporation held by a trustee residing in another state in trust for a resident of Ohio is not taxable in Ohio, although the trust is a revocable one established by the resident of Ohio. Opins. Atty. Gen. 1921, p. 969.

Stock in a foreign corporation, owned by another foreign corporation. Stock in a foreign corporation, owned by another foreign corporation doing business in Ohio, is not taxable, although the stock certificates are kept in its branch office in this state. Iron Co. v. Madigan, 17 C. C. n. s. 340 (1911); affd. no report, 88 O. S. 533.

Stock in foreign corporations under former laws, see Hubbard v. Brush, 61 O. S. 252 (1899); Lee v. Sturges, 46 O. S. 153 (1889); Bradley v. Bauder, 36 O. S. 28 (1880); Worthington v. Sebastian, 25 O. S. 1 (1874); Sturges v. Carter, 114 U. S. 511 (1885).

Section 193. (Record of fees.) The secretary of state shall keep a record of all fees collected under the provisions of this chapter and pay them into the state treasury to the credit of the general revenue fund. (R. S. Sec. 148; April 18, 1881, 78 v. 186; R. S. 1880; 73 v. 227, § 2; 44 v. 65, § 4; S. & C. 1394.)

Section 194. (Fees paid under protest.) If fees are paid under protest to recover which while held by him an action would lie against the secretary of state, and such fees are paid into the state treasury in compliance with the preceding section, actions to recover them shall be brought against the state and not against the secretary of state. For such purposes permission is hereby given to maintain actions against the state in the cases and to the extent that such actions might be maintained against the secretary of state, if the fees were held by him. Service of process shall be made on the attorney-general who shall represent the state. (R. S. Sec. 148b; 89 v. 325.)

FOREIGN CORPORATIONS GENERALLY.

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1. WHAT ARE FOREIGN CORPORATIONS.

A. Definition. A foreign corporation is one that has been organized under the laws of another state or of a foreign government. Cook on Corporations, § 7; *Horn Silver Min. Co. v. New York*, 143 U. S. 305, 314 (1891); *Boley v. Ohio, etc., Co.*, 12 O. S. 139 (1861).

B. Incorporation in more than one state. A corporation incorporated in several states has a legal domicile in each state. In each state it is regarded as a domestic and not a foreign corporation. *Gerling v. B. & O. R. R. Co.*, 151 U. S. 673, 677 (1894); *Graham v. Boston, etc., R. R.*, 118 U. S. 161, 168 (1886); *Covington, etc., Bridge Co. v. Mayer*, 31 O. S. 317 (1877); *Sebastian v. Covington, etc., Bridge Co.*, 21 O. S. 451 (1871); *State v. Covington, etc., Bridge Co.*, 6 N. P. n. s. 55; 18 L. D. 273 (1907).

A corporation incorporated in several states, including the one in which suit is brought against it, must be regarded as a citizen of the latter state for the purpose of determining the jurisdiction of a federal court. *L. S. & M. S. Ry. v. Eder*, 174 Fed. 944; 8 O. L. R. 386 (C. C. A. 1909).

C. Domestic corporation does not become foreign by qualifying to do business in another state. An Ohio corporation does not cease to be such nor become a foreign corporation by obtaining a license and transacting business elsewhere. *Lander v. Burke*, 65 O. S. 532 (1901); *Railway Co. v. Stringer*, 32 O. S. 468, 472 (1877); *Iron Co. v. Madigan*, 17 C. C. n. s. 340, 342 (1911); aff'd, no rep. 88 O. S. 533; *State v. Taylor*, 25 O. S. 279 (1874).

A foreign corporation does not become an Ohio corporation by reason of the fact that all of its business is transacted in Ohio, and that none of its business, beyond its mere incorporation, has been transacted in its home state. *Hanna v. Petroleum Co.*, 23 O. S. 622 (1873); *Iron Co. v. Madigan*, 17 C. C. n. s. 340, 342 (1911); aff'd, no rep. 88 O. S. 533; *Humphreys v. State*, 70 O. S. 67 (1904).

A foreign railroad company, by leasing and operating in this state the property of an Ohio corporation, does not thereby become an Ohio corporation. *B. & O. R. R. Co. v. Cary*, 28 O. S. 218 (1876); *Railway v. Stringer*, 32 O. S. 468 (1877); *B. & O. R. R. Co. v. Koontz*, 104 U. S. 5 (1881).

A foreign corporation, after compliance, may remove a suit to federal court. *Lee v. Insurance Co.*, 3 O. F. D. 663.

II. "DOING" OR "TRANSACTIONING" BUSINESS IN THE STATE; WHAT CONSTITUTES.

See also note to § 188.

A. In general. The words "doing business" or "transacting business" refer to the transaction of the ordinary business for which the corporation was organized, and do not include acts not a part of the ordinary business, such as bringing a suit. *Alpena Cement Co. v. Jenkins, etc., Co.*, 244 Ill. 354; 91 N. E. 480; *Trust Co. v. Railroad Co.*, 7 N. P. n. s. 497 (1908).

Or soliciting and obtaining subscriptions to the capital stock of the foreign corporation. *First Nat. Bk. v. Leeper*, 121 Mo. App. 688; 97 S. W. 636; *Payson v. Withers*, 5 Biss (U. S.) 269; *Bartlett v. Chouteau Ins. Co.*, 18 Kans. 369; 5 Opins. Atty. Gen. 830.

A single and isolated transaction does not constitute "doing business" in a state. *Cooper Mfg. Co. v. Ferguson*, 113 U. S. 727 (1885).

But the business need not be done "persistently and continuously". *Empire Fuel Co. v. Lyons*, 257 Fed. 890 (C. C. A. 6th Cir. 1919).

Jurisdiction of Ohio courts over a foreign corporation which is not "doing business" in the state. See note to § 11290.

B. Sales of goods. A foreign corporation which maintains a stock of goods in the state, from which deliveries are made of goods sold, is doing business in the state. *Cheney Co. v. Massachusetts*, 246 U. S. 147 (1918); *People v. Wemple*, 131 N. Y. 64; 29 N. E. 1002; *Singer Mfg. Co. v. Adams*, 165 Fed. 877 (1909); *Thomas Mfg. Co. v. Knapp*, 101 Minn. 432; 112 N. W. 989.

But where goods are shipped into the state to fill orders previously obtained, the transaction constitutes interstate commerce, upon which no license tax or restriction may be imposed by a state. A foreign corporation which maintains no stock of goods within the state, and limits its business to shipping goods into the state, upon orders, need

not obtain a license or certificate or comply with the conditions imposed by state laws. This is true whether the orders are obtained through traveling salesmen or correspondence. Toledo Commercial Co. v. Glen Mfg. Co., 55 O. S. 217 (1896); Haldy v. Tomoor-Haldy Co., 3 N. P. 43; 4 L. D. 118 (1896); General Electric Co. v. Lima, etc., Co., 4 N. P. 167 (1897); Aultman Miller & Co. v. Holder, 34 W. L. B. 92 (1895); Bruner v. Plow Co., 168 Fed. 218 (C. C. A. Okla. 1909); Opins. Atty. Gen. 1915, p. 1270; Opins. Atty. Gen. 1918, p. 6.

Or a resident broker. McBath v. Jones Cotton Co., 149 Fed. 383 (1906); Doe v. Springfield, etc., Mfg. Co., 104 Fed. 684 (1900).

Or whether the foreign corporation maintains an office in the state with a resident agent in charge, for the purpose of soliciting orders. Cheney v. Massachusetts, 246 U. S. 147 (1918); International Text Book Co. v. Pigg, 217 U. S. 91 (1910); reversing 76 Kans. 328.

It is not necessary, to constitute a transaction interstate commerce, that the goods, to fill orders previously obtained, be shipped direct to the purchaser. The goods may be sent to the agent for delivery by him to the purchaser. Caldwell v. North Carolina, 187 U. S. 622 (1903); Norfolk, etc., Co. v. Sims, 191 U. S. 441, 450 (1903); Crenshaw v. Arkansas, 227 U. S. 389; Stewart v. Michigan, 232 U. S. 665.

But the attaching of lightning rods to houses, after arrival, is not a part of interstate commerce. Browning v. Wayeross, 233 U. S. 16 (1914).

For definition of interstate commerce, see note to § 188.

C. Sales through commission merchants. A foreign corporation which has no warehouse, office or place of business in the state to which it consigns goods to a factor, the factor conducting all the business in such state, and paying all expenses of receiving, handling and storing the goods, is not doing business in such state. Butler Bros. Shoe Co. v. U. S. Rubber Co., 156 Fed. 1 (C. C. A. Colo. 1907); certiorari denied 212 U. S. 577; Atlas Engine Co. v. Parkinson, 161 Fed. 223 (D. C. 1908); Allen v. Tyson-Jones Buggy Co., 91 Tex. 22; 40 S. W. 393, 714; Lasater v. Purcell, etc., Co., 22 Tex. Civ. App. 33; 54 S. W. 425; Hovey's Estate, 198 Pa. St. 385; 48 Atl. 311; Bertha, etc., Zinc, etc., Co. v. Clute, 27 N. Y. S. 342; Brookford Mills v. Baldwin, 139 N. Y. Supp. 195. See Gibbin v. Coal Co., 2 C. S. C. R. 75 (1870).

D. Miscellaneous. (1). *Held not to constitute "doing business."* The maintaining of a resident agent to solicit and make contracts for traffic, by a foreign railroad corporation, the lines of which are wholly outside of the state, none of the contract of carriage being performed in the state. Green v. C. B. & Q. R. R. Co., 205 U. S. 530 (1907); General Investment Co. v. Railway, 250 Fed. 160 (C. C. A. Ohio 1918).

Acting as a stockholder in an Ohio corporation, or giving assent to changes in its regulations. Toledo Co. v. Smith, 205 Fed. 643 (D. C. 1913).

The ownership of a controlling interest in the stock of a domestic corporation. Mannington v. H. V. Ry. Co., 183 Fed. 133; 8 O. L. R. 451; 16 O. F. D. 522 (C. C. Ohio 1910).

Owning property in the state, but not engaging in the principal business of the corporation. Opins. Atty. Gen. 1917, p. 597; Opins. Atty. Gen. 1916, p. 995. See Rep. Atty. Gen. 1913, p. 85.

Bringing a suit and making a lease of a manufacturing plant, in which nothing has been manufactured. Rep. Atty. Gen. 1912, p. 526.

Maintaining a place for payment of interest coupons on its bonds. Toledo Co. v. Hill, 244 U. S. 49 (1917).

Keeping a correspondence file in Ohio, where the general manager

lived, so as to carry on correspondence with the corporation. *Empire Fuel Co. v. Lyons*, 257 Fed. 890 (C. C. A. 6th Cir. 1919).

President of the foreign corporation, a resident of Ohio and having a contract to sell its bonds on commission, placing the company's name on the door of an office which he occupied, no bonds being sold in Ohio, together with the opening of a bank account in Ohio in the name of the corporation to facilitate the transmission of funds to the home state, where the sign was abandoned and the bank account closed more than 18 months prior to the service of summons in an action against the corporation. *Cons. Iron & Steel Co. v. Maumee Co.*, 184 Fed. 550 (C. C. A. 8th Cir. 1922).

A change in the form of a certificate of stock in a foreign building and loan association, which is pledged to the association to secure a loan to it. *Demland v. Loan Co.*, 20 C. C. 223; 11 C. D. 249 (1899).

The discounting by a corporation in its own state of a note sent to it for such purpose from another state. *Bamberger v. Schoolfield*, 160 U. S. 149 (1895).

The loaning of money by a foreign insurance company on property in Ohio is not the doing of "banking or other business" in Ohio. *Hall v. Kummer*, 7 N. P. 394; 5 L. D. 176 (1883).

For one person to supply the means to another to do business with or on is not the doing of such business by the former. *U. S. v. American Bell Telephone Co.*, 29 Fed. 17 (C. C. Ohio 1886).

(2) *Held to constitute "doing business."* The supervision by a foreign corporation of plans for a factory to be built in the state by a resident, and the management and operation of the plant for such resident owner. *Diamond Glue Co. v. U. S. Glue Co.*, 187 U. S. 611 (1903).

Automobile company doing a repair business of automobiles sold into the state in interstate commerce, and selling second-hand cars taken in part payment for new cars.

Manufacturer of flour selling to wholesalers in another state, and employing salesmen to induce local dealers to deal in the flour, taking orders and turning them over to the wholesalers in the state.

A holding company, whose articles of incorporation contemplate an office within the state, and whose activities in the state consist in holding stockholders and directors meetings, keeping corporate records and financial account books, receiving dividends on its stock holdings, depositing the same in local banks and paying out the money in dividends. *Cheney v. Massachusetts*, 246 U. S. 147 (1918).

The purchasing and assembling, within the state, of machinery and parts for a manufacturing plant, by a foreign corporation engaged in engineering and contracting (case distinguished from that of a foreign manufacturing corporation). *Buffalo Refrigerating Mach. Co. v. Penn. H. & P. Co.*, 178 Fed. 696 (C. C. A. Pa. 1910). See also, *Browning v. Waycross*, 233 U. S. 16 (1914).

The maintaining of an office in Ohio, by a foreign insurance company, where insurance is written on property situated in other states is doing business in Ohio, although no contracts are made relating to property situated in Ohio. *State v. Amazon Insurance Co.*, 1 C. C. n. s. 4; 14 C. D. 387 (1903).

Alloting and improving a tract of land and selling the lots is doing business, although the title is held by a trustee who, out of the proceeds of sales, pays to the person from whom the land was purchased the purchase price thereof. *Opins. Atty. Gen.* 1916, p. 1061.

The operation of a factory in Ohio is doing business, regardless of where its product is sold or transported. *Opins. Atty. Gen.* 1915, p. 460.

Maintaining a "principal place of business" in the state where the only business transacted is the collection of book accounts. Opins. Atty. Gen. 1919, p. 521.

See notes to G. C. § 9559.

III. NONCOMPLIANCE WITH REQUIREMENTS. EFFECT OF.

A. **On contracts.** Before the enactment of § 5508 (1911) it was held that a contract entered into in Ohio by a foreign corporation, which had not complied with secs. 178 to 192 was not void. *Fergus v. Columbus*, 6 N. P. 82; 8 L. D. 290; *Union, etc., Ins. Co. v. McMillen*, 24 O. S. 67 (1873); *Manhattan Ins. Co. v. Ellis*, 32 O. S. 388 (1877). See *Johnson v. N. Y. Breweries Co.*, 178 Fed. 513 (C. C. A. 1910).

But the right of action thereon was suspended until a certificate was secured. *Simplex Dairy Co. v. Cole*, 86 Fed. 739 (1898); *Crefeld Milfer v. Goddard*, 69 Fed. 141 (1895); G. C. § 187.

Under § 5508 such a contract is void in behalf of the corporation, but is enforceable against it.

B. **Attachment.** The property of a foreign corporation which has not complied with the statutory requirements is subject to attachment. G. C. §§ 11819, 10253, 186.

C. **Ouster by quo warranto.** A foreign corporation which exercises its franchises in the state in contravention of its laws, may be ousted by quo warranto proceedings. *State v. W. U. M. Ins. Co.*, 47 O. S. 167 (1890); *State v. Ins. Co.*, 49 O. S. 440 (1892).

D. **Penalties** for doing business without compliance. G. C. §§ 182, 186.

IV. LIABILITY OF STOCKHOLDERS IN FOREIGN CORPORATIONS.

A. **As partners.** When a foreign corporation engages in a business not authorized by its charter, all of its stockholders do not become individually liable. Only those stockholders who engage in or sanction the same may be held. *Paul v. Groene*, 4 O. L. R. 632 (1907); *Bank v. Hall*, 35 O. S. 158, 166 (1878).

B. **Statutory liability may be enforced in Ohio.** An individual liability for corporate debts, imposed upon stockholders by the statutes of the state in which a foreign corporation is organized, may be enforced in Ohio, where such liability is contractual in its nature and not penal. *Kulp v. Fleming*, 65 O. S. 321 (1901); *Blair v. Newbegin*, 65 O. S. 425 (1902).

V. POWER OF OHIO COURTS OVER INTERNAL AFFAIRS OF FOREIGN CORPORATIONS.

A. **Calling stockholders' meeting.** The courts of Ohio have no visitatorial or supervisory jurisdiction with regard to the internal affairs of a foreign corporation. The calling of an annual meeting of stockholders of a foreign corporation can not be enforced in Ohio, although its office is located, and its directors and secretary reside, in this state. *State v. Unida Co.*, 13 C. C. n. s. 100; 22 C. D. 54 (1910).

B. **Inspection of books.** Where the books of a foreign corporation were kept in an office maintained by it in Ohio, it was held that

the right of stockholders to inspect its books, granted by a statute of its home state, could be enforced in the courts of this state. *State v. Farmer*, 7 C. C. 429 (1892). See § 5508.

C. **Injunction against election, accounting, etc.** Ohio policyholders of a foreign mutual life insurance company can not maintain a bill in equity in a federal court sitting in Ohio, to compel an accounting, to enjoin the company from holding an election of trustees, soliciting proxies, etc., and the appointment of a receiver for certain funds as such suit relates to the internal affairs and management of the corporation. *Eberhard v. Insurance Co.*, 210 Fed. 520 (D. C. 1914); *aff'd*, 241 Fed. 353.

D. **Accounting for money wrongfully exacted under color of a contract.** Where a foreign insurance company wrongfully collected assessments in excess of rates specified in its policy, the insured was held entitled to an account and judgment, where his proof did not necessitate an "exhaustive visitation and examination of the books of the company". *Insurance Co. v. Douds*, 103 O. S. 398 (1921).

VI. LEGAL EXISTENCE OF FOREIGN CORPORATION.

Allegation and proof of, see note to § 187.

A. The legal existence of a foreign corporation is not invalidated by the fact that it has transacted all its business in other states, and has done no business, beyond its mere organization, in its home state. *Hanna v. International Petroleum Co.*, 23 O. S. 622 (1873); *Iron Co. v. Madigan*, 17 C. C. n. s. 340, 342 (1911); *aff'd*, no rep. 88 O. S. 533.

B. **Corporation or partnership. How determined.** If an organization possesses the properties, rights, attributes, privileges and immunities of a corporation, it will be regarded as such. The designation or classification, by the statute of another state, of organization as joint stock associations or partnerships is not conclusive. *Express Co. v. State*, 55 O. S. 69 (1896); *State ex rel. v. Ackerman*, 51 O. S. 163, 197 (1894); *Iron Co. v. Madigan*, 17 C. C. n. s. 340 (1911); *aff'd*, no rep. 88 O. S. 533; *State v. U. S. Express Co.*, 1 N. P. 259; 2 N. P. 98 (1895); *Andrews Bros Co. v. Youngstown Coke Co.*, 86 Fed. 585 (1898).

VII. POWERS OF FOREIGN CORPORATIONS.

For corporate powers generally see note to § 8627.

A. **Charter powers can not be exceeded.** A corporation has no greater powers in a foreign state than in the state of its creation. A contract in excess of its charter powers, made in another state, is not validated by the fact that such contract is within the powers of a domestic corporation of such state. *Ewing v. Bank*, 43 O. S. 31, 37 (1885); *Larwell v. Hanover Sgs. Fund Soc.*, 40 O. S. 274 (1883); *Curtis v. Hutchinson*, 10 W. L. J. 134 (1852).

B. **Effect of general law of home state.** Where the charter powers of a foreign corporation are sufficiently broad to include a certain act, a general law of its home state restricting corporations in doing such acts will not affect it in other states. The power of a New York corporation to take land by devise is not affected by the New York statute of wills. *American Bible Soc. v. Marshall*, 15 O. S. 537 (1864).

C. **Powers must be exercised in accordance with laws of Ohio.** A corporation doing business in Ohio must transact its business and exer-

cise its powers in accordance with the laws of this state. It waives the powers and privileges of its charter which are contrary to the positive enactments of this state, or to the general spirit and policy of its law. *Manington v. Railway Co.*, 9 N. P. n. s. 641, 665 (1910); *Kit Carter Cattle Co. v. McGillin*, 21 C. C. 210; 11 C. D. 413; s. e., 7 N. P. 575; 10 L. D. 146 (1900).

D. Powers not greater than powers of similar Ohio corporations. Foreign corporations have no greater powers than are possessed by Ohio corporations of like character. G. C. § 5508. See *State v. Aetna Life Ins. Co.*, 69 O. S. 327 (1903); *Mannington v. H. V. Ry. Co.*, 8 O. L. R. 451, 484; 183 Fed. 133; 16 O. F. D. 552 (C. C. 1910).

E. To hold stock in Ohio corporations. See also note to § 8683. A foreign corporation organized for the sole purpose of holding the stock and securities of an Ohio corporation may exercise in Ohio all the incidents of such ownership, such as voting at stockholders' meetings and giving assent to change of regulations, provided the exercise of such incidents does not tend to foster monopoly or suppress competition. *Toledo Co. v. Smith*, 205 Fed. 643 (D. C. 1913).

F. To sue as a taxpayer. Where a foreign corporation is a taxpayer it may, under G. C. § 4314, bring suit to enjoin a municipality from abuse of its corporate powers. *United Cigars Stores Co. v. Von Bargen*, 7 N. P. n. s. 420; 19 L. D. 120 (1908).

G. To hold land. Until forbidden by express legislation or the general policy of the law, a foreign corporation may hold land in Ohio. *State v. Sherman*, 22 O. S. 411, 433 (1872).

It may acquire property by devise. *American Bible Soc. v. Marshall*, 15 O. S. 537 (1864).

H. To appropriate property. A foreign corporation can not exercise the right of eminent domain in the absence of express statutory provisions conferring it. *Central Union Tel. Co. v. Columbus Grove*, 8 C. C. n. s. 81; 18 C. D. 131 (1905).

Under the provisions of G. C. § 9090 a foreign railroad corporation may appropriate property in this state. *State v. Sherman*, 22 O. S. 411, 434 (1872).

I. To acquire property by devise or bequest. A foreign corporation may acquire property by devise or bequest, in the absence of a prohibitory statute. *American Bible Soc. v. Marshall*, 15 O. S. 537 (1864).

But such devise or bequest is in general liable to the collateral inheritance tax. *Humphreys v. State*, 70 O. S. 67 (1904).

VIII. FOREIGN CORPORATIONS AS "PERSONS" AND "CITIZENS" UNDER FEDERAL CONSTITUTION AND LAWS.

A foreign corporation is a "person" within the provisions of the 14th amendment that no state shall deprive any person of property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws. *Southern Railway Co. v. Greene*, 216 U. S. 400 (1910); *Blake v. McClung*, 172 U. S. 239, 259 (1898); *Santa Clara County v. So. Pac. R. R. Co.*, 118 U. S. 394, 396, 1886).

The "liberty" guaranteed by the 14th amendment is the liberty of natural persons, not corporations. *Western Turf Assn. v. Greenberg*, 204 U. S. 359, 363 (1907).

A foreign corporation is not a "citizen" within the provision of article IV, section 2, that "The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states." *Western Union Tel. Co. v. Mayer*, 28 O. S. 521 (1876); *Humphreys v. State*, 70 O. S. 67, 86 (1904); *Blake v. McClung*, 172 U. S. 239, 259 (1898).

For certain jurisdictional purposes, including diverse citizenship as a ground for the jurisdiction of federal courts, a corporation is to be regarded as a citizen of the state under the laws of which it was created and organized. *Railroad Co. v. Koonz*, 104 U. S. 5, 12 (1881); *Shelby v. Hoffman*, 7 O. S. 450 (1857); *Humphreys v. State*, 70 O. S. 86 (1904).

IX. RIGHTS OF FOREIGN CORPORATIONS IN ABSENCE OF STATUTES.

In the absence of statutes, a foreign corporation may transact business, exercise its powers and sue or be sued in this state. *Newburg Petroleum Co. v. Weare*, 27 O.S. 343 (1875); *State v. Sherman*, 22 O. S. 412 (1872); *B. & O. R. R. Co. v. Cary*, 28 O. S. 213, 214 (1876); *Hanna v. International Petroleum Co.*, 23 O. S. 622 (1873); *Bank v. Hall*, 35 O. S. 167 (1878); *Lewis v. Bank*, 12 Ohio 132 (1843).

But this right or privilege exists only by comity or legislative consent. *Western Union Tel. Co. v. Mayer*, 28 O. S. 521 (1876).

X. RIGHT OF STATE TO EXCLUDE, OR IMPOSE CONDITIONS UPON, FOREIGN CORPORATIONS.

Foreign corporations may be wholly excluded from the state, or their admission to operate in the state may be made subject to such reasonable terms and conditions as the general assembly may impose. *Ashley v. Ryan*, 153 U. S. 436; affirming 49 O. S. 504 (1894); *Western Union Co. v. Mayer*, 28 O. S. 521 (1876); *Humphreys v. State*, 70 O. S. 79, 80 (1904).

There are limited exceptions to this rule. A state can not exclude or impose conditions upon a corporation in the employ of the federal government, nor a corporation engaged in interstate commerce. *Pembina, etc., Co. v. Pennsylvania*, 125 U. S. 181, 190 (1883); *McClellan v. Chipman*, 164 U. S. 347, 357, 359 (1896); *Toledo Commercial Co. v. Glen Mfg. Co.*, 55 O. S. 217 (1896).

A foreign corporation engaged in interstate commerce can not be required to pay, as a license fee for doing its intrastate business, a percentage on its entire capital stock, whether employed in the state or elsewhere. Such a tax is a burden on interstate commerce. *Ludwig v. Western Union Tel. Co.*, 216 U. S. 146 (1910); *Pullman Car Co. v. Kansas*, 216 U. S. 56 (1910); *Western Union Tel. Co. v. Kansas*, 216 U. S. 1 (1910).

A state cannot require a foreign corporation to pay a license fee and appoint an agent for service, before bringing suit in a state court to collect the purchase price of goods sold in interstate commerce. *Sioux Remedy Co. v. Cope*, 235 U. S. 197 (1914).

A state can not require a foreign corporation, as a condition precedent to admission, to waive its right to remove actions to the federal courts; such a waiver is illegal and void, the requirement being repugnant to the federal constitution. *Railway v. Stringer*, 32 O. S. 468 (1877); *B. & O. Ry. v. Cary*, 28 O. S. 208 (1876); *Assurance Co. v. Pierce*, 27 O. S. 155 (1875); *Herndon v. Chicago, etc., Co.*, 218 U. S. 135 (1910); *Roach v. A. T. & S. F. Ry.*, 218 U. S. 159 (1910).

Nor may a state revoke the license of a foreign corporation because such corporation removed a suit to federal court. *Terral v. Burke Construction Co.*, — U. S. — (1922); 66 L. Ed. 223; overruling *Doyle v. Insurance Co.*, 94 U. S. 535.

A state statute prohibiting foreign corporations from asserting any citizenship other than of such state, and providing for the revocation and forfeiture of the charter of any corporation, which files a petition for the removal of an action to the federal courts, is unconstitutional as to corporations doing an interstate business. *Harrison v. Railroad*, 232 U. S. 318 (1914).

B. **Privilege of doing business is not property.** *W. U. Tel. Co. v. Mayer*, 28 O. S. 521 (1876).

XI. PERMISSION TO ENTER STATE AS A CONTRACT.

Aetna Iron & Steel Co. v. Taylor, 3 N. P. 152; 4 L. D. 180; 13 C. C. 602; 5 C. D. 242 (1896). Compare *American Smelting, etc., Co. v. Colorado*, 204 U. S. 103 (1906).

XII. INSOLVENT FOREIGN CORPORATIONS.

A. **Subject to involuntary bankruptcy.** When. A petition in involuntary bankruptcy may be filed against a foreign corporation in the district in which it has had its principal place of business for the greater portion of the preceding six months. *Home Powder Co. v. Geis*, 204 Fed. 568; *In re Worcester Footwear Co.*, 251 Fed. 760; *In re Pennsylvania Consol. Coal Co.*, 163 Fed. 579; *Dressel v. North State Lumber Co.*, 107 Fed. 255; 5 A. B. R. 744 (1901); *In re Magid-Hope Silk Mfg. Co.*, 110 Fed. 352; 6 A. B. R. 610 (1901); *White Mountain Paper Co. v. Morse*, 127 Fed. 643; 11 A. B. R. 633 (1904).

Although the corporation has not obtained a license from the state permitting it to do business therein. *In re Duplex Radiator Co.*, 142 Fed. 906; 15 A. B. R. 324 (1906).

B. **Preferences.** A preferential transfer of property by a foreign corporation to one creditor, is not void but voidable. Ohio creditors can not levy on such property, but may have the transfer treated and enforced as an assignment for all of its creditors. *Bryant v. Johnson*, 12 C. C. 102; 5 C. D. 333 (1896).

C. **Foreign assignment for creditors.** **Effect on property in Ohio.** A deed of assignment for creditors executed by a foreign corporation in its home state can not be filed in a probate court, or court of insolvency, under G. C. §§ 11092 and 11093; but it may be treated as a conveyance of property, and the trust enforced in equity. *Keystone Bank v. Union Oil Co.*, 2 C. C. n. s. 420; 15 C. O. 464 (1903); *Wright v. Franklin Bank*, 59 O. S. 80, 95 (1898). Compare *Hall v. Ohio, etc., Co.*, 24 W. L. B. 310 (1890).

D. **Jurisdiction of Ohio courts to wind up business.** The courts of Ohio have jurisdiction to wind up a part of the business of a foreign corporation which has been interdicted by the laws of this state. *Everhardt v. U. S. Inv. Red. Co.*, 8 N. P. 525; 11 L. D. 688.

PART VI.

PUBLIC UTILITIES COMMISSION.

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Section 487. (The public utilities commission of Ohio; appointment, term, vacancies.) There shall be and there is hereby created a public utilities commission of Ohio and by that name the commission may sue and be sued. The public utilities commission shall consist of three members, who shall be appointed by the governor with the advice and consent of the senate, and shall possess the powers and duties herein specified as well as all powers necessary and proper to carry out the purposes of this chapter. Immediately after this act shall take effect, the governor shall, with the advice and consent of the senate, appoint a member whose term shall expire on the first day of February, 1915; another whose term shall expire on the first day of February, 1917, and another whose term shall expire on the first day of February, 1919; and thereafter each member shall be appointed and confirmed for a term of six years. Vacancies shall be filled in the same manner for unexpired terms. One of such commissioners, to be designated by the governor, shall, during the term of the appointing governor, be the chairman of the commission. Not more than two of said commissioners shall belong to or be affiliated with the same

political party. (May 5, 1913, 103 v. 804, § 1, in effect August 8, 1913; April 2, 1906, 98 v. 342, § 1; R. S. Sec. 244-11.)

The public utilities act is constitutional. *Telephone Co. v. Cleveland*, 98 O. S. 358 (1918); *Coal Co. v. Railroad Commission*, 8 N. P. n. s. 585; 19 L. D. 783; *R. R. Co. v. Railroad Commission*, 10 N. P. n. s. 665; 21 L. D. 468; *affd.* no rep. 86 O. S. 365.

The railroad commission act was, in part, adapted from the Wisconsin railroad commission act. *Commission v. Railway Co.*, 79 O. S. 419, 424.

The commission has only those powers which are conferred by statute. *Cincinnati v. Commission*, 96 O. S. 270 (1917).

The restrictions, limitations and prohibitions of this act are matters between the state and railroad companies. Where a railroad return ticket is not made non-transferable, the act does not prohibit the sale of unused coupon. *Knecht v. Railway Co.*, 6 N. P. n. s. 13; 18 L. D. 202.

Section 493. (Quorum; transaction of business.) A majority of the commission shall constitute a quorum for the transaction of any business, for the performance of any duty or for the exercise of any power of the commission. No vacancy in the commission shall impair the right of the remaining commissioners to exercise all the powers of the commission. The act of a majority of the commission, when in session as a board, shall be deemed to be the act of the commission; but any investigation, inquiry or hearing which the commission has power to undertake or to hold may be undertaken or held by or before any commissioner designated for the purpose by the commission, and every finding, order or decision made by a commissioner so designated, pursuant to such investigation, inquiry or hearing, approved and confirmed by the commission and ordered filed in its office, shall be and be deemed to be the finding, order or decision of the commission. (May 5, 1913, 103 v. 805, § 7; G. C. § 493 (original number); April 2, 1906, 98 v. 343, § 1.)

Section 494. (Location of office; sessions.) The office of the commission shall be at the seat of government in the city of Columbus, in suitable quarters to be provided by the state, and shall be open between the hours of eight-thirty a. m. and five-thirty p. m. throughout the year, Sundays and legal holidays excepted. The commission shall hold its sessions at least once in each calendar month in said city of Columbus, but may also meet at such other times and at such other places as may be necessary for the proper performance of its duties. For the purpose of holding session in places other than the seat of government the commission shall have power to rent quarters or offices, and the expense thereof, in connection therewith, shall be paid in the

same manner as other expenses authorized by this chapter. (May 5, 1913, 103 v. 805, § 8; G. C. § 498 (original number); April 2, 1906, 98 v. 344, § 1.)

Section 499-1. (Right of commission, employes, etc., to pass on vehicles of common carrier.) The commissioners, their attorney, secretary, or other officers and employes of the commission shall, when in the performance of their official duties, have the right to pass, free of charge, on all railroads, cars, vessels and other vehicles of every common carrier, as said term is defined in this chapter, subject, in whole or in part, to the control or regulation by the commission, between points within this state, and such persons shall not be denied the right to travel upon any railroad, car, vessel or other vehicle of such common carrier, or any part thereof, whether such railroad, car, vessel or other vehicle be used for the transportation of passengers or freight, and regardless of its class. (May 5, 1913, 103 v. 807, § 14.)

See § 608.

Section 499-3. (Who eligible to the office of commissioner.) No person in the employ of or holding any official relation to any person, corporation or utility, which said person, corporation or utility is subject, in whole or in part, to regulation by the commission, and no person holding stocks or bonds of any such corporation or utility or who is in any manner pecuniarily interested therein shall be appointed to or hold the office of commissioner or be appointed or employed by the commission; provided, that if any such person shall become the owner of such stocks or bonds, or become pecuniarily interested in such corporation or utility otherwise than voluntarily he shall, within a reasonable time, divest himself of such ownership or interest; failing to do so, his office or employment shall become vacant. (May 5, 1913, 103 v. 807, § 16; G. C. § 488 (original number); April 2, 1906, 98 v. 342, § 1.)

Section 499-4. (Commissioner, attorney, employe, etc., prohibited from accepting gifts, etc.) Each commissioner, attorney to the commission, the secretary to the commission and every person employed or appointed to office, either by the commission or by the attorney to the commission, is hereby forbidden and prohibited from accepting any gift, gratuity, emolument or employment from any public utility or railroad or any officer, agent or employe thereof, or to solicit,

suggest, request or recommend, directly or indirectly, to any person, corporation or utility subject to the supervision of the commission, or to any officer, attorney, agent or employe thereof, the appointment of any person to any office, place, position or employment. Any commissioner, attorney to the commission, the secretary thereof, or any person employed or appointed to office by the commission violating any provision of this section, shall be removed from the office held by him. (May 5, 1913, 103 v. 807, § 17.)

Section 499-5. (All proceedings public records.) All proceedings of the commission and all documents and records in its possession shall be public records. (106 v. 509; May 5, 1913, 103 v. 808, § 18; G. C. § 614-80 (original number); April 22, 1913, 103 v. 176; May 31, 1902, 102 v. 574, § 84; G. C. § 614 (original number); R. S. Sec. 264; February 27, 1877, 74 v. 33, § 12.)

Whether a railway company has complied with the terms of a certain statute must, in an action between the railroad company and an individual, be proved. Judicial notice will not be taken of a statement in a report of the commissioner of railroads that such statute has been complied with. *Railroad Co. v. Hoffhines*, 46 O. S. 643.

Section 499-6. (Publication of rules governing proceedings.) The commission may adopt and publish rules to govern its proceedings, and to regulate the mode and manner of investigations and hearings of railroads and other parties before it. All hearings shall be open to the public. (May 5, 1913, 103 v. 808, § 19; G. C. § 497 (original number); April 2, 1906, 98 v. 344, § 1.)

Section 499-7. (The public service commission of Ohio superseded.) The public utilities commission shall succeed to and be possessed of the rights, authority and powers now exercised by the public service commission of Ohio and perform all the duties now imposed upon the public service commission of Ohio, and said powers and authority shall be exercised and enforced and said duties performed in the manner now provided by law for the said public service commission. Said public service commission of Ohio shall on and after the time when this act shall take effect have no further legal existence, and the public utilities commission is hereby authorized and directed to assume and continue as successor of said public service commission of Ohio. Wherever in the General Code the terms railroad commission or public service commission occur, the term public utilities

commission shall be substituted therefor. (May 5, 1913, 103 v. 808, § 20.)

Section 499-8. (Valuation of property to determine justice of rates. Utility shall aid commission in investigation and ascertainment of value of property.) The commission, for the purpose of ascertaining the reasonableness and justice of rates and charges for the service rendered by public utilities or railroads of this state, or for any other purpose authorized by law may investigate and ascertain the value of the property of any public utility or railroad in this state, used or useful for the service and convenience of the public. At the request of the council of any municipality the commission after hearing and determining that such a valuation is necessary may also investigate and ascertain the value of the property of any public utility used and useful for the service and convenience of the public where the whole or major portion of such utility is situated in such municipality. Every public utility or railroad shall furnish to the commission, its engineers, experts or other assistants from time to time and as the commission may require maps, profiles, contracts, reports of engineers and other documents, records and papers or copies of any or all of the same, in aid of any investigation and ascertainment of the value of its property, and shall grant to the commission or its agents free access to all of its premises and property and its accounts, records and memoranda whenever and wherever requested by any such duly authorized agent, and every public utility or railroad is hereby directed and required to cooperate with and aid the commission in the work of the valuation of its property in such further particulars and to such extent as the commission may require and direct. The commission shall have such power to make all rules and regulations, as to it may seem necessary, to ascertain the value of each and every utility or railroad in the state. (106 v. 225; May 5, 1913, 103 v. 808, § 21; G. C. §§ 614-24 (original number); May 31, 1911, 102 v. 557, § 26.)

It is not mandatory upon the commission to make a valuation, but if a valuation is made, it must be made in accordance with §§ 499-9 and 499-10. *Cincinnati v. Commission*, 105 O. S. 181, 195, 217 (1922).

Fair return on investment. *Ib.*, p. 208.

Valuation may be waived by the utility and complainant with the consent of the commission. *Lima v. Commission*, 103 O. S. 501 (1921).

Where a municipality requests the commission to make a valuation of the property of an electric light company, but, without waiting

for the valuation to be completed, the municipality passes an ordinance fixing the rates for ten years (see § 3982) the valuation proceeding does not fail, and an error proceeding thereto is not moot. *Cincinnati v. Commission*, 96 O. S. 554 (1917).

A rate yielding a return of $4\frac{1}{2}$ percent on the valuation is inadequate. The commission should not fix a rate based on a valuation made on incomplete information. In such a case, the commission should order a revaluation, as authorized by § 499-11, before fixing such rate. *Kent Water Co. v. Commission*, 97 O. S. 321 (1918).

Good will is not an element of value. And by § 614-23 monopoly and franchise values and reserves for surplus, depreciation and contingencies are to be excluded in fixing rates. But the value of the property as a "going concern" should be included. *Lima Telephone Co. v. Commission*, 98 O. S. 110 (1918).

The cost of acquiring new customers is not a proper item. *Cincinnati v. Commission*, 96 O. S. 554, 559 (1917); *Cleveland v. Commission*, 98 O. S. 462 (1918).

Power of commission to order public utilities to file inventories, etc., prior to amendment of 106 v. 225. See Opins. Atty. Gen. 1916, p. 500.

Practice and procedure before commission in valuations. 16 O. L. R. 54.

Finding of commission as to valuation of *Cleveland Electric Illuminating Company*, 16 O. L. R. 350; 15 O. L. R. 446; modified 98 O. S. 462.

Valuation of gas plant, see *Gas Light Co. v. Commission*, 106 O. S. 170 (1922).

Valuation of equipment for natural gas service. 14 O. L. R. 587.

Valuation of *Cleveland Telephone Co.* 14 O. L. R. 430.

Section 499-9. (Facts; commission has authority to ascertain and report in the valuation of property.) The commission shall prescribe the details of the inventory of the property of each public utility or railroad in the state; and such inventory shall include all the kinds and classes of property, with the value of each, owned by each public utility or railroad, used and useful for the service and convenience of the public. In ascertaining the value of the various kinds and classes of property of each public utility or railroad, the commission shall have authority to ascertain and report in such detail as it may deem necessary as to each piece of property owned or used by such public utility or railroad to show separately the following facts:

A. The original cost, if any, of each parcel of land owned and used by such public utility or railroad, and a statement of the conditions of acquisition; whether by direct purchase, by donation, by exercise of the power of eminent domain or otherwise.

B. The value as of a date certain, of each parcel of land owned and used by such public utility or railroad, by comparison with the value of contiguous and neighboring parcels of land, and land of similar character as to location and use.

C. If there shall be any additional value to such utility or railroad by reason of the ownership by it of one or more parcels of land and its use as a continuous right of way for transportation purposes, or for other purpose, such additional value shall be separately and specifically set forth for each parcel.

D. The cost of new production as of a date certain, of all physical property other than land, owned and used by such public utility or railroad, showing the values of the separate items comprising such property, together with the unit basis of such valuation.

E. Depreciation, if any, from the new reproductive cost as of a date certain, for existing mechanical deterioration, for age, for obsolescence, for lack of utility or for any other cause, the percentage and amount of each class of depreciation, if any, to be specifically set forth in detail.

F. The net value as of a date certain, of all physical property other than land owned by such utility or railroad, to be derived by deducting the sum of the amounts of depreciation from the sum of the new reproductive costs.

G. If there shall be any additional value given to the value of the property of a public utility or railroad due to the possession of a franchise to perform a public service, or for good will or for financing, such additional value shall be separately and specifically set forth, together with the basis for the computation or estimate of such additional value.

H. A duplicate copy of the record of every physical valuation of a public utility or railroad shall be furnished to the Ohio tax commission, on request, for its use in ascertaining the value of the property of such utility or railroad for purposes of taxation, and upon demand any person or corporation owning or operating a public utility or railroad shall be furnished with a copy of the valuation of his or its property.

Such investigations and report shall show separately the property used and useful to such utility or railroad in the furnishing of the service to the public, and the property held by such utility or railroad for other purposes, and such other items concerning values and methods of making valuations as the commission may deem proper; which said inventories and reports shall be filed in the office of the commission for the information of the governor and the general assembly. (May 5, 1913, 103 v. 809, § 22.)

Section 499-10. (What additional facts report may show.) Such investigation and report shall also show when-

ever the commission may deem necessary, the amounts and dates and rates of interest of all bonds, outstanding against each public utility or railroad, the property upon which they are a lien, the amounts paid therefor; and, in such detail as may be necessary, the original capital stock and the moneys received by any such utility or railroad by reason of any issue of stock, bonds or other securities. Such report shall also show the net and gross receipts of such utility or railroad and the method by which moneys were expended or paid out and the purpose of such payments. The commission shall have the power to prescribe the method of procedure to be followed in making the investigation and valuation and the form in which the results of the ascertainment of the value of each utility or railroad shall be submitted, and the classifications of the elements that constitute the ascertained value. Such investigation shall also show the value of the property of every public utility or railroad as a whole; and, in case such utility or railroad has property in more than one county, the value of its property in each of such counties. (May 5, 1913, 103 v. 810, § 23.)

Section 499-11. (Revision and correction of valuations.)

The commission, during the making of the valuation herein provided for, and after the completion thereof, shall thereafter in like manner keep itself informed through its engineers, experts and other assistants of all extensions and improvements or other changes in the condition and value of the property of all public utilities or railroads and shall ascertain the value of such extensions, improvements and changes and shall from time to time, as may be required for the proper regulation of such public utilities or railroads, revise and correct its valuations of property, showing such revisions and corrections as a whole and as to each county in the state. Such revisions and corrections shall be filed in the same manner as is provided for original reports. (May 5, 1913, 103 v. 811, § 24.)

Section 499-12. (Notice to public utility before valuation becomes final; protest, hearing.) The commission, whenever it shall have completed the valuation of the property of any public utility or railroad and before such valuation shall have become final, shall give notice by registered letter to such public utility or railroad, or if the whole or the major portion of said utility or railroad is situated in any municipality, then to the mayor of such municipality, stating the valuations placed upon the several kinds and classes of

property of such public utility or railroad and upon the property as a whole. If within thirty days after such notification no protest shall have been filed with the commission then said valuation shall be and become final. If notice of protest shall have been filed, however, by any public utility or railroad, the commission shall fix a time for hearing the same and shall consider at such hearing any matter material thereto presented by such public utility or railroad or municipality, in support of its protest or by any representative of the public against such protest. If after the hearing of any protest of any valuation so fixed, the commission shall be of the opinion that its inventory is incomplete or inaccurate or that its valuation is incorrect it shall make such changes as may be necessary and shall issue an order making such corrected valuations final. A final valuation by the commission and all classifications made for the ascertainment of such valuations shall be public and shall be prima facie evidence relative to the value of the property. (May 5, 1913, 103 v. 811, § 25; May 31, 1911, 102 v. 557, § 27; G. C. § 614-25 (original number).

Section 499-13. (Ohio state university engineers and experts may be employed.) In the employment of engineers, experts or other assistants the commission may make use of such engineers and experts as may be employed in the Ohio state university in such manner as may be provided by mutual arrangement between the commission and the trustees and faculty of such university, and any information, data and equipment of such university shall be placed at the disposal of the commission. Whenever the authority is conferred or the obligation imposed by law upon the commission to ascertain the value of any public utility or railroad, such valuation under such authority or obligation shall be made in accordance with the provisions of this act. (May 5, 1913, 103 v. 811, § 26.)

Section 499-14. (System of accounts may be established for public utilities.) The commission shall have power to establish a system of accounts to be kept by the public utilities or railroads (including municipally owned or operated utilities), or to classify said public utilities or railroads and to establish a system of accounts for each class, and to prescribe the manner in which such accounts shall be kept; and such system shall when practicable conform to the system prescribed by the tax commission of Ohio. It may also in its discretion prescribe the forms of accounts, records and

memoranda to be kept by such public utilities or railroads, including the accounts, records and memoranda of the movement of traffic as well as the receipts and expenditures of moneys, and any other forms, records and memoranda which in the judgment of the commission may be necessary to carry out any of the provisions of this chapter. The system of accounts established by the commission and the forms of accounts, records and memoranda prescribed by it shall not be inconsistent, in the case of corporations subject to the provisions of the act of congress entitled "An act to regulate commerce" approved February fourth, eighteen hundred and eighty-seven, and the acts amendatory thereof and supplementary thereto, with the systems and forms from time to time established for such corporations by the interstate commerce commission, but nothing herein contained shall affect the power of the commission to prescribe forms of accounts, records and memoranda covering information in addition to that required by the interstate commerce commission. The commission may, after hearing had upon its own motion or upon complaint, prescribe by order the accounts in which particular outlays and receipts shall be entered, charged or credited. Where the commission has prescribed the forms of accounts, records or memoranda to be kept by any public utility or railroad for any of its business, it shall thereafter be unlawful for such public utility or railroad to keep any accounts, records or memoranda for such business other than those so prescribed, or those prescribed by or under the authority of any other state or of the United States, excepting such accounts, records or memoranda as shall be explanatory of and supplemental to the accounts, records or memoranda prescribed by the commission. The commission shall at all times have access to all accounts kept by such utilities or railroads and may designate any of its officers or employees to inspect and examine any and all such accounts. It shall be the duty of the auditor or other chief accounting officer of any such utility to keep such accounts and make the reports provided for in section 614-48 of the General Code. Whoever being such auditor, or chief accounting officer violates or fails to comply with the provisions of this section shall upon conviction thereof be subject to the penalties provided for in section 614-65 of the General Code. It shall be the duty of the attorney general to enforce the provisions of this section upon request of the commission, by mandamus or other appropriate proceedings. (May 5, 1913, 103 v. 812, § 27.)

Section 499-15. (Hearing to ascertain value of property; notice.) For the purpose of ascertaining the value of the property of every public utility or railroad in this state, including municipally owned or operated utilities, the commission may cause a hearing or hearings to be held at such time or times and place or places as the commission may designate. Before any hearing is had, the commission shall give the public utility or railroad affected thereby, or if the whole or the major portion of said utility or railroad is situated in any municipality, then to the mayor of such municipality, at least thirty days' written notice specifying the time and place of hearing, and such notice shall be sufficient to authorize the commission to inquire into the matters designated in this section, but this provision shall not prevent the commission from making any preliminary examination or investigation into the matters herein referred to, or from inquiring into such matters in any other investigation or hearing. All public utilities or railroads affected, and any municipality in which the whole or the major portion of said utility or railroad is located, shall be entitled to be heard and to introduce evidence at such hearing or hearings. The commission is empowered to resort to any other source of information available. The evidence introduced at such hearing shall be reduced to writing and certified under the seal of the commission. (May 5, 1913, 103 v. 813, § 28; May 31, 1911, 102 v. 557, § 27; G. C. § 614-25 (original numbering).)

Section 499-16. (Filing finding of facts; review.) The commission shall make and file its findings of fact in writing upon all matters concerning which evidence shall have been introduced before it which in its judgment have bearing on the value of the property of the public utility or railroad affected. Such findings shall be subject to review by the supreme court of this state in the same manner and within the same time as other orders and decisions of the commission. (May 5, 1913, 103 v. 813, § 29.)

Section 499-17. (Admissibility in evidence of finding.) The findings of the commission so made and filed, when properly certified under the seal of the commission, shall be admissible in evidence in any action, proceeding or hearing before the commission or any court, in which the commission, the state or any officer, department or institution thereof, or any county, city, municipality or other body politic and the public utility railroad affected may be interested, whether

arising under the provisions of this chapter or otherwise, and such findings, when so introduced, shall be evidence of the facts therein stated as of the date therein stated under conditions then existing. (May 5, 1913, 103 v. 813, § 30.)

Section 499-18. (Further hearings.) The commission may from time to time cause further hearings and investigations to be had for the purpose of making revaluations or ascertaining the value of any betterments, improvements, additions or extensions made by any public utility or railroad subsequent to any prior hearing or investigation, and may examine into all matters which may change, modify or affect any finding of fact previously made, and may at such time make findings of fact supplementary to those theretofore made. Such hearings shall be had upon the same notice and be conducted in the same manner and the findings so made shall have the same force and effect as is provided herein for such original notice, hearing and findings; provided, that such findings made at such supplemental hearings or investigations shall be considered in connection with and as a part of the original findings except in so far as such supplemental findings shall change or modify the findings made at the original hearing or investigation. (May 5, 1913, 103 v. 813, § 31.)

Section 501. ("Railroad" defined. Other companies.) The term "railroad" as used in this chapter shall include all corporations, companies, individuals, associations of individuals, their lessees, trustees, or receivers appointed by a court, which owns, operates, manages or controls a railroad or part thereof as a common carrier in this state, or which owns, operates, manages or controls any cars or other equipment used thereon, or which owns, operates, manages or controls any bridges, terminals, union depots, side tracks, docks, wharves, or storage elevators used in connection therewith, whether owned by such railroad or otherwise. Such term "railroad" shall mean and embrace express companies, water transportation companies and interurban railroad companies, and all duties required of and penalties imposed upon a railroad or an officer or agent thereof insofar as they are applicable, shall be required of and imposed upon express companies, water transportation companies and interurban railroad companies, their officers and agents. The commission shall have the power of supervision and control of express companies, water transportation companies and interurban railroad companies to the same extent as railroads. (May

31, 1911, 102 v. 549; April 2, 1906, 98 v. 344, § 2; R. S. Sec. 244-12.)

For definitions of "railroad." See *Commissioners v. Traction Co.* 75 O. S. 548, 559; *In re Avon Beach, etc., Co.* 3 N. P. n. s. 561; 16 L. D. 87.

A state court is without power to enforce payment of a statutory penalty against a railroad, out of funds, in the hands of a receiver appointed by a federal court, but the commission probably has a right to apply to the federal court, which has appointed a receiver for the railroad, for an order compelling the receiver to execute an order of the commission, requiring the receiver to perform the statutory duty. *Rep. Atty. Gen.* 1911-1912, p. 724.

Section 502. (Application of act.) This chapter shall apply to the transportation of passengers and property between points within this state, to the receiving, switching, delivering, storing and handling of such property, and to all charges connected therewith, including icing charges and mileage charges, to all railroad companies, sleeping car companies, equipment companies, express companies, car companies, freight and freight line companies, to all associations of persons, whether incorporated or otherwise, which do business as common carriers, upon or over a line of railroad within this state, and to a common carrier engaged in the transportation of passengers or property wholly by rail or partly by rail and partly by water or wholly by water. In addition thereto the provisions of this act shall apply to the regulation of any and all other duties, services, practices and charges, of the railroad company, incident to the shipping and receiving of freight, which are proper subjects of regulation, excepting only, that they shall not apply to the regulation of commerce with foreign nations, and among the several states, and with the Indian tribes. (May 31, 1911, 102 v. 549; May 20, 1910; 101 v. 327; April 2, 1906, 98 v. 345, § 2; R. S. Sec. 244-12a.)

A state has no jurisdiction to regulate rates for interstate commerce transportation. An order by the commission which directly burdens or regulates interstate commerce may be enjoined by a federal court. *Ohio Commission v. Worthington*, 225 U. S. 101 (1912).

A rate fixed by the commission on coal, for transporting by rail and placing the coal into vessels ready to be carried to a point outside of the state, is a burden on interstate commerce. *Ohio Commission v. Worthington*, 225 U. S. 101 (1912).

But in so far as the property or traffic of a railroad company is intrastate, it is subject to the control of the commission. *Railroad Co. v. Commission*, 92 O. S. 1 (1915).

The jurisdiction of the federal interstate commerce commission over intra-state commerce, to prevent discrimination against interstate commerce, does not interfere with the power of the state commission over intrastate rates which do not result in such discrimination. *Railroad Co. v. Commission*, 105 O. S. 553 (1922).

Where a federal court authorized its receiver of an interstate system of interurban railroad to abandon a branch line wholly located in Ohio, such authorization is binding on the commission and state courts. *Commissioners of Franklin County v. Commission*, 107 O. S. 442.

Before the amendment of this section it was held that the railroad commission had no power to regulate car service or demurrage charges as to cars employed in interstate commerce. *Railroad Commission v. Ann Arbor R. R. Co.*, 12 C. C. n. s. 317; 21 C. D. 340, affirming 8 N. P. n. s. 233; 19 L. D. 691.

A state court has no jurisdiction to enjoin the putting into effect of an increased rate on interstate traffic, pending a determination by the Interstate Commerce Commission of the reasonableness of the proposed rate. *Ohio Dairy Co. v. Railway*, 7 N. P. n. s. 451; 19 L. D. 97.

An order of the commission requiring a railroad to cease and desist from requiring shippers of milk, between points within the state, to load the same into cars, is not an interference with interstate commerce. *B. & O. R. R. v. Railroad Commission*, 10 N. P. n. s. 665; 21 L. D. 468, aff'd, no rep., 86 O. S. 365; s. c., 88 O. S. 599.

Section 503. (To what this chapter shall not apply.)

This chapter shall not apply to street and electric railroads engaged solely in the transportation of passengers within the limits of cities, or other private railroads not doing business as common carriers. (98 v. 345, § 2; R. S. Sec. 244-12b.)

Section 504. (Railroad required to furnish adequate service and facilities.) Each railroad shall furnish reasonably adequate service and facilities. The charges made for any service rendered or to be rendered in the transportation of passengers or property, or for any service in connection therewith, or for the receiving, switching, delivering, storing or handling of such property, shall be reasonable and just. Every unjust and unreasonable charge for such service is prohibited and declared to be unlawful. (April 2, 1906, 98 v. 345, § 3; R. S. Sec. 244-13.)

See further as to rates and service note to § 535.

The commission has no power to order the name of a station changed. *Buckeye City v. Commission*, 97 O. S. 324 (1917).

Nor to order a receiver, appointed and acting under orders of court, to resume interurban service discontinued by the receiver. *Zanger v. Commission*, 97 O. S. 327 (1917). But see §§ 504-2 and 504-3.

The commission may order a railroad company to provide passenger service. *Railroad v. Commission*, 92 O. S. 1 (1915).

Where a railroad company "spiked" a side track to prevent its use by a shipper, because of nonpayment by the shipper of a disputed claim, the commission ordered the railroad company to resume the service, leaving the dispute as to the claim for determination by the courts. *McIntire v. Zanesville Co.*, 16 O. L. R. 493 (1918); affirmed 100 O. S. 225.

Competition is an element to be considered in determining whether rates are reasonable and just. Between competitive points a railroad

may reduce its rates below those of its competitors. *Commission v. Railway Co.*, 82 O. S. 25, affirming 5 N. P. n. s. 265; 18 L. D. 21.

Power of commission to enforce contracts. The commission has no power to enforce a contract made by an interurban railroad to stop its cars at a certain platform, in consideration of such platform being constructed by the complainant; or to award damages for its violation. *Ashley v. Sandusky, etc., Co.*, 5 O. L. R. 359, 361; 52 B. 498 (Railroad Commission).

Section to be construed as a part of entire act. This section and § 567 are to be operative only as a part of the whole legislative plan. They can not be segregated either in the interpretation of the act or in its application. *Warner v. Railway*, 11 N. P. n. s. 487 (C. P. 1911).

Adequate service and facilities. See note to §§ 535 and 519.

Section 504-1. (Charges for transportation of freight upon railroads regulated.) That no company, or person owning, controlling, or operating a railroad in whole or part within this state, shall charge or receive any greater compensation in the aggregate for the transportation of freight of like kind, for a shorter than for a longer distance over the same line or route in the same direction, the shorter being included within the longer distance, or charge any greater compensation as a through route than the aggregate of the intermediate rates, within the state of Ohio; but this shall not be construed as authorizing any company or person within the terms of this act to charge or receive as great compensation for a shorter as for a longer distance; provided, however, that upon application to the Public Utilities Commission of Ohio, such company or person may in special cases, after investigation, be authorized by the commission to charge less for a longer than for shorter distances for the transportation of freight of like kind; and the commission may from time to time prescribe the extent to which such designated company or person may be relieved from the operation of this section. Provided further, that no rates or charges lawfully existing at the time of the passage of this section shall be required to be changed by reason of the provisions thereof, prior to the expiration of six months after the passage of this section, nor in any case where application shall have been filed before the commission, in accordance with the provisions of this section, until a determination of such application by the commission. (107 v. 431.)

This section superseded §§ 8988 and 8989 which were repealed at the time of its enactment. § 8988 related to freight traffic only. *Railway v. Commission*, 5 N. P. n. s. 274; 18 L. D. 21 (1907); affirmed 82 O. S. 25.

A higher rate for short hauls to intermediate points was said to be a violation of § 8988. Rep. Atty. Gen. 1912, p. 644.

A charge higher than that made for a transportation of the same commodity for an equal or greater distance over the same connecting lines under former § 8988 is an "overcharge" within the meaning of § 579. *Railway v. Mills Bros.* 101 O. S. 163 (1920).

To recover an overcharge under former section § 8988 it was not necessary to prove that any shipment had been made for the longer distance at the lesser rate. Proof of the published rates was sufficient. *Beeghly v. Commission*, 104 O. S. 158 (1922).

Section 504-2. (Abandonment of track, depot, line, pumping stations, etc.; forfeiture.) No railroad as defined in section 501 of the General Code, operating any railroad in the state of Ohio, and no public utility as defined in section 614-2a of the General Code furnishing service or facilities within the state of Ohio, shall abandon or be required to abandon or withdraw any main track or tracks or depot of a railroad or main pipe line, gas line, telegraph line or telephone toll line, electric light line, water line or steam pipe line, or any portion thereof, pumping station, generating plant, power station, or service station of a public utility, or the service rendered thereby, which has once been laid, constructed, opened and used for public business, nor shall be closed for traffic or service thereon, therein or thereover except as provided in section 504-3. Any railroad or public utility violating the provisions of this section shall forfeit and pay into the state treasury not less than one hundred (\$100.00) dollars, nor more than one thousand (\$1,000.00) dollars, and shall be subject to all other legal and equitable remedies for the enforcement of the provisions of this act. (108 (Pt. 1) v. 372; 107 v. 525.)

See §§ 8747, 8750-8752 and notes to §§ 8747 and 8759.

This section and § 504-3 are unconstitutional in so far as they apply to "all such service now rendered and facilities furnished". *Gas Company v. Cleveland*, 106 O. S. 489 (1922); reversing 15 Ohio App. 117.

Where a federal court authorized its receiver of an interstate system of interurban railroad to abandon a branch line wholly located in Ohio, such authorization is binding on the commission and state courts. *Commissioners of Franklin County v. Commission*, 107 O. S. 442.

Section 504-3. (Application to commission for abandonment. Hearing upon abandonment.) Any such railroad or any political subdivision desiring to abandon, close, or have abandoned, withdrawn or closed for traffic or service all or any part of such main track or tracks, or depot, and any such public utility, or political subdivision desiring to abandon or close, or have abandoned, withdrawn or closed for

traffic or service all or any part of such line or lines, pumping station, generating plant, power station or service station, shall first make application to the public utilities commission in writing who shall thereupon cause reasonable notice thereof to be given, stating the time and place fixed by the commission for the hearing of said application. Upon the hearing of said application said commission shall ascertain the facts, and make its finding thereon, and if such facts satisfy the commission that the proposed abandonment, withdrawal or closing for traffic or service is reasonable, having due regard for the welfare of the public and the cost of operating the service or facility, they may allow the same; otherwise it shall be denied, or if the facts warrant, the application may be granted in a modified form. Provided, however, that should the application ask for the abandonment or withdrawal of any main track, main pipe line, gas line, telegraph line or telephone toll line, electric light line, water line or steam pipe line, pumping station, generating plant, power station, service station, or the service rendered thereby, in such manner as can result in the permanent abandonment of service between any two points on such railroad, or of service and facilities of any such public utility, no application shall be granted unless the company or public utility shall have operated said track, pipe line, gas line, telegraph line or telephone toll line, electric light line, water line, or steam pipe line, pumping station, generating plant, power station or service station for a period of at least five years, and such notice shall be given by publication in a newspaper of general circulation throughout any county or municipality which may have granted a franchise to said company or public utility, under which said track, pipe line, gas line, telegraph line or telephone toll line, electric light line, water line or steam pipe line, pumping station, generating plant, power station or service station is operated or in which the same is located, once a week for four consecutive weeks before the hearing of said application, and notice of said hearing shall be given such county, municipality or public utility in the manner provided for the service of orders of the commission in section 614-71 of the General Code, and except that the provisions of section 504-2 and 504-3 shall not apply to a gas company when removing or exchanging abandoned field lines.

(To what provisions apply.) The provisions of this section shall apply to all such service now rendered and facilities furnished or hereafter built and operated, and an order of the commission authorizing the abandonment or with-

drawal of any such service or facility shall not affect rights and obligations of a railroad or public utility beyond the scope of said order, anything in its franchise to the contrary notwithstanding. (108 (Pt. 1) v. 372; 107 v. 525.)

Prior to the enactment of this section the commission had no authority to determine the right of a railroad to abandon its tracks. *Fish v. Commission*, 97 O. S. 330.

Since the enactment of this section, the commission may authorize abandonment. A court which has appointed a receiver of an interurban line cannot, on application of such receiver, order an abandonment of a branch thereof. *Cincinnati v. Westinghouse Co.*, 9 Ohio App. 182; 29 O. C. A. 42 (1917).

But, in a suit by a municipality to enjoin an abandonment, the court may order an abandonment where it finds no contractual obligation to operate, and there is no prospect that the road can be operated without loss. *Gress v. Fort Loramie*, 100 O. S. 35 (1919); reversing 21 N. P. n. s. 81.

And where the question is involved in an action pending in a court of general jurisdiction at the time of the filing of the application, the commission should dismiss an application for permission to abandon. *New Bremen v. Commission*, 103 O. S. 23 (1921).

Notice to each consumer is not required by this section, other than notice by publication. *St. Clairsville v. Com.*, 102 O. S. 574 (1921).

This section authorizes the commission to allow a gas company to discontinue service, if satisfied that the company no longer has a supply of gas, and is unable to procure such a supply. The commission has no power to require one gas company (not a pipe-line company) having no contractual relations with a municipality, to furnish gas to another company to enable it to supply a municipality. *St. Clairsville v. Com.*, 102 O. S. 574 (1921).

§ 504-3 authorizes abandonment of a part of an interurban line where the commission is satisfied that it would be reasonable, having due regard to the welfare of the public and the cost of operation. *Northfield v. Commission*, 100 O. S. 424 (1919).

That service was discontinued shortly prior to application for leave to abandon does not defeat the application, provided the track was operated for five years previous to the application. *Northfield v. Commission*, 100 O. S. 424 (1919).

When application for leave to abandon unnecessary. *Brooks-Scanlon Co. v. R. Com. of La.*, 251 U. S. 396 (1920).

Considerations by which commission will be guided in granting applications for abandonment. See 17 O. L. R. 261; 16 O. L. R. 6, 134.

Section 504-5. (Rules and regulations relative to carload shipments of livestock.) Any company owning or operating a railroad in whole or in part in this state, which receives livestock for shipment in carload lots, shall be governed and regulated by the following rules and regulations relative to the intrastate rates and minimum weights to be charged in carload lot shipments of livestock.

(Specifications relating to shipment of hogs.) Such company receiving hogs for carload shipments in cars of a length

of 36.7 feet, or under, shall make the rate charge on a basis of a minimum weight of not over 16,000 pounds for single deck cars, and 22,000 pounds for double deck cars. In cars of a length exceeding 36.7 feet, and not over 40 feet, the rate charged shall be on a basis of a minimum weight of not over 17,000 pounds for single deck cars, and 23,000 pounds for double deck cars. In cars over 40 feet in length the rate charged shall be on a basis of a minimum weight of not exceeding 18,000 pounds for single deck cars and 24,000 pounds for double deck cars.

(Shipments of mixed livestock.) If such company receive for shipment a car containing a mixture of hogs, cattle and sheep or any two of them, the freight rate charged shall be based upon the same animal classification as is used to determine the minimum freight weight. It shall be the duty of the public utilities commission to enforce the provisions of this section. (109 v. 193.)

Section 505. (Railroad required to file schedules with commission.) Each railroad shall print in plain type and file with the commission, within a time fixed by the commission, schedules which shall be open to public inspection, showing all rates, fares and charges for transportation of passengers and property, and any service in connection therewith, which such railroad has established and which are in force at such time between all points in this state upon its line, or any line controlled or operated by it. (April 2, 1906, 98 v. 345, § 4; R. S. Sec. 244-14.)

The commission has no discretion as to the filing of tariffs by industrial roads which are common carriers as defined by § 501. Rep. Atty. Gen. 1911-1912, p. 706.

A schedule, properly printed and filed, is binding upon shippers and travellers as well as upon the railroad company. But a common carrier can not relieve itself from the liability imposed by § 8994-1 by a rule or regulation contained in the schedule. *Railroad v. Steinberg*, 94 O. S. 189 (1916).

A special contract, not mentioned in schedules on file, made in view of an unusual flood, for the immediate and necessary removal of perishable goods beyond reach of the flood, is not *per se* void, unless its terms are unjust, unreasonable or discriminatory in their nature or operation. *Railroad v. Armstrong*, 99 O. S. 163 (1918).

Section 506. (What schedules shall contain and where posted.) The schedules shall plainly state the places upon the line of such railroad or upon any line controlled or operated by it in this state between which passengers and property will be carried, and there shall be filed with such schedule the classification of freight in force. As a part of

such schedules, each railroad shall publish the rules and regulations affecting the rates charged or to be charged for transportation of passengers or property; also its charges for delay in loading or unloading cars, for track and car service, rental, demurrage, switching, terminal or transfer service, or for any other service in connection with transportation of persons or property. Two copies of such schedules, in such form and place as to be accessible for inspection by the public, shall be filed and kept on file in every depot, station and office of such railroad where passengers or freight are received for transportation. (R. S. Sec. 244-14; April 2, 1906, 98 v. 345, § 4.)

A rate or rule which is in violation of a statute is not validated by insertion in schedules which are filed and published. *Railway v. Mills Bros.*, 101 O. S. 173 (1920); *Railroad v. Steinberg*, 94 O. S. 189 (1916).

Schedules filed with the interstate commerce commission, so long as in force, have the effect of statutes, and are binding upon shipper and carrier alike. *Carlin Co. v. Hines*, 107 O. S. 328 (1923).

Regulations affecting passengers, baggage and limitations of liability, are authorized and required by the federal interstate commerce act. *Railroad v. Hooker*, 233 U. S. 97 (1914).

Section 507. (Schedules of joint rates.) When passengers or property are transported over connecting lines in this state operated by two or more railroads, and such railroads establish joint rates, fares and charges, a schedule thereof, compiled as provided in the next preceding section, shall be printed, filed with the commission and filed in every depot, station and office of such railroads where passengers or property are received for transportation. (R. S. Sec. 244-14; April 2, 1906, 98 v. 345, § 4.)

Section 508. (Changes in schedules.) No change thereafter shall be made in any schedule, including schedule of joint rates, or in any classification, except upon thirty days' notice to the commission. All such changes shall be plainly indicated upon existing schedules, or by filing new schedules thirty days prior to the time they are to take effect, but the commission may, in its discretion and for good cause shown, allow changes upon less than the notice herein specified, or modify the requirements of this section in respect to publishing, posting, and filing of tariffs, either in particular instances or by a general order applicable to special or peculiar circumstances or conditions. Copies of all new schedules shall be filed as provided in the preceding section in every depot, station and office of such railroad thirty days prior to

the time they are to take effect, unless the commission shall prescribe a less time. (106 v. 188; 98 v. 346, § 4; R. S. Sec. 244-14a.)

Section 509. (Posting changes in schedules.) When a change is made in an existing schedule, including schedules of joint rates, the railroad shall post a notice in a conspicuous place in every depot, station and office, stating that changes have been made in the schedules on file, specifying the class or commodity affected and the date when such changes will take effect. (April 2, 1906, 98 v. 346, § 4; R. S. Sec. 244-14b.)

Section 510. (Charges shall conform to schedule.) No railroad shall charge, demand, collect or receive a greater or less compensation for the transportation of passengers or property, or for any service in connection therewith, than is specified in such printed schedules, including schedules of joint rates, as being then in force. The rates, fares and charges named therein shall be the lawful rates, fares and charges until they are changed as provided in this chapter. (R. S. Sec. 244-14c; April 2, 1906, 98 v. 346, § 4.)

A schedule, properly printed and filed, is binding upon shippers and travellers as well as upon the railroad company. But a common carrier can not relieve itself from the liability imposed by § 8994-1 by a rule or regulation contained in the schedule. *Railroad v. Steinberg*, 94 O. S. 189 (1916).

Where a railroad company, by mistake, collected less than its published rate, it may recover the deficiency from the consignee. *Railway Co. v. Magnus Co.*, 13 C. C. n. s. 305 (1910); *Store Fixture Co. v. Railway Co.*, 1 N. P. n. s. 242; 13 L. D. 648; *Railroad v. Peak*, 6 Ohio App. 399; 28 O. C. A. 77 (1917); *Railway v. Tile Co.*, 19 N. P. n. s. 244 (1916); *Railroad v. Fink*, 250 U. S. 577 (1919); reversing 2 Ohio App. 235; 19 C. C. n. s. 103; 25 C. D. 494.

Where a ticket agent sold at full tariff rates, tickets for two parties of sixteen and nineteen men respectively, and agreed to furnish a special baggage car free, the division of the parties being determined by the ticket agent, the railroad company can not recover further compensation because of a rule that a special baggage car is only furnished free for parties of twenty-five or more. *Columbus Co. v. Ry.*, 10 Ohio App. 480; 30 O. C. A. 145 (1919).

A rate scheduled and established pursuant to the statute is the lawful rate. If unjust or discriminatory it may be changed by the commission, but a railroad charging such established rate is not liable in damages under § 569. *Warner v. Railway*, 11 N. P. n. s. 487 (C. P. 1911).

A contract made prior to the enactment of the railroad commission act, whereby an interurban railway obtained a right of way in return for an agreement for a fixed rate of fare, was held not abrogated by the railroad commission act. *Taylor v. Niles*, 2 Ohio App. 293; 21 C. C. n. s. 391; 25 C. D. 445 (1913); *Short v. Railway*, 18 N. P. n. s. 537 (1916). *Contra*, *King Co. v. Thrasher*, 20 N. P. n. s. 401 (1918).

But the commission has no jurisdiction to enforce such a contract. *Coss v. Commission*, 101 O. S. 528 (1920).

A special contract made after the enactment of the public utilities act is not enforceable in so far as it conflicts with rates established by the commission. *Patterson Co. v. Power Co.*, 99 O. S. 429 (1919).

Section 511. (Commission shall prescribe forms.) The commission may prescribe such changes in the form in which schedules are issued by a railroad as may be found expedient. Such schedules, as far as practicable, shall conform to the forms prescribed by the interstate commerce commission. (April 2, 1906, 98 v. 346, § 4; R. S. Sec. 244-14d.)

Section 512. (Rates shall be just and reasonable.) When passengers or property are transported over two or more connecting lines of railroad between points in this state, and the railroad companies have made joint rates for the transportation of such passengers or property, such rates and all charges in connection therewith shall be just and reasonable, and every unjust and unreasonable charge is prohibited and declared to be unlawful; but a less charge by each of such railroads for its proportion of such joint rates than is made locally between the same points on their respective lines shall not for that reason be construed as a violation of the provisions of this chapter, nor render such railroads liable to any of the penalties thereof. (April 2, 1906, 98 v. 346, § 5; R. S. Sec. 244-15.)

Section 513. (Special contract rates.) Nothing in this chapter shall prevent concentration, commodity, transit and other special contract rates, but all such rates shall be subject to the provisions of this chapter as to their printing and filing, shall be open to all shippers for a like kind of traffic under similar circumstances and conditions, and shall be under the supervision and regulation of the commission. (April 2, 1906, 98 v. 346, § 6; R. S. Sec. 244-16.)

Section 514. (Classification of freight shall be uniform.) The classification of freight in the state shall be uniform on all railroads. (98 v. 347, § 7; R. S. Sec. 244-17.)

Section 515. (Exceptions as to freight rates.) Nothing in this chapter shall prevent the carriage, storage or handling of freight free or at reduced rates, for the United States, the state, any political subdivision or municipality thereof, for charitable purposes, to and from fairs and exhibitions for exhibition thereat, or the property of railway

employees for their own exclusive use or consumption or that of their families; or the issuance of mileage, commutation or excursion passenger tickets, if obtainable by any person applying therefor without discrimination, or of party tickets, if obtainable by all persons applying therefor under like circumstances and conditions. (May 20, 1910, 101 v. 322; R. S. Sec. 244-18; April 21, 1908, 99 v. 128, § 8; April 2, 1906, 98 v. 347, § 8.)

The issuance of mileage, excursion, etc., tickets is permissive only. Ordinarily railroads cannot be required to issue such tickets.

The giving of more favorable commutation rates to children attending public school, as a class, than to children traveling for other purposes, is not an arbitrary selection or unjust discrimination.

Shryock v. B. & O. R. R., 6 O. L. R. 19; 53 B. 86; s. c., 4 O. L. R. 614; 52 B. 23.

This section does not prevent the holder of an excursion ticket, sold at a reduced rate, from selling the unused return coupon where the ticket is not, in terms, nontransferable.

Knecht v. Railway, 6 N. P. n. s. 13; 18 L. D. 202 (C. P. 1907).

This section is applicable to express companies (§ 501). A railroad or express company may carry free, or at reduced rates, the property of employes of other railroads or express companies.

Rept. Atty. Gen. 1910-1911, p. 624.

Section 516. (Prohibiting free transportation by railroad company. Exceptions. Definitions.) No railroad company, owning or operating a railroad wholly or partly within this state, shall, directly or indirectly, issue or give a free ticket, free pass, or free transportation for passengers, except to its employes and their families, its officers, agents, surgeons, physicians, and attorneys at law; to ministers of religion, traveling secretaries of railroad young men's christian associations, inmates of hospitals and charitable and eleemosynary institutions, and persons exclusively engaged in charitable and eleemosynary work; to indigent, destitute and homeless persons, and to such persons when transported by charitable societies or hospitals, and the necessary agents employed in such transportation; to inmates of the national homes or state homes for disabled volunteer soldiers, and soldiers' and sailors' homes, including those about to enter and those returning home after discharge, and boards of managers of such homes; to necessary caretakers of live stock, poultry and fruit; to employes on sleeping cars, express cars, and to linemen of telegraph and telephone companies; to railway mail service employes, postoffice inspectors, custom inspectors and immigration inspectors; to newsboys on trains, baggage agents, witnesses attending any legal investigation in which the railroad is interested, persons injured in wrecks and physicians and nurses attending such persons. Provided, that the term "employes" as used in this paragraph shall

include furloughed, pensioned, and superannuated employes, persons who have become disabled or infirm in the service of any such common carrier, and the remains of a person killed in the employment of a carrier and ex-employes traveling for the purpose of entering the service of any such common carrier; and the term "families" as used in this paragraph shall include the families of those persons named in this proviso and also the widows and dependent children of employes who died while in the service of any common carrier. (April 29, 1911, 102 v. 85; R. S. Sec. 244-18; April 21, 1908, 99 v. 128, § 8; April 2, 1906, 98 v. 347, § 8.)

See 4 O. L. R. 667.

An ordinance granting a franchise to an interurban railway, prior to the enactment of § 516, requiring free transportation of mail carriers, was not rendered inoperative by § 516. *Steubenville v. Traction Co.*, 13 Ohio App. 493; 31 O. C. A. 513 (1920). Motion to certify record overruled, 19 O. L. R. 51.

A railroad company may issue a pass to an employe, although the latter is a member of the general assembly. *Rep. Atty. Gen.* 1915, p. 160.

Where a right of way was granted in consideration of an agreement for free life passes, the subsequent enactment of the Ohio railroad commission act was held not to justify the railroad company in refusing to issue passes for intrastate travel. As to passes for interstate travel, it was held that the federal interstate commerce act disabled the railway company from issuing passes, but that, under the provisions of the deed, the right of way reverted to the grantor, who was entitled to maintain an action in ejectment. *Short v. Railway*, 18 N. P. n. s. 537, 27 L. D. 294 (1916).

Section 517. (Passes may be interchanged.) The next preceding section shall not be construed to prohibit the interchange of passes for the officers, agents, and employes and their families; nor to prohibit any railroad company from carrying passengers free in order to provide relief in cases of general epidemics, pestilence, or other calamitous visitation. (R. S. Sec. 244-18; April 21, 1908, 99 v. 128, § 8; April 2, 1906, 98 v. 347, § 8.)

Section 518. (Penalty.) Any railroad company violating a provision of the preceding three sections, for each offense, shall be fined not less than fifty dollars nor more than five hundred dollars, and any person other than the persons excepted in such sections, who uses such free ticket, free pass, or free transportation, shall be subject to a like penalty. (R. S. Sec. 244-18; April 21, 1908, 99 v. 128, § 8; April 2, 1906, 98 v. 347, § 8.)

Section 519. (Depots, switches and sidetracks.) Each railroad shall provide and maintain adequate depots and

depot buildings at its regular stations for the accommodation of passengers, and such depot buildings shall be kept clean, well lighted and warmed, for the comfort and accommodation of the traveling public. Each railroad shall provide and maintain adequate and suitable freight depots, buildings, switches and sidetracks for receiving, handling and delivering freight, transported or to be transported by such railroads; but this section shall not be construed as repealing any existing law on the subject. (April 2, 1906, 98 v. 347, § 9; R. S. Sec. 244-19.)

Upon application by a shipper for a switch connection with a railroad siding owned and controlled by the railroad, the commission has no authority to require the applicant to reimburse another shipper for expenses voluntarily incurred in a change of location of the siding. *Cincinnati Co. v. Commission*, 96 O. S. 288 (1917); affirming 14 O. L. R. 275.

This section does not require a railroad company to open its public or team tracks to other companies.

Rheinstrom v. Railway, 4 O. L. R. 755 (Railroad Commission).

The commission has power to order and require reasonably adequate depot facilities.

Greenwich v. N. O. Ry. Co., 6 O. L. R. 51 (Railroad Commission).

See G. C. §§ 8926, 8927 and notes to § 535.

Section 520. (Supply of cars.) If within its power so to do, and upon reasonable notice, each railroad shall furnish suitable cars for all persons who may apply therefor, for the transportation of any and all kinds of freight in car load lots. In case of insufficiency of cars at any time to meet all requirements, such cars as are available shall be distributed among the applicants therefor in proportion to their respective immediate requirements, without discrimination between shippers or competitive or non-competitive places; but preference may be given to shipments of live stock and perishable property. (April 2, 1906, 98 v. 347, § 10; R. S. Sec. 244-20.)

This section does not authorize the commission to require a railroad to furnish cars of a special type without reference to safety of transportation. *Provision Co. v. Commission*, 104 O. S. 253 (1922).

Railroad fuel cars should not be ordered distributed to coal mines when. See *Coal Co. v. Railroad Commission*, 8 N. P. n. s. 585; 19 L. D. 783; enjoining order of railroad commission reported in *Carbon Coal Min. Co. v. M. C. & C. R. R.*, 7 O. L. R. 196; s. e., 6 O. L. R. 528.

When an industry is uncertain and irregular in its requirements as to cars, the shipper must give reasonable notice thereof to the railroad.

Greer, etc., Co. v. Penna. Co., 6 O. L. R. 133 (Railroad Commission).

See also notes to §§ 535 and 567.

Section 521. (Commission shall enforce regulations as to cars.) The commission may enforce reasonable regulations

for furnishing cars to shippers, switching, loading and unloading them, and the weighing of cars and freight offered for shipment over any line of railroad. (April 2, 1906, 98 v. 348, § 10; R. S. Sec. 244-20a.)

The commission has no power to promulgate an arbitrary rule as to the distribution of cars in the future, and thereby determine a future judicial question.

Coal Co. v. Railroad Commission, 8 N. P. n. s. 585; 19 L. D. 783.

Demurrage charges. A reasonable charge for demurrage may be made upon failure of the consignee to unload freight from its cars within a reasonable time. A railroad company may refuse to deliver cars upon the private siding of the consignee until he pays demurrage charged for the unreasonable detention of former cars delivered upon the siding. Phillips Co. v. Erie R. Co., 6 C. C. n. s. 505; 17 C. D. 486 (1905); affirming, 14 L. D. 706.

But where the delay is caused by the acts of the railway company it is not entitled to demurrage. Tray, etc., Co. v. Railway, 3 N. P. n. s. 412 (1903); aff'd, 72 O. S. 612.

Where a large part of its bill for demurrage is disputed in good faith, the railroad company can not require as a condition of continuing switching service, payment of the entire bill and an unconditional promise to pay all similar future bills. Troy, etc., Co. v. Railway Co., 3 N. P. n. s. 412 (1903); aff'd, 72 O. S. 613.

The transferee of a bill of lading, who presents it to the railroad company and receives the goods contained in the cars, is bound by a provision in such bill of lading for demurrage, and is liable to the railroad company. Traction Co. v. Railway Co., 8 C. C. n. s. 134; 18 C. D. 543 (1906).

A railroad company has a common-law lien upon property in a car, for demurrage charges, and may refuse to deliver such property until payment is made. Such lien exists independently of any stipulation in the contract of shipment. Railway Co. v. Mooar Lumber Co., 6 C. C. n. s. 638; 17 C. D. 588 (1905).

Forty-eight hours is a reasonable time within which a consignee may be required to remove freight from cars, after which time a demurrage charge may be imposed. Phillips Co. v. Railroad Co., 6 C. C. n. s. 505; 17 C. D. 486 (1905); s. c., 14 L. D. 706; Troy, etc., Co. v. Railway Co., 3 N. P. n. s. 412 (1903); aff'd, 72 O. S. 613; Railroad v. Seiberling, 8 C. C. 593; 4 C. D. 210. See § 8998.

Where, upon arrival of cars, the consignee instructs delivery upon side tracks leading from another railroad which has duly promulgated an embargo on deliveries on such side tracks, and immediate notice of the embargo is given to the consignee, who permits the goods to remain in the cars until the embargo is lifted, he is liable for demurrage charges. Railway v. Mayer, 7 Ohio App. 44; 28 O. C. A. 29 (1916).

Where a consignee refuses a carload of freight, the railway company must make disposition thereof within a reasonable time, and may recover demurrage only for such reasonable time. Railway Co. v. Wilson, 26 C. C. n. s. 476 (1913); affirming 15 N. P. n. s. 513.

But where, in such a case, the railroad company notifies the consignor and requests instructions for disposition, which the consignor refuses to give, the consignor is liable for demurrage charges accruing after rejection of the shipment by the consignee. Moores Lime Co. v. Railway, 6 Ohio App. 159; 25 C. C. n. s. 527 (1916).

No demurrage charges are recoverable on cars held by a railroad

company because of a controversy with other carriers over a division of the freight charges. *Coal Co. v. Railway*, 4 Ohio App. 459; 25 C. C. n. s. 276 (1915); motion to certify record overruled, 13 O. L. R. 515.

A consignee who is bound under the "average agreement" rule for demurrage charges on cars constructively delivered, notwithstanding the "bunching" of such cars, is relieved therefrom where the bunching was due to an Act of God such as the flood of March, 1913. *Joslin Schmidt Co. v. Railroad*, 6 Ohio App. 193; 25 C. C. n. s. 379 (1916); motion to certify record overruled, 14 O. L. R. 204; *Carlin Co. v. Hines*, 107 O. S. 328 (1923); reversing 23 N. P. n. s. 457.

Where a demurrage rule of an interstate railroad has been passed upon and approved by the Interstate Commerce Commission, the validity of the rule is not open for consideration in a suit by the railroad company in a state court to recover demurrage charges assessed under the rule as to cars engaged in interstate commerce. *Swift v. Railway*, 93 O. S. 143 (1915).

Under the interstate commerce commission rule, demurrage charges must be collected in accordance with the tariff on file. Where certain exceptions are specified in the tariff, no others may be added. *Carlin Co. v. Hines*, 107 O. S. 328 (1923); reversing 23 N. P. n. s. 457.

In a suit by a railroad company to recover demurrage charges, the shipper cannot defend on the ground of delay by the railroad company in shipment, where the shipment was interstate, the Interstate Commerce Commission having exclusive primary jurisdiction in such matters. *Coal Co. v. Penna. Co.*, 97 O. S. 161 (1918). See also, *Harmon v. Jewett*, 9 Ohio App. 350 (1918).

Demurrage rule construed as imposing a charge for one day only regardless of time the car was detained by the consignee. *Railroad v. Proctor & Gamble Co.*, 21 N. P. n. s. 169 (1913).

Under the Federal Transportation Act of 1920 the Interstate Commerce Commission may change rates fixed by a state statute or state commission, the effect of which is an undue, unreasonable or unjust discrimination against interstate or foreign commerce. *R. Com. of Wis. v. C. B. & Q. Ry.* (U. S. Sup. Ct. 1922), 66 L. Ed. 236; *New York v. U. S.*, 66 L. Ed. 244.

Car service rules established by railroad commission. *Ohio Shippers Ass'n v. Ann Arbor R. Co.*, 52 O. L. B. 279 (1907).

Section 522. (Interchange of traffic.) Steam railroad companies as between themselves, and interurban and electric railroads as between themselves, shall afford reasonable and proper facilities for interchange of traffic between their respective lines, for forwarding and delivering passengers and property, and shall transfer and deliver without unreasonable delay or discrimination cars, loaded or empty, freight or passengers, destined to a point on its own or connecting lines; but precedence over other freight may be given to live stock and perishable freight. (April 2, 1906, 98 v. 348, § 11; R. S. Sec. 244-21.)

The Ohio statutes do not make it the duty of a railroad company, whose tracks intersect those of another company, to establish physical connections. But the commission is authorized by §§ 614-42 and 522 to

require such connection, if it finds the same practicable and reasonably necessary to accommodate the public. The mere fact of a previous connection with tracks of one company and a refusal to connect with those of another company does not establish a charge of unjust discrimination. *Railway Co. v. Commission*, 96 O. S. 359 (1917). See also, *Penna. Co. v. Commission*, 14 N. P. n. s. 262; 58 Bull. 185 (1913).

The test is whether the connection is practicable and reasonably necessary to accommodate the public. *Railroad Co. v. Commission*, 96 O. S. 370. (1917); *Railway Co. v. Commission*, 96 O. S. 359 (1917).

A state, acting within its jurisdiction and not in hostility to a federal regulation of interstate commerce, may make a reasonable order for interchange of traffic, without violating the federal constitution. *Michigan Co. v. Mich. R. R. Com.*, 236 U. S. 615 (1915).

An order requiring three railroad companies, whose tracks intersect in a city, to construct transfer or connecting tracks at a cost of \$14,000, in order to accommodate manufacturers and other shippers whose traffic approximates two thousand cars per year, is not so unreasonable as to violate a constitutional right.

Penna. Co. v. Commission, 14 N. P. n. s. 262, 58 Bull. 185 (C. P. 1913).

The commission may require the tracks of an interurban railway and a steam railroad to be connected and may establish joint rates under § 540. *H. V. Ry. v. Commission*, 107 O. S. 43 (1923).

Section 523. (Control over private tracks.) The commission shall have the same control over private tracks, so far as such tracks are used by common carriers in connection with a railroad for the transportation of freight, as it has over the tracks of such railroad. (R. S. Sec. 244-21a; April 2, 1906, 98 v. 348, § 11.)

This section places under control of the commission arrangements made by a railroad for transportation of freight over its road in connection with private tracks. *Railway v. Commission*, 98 O. S. 218 (1918).

The commission has no jurisdiction to determine a controversy growing out of a switch track contract between a railroad company and a shipper. *Zanesville Railroad v. Commission*, 100 O. S. 225 (1919).

Section 524. (Complaints and hearings.) Upon complaint of a person, firm, corporation or association, or of a mercantile, agricultural or manufacturing society, or of a body politic or municipal organization, that any of the rates, fares, charges or classifications, or any joint rate or rates are in any respect unreasonable or unjustly discriminatory, or that any regulation or practice, affecting the transportation of persons or property, or any service in connection therewith, are in any respect unreasonable or unjustly discriminatory, or that any service is inadequate, the commission may notify the railroad complained of that complaint has been made, and ten days after such notice proceed to investigate such

charges as provided in this chapter. Before proceeding to make such investigation, the commission shall give the railroad and the complainants ten days' notice of the time and place such matters will be considered and determined, and such parties shall be entitled to be heard and to have process to enforce the attendance of witnesses. (April 2, 1906, 98 v. 348, § 12; R. S. Sec. 244-22.)

See § 535.

This act provides an adequate remedy for discrimination and unjust or unreasonable rates and classifications, and courts have no original jurisdiction with reference thereto.

Publishing Co. v. Express Co., 13 N. P. n. s. 403 (1911).

A proceeding before the commission, upon complaint charging that certain railroad rates are unreasonable or unjustly discriminatory, is a matter of public concern in which all shippers are interested. The orders made are general in their operation, not only in favor of the complainant, but also of all persons interested. **Taylor Williams Co. v. Commission, 97 O. S. 224 (1918).**

The laws giving the commission power over rates do not deprive the courts of equitable jurisdiction. Where a municipality brought suit to enforce an unaccepted ordinance fixing the rate of gas, an answer of the gas company alleging facts showing the rate to be confiscatory states a case of which a court of equity has jurisdiction. **State v. Ct. of App., 104 O. S. 96 (1922).**

Section 525. (Railroad may be complainant.) The next preceding section shall be construed to permit a railroad to make complaint with like effect as though made by any person, firm, corporation or association, mercantile, agricultural or manufacturing society, body politic or municipal organization. (April 2, 1906, 98 v. 349, § 12; R. S. Sec. 244-22c.)

Section 526. (May separate complaint.) When complaint is made of more than one rate or charge, the commission may order separate hearings thereon, and may consider and determine the matters complained of separately, and at such times as it may prescribe. No complaint shall necessarily be dismissed because of the absence of direct damage to the complainant. (April 2, 1906, 98 v. 349, § 12; R. S. Sec. 244-22a.)

Section 527. (Commission may change unreasonable rate.) Upon an investigation, if the rate or rates, or any regulation, practice or service complained of is found to be unreasonable or unjustly discriminatory, or the service inadequate, the commission may fix and order substituted therefor, such rate or rates, fares, charges or classification as it shall have determined to be just and reasonable, which shall be charged, imposed and followed in the future. It

also may make such orders respecting such regulation, practice or service as it shall have determined to be reasonable, which shall be observed and followed in the future, but no rates fixed shall exceed the maximum rates prescribed by any statute of this state in force at the time the commission fixes such rates. (April 2, 1906, 98 v. 348, § 12; R. S. Sec. 244-22.)

Both a finding and an order are requisite to give effect to any action by the commission. A finding is the ascertainment of facts, and results from investigation. A judgment is the application of the law to ascertained facts, and results from consideration.

Warner v. Railway, 11 N. P. n. s. 487 (C. P. 1911).

See § 535 and note.

This act provides an adequate remedy for discrimination and unjust or unreasonable rates and classifications, and courts have no original jurisdiction with reference thereto.

Publishing Co. v. Express Co., 13 N. P. n. s. 403 (1911).

See Railway v. Tie Co., 234 U. S. 138 (1914).

The public utilities commission, in fixing a reasonable rate of fare between points on an interurban railroad, need not adopt a rate between other points fixed in a franchise to the same railroad. Stark County v. Traction Co., 102 O. S. 124 (1921).

Section 528. (Commission may investigate on its own motion. Hearing upon new rate or charge; power of commission to suspend new rate or charge.) If the commission believes that any rate or rates, or charge or charges, may be unreasonable or unjustly discriminatory, and that an investigation relating thereto should be made, it may investigate them upon its own motion. Before such investigation it shall present to the railroad a statement in writing setting forth the rate or charge to be investigated. Thereafter, on ten days' notice to the railroad of the time and place of such investigation, the commission may proceed to investigate such rate or charge in the same manner and make like orders in respect thereto, as if such investigation had been made upon complaint.

Whenever there shall be filed with the commission any schedule stating a new individual or joint rate or charge, or any new individual or joint classification, or any new individual or joint regulation or practice affecting any rate or charge, the commission shall have, and it is hereby given, authority, either upon complaint or upon its own initiative without complaint, at once, and if it so orders, without answer or other formal pleading by the interested carrier or carriers, but upon reasonable notice, to enter upon a hearing concerning the propriety of such rate, charge, classification, regulation or practice; and pending such hearing and the decision thereon, the commission upon filing with such schedule and delivering to the carrier or carriers af-

fectured thereby, a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and postpone the use and operation of such rate, charge, classification, regulation or practice, but not for a longer period than thirty days beyond the time when such rate, charge, classification, regulation or practice would otherwise go into effect; and after a full hearing, whether completed before or after the rate, charge, classification, regulation or practice goes into effect, the commission may make such order in reference to such rate, charge, classification, regulation or practice as would be proper in a proceeding initiated after the rate, charge, classification, regulation or practice, had become effective; provided, that if any such hearing can not be concluded within the period of suspension, as above stated, the commission may, in its discretion, extend the time of suspension for a further period not exceeding thirty days. At any hearing involving a rate increased after January 15, 1915, or of a rate sought to be increased after this section shall have become effective, the burden of proof to show that the increased rate or the proposed increased rate is just and reasonable shall be upon the common carrier, and the commission shall give to the hearing and decision of such question preference over all other questions pending before it, and decide the same as speedily as possible. (106 v. 188; 98 v. 349, § 12; R. S. Sec. 244-22b.)

Section 529. (Record of certain investigation.) A full record shall be kept of the proceedings before the commission on such investigations. All testimony shall be taken by the stenographer appointed by the commission. (April 2, 1906; 98 v. 350, § 13; R. S. Sec. 244-23c.)

Section 530. (Power of commissioners to administer oaths.) Each of the commissioners, for the purposes mentioned in this chapter, may administer oaths, certify to official acts, issue subpoenas, compel the attendance of witnesses, and the production of papers, way-bills, books, accounts, documents and testimony. (April 2, 1906, 98 v. 349, § 13; R. S. Sec. 244-23.)

Section 531. (Witnesses may be compelled to testify.) If a person disobeys an order of the commission or a commissioner, or a subpoena, or if a witness refuses to testify to any matter regarding which he may be lawfully interrogated, on application of a commissioner, the court of com-

mon pleas of a county or a judge thereof shall compel obedience by attachment proceedings for contempt, as in the case of disobedience of the requirements of a subpoena issued from such court, or a refusal to testify therein. The commission also shall have the powers vested in justices of the peace or notaries public to compel witnesses to testify and to produce books and papers. (April 2, 1906, 98 v. 349, § 13; R. S. Sec. 244-23.)

Section 532. (Witness fees and mileage.) Each witness who appears before the commission by its order shall receive for his attendance the fees and mileage provided for witnesses in civil cases in courts of record, which shall be audited and paid by the state as other expenses are audited and paid, upon the presentation of proper vouchers sworn to by such witnesses and approved by the chairman of the commission. No witness subpoenaed at the instance of parties other than the commission shall be entitled to compensation from the state for attendance or travel, unless the commission certify that his testimony was material to the matter investigated. (April 2, 1906, 98 v. 349, § 13; R. S. Sec. 244-23a.)

Section 533. (Depositions may be taken.) In an investigation, the commission or any party may cause the depositions of witnesses residing within or without the state to be taken in the manner prescribed by law for depositions in civil actions in the court of common pleas. (April 2, 1906, 98 v. 349, § 13; R. S. Sec. 244-23b.)

Section 534. (Transcribed copy certified by stenographer is evidence.) A transcribed copy of the evidence and proceedings on an investigation, or a specific part thereof, taken by a stenographer appointed by the commission, certified by such stenographer to be a true and correct transcript thereof, carefully compared by him with his original notes, shall be received in evidence as if such reporter was present and testified to the facts as certified. A copy of such transcript shall be furnished on demand, free of cost, to a party to an investigation, and to all other persons, on payment of a reasonable amount therefor. (R. S. Sec. 244-23c; April 2, 1906, 98 v. 350, § 13.)

Section 535. (Commission may change rate or service.) If, upon an investigation under the provisions of this chapter, the commission finds that any existing rate or rates, fares, charges or classification, any joint rate or rates, or

any regulation or practice affecting the transportation of persons or property, or service in connection therewith, are unreasonable or unjustly discriminatory, or that any service is inadequate, it shall determine and by order fix a reasonable rate, fare, charge, classification, joint rate, regulation, practice or service to be imposed, observed and followed in the future, in place of that so found to be unreasonable, unjustly discriminatory, or inadequate, as the case may be. A certified copy of each such order shall be delivered to an officer or station agent of the railroad affected thereby, and such order shall of its own force take effect and become operative thirty days after service thereof. (R. S. Sec. 244-24; April 21, 1908, 99 v. 129, § 14; April 2, 1906, 98 v. 350, § 14.)

See §§ 527, 564, 567, 572.

Some of the functions of the commission are administrative or executive in their character and not judicial or legislative.

Penna. Co. v. Commission, 14 N. P. n. s. 262 (C. P. 1913).

Railroad v. Commission, 10 N. P. n. s. 665; 21 L. D. 468; aff'd. no rep., 86 O. S. 365.

The commission is an administrative board. New Bremen v. Commission, 103 O. S. 23 (1921).

The prescribing of rates for the future is an act legislative, and not judicial, in kind. The authority to fix rates may, in the absence of constitutional restriction, be committed by the legislature to a subordinate body. Railroad v. Garrett, 231 U. S. 298 (1913); Lima Tel. Co. v. Commission, 98 O. S. 110 (1918).

Rate fixing is not a judicial function. Gas Co. v. Cleveland, 106 O. S. 489 (1922).

Under the Federal Transportation Act of 1920 the Interstate Commerce Commission may change rates fixed by a state statute or state commission, the effect of which is an undue, unreasonable or unjust discrimination against interstate or foreign commerce. R. Com. of Wis. v. C. B. & Q. Ry. (U. S. Sup. Ct. 1922); 66 L. Ed. 236; New York v. U. S., 66 L. Ed. 244.

Powers of commission. The commission has no power to change rates which have been fixed by valid contract between a municipality and a public utility. Interurban Railway v. Commission, 98 O. S. 287 (1918). See § 614-47.

Freight rates. That a rate has been in effect a long period of time has a bearing upon its reasonableness.

Nat'l. Refg. Co. v. Penna. Co., 7 O. L. R. 192, 193.

Reasonable classifications of business may be made in establishing rate. Due regard should be had to the carrier's right to proper compensation. Railway v. Commission, 92 O. S. 362 (1915).

Factors in rate making.

See Akron Sand & Gravel Co. v. B. & O., 8 O. L. R. 263.

Natl. Refg. Co. v. Penna. Co., 7 O. L. R. 192, 195.

Rates in less than car load lots.

Interstate Commerce Commission v. C. H. & D. Ry., 3 O. L. R. 497, (U. S. C. C. Ohio).

To justify a finding that a classification rating is wrong, when the

result would be to disturb the entire system of rates, the evidence should be clear and convincing and not merely speculative.

Nat'l. Refg. Co. v. Penna. Co., 7 O. L. R. 192.

Reasonable Rates.

(Coal) Pittsburg, etc., Assn. v. W. & L. E. R. R. Co., 8 O. L. R. 1.

May v. Ohio Co., 13 O. L. R. 89.

Warner v. B. & O., 8 O. L. R. 251.

(Lumber) Settle v. Commission, 94 O. S. 417 (1916); affirming 13 O. L. R. 34.

(Express rates on ice cream and returned containers) Ice Cream Assn. v. Commission, 96 O. S. 451 (1917).

(Increase of commodity rates because of war conditions) 16 O. L. R. 13.

(Slag) 13 O. L. R. 509.

(Livestock) 15 O. L. R. 453.

(Lime and limestone for agricultural purposes) 15 O. L. R. 498.

(Sand and gravel) 14 O. L. R. 2, 18.

(Tile drain) 13 O. L. R. 25.

Classification of commodities according to use for which they are intended is improper and unreasonable. Summit Co. v. Railroad, 13 O. L. R. 25 (1915).

Reduction of rates. Showing necessary to entitle complainant to. 15 O. L. R. 235.

Discrimination. In distribution of cars.

Greer, etc., Co. v. Penna. Co., 6 O. L. R. 133.

Coal Co. v. Railroad Commission, 8 N. P. n. s. 585; 19 L. D. 783.

Haring, etc., Co., v. W. & L. E. R. R., 4 O. L. R. 639.

Oeffler v. Ry. Co., 4 O. L. R. 709; 52 B. 134; aff'd 6 N. P. n. s. 273; 18 L. D. 519.

Railway Co. v. Wren, 78 O. S. 137 (1908).

In coal rates.

Warner v. B. & O., 8 O. L. R. 251.

Against locality in passenger rates.

Ransbottom, etc., Co. v. S. E. Ohio, etc., Co., 6 O. L. R. 159.

Shryock v. B. & O. R. R., 6 O. L. R. 19; 52 B. 88.

See § 567.

In rates on piling as compared with logs other than piling.

Callahan v. C. C. C. & St. L. Ry., 6 O. L. R. 523.

In rating of coal mines.

Nimishilling, etc., Co. v. C. T. & V. R. R., 5 O. L. R. 455; 52 B. 569.

H. V. Ry. Co. v. Railroad Commission, 18 L. D. 519; 6 N. P. n. s.

273; affirming 4 O. L. R. 709; 52 B. 134.

In switching service.

Johnson, etc., Co. v. Railroad Co., 1 N. P. n. s. 385; 14 L. D. 209 (1910).

Gill v. H. V. Ry. Co., 6 O. L. R. 140.

Pierce, etc., Co. v. C. N. R. R. Co., 6 O. L. R. 147; 53 B. 285.

Rheinstrom v. P. C. C. & St. L. Ry., 4 O. L. R. 755.

Railway v. Scofield, 2 C. C. 305 (1887).

See G. C. § 8998.

Against irregular shippers.

H. V. Ry. Co. v. Railroad Commission, 6 N. P. n. s. 273; 18 L. D.

519; affirming 4 O. L. R. 709; 52 B. 134.

In terminal facilities.

Coal Co. v. Railway, 1 C. C. n. s. 333; 14 C. D. 289 (1902).

Adequate service and facilities. The commission may order a railroad company to furnish passenger service. *Railroad v. Commission*, 92 O. S. 1 (1915).

In ordering a railroad to furnish service or perform a duty imposed by its public franchise, the fact that some loss would result does not, alone, conclusively establish unreasonableness, although it is an element for consideration. Such an order is distinguishable from an order fixing a rate. *Railway v. Commission*, 92 O. S. 9 (1915).

In a proceeding to compel a railroad to continue an established interurban service, the burden of showing facts justifying discontinuance rests upon the railroad. *Railway v. Commission*, 92 O. S. 9 (1915).

Validity of order requiring interstate trains to stop at designated stations. See *Railroad v. Commission*, 237 U. S. 220 (1915).
Stops of passenger trains at small village.

Cloppert v. B. & O. S. W., 5 O. L. R. 431; 52 B. 520.

Stops of interurban cars other than at crossings.

Ashley v. Railway Co., 5 O. L. R. 359; 52 O. L. B. 498.

Switching limits. 15 O. L. R. 315.

By interurban railway. Duty to furnish seats to passengers.

Falls, etc., *Co. v. No. Ohio, etc., Co.*, 5 O. L. R. 364; 52 B. 506.

Unprofitableness of operation of interurban railway. Effect of.

Ferguson v. Dayton, etc., Co., 4 O. L. R. 750; 52 B. 197.

In receiving shipments of milk.

West Jefferson, etc., Co. v. B. & O. R. R. Co., 8 O. L. R. 10.

Establishment of stations.

Good v. T. & O. C. Ry., 8 O. L. R. 260; s. c., 55 O. L. B. 301.

Leedon & Co. v. N. & W. Ry., 7 O. L. R. 474.

Rule requiring shipper to load milk into car.

West Jefferson, etc., Co. v. B. & O. R. R. Co., 8 O. L. R. 10.

B. & O. R. R. v. Railroad Commission, 10 N. P. n. s. 665; s. c., 21 L. D. 468; 86 O. S. 365; modified, 88 O. S. 599.

Section 504 does not require a railroad company to open its public or team tracks to other railroads.

Rheinstrom v. Railway, 4 O. L. R. 755.

Recovery of overcharges, see §§ 579, 580.

Section 536. (Railroads shall correct schedules.) All railroads to which the order applies shall make such changes in their schedules on file as are necessary to conform to such order, and no change shall thereafter be made by any railroad in any such rates, fares, or charges, or in any joint rate or rates, without the approval of the commission. (R. S. Sec. 244-24; April 21, 1908, 99 v. 129, § 14; April 2, 1906, 98 v. 350, § 14.)

Section 537. (Copies of orders to be supplied railroad.) Certified copies of all other orders of the commission shall be delivered to an officer or station agent of each railroad affected thereby, and shall take effect within such time thereafter as the commission prescribes. (R. S. Sec. 244-24; April 21, 1908, 99 v. 129, § 14; April 2, 1906, 98 v. 350, § 14.)

Section 538. (Commission may rescind or amend an order.) Upon application of any person or any railroad and after notice to the parties in interest and opportunity to be heard as provided in this chapter for other hearings, has been given, the commission may rescind, alter or amend an order fixing any rate or rates, fares, charges or classification, or any other order made by the commission. Certified copies of such orders shall be served and take effect as provided for original orders. (R. S. Sec. 244-24a; April 21, 1908, 99 v. 130, § 14; April 2, 1906, 98 v. 350, § 14.)

Section 539. (Supplemental order.) Whenever a joint rate or charge is ordered substituted by the commission, and the railroads party thereto fail to agree within twenty days after the service of such order upon the apportionment thereof, the commission may after a hearing, issue a supplemental order declaring the apportionment of such joint rate or charge, which shall take effect of its own force as part of the original order. (May 2, 1910, 101 v. 166; R. S. Sec. 244-24b; April 21, 1908, 99 v. 130, § 14; April 2, 1906, 98 v. 350, § 14.)

The commission is authorized to divide a joint rate only in proceedings in which it has ordered a joint rate and where the carriers have failed to agree on a division. 14 O. L. R. 130.

Section 540. (When commission may fix joint rate.) Whenever railroads refuse or neglect to establish a joint rate or rates for the transportation of persons or property, the commission may, upon notice to the railroads and after opportunity to be heard, fix and establish such joint rate or rates. If the railroads party thereto fail to agree upon the apportionment thereof within twenty days after service of such order, the commission may, upon a like hearing, issue a supplemental order declaring the apportionment of such joint rate or rates which shall take effect of its own force as part of the original order. (R. S. Sec. 244-24c; April 21, 1908, 99 v. 130, § 14; April 2, 1906, 98 v. 350, § 14.)

This section empowers the commission to require railroads to fix joint passenger rates.

Rep. Atty. Gen. 1910-1911, p. 623.

Where a carrier holds itself out as a carrier beyond its own lines, or establishes a joint rate and through rate beyond its own lines, or is required by law to maintain such through route, it is obligated to furnish cars therefor if within its power to do so. *Grant v. Ohio Co.*, 15 O. L. R. 401 (Pub. Ut. Com.).

An interurban railway is a "railroad" under this section. *H. V. Ry. Co. v. Commission*, 107 O. S. 43 (1923).

Section 541. (Rates, fares, etc., fixed by commission, *prima facie* lawful and in force for two years.) All rates, fares, charges, classifications and joint rates fixed by the commission shall be in force and be *prima facie* lawful for two years from the day they take effect, or until changed or modified by the commission, or by an order of a competent court in an action under the provisions of this chapter. (106 v. 188; April 2, 1906, 98 v. 351, § 15; R. S. Sec. 244-25.)

Section 542. (Regulations, practices, etc., prescribed by commission *prima facie* reasonable.) All regulations, practices and service prescribed by the commission shall be in force and be *prima facie* reasonable, unless suspended or found otherwise in an action brought for that purpose pursuant to the provisions of this chapter, or until changed or modified by the commission. (April 2, 1906, 98 v. 351, § 15; R. S. Sec. 244-25.)

This section applies to a proceeding in error to the commission under § 544 et seq. *Cincinnati v. Commission*, 91 O. S. 331 (1915).

Section 543. (Rehearing; who may have. Time of hearing, when granted without suspension of order.) After any order or decision has been made by the commission, any party to the action or proceeding, or any stockholder or bondholder or other party pecuniarily interested in the public utility affected, may apply for a rehearing in respect to any matters determined in said action or proceeding and specified in the application for rehearing, and the commission may grant and hold such rehearing on said matters, if in its judgment sufficient reason therefor be made to appear. No cause of action arising out of any order or decision of the commission shall accrue in any court to any corporation or person unless such corporation or person shall have made, before the effective date of said order or decision, application to the commission for a rehearing. Such application shall set forth specifically the ground or grounds on which the applicant considers said decision or order to be unreasonable or unlawful. No corporation or person shall in any court urge or rely on any ground not so set forth in said application. Any application for a rehearing made ten days or more before the effective date of the order as to which a rehearing is sought, shall be either granted or denied before such effective date, or the order shall stand suspended until such application is granted or denied. Any application for a rehearing made within less than ten days before the effective date of the order as to which a rehearing is sought, and not granted within twenty days, may be taken by the

party making the application to be denied, unless the effective date of the order is extended for the period of the pendency of the application.

If an application for a rehearing be granted without suspension of the order involved, the commission shall forthwith proceed to hear the matter with all dispatch and shall determine the same within twenty days after final submission and if such determination is not made within said time, it may be taken by any party to the rehearing that the order involved is affirmed. An application for rehearing shall not excuse any corporation or person from complying with and obeying any order or decision, or any requirement of any order or decision of the commission theretofore made, or operate in any manner to stay or postpone the enforcement thereof, except in such cases and upon such terms as the commission may by order direct. If, after such rehearing and a consideration of all the facts, including those arising since the making of the order or decision, the commission shall be of the opinion that the original order or decision or any part thereof is in any respect unjust or unwarranted, or should be changed, the commission may abrogate, change or modify the same. An order or decision made after such rehearing, abrogating, changing or modifying the original order or decision shall have the same force and effect as an original order or decision, but shall not affect any right or the enforcement of any right arising from or by virtue of the original order or decision unless so ordered by the commission. (May 5, 1913, 103 v. 814, § 32.)

An application for rehearing must be filed within the time specified by statute. The commission has no authority to entertain an application filed after expiration of such time. *Pollitz v. Commission*, 98 O. S. 445 (1918).

Where, under a former statute, suit was brought to reverse an order of the commission, and the order was suspended by the court on the giving of a bond by the railway company, and after suspension the former rate was collected, the remedy of a shipper was held to be by suit, and not by complaint, to the commission under § 579. *Taylor Williams Co. v. Commission*, 97 O. S. 224 (1918).

When not required by statute, a public utility need offer no evidence, but may wait until a regulation is made and then insist upon its constitutional rights. *Irrigation Co. v. Stanislaus County*, 233 U. S. 454 (1914).

Section 544. (Order may be reversed.) A final order made by the commission shall be reversed, vacated or modified by the supreme court, on a petition in error, if upon consideration of the record such court is of the opinion that such order was unlawful or unreasonable. (May 5, 1913,

103 v. 815, § 33; G. C. § 543 (original numbering); R. S. Sec. 244-26; April 2, 1906, 98 v. 351, § 16.)

As erroneously printed in 103 v. 815, the last three words of this section read "unlawful and unreasonable."

The court will not substitute its judgment for that of the commission. Before the court will interfere with an order of the commission, it must appear from a consideration of the record that the order was unlawful or unreasonable. *Railway v. Commission*, 92 O. S. 362 (1915).

The court will examine the entire record to determine whether a finding of facts made by the commission is so involved with and dependent upon questions of law as to be in effect a decision of the latter. *Railway v. Commission*, 92 O. S. 9 (1915).

This section and the sections following, providing for judicial review of the orders of the commission, preserve the validity of the act.

Railroad v. Railroad Commission, 10 N. P. n. s. 665; *aff'd no rep.* 86 O. S. 365; *Railway v. Commission*, 92 O. S. 9, 14 (1915).

Coal Co. v. Railroad Commission, 8 N. P. n. s. 585; 19 L. D. 783.

Under the railroad commission act, empowering common pleas courts to vacate "unlawful or unreasonable" orders of the commission, it was held that the court was authorized to vacate only orders which were so unreasonable as to amount to a taking of private property without due process of law or without just compensation.

Penna. Co. v. Commission, 14 N. P. n. s. 262 (C. P. 1913).

See *Railroad v. Commission*, 6 N. P. n. s. 273; 18 L. D. 519, *affirming* 4 O. L. R. 709; 52 Bull. 134.

The only mode of judicial relief in federal courts against unreasonable rates is by suit against the governmental authority which established them or is charged with the duty of enforcing them. It is not competent for each individual having dealings with the regulated company to raise a contest in the courts over the questions which ought to be settled in this general and conclusive way. In *re Engelhard*, 231 U. S. 646 (1914).

An order by the commission which directly burdens or regulates interstate commerce may be enjoined in federal court. *Commission v. Worthington*, 225 U. S. 101 (1912).

In reviewing orders of the Michigan railroad commission, the courts were held to exercise judicial and not legislative powers. *Detroit, etc., Ry. v. Commission*, 235 U. S. 402 (1914).

Sections 544 et seq. are constitutional. *H. V. Ry. Co. v. Commission*, 100 O. S. 321 (1919).

Section 545. (Proceedings in error.) The proceeding to obtain such reversal, vacation or modification shall be by petition in error, filed in the supreme court, by any party to the proceeding before the commission, against the public utilities commission of Ohio, setting forth the errors complained of. Thereupon unless the same is duly waived a summons shall issue and be served, as in other cases, upon the chairman of the commission, or, in the event of his absence, upon any member of the commission, or by leaving a copy at the office of the commission at the city of Columbus. The court may permit any interested party to intervene by cross-petition in error. (May 5, 1913, 103 v. 815, § 34; G.

C. § 544 (original numbering); April 2, 1906, 98 v. 350, §§ 13, 16.)

Where an order of the commission is a final order, the remedy is by petition in error. *Mandamus* will not lie. *State v. Commission*, 101 O. S. 313 (1920).

Section 546. (Transcript.) Upon service or waiver of the summons in error the commission shall forthwith transmit to the clerk of the supreme court a transcript of the journal entries, original papers or transcripts thereof and a certified transcript of all evidence adduced upon the hearing before the commission in the proceeding complained of, which shall be filed in said court. (May 5, 1913, 103 v. 815, § 35; G. C. § 544 (original numbering); April 2, 1906, 98 v. 350, §§ 13, 16.)

Section 547. (When proceeding commenced.) No proceeding to reverse, vacate or modify a final order of the commission shall be deemed commenced unless the petition therefor is filed within sixty days after the entry of the final order complained of upon the journal of the commission. (May 5, 1913, 103 v. 815, § 36; G. C. § 543 (original numbering); April 2, 1906, 98 v. 351, § 16.)

Under the original railroad commission act, orders of the commission were reviewed by the common pleas court. Under that act it was held that the limitation of sixty days applied exclusively to the judgment of the court of common pleas, and did not apply to an error proceeding in the supreme court to review a judgment of the circuit court.

Commission v. Railway Co., 79 O. S. 419.

Section 548. (Stay of execution.) No proceeding to reverse, vacate or modify a final order rendered by the commission shall operate to stay execution thereof unless the supreme court or a judge thereof in vacation, on application and three days' notice to the commission, shall allow such stay, in which event the plaintiff in error shall be required to execute an undertaking, payable to the state of Ohio, in such a sum as the court may prescribe, with surety to the satisfaction of the clerk of the supreme court, conditioned for the prompt payment by the plaintiff in error of all damages arising from or caused by the delay in the enforcement of the order complained of, and for the repayment of all moneys paid by any person, firm or corporation for transportation, transmission, produce, commodity or service in excess of the charges fixed by the order complained of, in the event such order be sustained. (May 5, 1913, 103 v. 815,

§ 37; G. C. § 551 (original numbering); April 2, 1906, 98 v. 351, § 16.)

See note to § 543.

Section 549. (Jurisdiction.) No court other than the supreme court shall have power to review, suspend or delay any order made by the commission, or enjoin, restrain or interfere with the commission or any member thereof in the performance of official duties. Nor shall the writ of mandamus be issued against the commission or any member thereof by any court other than the supreme court. (May 5, 1913, 103 v. 816, § 38.)

Where it is shown that an order, sought in an application filed with the commission, will affect rights which are involved in an action pending in a court of general jurisdiction at the time of the filing of the application, it is the duty of the commission to dismiss the application. *New Bremen v. Commission*, 103 O. S. 23 (1921).

The common pleas court and court of appeals have no jurisdiction to restrain the erection of safety gates ordered by the commission, on the ground that they were not being erected at the proper location, where the commission has taken no action under § 614-67. *Railway v. Railway*, 5 Ohio App. 151; 25 C. C. n. s. 572 (1916).

Section 550. (Order as to payment of money in case of stay, etc.) The supreme court, in case it stays or suspends the order or decision of the commission in any matter affecting rates, joint rates, fares, tolls, rentals, charges or classifications, may also by order direct the public utility or railroad affected to pay into the hands of a trustee to be appointed by the court, from time to time, to be held until the final determination of the proceeding, under such conditions as the court may prescribe, all sums of money collected in excess of the sums payable if the order or decision of the commission had not been stayed or suspended. (May 5, 1913, 103 v. 816, § 39.)

Recovery of overcharges, see §§ 579, 580.

Section 551. (Order to keep excess accounts pending review.) In case the supreme court stays or suspends any order or decision lowering any rate, joint rate, fare, toll, rental, charge or classification, the commission, upon the execution and approval of said suspending bond may require the public utility or railroad affected, under penalty of the immediate enforcement of the order or decision of the commission, pending review, to keep such accounts, verified by oath, as may, in the judgment of the commission, be sufficient to show the amounts being charged or received by

such public utility or railroad, in excess of the charges allowed by the order or decision of the commission, together with the names and addresses of the corporations or persons to whom overcharges will be refundable in case the charges made by the public utility or railroad, pending review, be not sustained by the supreme court. (May 5, 1913, 103 v. 816, § 40.)

Section 551-1. (Disposition of moneys charged in excess.)

Upon the final decision by the supreme court, all moneys which the public utility or railroad may have collected, pending the appeal, in excess of those authorized by such final decision, shall be promptly paid to the corporations or persons entitled thereto, in such manner and through such methods of distribution as may be prescribed by the court. If any such money shall not have been claimed by the corporations or persons entitled thereto within one year from the final decision of the supreme court, the trustees appointed by the court shall cause notice to such corporations or persons to be given by publication, once a week for two consecutive weeks, in a newspaper of general circulation, printed and published in the city of Columbus, Franklin county, Ohio, and such other newspaper or newspapers as may be designated by such trustee, said notice to state the names of the corporations or persons entitled to such moneys and the amount due each corporation or person. All moneys not claimed within three months after the publication of said notice shall be paid by the public utility or railroad, under the direction of such trustee, into the state treasury for the benefit of the general fund, and the court may make such order with respect to the compensation of the trustee as it may deem proper. (May 5, 1913, 103 v. 816, § 41.)

Right of one or more individual consumers to intervene to determine the amount of refund. See *In re Engelhard*, 231 U. S. 646 (1914).

Where, under a former statute, suit was brought to reverse an order of the commission, and the order was suspended upon the giving of a bond by the railway company, and after suspension the former rate was collected, the remedy of a shipper was held to be by suit, and not by complaint, to the commission under § 579. *Taylor Williams Co. v. Commission*, 97 O. S. 224 (1918).

Section 551-2. (Act shall not affect pending actions.)

This act shall not affect pending actions or proceedings brought by or against the state of Ohio, the railroad commission of Ohio, the public service commission of Ohio, or by any other person or corporation, but the same may be prosecuted and defended with the same effect as though this act had not been passed or said commission abolished. Any in-

vestigation, hearing or examination undertaken, commenced, instituted or prosecuted prior to the taking effect of this act may be conducted and continued to a final determination in the same manner and with the same effect as if it had been undertaken, commenced, instituted or prosecuted in accordance with the provisions of this act. All proceedings hitherto taken by the commissions above named in any such investigation, hearing or examination and hereby ratified, approved, validated and confirmed, and all such proceedings shall have the same force and effect as if they had been undertaken, commenced, instituted and prosecuted under the provisions of this act and in the manner herein prescribed. (May 5, 1913, 103 v. 817, § 42; in effect August 8, 1913.)

Section 551-3. (Abatement.) No cause of action arising under the laws of Ohio shall abate by reason of the passage of this act, whether a suit or action has been instituted thereon at the time of the taking effect of this act or not, but actions may be brought upon such causes in the same manner, under the same terms and conditions, and with the same effect as though said laws in force at the time this act takes effect had not been repealed. (May 5, 1913, 103 v. 817, § 43.)

Section 551-4. (Orders, decisions, etc., remain in force.) All orders, decisions, rules or regulations heretofore made, issued or promulgated by the commission above named shall continue in force and have the same effect as though they had been lawfully made, issued or promulgated under the provisions of this act. (May 5, 1913, 103 v. 817, § 44.)

Section 551-5. (Each section independent.) Each section of this act and every part thereof is hereby declared to be an independent section, and part of a section, and the holding of a section or part thereof to be void or ineffective for any cause shall not be deemed to affect any other section or part thereof. (May 5, 1913, 103 v. 817, § 45.)

Section 551-6. (Order of disposition of cases under chapter.) All actions and proceedings in the supreme court, under this chapter, and all actions or proceedings to which the commission or the state of Ohio may be parties, and in which any question arises under this chapter, or under or concerning any order or decision of the commission, to reverse, vacate or modify an order of the commission, shall be taken up and disposed of by the court out of its order on the docket. (May 5, 1913, 103 v. 817, § 46; G. C. § 545 (original numbering); April 2, 1906, 98 v. 351, § 16.)

Section 552. (Rules of practice.) Except when otherwise provided by law, all processes in actions and proceedings in a court arising under the provisions of this chapter shall be served, and the practice and rules of evidence be the same, as in civil actions. A sheriff or other officer empowered to execute civil processes shall execute process issued under the provisions of this chapter and receive compensation therefor as prescribed by law for like services. (April 2, 1906, 98 v. 352, § 17; R. S. Sec. 244-27.)

Section 553. (Witnesses compelled to testify.) A person shall not be excused from testifying or from producing books and papers in a proceeding based upon or growing out of violation of the provisions of this chapter, on the ground that the testimony or evidence, documentary or otherwise, required of him may tend to incriminate him or subject him to a penalty or forfeiture; but no person having so testified shall be prosecuted or subjected to a penalty or forfeiture for, or on account of, any transaction, matter or thing concerning which he may have testified or produced documentary evidence. A person so testifying shall not be exempt from prosecution or punishment for perjury. (April 2, 1906, 98 v. 352, § 17; R. S. Sec. 244-27a.)

Section 554. (Certified copy shall be evidence.) Upon application, the commission shall furnish certified copies under its seal or any order made by it, which certified copy shall be prima facie evidence in a court or proceeding of the facts stated therein. (April 2, 1906, 98 v. 352, § 17; R. S. Sec. 244-27b.)

Section 555. (Commission may inquire into management of railroads.) The commission may inquire into the management of the business of any railroad, and shall keep itself informed as to the manner and method in which it is conducted. It may obtain from a railroad the information necessary to enable it to perform the duties and carry out the objects for which it was created. (April 2, 1906, 98 v. 353, § 18; R. S. Sec. 244-28.)

Matters of purely business policy are for the determination of railroad companies themselves. *Railway v. Commission*, 98 O. S. 218 (1918).

Section 556. (Commission shall prepare blanks for railroad.) The commission shall cause blanks to be prepared suitable for the purposes designated in this chapter which shall conform as nearly as practicable to the forms prescribed

by the interstate commerce commission, and, when necessary, furnish such blanks to each railroad. (April 2, 1906, 98 v. 353, § 18; R. S. Sec. 244-28a.)

Section 557. (Railroads shall file blanks and verify answers.) A railroad receiving blanks from the commission shall cause them to be properly filled, answering fully and correctly each question therein. In case it is unable to answer any question, such railroad shall give a good and sufficient reason therefor. Such answers shall be verified under oath by the proper officer of the railroad and returned to the commission within the time fixed by it. The making or filing of a false affidavit shall be deemed perjury and punishable as such. (R. S. Sec. 244-28a; April 2, 1906, 98 v. 353, § 18.)

Section 558. (Commission may make examinations.) Upon demand, the commission, a commissioner, or any person or persons employed by it for that purpose, may inspect the books and papers of a railroad and examine under oath any officer, agent or employe thereof, in relation to any matter which is the subject of complaint and investigation. A person other than one of the commissioners, who makes such demand shall produce his authority to make such inspection, under the hand of a commissioner, or of the secretary, and under the seal of the commission. (April 2, 1906, 98 v. 353, § 18; R. S. Sec. 244-28b.)

Section 559. (Commission may require production of books and papers.) By order or subpoena, served on a railroad as a summons is served in a civil action in the court of common pleas, the commission may require at such time and place within this state as it designates the production of books, papers or accounts relating to any matter which is the subject of complaint or investigation, kept by such railroad in any office or place outside of this state, or verified copies thereof, in order that an examination of such books, papers or accounts may be made by the commission or under its direction. Such subpoena may issue to a sheriff of any county of the state. (April 2, 1906, 98 v. 353, § 18; R. S. Sec. 244-28c.)

Section 560. (Forfeiture for refusal to comply with subpoena.) A railroad failing or refusing to comply within a reasonable time with such order or subpoena from the commission shall forfeit and pay into the state treasury, for each day it so fails or refuses, not less than one hundred dollars

nor more than one thousand dollars, to be recovered in a civil action in the name of the railroad commission of Ohio. (R. S. Sec. 244-28c; April 2, 1906, 98 v. 353, § 18.)

Section 561. (Commission may demand copies of transportation contracts.) When required by the commission and within a time fixed by it, each railroad shall deliver to the commission for its use copies of all contracts which relate to the transportation of persons or property or any service in connection therewith, made or entered into by such railroad with any other railroad, terminal, depot, car or equipment company, express or other transportation company, bridge company, or any shipper or shippers, producers or consumers or other person or persons doing business with it. (April 2, 1906, 98 v. 353, § 19; R. S. Sec. 244-29.)

Section 562. (Report of free transportation.) On the first Monday in February in each year and oftener if required by the commission, each railroad shall file with the commission a verified list of all railroad tickets, passes and mileage books issued free or for other than actual bona fide money consideration at full established rates during the preceding year, together with the names of the recipients thereof, the amount received therefor and the reason for issuing them. This provision shall not apply to the sale of tickets at reduced rates open to the public, or tickets, passes, or mileage books issued to persons not residents of the state, or tickets, passes or mileage books issued free pursuant to authority conferred in this chapter. (April 2, 1906, 98 v. 354, § 19; R. S. Sec. 244-29a.)

Section 563. (Investigation into violations of the interstate commerce law.) The commission shall have power and, on complaint, it is hereby made its duty to investigate any freight rates on interstate traffic on railroads in this state, and, if in its opinion they are excessive or discriminatory or are levied in violation of the interstate commerce law, or in conflict with the rulings, orders or regulations of the interstate commerce commission, it shall present the facts to the railroad with the request to make such changes as the commission may advise. If such changes are not made within a reasonable time, the commission shall apply by petition to the interstate commerce commission for relief. All freight tariffs issued by any such railroad relating to interstate traffic in this state shall be filed in the office of the commission when issued. (April 2, 1906, 98 v. 354, § 21; R. S. Sec. 244-31.)

This section does not empower the commission to make rules relating to car service or demurrage in interstate commerce.

Railroad Commission v. Railroad Co., 12 C. C. n. s. 317; 21 C. D. 337; affirming 8 N. P. n. s. 233; 19 L. D. 691.

Where a demurrage rule has been passed upon and approved by the interstate commerce commission, the decision is binding upon state courts, and the validity of the rule is not open for consideration in a suit by a railroad company to recover demurrage charges thereunder. *Swift v. Railway*, 93 O. S. 143 (1915).

The commission has no authority to order an interstate railway, entering the state over leased tracks, to furnish intrastate service on said leased tracks, unless obligated so to do by its lease. 15 O. L. R. 317 (Com. 1917).

Section 564. (Unjust discriminations, forfeiture.) If a railroad, or an agent or officer thereof, by special rate, rebate, drawback, or by means of false billing; false classification, false weighing, or other device, shall charge, demand, collect or receive, either directly or indirectly, from any person, firm or corporation, a greater or less compensation for service rendered or to be rendered by it for the transportation of persons or property or any service in connection therewith, than that prescribed in the published tariffs then in force, or established as provided herein, or a greater or less compensation than it charges, demands, collects or receives from any other person, firm, or corporation for a like and contemporaneous service in the transportation of a like kind of traffic, under substantially similar circumstances and conditions, it shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared unlawful, and upon conviction thereof shall forfeit and pay into the state treasury not less than one hundred dollars nor more than five thousand dollars for each offense. (R. S. Sec. 244-32; April 2, 1906, 98 v. 354, § 22.)

Decisions of commission as to discriminations, see note to § 535.

Charging less than minimum carload rate, where car does not contain minimum weight of freight, constitutes a rebate.

Hisylvania Coal v. T. & O. C. Ry., 7 O. L. R. 467, 468 (Railroad Commission).

Where a lower rate is given by a common carrier to a favored shipper, which is intended to give and necessarily gives an exclusive monopoly to the favored shipper, affecting the business and destroying the trade of other shippers, the latter have the right to require an equal rate for all under like circumstances. An injunction may be obtained to prevent discrimination.

Scofield v. Railway Co., 43 O. S. 571 (1885).

Where a railway company, as a common carrier, in consideration of the fact that a shipper furnished a greater quantity of freights than other shippers during a given term, agrees to make a rebate from the published tariff on such freights to the prejudice of the other shippers of like freights under the same circumstances, the contract so made is an unlawful discrimination in favor of the larger shipper, tending

to create monopoly, destroy competition, injure, if not destroy, the business of smaller operators, contrary to public policy, and will be declared void at the instance of parties injured thereby.

And such a contract can not be upheld simply because the favored shipper may furnish for shipment during the year a larger freightage in the aggregate than any other shipper, or more than all others combined. A discrimination resting exclusively on such a basis will not be sustained. And such a contract will not be upheld simply because the business to be done under it is "largely profitable" to the company.

Scofield v. Railway Co., 43 O. S. 571 (1885).

A railroad company is not warranted in making a contract whereby it binds itself to carry for one shipper crude petroleum, or other article, at half the rate it agrees to charge all others for the same service, at the same time, and as part of the agreement, binding itself to charge all others double the amount as a fixed open rate, and to pay such favored shipper one-half of it when collected, in consideration of his agreeing to establish and maintain a system of pipe lines to its road. Money so paid by a shipper, in ignorance of the agreement, and received by the favored shipper, may be recovered back in an action for money had and received by the former against the latter.

Brundred v. Rice, 49 O. S. 640 (1892).

Action to enforce rebate. A railroad company whose line extends to a point of intersection with a canal of the state can not make a valid contract to repay to a shipper a portion of the freight paid by him, it being the regular rate posted by the company and received from other shippers, such contract being prohibited by § 8981. An action can not be maintained to enforce a promise of such repayment.

Baltimore, etc., R. R. Co. v. Diamond Coal Co., 61 O. S. 242 (1899).

Remedy by quo warranto. A corporation created by this state, and engaged in carrying goods for hire as a common carrier, has no franchise, privilege, or right to discriminate in its freight rates in favor of one shipper, even when it is necessary to do so to secure his custom, if the discriminating rate will tend to create a monopoly by excluding from their proper markets the products of the competitors of the favored shipper.

State ex rel v. Railway, 47 O. S. 130 (1890).

Rights of shipper when agent fraudulently overcharges.

Maple v. Railroad Co., 40 O. S. 313 (1883).

When consignee can not sue. Consignee can not sue when he has a delivered price on the goods.

Thompson v. Cleveland, etc., Ry. Co., 11 W. L. B. 211 (1884).

Section 565. (Penalty against agent or officer.) Whoever, being an agent or officer of a railroad, violates any provision of the next preceding section shall be fined not less than fifty dollars nor more than one thousand dollars for each offense. (April 2, 1906, 98 v. 355, § 22; R. S. Sec. 244-32.)

Section 566. (Illegal concessions.) No railroad shall demand, charge, collect or receive from a person, firm or corporation a less compensation for the transportation of property or for a service rendered or to be rendered by it in

consideration of such person, firm or corporation furnishing a part of the facilities incident thereto; but nothing herein shall prohibit a railroad from procuring facilities or service incident to transportation and paying a reasonable compensation therefor. (April 2, 1906, 98 v. 355, § 22; R. S. Sec. 244-32a.)

Payments to one shipper for switching cars. See *Ohio Co. v. Railroad*, 15 O. L. R. 142.

Section 567. (Unlawful preference.) No common carrier subject to the provisions of this chapter shall make or give undue or unreasonable preference or advantage to a particular person, company, firm, corporation or locality, or to any particular description of traffic, in any respect whatsoever, or subject any particular person, company, firm, corporation or locality, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever. (R. S. Sec. 244-33; April 2, 1906, 98 v. 355, § 23.)

See §§ 8981, 8988, 8990 and note to § 535.

The prohibition of this section against preferences applies only to circumstances or conditions substantially similar. *Provision Co. v. Commission*, 104 O. S. 253 (1922).

Discrimination in side tracks and switching facilities is unlawful. *Railway Co. v. Commission*, 98 O. S. 218 (1918); *Coal Co. v. Railway*, 20 C. C. n. s. 420 (1905).

Only undue or unreasonable discrimination is prohibited. The waiver by a carrier of one of the provisions of a uniform contract, thus giving the shipper a service not required by the contract, is not unlawful, unless the discrimination is undue or unreasonable and can fairly be considered as granting a privilege not enjoyed by others. *Bennett v. Railway*, 25 C. C. n. s. 335 (1916); reversing 17 N. P. n. s. 42. Motion to certify record overruled.

Charging a rate, between competitive points, lower than the rates of competitors, does not of itself constitute undue or unreasonable discrimination against other localities. Such discrimination must be ascertained from all the facts and circumstances of each case.

Commission v. Railway Co., 82 O. S. 25; affirming 5 N. P. n. s. 265; reversing 5 O. L. R. 69 (Railroad Commission).

Discrimination against locality in passenger rates.

See *Ransbottom, etc., Co. v. S. E. Ohio, etc., Co.*, 6 O. L. R. 159 (Railroad Commission).

To establish commutation, party rate, etc., rate tickets between certain stations and to refuse to establish like rates between other stations is not, of itself, a discrimination against such other localities.

Shryock v. B. & O. R. R., 6 O. L. R. 19; 53 B. 88.

This section to be construed as part of the entire act.

Warner v. Railway, 11 N. P. n. s. 487 (C. P. 1911).

A lease of ground by a railroad company to a shipper, for a term of five years with an option to renew, at a rent much less than its rental value, the reduction being a concession on freight charges, is an illegal preference or advantage and invalid; but the railroad company

was held not to be precluded from maintaining a suit for a cancellation of the lease at the end of the five year term, the renewal being executory. The company was held not entitled to an accounting for rents accrued prior to the commencement of the suit.

Railway Co. v. Hirsch, 204 Fed. 849 (C. C. A. 1913).

Section 568. (Giving rebate or concession.) Whoever, being a person, firm or corporation, knowingly accepts or receives a rebate, concession or discrimination in respect to transportation of property wholly within this state or for service in connection therewith, whereby such property by false billing, false classification, false weighing or other device, is transported at a less rate than that named in the published tariffs in force, or whereby any service or advantage is received other than that therein specified, shall be fined not less than fifty dollars nor more than one thousand dollars. (April 2, 1906, 98 v. 355, § 24; R. S. Sec. 244-34.)

See notes to § 510.

Section 569. (Punitive damages.) If a railroad does, causes or permits to be done any matter, act or thing in this chapter prohibited or declared to be unlawful, or omits to do an act, matter or thing required to be done by this chapter, such railroad shall be liable to the person, firm, or corporation injured thereby in treble the amount of damages sustained in consequence of such violation. A recovery provided by this section shall not affect a recovery by the state of the penalty prescribed for such violation. (April 2, 1906, 98 v. 355, § 25; R. S. Sec. 244-35.)

A railroad is not liable in treble damages for charging the rate which has been established and scheduled, although such rate may be unjust or discriminatory.

Warner v. Railway, 11 N. P. n. s. 487 (C. P. 1911).

Section 570. (Penalty for refusal to fill blanks.) Whoever, being an officer, agent or employe of a railroad company, wilfully fails or refuses to fill out and return a blank required by the commission, or by law, or wilfully fails or refuses to answer a question therein propounded, or knowingly gives false answer to such question or evades the answer to it, if the fact inquired of is within his knowledge, or, upon proper demand, wilfully fails or refuses to exhibit a book, paper or account of such railroad, which is in his possession or under his control, to a member of the railroad commission or other person authorized to examine it, shall be fined not less than one hundred dollars nor more than one thousand dollars; and a penalty of not less than five hundred

dollars nor more than one thousand dollars shall be recovered from the railroad for each such offense when such officer, agent or employe acted in obedience to the direction, instruction or request of such railroad or a general officer thereof. (April 2, 1906, 98 v. 356, § 26; R. S. Sec. 244-36.)

Section 571. (Forfeiture for failure or neglect to comply with this chapter.) If a railroad fails or refuses to perform a duty enjoined upon it by the provisions of this chapter or does any act prohibited by such provisions, for which no penalty has been provided by law, or fails, neglects or refuses to obey a lawful requirement or order made by the commission or order of any court upon its application for each violation, failure, or refusal, such railroad shall forfeit and pay into the state treasury not less than one hundred dollars nor more than ten thousand dollars. In construing and enforcing the provisions of this section, the act, omission or failure of any officer, agent or other person acting for or employed by a railroad, while acting within the scope of his employment, shall be the act, omission or failure of the railroad. (April 2, 1906, 98 v. 356, § 27; R. S. Sec. 244-37.)

Section 572. (Power of commission to regulate in cases not designated.) If, after hearing and investigation as provided by this chapter, the commission finds any charge, regulation or practice affecting the transportation of passengers or property, or any service in connection therewith, not heretofore specifically designated, unreasonable or unjustly discriminatory, it may regulate it as herein provided in such cases. (April 2, 1906, 98 v. 356, § 28; R. S. Sec. 244-38.)

See § 535.

Section 573. (Duty of railroad to report certain accidents.) Whenever an accident attended with loss of human life occurs within this state upon the line of any railroad or on the depot grounds or yards thereof, such railroad shall give immediate notice thereof to the commission. (April 2, 1906, 98 v. 356, § 29; R. S. Sec. 244-39.)

Section 574. (Duty of the commission to investigate such accident.) In case of such accident, the commission, if it deems the public interest requires it, shall cause an investigation to be made forthwith, which shall be held in the locality of the accident, unless, for greater convenience of those concerned, it shall order it held at some other place. Such

investigation may be adjourned from place to place as it may be found necessary and convenient. The commission shall give reasonable notice to an officer or station agent of the company of the time and place of the investigation. (April 2, 1906, 98 v. 356, § 29; R. S. Sec. 244-39.)

Section 575. (Costs of investigation.) The cost of such investigation shall be certified by the chairman of the commission, and audited and paid by the state as other expenses. A record or file of the proceedings and evidence shall be kept by the commission. (April 2, 1906, 98 v. 357, § 29; R. S. Sec. 244-39.)

Section 576. (Commission shall inquire into violation of laws.) The commission shall inquire into any neglect or violation of the laws of this state by a railroad doing business in this state, by its officers, agents or employes or by any person operating a railroad. It shall enforce the provisions of this chapter, as well as all other laws relating to railroads and report violations thereof to the attorney general. (April 2, 1906, 98 v. 357, § 30; R. S. Sec. 244-40.)

Section 577. (Counsel for commission.) Upon request of the commission, the attorney general or the prosecuting attorney of the proper county shall aid in an investigation, prosecution, hearing or trial had under the provisions of this chapter, and shall institute and prosecute necessary actions or proceedings for the enforcement of such provisions and of other laws of this state relating to railroads and for the punishment of all violations thereof. (April 2, 1906, 98 v. 357, § 30; R. S. Sec. 244-40.)

Section 578. (Action for forfeiture by attorney general.) An action for the recovery of a forfeiture provided for in this chapter, when prosecuted by the attorney general, may be brought in the court of common pleas of Franklin county, or of any county having jurisdiction of the defendant. (April 2, 1906, 98 v. 357, § 30; R. S. Sec. 244-40.)

Section 579. (Damage claims. Verification. Burden of proof.) All claims, charges or demands against a railroad for loss of, or damage to property occurring while in the custody of such railroad and unreasonable delay in transportation and delivery, or for overcharges upon a shipment, or for any other service in violation of this chapter, if not paid within sixty days from the date of the filing thereof with such railroad, may be submitted to the commission by

a formal complaint to be made upon blank forms which it is hereby made the duty of the commission to provide upon demand of the claimant. Such complaint shall be verified as petitions in civil actions and may be accompanied by the sworn statements of any witnesses who have knowledge of any fact material to the inquiry. Upon the filing of such complaint the commission shall forthwith cite the railroad to answer the complaint, and the citation shall be accompanied with a brief statement of the claim. The answer of the railroad shall be filed within three weeks from the service of the citation and shall be verified as answers in civil cases and may be accompanied with the affidavits of any witnesses having knowledge of facts material to the inquiry. The burden of proof shall be upon the railroad to show that loss or damage to property was not due to its negligence. The railroad to which property is delivered for shipment shall *prima facie* be liable for loss or damage occurring to such property in transit notwithstanding it may be delivered to other railroads before reaching its destination. The claim referred to in this section for loss of or damage to property may be made to any carrier over whose lines the lost or damaged property has been consigned, and such claimant may at his option join all of such railroads as parties defendant in his complaint before said commission. The railroad shall furnish the claimant with a copy of its answer and affidavits, if any, and within two weeks from the filing of such answers the claimant may file his reply with affidavits in support thereof, verified as replies in civil cases. At the expiration of said period of two weeks the commission shall proceed summarily to examine the complaint, answer, the reply and affidavits and shall determine the existence and validity of the claim presented. If it find in favor of the claimant it shall certify its findings to the clerk of the court of common pleas of the county in which the claimant resides or where the railroad or any of its offices is maintained. (May 9, 1910, 101 v. 173; R. S. Sec. 244-41; April 21, 1908, 99 v. 130, § 31; April 2, 1906, 98 v. 357, § 31.)

This section is constitutional. *Railway v. Mills Bros.*, 101 O. S. 173 (1920).

A charge higher than that made for a transportation of the same commodity for an equal or greater distance over the same connecting lines under former § 8988 is an "overcharge" within the meaning of § 579. *Railway v. Mills Bros.*, 101 O. S. 163 (1920).

A finding by the commission under this section is not a judgment, but merely provides *prima facie* evidence in favor of the claim, which the railroad company may contest in the court to which the finding is certified. *Taylor Williams Co. v. Commission*, 97 O. S. 224 (1918).

Where, under a former statute, suit was brought to reverse an order of the commission, and the order was suspended by the court

upon the giving of a bond by the railroad company, and after suspension the former rate was collected, the remedy of the shipper is by suit, and not by complaint, to the commission under § 579. *Taylor Williams Co. v. Commission*, 97 O. S. 224 (1918).

The remedy provided by this section and § 580 is cumulative and not exclusive. A shipper may sue at common law to recover damages for delay. *Wright v. Erie Railroad*, 14 Ohio App. 217 (1921).

Remedy for overcharges under former §§ 614-69 and 614-70, see *Big 4 Coal Co. v. H. V. Ry.*, 31 O. C. A. 33 (1919). Motion to certify record overruled.

The commission has no power to award damages for the violation of a contract to make stops at a platform.

Ashley v. Sandusky, etc., Co., 5 O. L. R. 359; 52 B. 498 (Railroad Commission).

A carrier is liable for negligence in weighing coal and in furnishing incorrect weight certificates to shipper.

Nimishilling, etc., v. C. T. & V. R. R., 5 O. L. R. 455; 52 B. 569.

Consignor is real party in interest, when.

Hisylvania Coal Co. v. T. & O. C. Ry., 7 O. L. R. 467.

Compare State v. Mullin 78 O. S. 358.

Exemption from liability, in bill of lading. A carrier can not, by contract exempt itself from liability for negligence.

Hisylvania Coal Co. v. T. & O. C. Ry., 7 O. L. R. 467.

Section 580. (Immediate trial. Costs.) Within thirty days from the receipt of such findings by said clerk, the railroad may by motion cause the same to be docketed as a civil action in said court in which case the original pleadings shall be used and the case shall be advanced for immediate trial. If no such motion is filed the clerk shall enter up the finding of the commission as a judgment and the same shall be in all respects treated as a judgment at law with all the incidents thereof and upon which execution may issue as in other cases. If said matter is docketed for trial the action shall proceed as in other civil actions for damages except that upon trial thereof a copy of the findings and order of the commission, duly certified by the secretary thereof, shall be competent testimony and shall be prima facie evidence of the facts therein stated, and except that the plaintiff shall not be liable for any costs unless they accrue upon his appeal. (May 9, 1910, 101 v. 174; R. S. Sec. 244-41; April 21, 1908, 99 v. 130, § 31; April 2, 1906, 98 v. 357, § 31.)

The act of the clerk in entering up the finding of the commission as a judgment is ministerial and not judicial. This section does not confer judicial power upon the clerk, and is constitutional. *Railway Co. v. Cluster Co.*, 97 O. S. 140 (1918).

Section 581. (Construction to be placed on provisions of this chapter.) A substantial compliance by the commission with the requirements of this chapter shall be sufficient to give effect to all its rules, orders, acts and regulations, and

they shall not be declared inoperative, illegal or void for an omission of a technical nature in respect thereto. Nothing in this chapter shall be construed as affecting, modifying or repealing any law, fixing the rate which a company operating a railroad may demand and receive for the transportation of passengers. (April 2, 1908, 98 v. 357, §§ 32, 38; R. S. Sec. 244-42.)

Section 582. (Forfeiture shall be cumulative.) All forfeitures accruing under this chapter shall be cumulative, and a suit for and recovery of one shall not bar the recovery of any other forfeiture. (April 2, 1906, 98 v. 358, § 33; R. S. Sec. 244-43.)

Section 583. (Actions by mandamus, etc., in certain cases.) In addition to the other remedies provided in this chapter for the prevention and punishment of violations of the provisions thereof and orders of the commission, the commission may compel compliance with such provisions and its orders by proceedings in mandamus, injunction, or by other appropriate civil remedies. (April 2, 1906, 98 v. 358, § 34; R. S. Sec. 244-44.)

Section 584. (Sections of this chapter independent.) Each section of this chapter and every part thereof is hereby declared to be an independent section, and part of a section, and the holding of a section or part thereof to be void or ineffective for any cause shall not be deemed to affect any other section or part thereof. (April 2, 1906, 98 v. 358, § 37; R. S. Sec. 244-47.)

TRACKS AND CROSSINGS.

Section 585. (Duty of commission as to dangerous track, bridges, etc.) If, on complaint or otherwise, the commission has reasonable grounds to believe that any of the tracks, bridges, or other structures of a railroad are in a condition which renders them dangerous or unfit for the transportation of passengers, it shall forthwith inspect and examine them, and, if of opinion that they are unfit for the transportation of passengers with safety, it shall immediately give to the superintendent, or other executive officer of the company operating such road, notice of the condition thereof, and of the repairs or reconstruction necessary to place them in a safe condition. The commission may prescribe the time within which such repairs or reconstruction must be made,

and the rate of speed for trains passing over such dangerous or defective track, bridge or other structure, until the repairs or reconstruction required are made. If of opinion that it is needful and proper, it may forbid the running of passenger trains over such defective track, bridge or other structure. (R. S. Sec. 247; April 5, 1867, 64 v. 111, § 6, S. & S. 77.)

Section 586. (Penalty for neglect to repair defective track, etc.) Whoever, being the superintendent or other executive officer of a company operating a railroad, receives from the railroad commission notice of a prescribed rate of speed for trains passing over a defective track, bridge or other structure, or forbidding the running of passenger trains over such defective track, bridge or other structure, neglects for two days after receiving such notice to direct the proper subordinate officers to run the passenger trains over such defective track, bridge or other structure, at a speed not greater than that so prescribed, or, if the running of a passenger train is so forbidden, to stop running passenger trains over it, or, an engineer, conductor or other employe who knowingly disobeys such order shall be fined not exceeding five hundred dollars or imprisoned in the county jail not exceeding one year, or both. (R. S. Sec. 247; April 5, 1867, 64 v. 111, § 6; S. & S. 77.)

Section 587. (Forfeiture in case of noncompliance.) If the company operating such road neglects or without good cause fails to make the repairs or reconstruction prescribed by the commission within the time limited by it, for each day that such repairs or reconstruction is delayed beyond the time prescribed, such company shall forfeit and pay to the state the sum of one hundred dollars. (R. S. Sec. 247; April 5, 1867, 64 v. 111, § 6; S. & S. 77.)

Section 588. (Gates, bells, devices, or flagmen at crossing.) If, in its opinion, the public safety requires that a gate or gates, automatic alarm-bell, or other mechanical device be erected and maintained at any place where a public road or street is crossed at the same level by a railroad, and the crossing has been declared by the commission to be dangerous, or the public safety requires that a flagman be stationed and maintained at such dangerous crossing, the commission shall give the superintendent, manager or other officer in charge of such railroad, a written notice of what is required, and such company, person or corporation owning or operating such railroad shall erect such mechanical device or sta-

tion such flagman within the time prescribed by the commission. (R. S. Sec. 247a; April 15, 1889, 86 v. 367; May 19, 1894, 91 v. 353.)

This section requires flagmen to be maintained only at crossings which have been found dangerous to the public.

Akron, etc., Co. v. Erie R. R. Co., 7 C. C. n. s. 199; 18 C. D. 36.

This section does not relieve the company from liability for failure to adopt such precautions as the circumstances may require, in the absence of an order by the commission. Evans v. Erie R. Co., 213 Fed. 129, 134 (C. C. A. 1914); Railway Co. v. Schneider, 45 O. S. 678; Weaver v. Railway Co., 76 O. S. 164, 176.

Gates may be ordered erected only at a crossing of a railroad and a street or road at grade. Railway v. Railway, 5 Ohio App. 151, 25 C. C. n. s. 572 (1916).

Duty of gatemen.

Railway Co. v. Schneider, 45 O. S. 678.

Toledo, etc., Co. v. Fuller, 17 C. C. 562, 571; 9 C. D. 123.

A municipal corporation has no power, by ordinance, to compel a railroad company to maintain a watchman at a street crossing, in the absence of a special statute.

Ravenna v. Penna. Co., 45 O. S. 118.

Section 589. (Forfeiture for failure to comply with notice of commission.) Any person, company, or corporation neglecting or refusing to erect or maintain such gate or gates, automatic alarm-bell or other mechanical device, or to maintain such flagman, when required by the commission, shall forfeit and pay to the state, for every such neglect or refusal, one hundred dollars, and in addition ten dollars for each day such neglect or refusal continues. (R. S. Sec. 247a; May 19, 1894, 91 v. 353; April 15, 1889, 86 v. 367.)

Section 590. (Regulations as to gates, bells, and devices.)

All gates, bells or devices erected under the direction of the commission shall be built within the time, in the manner and of materials approved by the commission. Such gates shall be located in the highway or street on one or both sides of the railroad track or tracks, as the commission deems the public safety requires, and shall be so constructed that when closed, they shall obstruct or prevent passage across such railroad or railroads from the side on which a gate is located. Such bell must be so constructed that it will ring before the approach of every train of cars or locomotive within three hundred feet or more of such crossing, and continue to ring until such train or locomotive has reached the crossing. A person shall be in charge of such gate who shall close it at the approach of each train or locomotive, and keep it open at all other times. If an automatic bell or other mechanical device is required at such crossing, the railroad shall keep such bell or device at all times in good working

order, and for every neglect of duty imposed by this section such railroad shall forfeit and pay the sum of twenty-five dollars. (R. S. Sec. 247b; May 19, 1894, 91 v. 353; April 15, 1889, 86 v. 367.)

Section 591. (Cost of gates, bells, and devices in certain cases.) When two or more railroads cross a public highway or street at a dangerous crossing, the expenses incurred in the erection and maintenance of gates, bells or other device, and of necessary gate-keepers or flagmen shall be shared equally by such railroads; but nothing in this chapter shall prevent the use of automatic bells or other mechanical device by a railroad at a public crossing not declared dangerous by the commission. If a gate is erected or a flagman is stationed and maintained by a railroad, such gate or flagman shall not be abandoned nor an automatic bell or other mechanical device substituted therefor. (R. S. Sec. 247b; May 19, 1894, 91 v. 353; April 15, 1889, 86 v. 367.)

Section 592. (When engines or trains may pass crossings without stopping.) When two or more railroads, or a railroad and an electric railroad, erect a system of interlocking works or fixtures at the place where such railroads cross each other at a common grade, or when a railroad erects such works or fixtures at a swing or draw-bridge where it crosses a stream, and such works or fixtures render it safe for engines or trains to pass over such crossing or bridge without stopping, such railroad or railroads may run engines or trains over such works or fixtures without stopping, and any law to the contrary shall not apply in such case; but such system of interlocking works or fixtures shall have been approved by the commission, and a plan thereof shall have been prepared by such railroad or railroads and filed with the commission. (R. S. Sec. 247d; April 27, 1896, 92 v. 315, § 1.)

See §§ 8826, 8827 and 8833.

Section 593. (Unsafe interlocking works or fixtures.) If in its opinion any such system of interlocking works or fixtures proves to be unsafe or impracticable, the commission may order that no engines or trains shall pass over any such crossing or bridge without stopping, and the laws regulating the running of engines and trains shall apply. Before such order is made or enforced the commission shall give such railroad or railroads opportunity to be heard as to the propriety of the order. (April 27, 1896, 92 v. 315, § 1; R. S. Sec. 247d.)

Section 594. (Safety devices at grade crossings.) When two steam railroads, a steam railroad and an inter-urban, electric or street railway, two inter-urban railroads, or a steam or electric railroad and a street or highway cross at grade, if, in its opinion, public safety requires protection, the railroad commission, upon its own motion or upon complaint, after notice to the railroads interested and full investigation, may make an order requiring the railroads so intersecting and crossing to install such device or devices as in the opinion of the commission will properly protect such crossing. (R. S. Sec. 247e; May 9, 1908, 99 v. 390, § 2; April 27, 1896, 92 v. 315.)

See note to § 597.

Section 595. (Commission may make order as to a crossing.) The railroad commission may make any further or other orders regulating the speed and running of trains or of cars and the switching of cars over such crossing or street, and it shall apportion the expense of installation or maintenance of such device or devices between the railroad companies whose tracks are thus protected. (R. S. Sec. 247e; May 9, 1908, 99 v. 390, § 2; April 27, 1896, 92 v. 315.)

Section 596. (Hearing as to necessity of safety device.) At the time and place named for hearing, unless continued for good cause, the railroad commission shall try the question of whether or not such crossing shall be protected by interlocking or other safety devices and shall give all companies or parties interested an opportunity to be fully heard. (R. S. Sec. 247e; May 9, 1908, 99 v. 390, § 2; April 27, 1896, 92 v. 315.)

Section 597. (What order of commission shall contain.) After such hearing, the railroad commission shall enter upon a record book or docket kept for that purpose an order granting or denying the petition. In case the petition is granted, such order shall prescribe the inter-locking or other safety devices for such crossing and all other matters deemed proper for the efficient protection of such crossing, the proportion of the cost of construction and of the expense of maintaining and operating such device which each company or person concerned shall pay. The order shall also fix the time within which such appliance shall be put in and the time within which such order shall be complied with. (R. S. Sec. 247e; May 9, 1908, 99 v. 390, § 2; April 27, 1896, 92 v. 315.)

When one railway company desires to cross the tracks of another railway company, it is competent for the companies to agree between themselves upon the terms of crossing, including the compensation for the right to cross, the cost of constructing and maintaining an interlocking system, and as to which company shall employ, control and pay the employe by whom the interlocking system is operated. Such a contract is not prohibited by Secs. 594 to 597.

Hydell v. Railway 74 O. S. 138 (1906).

Section 598. (Compulsory interlocking.) If a railroad or electric railroad with its track or tracks shall cross at grade the track or tracks of a railroad or electric railroad previously constructed, the former shall provide at such crossing interlocking works or other fixtures satisfactory to the commission, and pay the costs of such fixtures and the expenses of installing them. The maintenance and operation thereof shall be apportioned equally between the railroads by the commission; but this section shall not apply to crossings of side-tracks only. (R. S. Sec. 247f; April 25, 1898, 93 v. 334, § 3; April 27, 1896, 92 v. 315.)

See Street Railway v. Railway 21 C. C. 391; 12 C. D. 113.

Railway Co. v. Railway Co. 5 N. P. 83; 7 L. D. 558.

Railway Co. v. Traction Co. 1 N. P. n. s. 218; affirmed 4 C. C. n. s. 329, reversed on other grounds, 72 O. S. 429.

Section 599. (Crossing without stopping.) Whenever interlocking works or other fixtures are constructed and maintained in compliance with law by railroads and electric railroads where such road or roads cross each other; engines and trains or cars of an electric railroad may be run over such crossing without stopping; any law to the contrary shall not apply to such case. (April 27, 1896, 92 v. 316, § 4; R. S. Sec. 247g.)

Section 600. (Forfeiture for noncompliance with order.) A railroad or electric railroad refusing or neglecting to comply with an order of the commission, concerning the protection of persons and property from danger at grade crossings of any such railroad over another, or over a swing or draw-bridge and at junction points, by providing interlocking works or other fixtures, shall forfeit and pay five hundred dollars per week for each week such railroad refuses or neglects to obey such orders. Such forfeiture shall be recovered in an action of debt in the name of the state, and, when collected, paid into the treasury of the county in which such suit was brought. (April 27, 1896, 92 v. 317, § 5; R. S. Sec. 247h.)

MISCELLANEOUS.

Section 601. (Examinations into alleged violations of law.) If upon complaint, or otherwise, the commission has reason to believe that a railroad or any officer, agent, or employe thereof has violated or is violating any law of the state, or if it has reason to believe that differences have arisen between citizens of the state and any railroad operating as a common carrier within the state, it shall examine into the matter. (R. S. Secs. 248, 248a; May 18, 1886, 83 v. 206; April 15, 1867, 64 v. 111, § 5; S. & S. 76.)

Section 602. (List of officers and directors must be furnished by railroad or telegraph company.) Within thirty days after the election of the directors of a railroad, or telegraph company, now doing business, or whose line is in process of construction, or which hereafter may be organized in the state, the secretary of such companies shall make and forward to the commission a list of the officers and directors thereof, giving the place of residence and post office address of each. If a change occurs in the organization of the officers or board of directors of a railroad or company, the secretary shall notify the commission of such change and the residence and post office address of each of the officers and directors. (R. S. Sec. 260; April 24, 1873, 70 v. 155, § 1.)

Section 603. (Commission shall be furnished copies of certain leases, contracts, and agreements.) On demand of the commission, each railroad within this state shall furnish it copies of all leases, contracts and agreements with express, sleeping car, freight or rolling stock companies, or other companies doing business upon or in connection with such road. The commission or its duly authorized agent may examine any officer, agent or employe of a railroad or of such other companies, under oath, relative to the stock which he has in any of such companies, and his pecuniary interests direct or indirect therein. (R. S. Sec. 256; May 5, 1873, 70 v. 276, §§ 2, 3.)

Section 604. (Map and profile of new railroad.) Within a reasonable time after the construction of a railroad, or at any time when required by the commission, such railroad shall make and file with the commission a map and profile of such railroad, which shall be drawn on a scale, and certified and signed by the president or engineer of such railroad. (R. S. Sec. 250-1; April 19, 1894, 91 v. 154, § 1.)

Section 605. (Annual statement under oath to commission.) Every railroad company incorporated or doing business in this state, shall file with the commission a full and true statement of the affairs of such corporation relative to the state of Ohio, covering the yearly period fixed by the commission. Such statement shall be made under oath of the proper officers of such corporation and shall be similar in character and detail to the annual report required to be made by railroad companies to the interstate commerce commission. If any such report is defective or erroneous, the commission may order the same to be amended within a prescribed time. Such annual reports shall be preserved in the office of the commission. The commission may, at any time, require specific answers to questions upon which it may desire information. (107 v. 543; R. S. Secs. 244-30, 250-1; April 19, 1894, 91 v. 154, § 1; April 2, 1906, 98 v. 354, § 20.)

Reports of accidents, made by railroad companies under this section, are not admissible in evidence in personal injury actions by employees. C. C. C. & St. L. Ry. Co. v. Ullom 20 C. C. 512; 11 C. D. 321; affirmed no report 64 O. S. 582.

Section 606. (Assessment for maintaining commission, and how apportioned.) For the purpose of maintaining the department of public utilities commission of Ohio, including the payment of salaries, traveling expenses, printing, rent, light, heat, water, telephones and all other overhead expenses, and the exercise of police supervision of railroads and public utilities of the state by it, a sum not exceeding two hundred thousand dollars each year shall be apportioned among and assessed upon the railroads and public utilities within the state, by the commission, in proportion to the intrastate gross earnings or receipts of such railroads and public utilities for the year next preceding that in which the assessments are made.

On or before the first day of August next following, the commission shall certify to the auditor of state the amount of such assessment appropriated by it to each railroad and public utility and he shall certify such amount to the treasurer of state, who shall collect and pay the same into the state treasury to the credit of a special fund for the maintenance of the department of such public utilities commission. (108 (Pt. 1) v. 1151; May 31, 1911, 102 v. 550; April 19, 1894, 91 v. 155, § 2; R. S. Sec. 250-2.)

A utility is not subject to assessment unless it has been in existence during the year in which the assessment is made. Where one utility purchases another utility at the end of the year preceding that in which the assessment is made, the receipts of the selling utility do

not enter into the basis of apportionment of the assessment for the succeeding year. Opins. Atty. Gen. 1921, p. 486.

Section 607. (Penalty.) A railroad company or telegraph company violating a provision of the preceding three sections shall forfeit and pay to the state one thousand dollars, and twenty-five dollars for each day such company refuses, neglects or fails to comply with a requirement of such sections, which forfeiture shall not release such company from the assessment provided in the next preceding section. (April 15, 1894, 91 v. 155, § 3; R. S. Sec. 250-3.)

Section 608. (Commission may pass free over all railroads.) In the performance of its duties, the commission may pass free of charge on all railroads and upon all trains or any part thereof within this state. (R. S. Sec. 250; April 5, 1867, 64 v. 111, § 4; S. & S. 76.)

See § 499-1.

Section 609. (Penalty for refusing to answer questions in examination.) Whoever, being an officer, agent, or employe of a railroad company, refuses to answer a question propounded to him by a member of the commission in the course of an examination authorized by this chapter shall be fined not less than fifty dollars nor more than five hundred dollars. The property of the railroad company of which he is an officer, agent or employe, shall be liable to be taken in execution to satisfy the fines and costs in such cases. (R. S. Sec. 259; May 5, 1873, 70 v. 276, § 3.)

Section 610. (Form of action for forfeitures and penalties.) Unless otherwise provided by law, all prosecutions against a railroad or telegraph company or an officer, agent or employe thereof for forfeitures under the provisions of this chapter and other provisions of law shall be by civil action in the name of the state. All prosecutions for penalties involving imprisonment shall be by indictment. (R. S. Sec. 262; April 25, 1893, 90 v. 299; April 5, 1867, 64 v. 111, § 7; May 5, 1873, 70 v. 276, § 3.)

Section 611. (Action for forfeiture by prosecuting attorney.) If the commission, the officer requested by it, or a city solicitor, when the cause of action arises in a municipality, fails or neglects to prosecute a civil action for forfeiture against a railroad, telegraph company, officer, agent or employe thereof as provided by law, the prosecuting attorney of the county in which a cause of action for for-

feiture arises, upon the request of any taxpayer thereof, and on being furnished with evidence which in his judgment will sustain it, shall bring such action. If such action fails the costs thereof shall be adjudged against the county. (R. S. Sec. 263; April 25, 1893, 90 v. 299; April 5, 1867, 64 v. 111, § 8.)

Section 612. (Action for forfeiture by city solicitor.)

If a cause of action for forfeiture arises within a municipality, and the commission, the officer requested by it or the prosecuting attorney as above provided, fails or neglects to prosecute such action, the city solicitor of such municipality, when required by resolution of the council, shall institute such action and prosecute it to final judgment. If such action fails, the costs therefore shall be adjudged against the municipality. The time for notice of appeal and giving a bond shall not apply to cases within the meaning of this and the preceding section. (R. S. Sec. 263; April 25, 1893, 90 v. 299; April 5, 1867, 64 v. 111, § 8.)

Section 613. (Moneys arising from prosecutions and actions for forfeiture.) All moneys arising from prosecutions or from actions for forfeiture in the name of the state against a railroad or telegraph company, or against an officer or employee thereof, for violations of the provisions of law relating to railroads or telegraph companies shall be paid into the state treasury. (R. S. Sec. 265; April 5, 1867, 64 v. 111, § 7.)

PUBLIC UTILITIES

Section 614-2. (Definition of terms.) The following words and phrases used in this act unless the same is inconsistent with the text shall be construed as follows:

The term "commission" when used in this act, or in chapter one, division two, title three, part first of the General Code and the acts amendatory or supplementary thereto means "The Public Utilities Commission of Ohio."

The term "commissioner" means one of the members of such commission.

Any person, or persons, firm or firms, co-partnership or voluntary association, joint stock association, company or corporation, wherever organized or incorporated:

When engaged in the business of transmitting to, from, through or in this state, telegraphic messages, is a telegraph company;

When engaged in the business of transmitting to, from, through or in this state, telephonic messages, is a telephone company and as such is declared to be a common carrier;

When engaged in the business of carrying and transporting persons or property or both, in motor propelled vehicles of any kind whatsoever, for hire, over any public street, road or highway in this state except as hereinafter provided in section 614-84, is a motor transportation company and as such is declared to be a common carrier. The term "motor propelled vehicle" when used in this chapter means any automobile, automobile truck, motor bus, or any other self-propelled vehicle not operated or driven upon fixed rails or track;

When engaged in the business of supplying electricity for light, heat or power purposes to consumers within this state, is an electric light company;

When engaged in the business of supplying artificial gas for lighting, power or heating purposes to consumers within this state, is a gas company;

When engaged in the business of supplying natural gas for lighting, heating or power purposes to consumers within this state, is a natural gas company;

When engaged in the business of transporting natural gas or oil through pipes or tubing, either wholly or partly within this state, is a pipe line company;

When engaged in the business of supplying water through pipes or tubing, or in a similar manner to consumers within this state, is a water works company;

When engaged in the business of supplying water, steam or air through pipes or tubing to consumers within this state for heating or cooling purposes, is a heating or cooling company;

When engaged in the business of supplying messengers for any purpose, is a messenger company;

When engaged in the business of signalling or calling by an electrical apparatus, or in a similar manner, for any purpose, is a signalling company;

When engaged in the business of operating, as a common carrier a railroad, wholly or partly within this state with one or more tracks upon, along, above or below any public road, street, alley way or ground, within any municipal corporation, operated by any motive power other than steam, and not a part of an interurban railroad, whether such railroad be termed street, inclined plane, elevated, or underground railroad, is a street railroad company;

When engaged in the business of operating as a common

carrier whether wholly or partially within this state, a part of a street railway constructed or extended beyond the limits of a municipal corporation, and not a part of an interurban railroad is a suburban railroad company;

When engaged in the business of operating a railroad, wholly or partially within this state, with one or more tracks from one municipal corporation or point in this state to another municipal corporation or point in this state, whether constructed upon the public highways or upon private rights-of-way, outside of municipalities, using electricity or other motive power than animal or steam power for the transportation of passengers, packages, express matter, United States mail, baggage and freight, is an interurban railroad company, and included in the term "railroad" as used in section 501 of the General Code. The term "railroad," when used in this act, includes all railroads, interurban railroad companies, express companies, freight line companies, sleeping car companies, equipment companies, car companies, water transportation companies, and all persons and associations of persons, whether incorporated or not, operating such agencies for public use in the conveyance of persons or property within this state. (110 v. 212; 109 v. 301; 102 v. 552, § 3.)

Definitions in tax commission act. See § 5416.

Public service commission superseded by the public utilities commission, G. C. § 499-7.

In enacting the public service commission act (102 v. 552), it was the intention of the legislature to keep alive all of the former powers, prerogatives, jurisdiction and purposes of the previous railroad commission act.

Rep. Atty. Gen. 1911-1912 p. 712.

The mere fact that a corporation sells its entire product to public utilities which in turn resell to consumers, does not make the corporation a public utility. *Ohio Mining Co. v. Commission*, 106 O. S. 138 (1922).

But under some circumstances the business of a producing gas company and of a distributing company may be held to constitute a single enterprise, subject to control by the commission. *Ohio Mining Co. v. Commission*, 106 O. S. 138 (1922).

Equipment company. A corporation organized to acquire and furnish cars with equipment attached, to railroads, to enable the railroads to test the equipment, with the ultimate purpose of selling or leasing the equipment to the railroads, is an equipment company. Rep. Atty. Gen. 1912, p. 664.

Natural gas company. A corporation organized to drill gas wells on leased property, furnishing a part of the gas to the owner of the property, and selling the surplus, not to consumers, but to a distributing gas company, is not a public utility. Rep. Atty. Gen. 1912, p. 663.

Section 614-2a. ("Public utility" defined.) The term "public utility" as used in this act, shall mean and include every corporation, company, co-partnership, person or association, their lessees, trustees or receivers, defined in the next preceding section, except such public utilities as operate their utilities not for profit, and except such public utilities as are, or may hereafter be owned or operated by any municipality, and except such utilities as are defined as "railroads" in sections 501 and 502 of the General Code and these terms shall apply in defining "public utilities" and "railroads" wherever used in chapter one, division two, title three, part first of the General Code and the acts amendatory or supplementary thereto or in this act. (May 31, 1911, 102 v. 552, § 4.)

The construction of a private telephone line and station for the use of a number of persons associated together for that purpose does not constitute a public utility, and the persons using such a line are not subject to control by the public service commission.

Gratiot etc. Co. v. Brownsville etc. Co. 15 C. C. n. s. 508 (1912); affirming 13 N. P. n. s. 429; aff'd, no rep. 89 O. S. 418; Mutual Tel. Co. v. Telephone Co., 92 O. S. 336 (1915).

A mutual telephone company operating on the assessment plan does not become a public utility by renting telephones to the county at actual cost. Opins. Atty. Gen. 1917, p. 1146.

A mutual telephone company, incorporated not for profit, but which furnishes services to nonmembers and charges therefor, is a public utility, and subject to control by the commission. Celina Co. v. Mutual Co., 102 O. S. 487 (1921); Rep. Atty. Gen. 1912, p. 645.

A building company which is authorized by its articles to, and does, furnish electric current to consumers other than tenants of the building, is a public utility under § 614-2a. Rep. Atty. Gen. 1912, p. 646.

A building company which furnishes electric current to tenants for light and power, charging each tenant a higher rate than the building company itself pays therefor, is a public utility. Rep. Atty. Gen. 1913, p. 698.

Electric light company. A corporation organized for the sole purpose of furnishing electric current, heat and water to a group of manufacturing plants, which does not use streets, nor exercise the power of eminent domain, nor serve the general public, its stock being owned by the factories in proportion to the service supplied by each, is not a public utility. State v. Factory Power Co., 16 N. P. n. s. 545 (1915).

Dissolution of public utility company. A public utility corporation may be dissolved under § 11938. In re Mansfield Co., 21 C. C. n. s. 193, 223 (1914).

Section 614-3. (Jurisdiction to regulate "public utilities" and "railroads.") The public service commission of Ohio is hereby vested with the power and jurisdiction to supervise and regulate "public utilities" and "railroads" as herein

defined and provided and to require all public utilities to furnish their products and render all services required by the commission, or by law. (May 31, 1911, 102 v. 552, § 5.)

This act provides an adequate remedy for discrimination and unjust or unreasonable rates and classifications, and courts have no original jurisdiction with reference thereto.

Publishing Co. v. Express Co. 13 N. P. n. s. 403 (1911).

The commission has no power to regulate a corporation which is not a public utility; but a contract of a nonpublic utility corporation which involves the rates and charges which a public utility must receive in order to earn a fair return on its investment may, under some circumstances, be investigated and adjudged to be just and reasonable to the utility or otherwise. *Ohio Mining Co. v. Commission*, 106 O. S. 138 (1922).

Section 614-4. (Powers of commission.) The jurisdiction, supervision, powers and duties of the public service commission shall extend to every public utility and railroad, the plant or property of which lies wholly within this state and when the property of a public utility or railroad lies partly within and partly without this state to that part of such plant or property which lies within this state, and to the persons or companies owning, leasing or operating the same, and to the records and accounts of the business thereof done within this state. (May 31, 1911, 102 v. 552, § 6.)

The commission is a board of special and limited jurisdiction and has only those powers which are conferred by statute. *Cincinnati v. Commission*, 96 O. S. 270 (1917); *Staver v. Gas Co.*, 13 Ohio App. 276, 31 O. C. A. 554 (1920).

The commission is not authorized to change rates fixed by a valid franchise contract with a municipality. § 614-47; *Interurban Ry. v. Commission*, 98 O. S. 287 (1918); *Columbus v. Telephone Co.*, 13 Ohio App. 232; 28 O. C. A. 102 (1917); *Columbus v. Commission*, 103 O. S. 79 (1921).

Section 614-5. (Rules governing proceedings.) The commission shall have power to adopt and publish rules to govern its proceedings and to regulate the mode and manner of all valuations, tests, audits, inspections, investigations and hearings which shall be open to the public. (May 31, 1911, 102 v. 552, § 7.)

Section 614-6. (Examination of witnesses and production of records.) The commission shall have power, either through its members or by inspectors or employees duly authorized by it, to examine under oath, at any time and for assisting the commission in the performance of any powers or duties of the commission, any officer, agent or employee of any public utility or railroad or any other person, in relation to the business and affairs of such utility and to compel

the attendance of such witness for the purpose of such examination. In case of disobedience on the part of any person or persons to comply with any order relating to the production or examination of books, contracts, records, documents and papers or in case of the refusal of any person to testify to any matter regarding which he may be lawfully interrogated by any such member, employe or inspector of the commission at any time or place, it shall be the duty of the common pleas court of any county or any judge thereof, on application of any member of the commission, to compel obedience by contempt proceedings as in the case of the disobedience of the requirements of a subpoena issued from such court or a refusal to testify therein. (May 31, 1911, 102 v. 552, § 8.)

Section 614-7. (Examination of records.) The commission shall have power, either through its members or by inspectors or employes duly authorized by it, to examine all books, contracts, records, documents and papers of any public utility, and by subpoena duces tecum to compel the production thereof, or of duly verified copies of the same or any of them, and to compel the attendance of such witnesses as the commission may require to give evidence at such examination. (May 31, 1911, 102 v. 552, § 9.)

Section 614-8. (General supervision.) The commission shall have general supervision over all public utilities within its jurisdiction as hereinbefore defined, and shall have the power to examine the same and keep informed as to their general condition, their capitalization, their franchises and the manner in which their properties are leased, operated, managed, and conducted with respect to the adequacy or accommodation afforded by their service, and also with respect to the safety and security of the public and their employes, and with respect to their compliance with all provisions of law, orders of the commission, franchises and charter requirements. The commission, either through its members or inspectors or employes, duly authorized by it, may enter in or upon, for the purpose of inspection, any property, equipment, building, plant, factory, office, apparatus, machinery, device and lines of any public utility. (May 31, 1911, 102 v. 553, § 10.)

The commission has no power to enforce the provisions of a street franchise granted by a municipal corporation. This section authorizes the commission to examine franchises, etc., for the purpose of information as to capitalization, general conditions, etc. Rep. Atty. Gen. 1913, p. 696.

Section 614-9. (May require copy of contract.) Every public utility shall file with the commission, when and as required by it, a copy of any contract, agreement or arrangement, in writing, with any other public utility relating in any way to the construction, maintenance or use of its plant or property, or any service, rate or charge. (May 31, 1911, 102 v. 553, § 11.)

Section 614-10. (System of accounts. Form of records. Changes in accounts.) The commission may establish a system of accounts to be kept by public utilities, or classify utilities and prescribe a system of accounts for each class and prescribe the manner in which such accounts shall be kept. Such system shall when practicable conform to the system prescribed by the tax commission of Ohio. It may also, in its discretion, prescribe the form of records to be kept by public utilities, and the commission may require that no other records be kept except as may be required by the laws of the United States or as may hereafter be required by the laws of this state. The commission shall, at all times, have access to all accounts kept by public utilities, and may designate any of its officers or employes to inspect and examine any and all such accounts.

The commission, may, if it shall determine that any expenditures or receipts have been improperly charged or credited, order the necessary changes in such accounts. (May 31, 1911, 102 v. 553, § 12.)

Section 614-11. (Penalty for divulging information.) Except in his report to the commission or when called on to testify in any court or proceeding, any such employe or agent who shall divulge any information acquired by him in respect to the transaction, property, or business of any public utility, while acting or claiming to act as such employe or agent shall be fined not less than fifty dollars, and not more than one hundred dollars, and shall thereafter be disqualified from acting as agent, or in any other capacity under the appointment or employment of the commission. (May 31, 1911, 102 v. 553, § 13.)

Section 614-12. (Unreasonable charge prohibited.) Every public utility shall furnish necessary and adequate service and facilities which shall be reasonable and just, and every unjust or unreasonable charge for such service is prohibited and declared to be unlawful. (May 31, 1911, 102 v. 553, § 14.)

Section 614-13. (Facilities and charges.) Every public utility shall furnish and provide with respect to its business such instrumentalities and facilities as shall be adequate and in all respects just and reasonable. All charges made or demanded for any service rendered, or to be rendered, shall be just and reasonable, and not more than allowed by law or by order of the commission. Every unjust or unreasonable charge made or demanded for any service, or in connection therewith, or in excess of that allowed by law or by order of the commission, is prohibited and declared to be unlawful. (May 31, 1911, 102 v. 554, § 15.)

A physician who maintains an office in his residence, which is owned by his wife, cannot compel installation of a phone in the living apartments, unless he agrees to pay office rates, in a proceeding brought in his own name. In a proceeding brought by his wife, the rates will depend on whether the phone is used for professional business. *Plummer v. Telephone Co.*, 13 O. L. R. 79. See also notes to § 9191.

Section 614-14. (Rebates, special rates, free service, etc., prohibited.) No public utility shall directly or indirectly, or by any special rate, rebate, drawback or other device or method, charge, demand, collect or receive from any person, firm, or corporation, a greater or less compensation for any services rendered, or to be rendered, except as provided in this act, than it charges, demands, collects, or receives from any other person, firm, or corporation for doing a like and contemporaneous service under the same, or substantially the same circumstances and conditions. Nor shall free service or service for less than actual cost be furnished for the purpose of destroying competition, and such free service and every such charge is prohibited and declared unlawful. (May 31, 1911, 102 v. 554, § 16.)

See *State v. Union etc. Co.* 13 C. C. n. s. 12 (1910).

Nivison etc. Co. v. Union etc. Co. 7 O. L. R. 243 (1909).

The words "any person, firm or corporation" do not include a county. *Opins. Atty. Gen.* 1917, p. 788.

Section 614-15. (Undue advantage.) No public utility shall make or give any undue or unreasonable preference or advantage to any person, firm, corporation, or locality, or subject the same to any undue or unreasonable prejudice or disadvantage in any respect whatsoever. (May 31, 1911, 102 v. 554, § 17.)

A consumer can not enforce a private contract for a rate less than the scheduled rate. *Glass Co. v. Power Co.*, 11 Ohio App. 80;

29 O. C. A. 265 (1918); motion to certify record overruled, 16 O. L. R. 364; 11 Dept. Rep. 121. See also note to § 614-19.

Section 614-16. (Printed schedules of rates must be filed.) Every public utility shall print and file with the commission, within ninety days after this act takes effect, schedules, showing all rates, joint rates, rentals, tolls, classifications and charges for service of each and every kind by it rendered or furnished, which were in effect at the time this act takes effect and the length of time the same has been in force, and all rules and regulations in any manner affecting the same. Such schedules shall be plainly printed and kept open to public inspection. The commission shall have power to prescribe the form of every such schedule, and may, from time to time, prescribe, by order, changes in the form thereof. The commission may establish rules and regulations for keeping such schedule open to public inspection, and may, from time to time, modify the same. A copy of such schedules or so much thereof as the commission shall deem necessary for the use and information of the public, shall be printed in plain type and kept on file or posted in such places and in such manner as the commission may order. (May 31, 1911, 102 v. 554, § 18.)

See notes to §§ 505 and 506.

This section does not apply to rates fixed by municipal ordinance under §§ 3644, 3982 and 3983, nor to rates fixed by the commission on appeal from such ordinance. *Cleveland v. Commission*, 100 O. S. 121 (1919); *Universal Co. v. Ohio Northern Co.*, 13 Ohio App. 271 (1919); motion to certify record overruled, 17 O. L. R. 475.

Where a municipal ordinance fixed a rate for gas, but a referendum petition was filed which suspended the operation of the ordinance, the commission is not authorized to summarily fix a rate for the period of the suspension. Such circumstances do not constitute an emergency contemplated by § 614-32. The rate should be fixed under § 614-16 et seq. *Cincinnati v. Commission*, 96 O. S. 270 (1917).

Schedules filed with the interstate commerce commission, so long as in force, have the effect of statutes and are binding upon shipper and carrier alike. *Carlin Co. v. Hines*, 107 O. S. 328.

A rate or rule which is in violation of a statute is not validated by insertion in schedules which are filed and published. *Railway v. Mills Bros.*, 101 O. S. 173 (1920); *Railroad v. Steinberg*, 94 O. S. 189 (1916).

Where a telegraph company had filed schedules for "baseball ticker service" in one city only, the commission refused to consider a complaint as to such service in another city, but ordered the company to cease and desist from furnishing such service in other cities until schedules were filed. *Lang v. Tel. Co.*, 16 O. L. R. 27.

A contract by a natural gas company, agreeing to give an inter-urban railway and light company certain quantities of gas in preference to other consumers, is not binding on the commission, where the schedules on file prior to the making of the contract did not provide therefor. *Oberlin v. Gas Co.*, 16 O. L. R. 201.

Section 614-17. (Reasonable arrangements allowed. Approval.) Nothing in this act shall be taken to prohibit a public utility from entering into any reasonable arrangement with its customers, consumers or employes for the division or distribution of its surplus profits or providing for a sliding scale of charges or providing for a minimum charge for service to be rendered, unless such minimum charge is made or prohibited by the terms of the franchise, grant or ordinance under which such public utility is operated, a classification of service based upon the quantity used, the time when used, the purpose for which used, the duration of use, and any other reasonable consideration, or providing any other financial device that may be practicable or advantageous to the parties interested. No such arrangement, sliding scale, minimum charge, classification or device shall be lawful unless the same shall be filed with and approved by the commission. Every such public utility is required to conform its schedules of rates, tolls and charges to such arrangement, sliding scale, classification or other device. Every such arrangement, sliding scale, minimum charge, classification or device shall be under the supervision and regulation of the commission, and subject to change, alteration or modification by the commission. (May 31, 1911, 102 v. 554, § 19.)

Where a price-fixing ordinance providing for a "minimum charge" was appealed to the commission, the commission was held not authorized to add a "readiness to serve" charge. *Gas Co. v. Commission*, 102 O. S. 678 (1920).

Where a gas company accepted an ordinance fixing the price of gas, and prohibiting a charge for meter reading, a "readiness to serve" charge is unauthorized, and cannot be validated by an order of the commission. *Lima v. Commission*, 100 O. S. 416 (1919).

Schedules may contain a classification of service, based on quantity used, time, purpose and duration of use. Certain classification of consumers of electric current held valid. *Cleveland & E. Traction Co. v. Commission*, 106 O. S. 210 (1922).

Section 614-18. (Schedule rate collected. Refunder or remitter not allowed.) No public utility shall charge, demand, exact, receive or collect a different rate, rental, toll or charge for any service rendered, or to be rendered, than that applicable to such service as specified in its schedule filed with the commission and in effect at the time. Nor shall any public utility refund or remit directly or indirectly, any rate, rental, toll or charge so specified, or any part thereof, nor extend to any person, firm or corporation, any rule, regulation, privilege or facility except such as are specified in such schedule and regularly and uniformly extended to all persons, firms and corporations under like

circumstances for the like, or substantially similar, service. (May 31, 1911, 102 v. 555, § 20.)

Section 614-19. (Prior contract.) The furnishing by any public utility of any product or service, at the rates, and upon the terms and conditions provided for in any existing contract, executed prior to the passage of this act, shall not be construed as constituting a discrimination, or undue or unreasonable preference, or advantage within the meaning specified.

Provided, however, that when any such contract or contracts are or become terminable by notice, the commission shall have power, in its discretion, to direct by order, that such contract or contracts shall be terminated as and when directed by such order. (May 31, 1911, 102 v. 555, § 21.)

Contracts made subsequent to June 14, 1911, are subject to the public utilities act. *Patterson Foundry Co. v. Ohio River Co.*, 99 O. S. 429 (1919).

A prior contract does not oust the jurisdiction of the commission as to service furnished by the utility. *Telephone Co. v. Commission*, 92 O. S. 90 (1915).

A contract made prior to the enactment of the public utilities law is not a discrimination or preference, but contracts made thereafter are subject to the supervision of the commission and if in conflict with orders of the commission, are not binding or enforceable. *Traction Co. v. Commission*, 106 O. S. 210 (1922).

Rates fixed in a valid franchise ordinance in effect when the public utilities act was enacted are not subject to the control of the commission. *Columbus v. Telephone Co.*, 13 Ohio App. 232, 28 O. C. A. 102 (1917); *Interurban Railway v. Commission*, 98 O. S. 287 (1918). See *Lakewood v. Cleveland Co.*, 21 N. P. n. s. 289 (1918).

A contract by an interurban railway with a land owner, fixing a rate of fare in consideration of a right of way, was held not abrogated by the subsequent enactment of the railroad commission act. *Taylor v. Niles*, 2 Ohio App. 293, 21 C. C. n. s. 391, 25 C. D. 445 (1913).

A consumer, having a contract with an electric power company at certain rates, was held not entitled to an injunction restraining the company from refusing further service because of the consumer's refusal to pay higher rates approved by the commission. *Glass Co. v. Power Co.*, 11 Ohio App. 80; 29 O. C. A. 265 (1918); motion to certify record overruled, 16 O. L. R. 364.

Section 614-20. (Thirty days' written notice required before change of rate, toll, etc., unless ordered by commission. Powers of commission to enter upon hearing without pleadings filed; notice of suspension of schedule pending hearing extension of time suspending schedule. Rates, tolls, classifications, charges or rentals shall be in force two years. Burden of proof on public utility to show increase rate reasonable; preference over other questions.) Unless otherwise or-

dered by the commission, no change shall be made in any rate, joint rate, toll, classification, charge or rental in force at the time this act takes effect, or as shown upon the schedules which shall have been filed by a public utility in compliance with the requirements of this act, or by order of the commission, except after thirty days' notice, in writing, to the commission, which notice shall plainly state the changes proposed to be made in the schedule then in force, and the time when the change, rate, charge, toll, classification, or rental shall go into effect; and all proposed changes shall be plainly indicated upon existing schedules, or by filing new schedules thirty days prior to the time when they are to take effect, but the commission may prescribe a less time when they may take effect, provided, however, that if the proposed change shall effect an increase in the rate, joint rate, toll, classification, charge or rental, notice, in form approved by the commission, published once each week for three consecutive weeks before the effective date thereof, unless the commission shall authorize a less time, shall be given by publication in a newspaper published at the county seat of each county in which such change applies, and of general circulation therein, or in one newspaper published in, and of general circulation throughout the territory in which such utility operates. Such published notice shall set forth the fact that such application has been made, the effective date of the proposed new schedule, the name and location of the agent of the utility in such county or territory where a copy of such proposed new schedule may be inspected by any interested party; and provided, further, however, that such utility shall at the time of the filing of the schedule with the commission, place on file with such agent of such utility a copy of the proposed new schedule and keep the same on file for the inspection of any interested party pending the hearing before such commission.

Whenever there shall be filed with the commission any schedule effecting an increase in any rate, joint rate, toll, classification, charge or rental, or stating any new regulation or practice affecting any existing rate, joint rate, toll, classification, charge or rental in force at the time this act takes effect, the commission shall have, and it is hereby given authority, either upon complaint or upon its own initiative without complaint, at once, and if it so orders without answer or other form of pleading by the interested public utility, but upon reasonable notice, to enter upon a hearing concerning the propriety of such rate, joint rate, toll, classification, charge, rental, regulation or practice; and pend-

ing such hearing and the decision thereon, the commission upon filing with such schedule and delivering to the public utility affected thereby, a statement in writing of its reasons for such suspension, shall suspend the operation of such schedule and postpone the use and operation of such rate, joint rate, toll, classification, charge, rental, regulation or practice, but not for a longer period than one hundred and twenty days from the time when such schedule was filed with the commission; and after a full hearing, whether completed before or after the rate, joint rate, toll, classification, charge, rental, regulation or practice goes into effect, the commission may make such order in reference to such rate, joint rate, toll, classification, charge, rental, regulation or practice as would be proper in a proceeding initiated after the rate, joint rate, toll, classification, charge, rental, regulation or practice had become effective; provided, that if any such hearing can not be concluded within the period of suspension, as above stated, such rate, joint rate, toll, classification, charge, rental, regulation or practice shall go into effect at the end of such period of suspension upon the public utility filing with the commission a bond, undertaking or other security, to the satisfaction of the commission, securing and guaranteeing the repayment, with interest at the rate of six per centum per annum from the date of payment by the consumer to the date of repayment by the utility, to all the consumers of such portion of such increased rate, joint rate, toll, classification, charge or rental, collected by such utility as the commission, upon final hearing, may determine to have been unreasonable or excessive, which repayments shall be made at such times and in such amounts as the commission shall order, and shall be promptly paid by said utility to the corporations or persons entitled thereto, and in such manner as the commission may prescribe, and if any such money ordered by the commission to be repaid shall not have been claimed by the corporations or persons entitled thereto, within one year from the time the same shall become due and payable in accordance with the order of the commission, all such moneys shall be paid by the utility to the treasurer of the county, or other political subdivision, in which such new schedule is effective for the benefit of its general fund, in such amounts and in such manner as the commission may order; and thereafter such public utility shall not be liable therefor. Such bond, undertaking or security shall be in such amount as the commission may from time to time determine; provided, however, that the amount fixed at any time shall not, in addition to the amount

of such increase or other charge made by the utility already accrued, exceed the estimated amount of such increase or other charge made by the utility extending over a period of one year, based upon the business of the utility for the previous year, or be less than one-half of such estimated amount.

All rates, joint rates, tolls, classifications, charges or rentals of a public utility heretofore or hereafter fixed and determined by any order of the commission under the provisions of this chapter shall be in force and be *prima facie* lawful for two years from their effective date or until changed or modified as provided by law; provided, however, that after any such rate, joint rate, toll, classification, charge or rental shall have been in force for a period of two years, the same may be changed by the public utility affected in the manner provided in this section; and that nothing herein contained shall be construed as in any way affecting the right of any person or public utility to make application, as provided in sections 614-21 and 614-23 of the General Code or otherwise as provided by law, for an order rescinding, altering or amending any order of the commission within said two-year period or thereafter.

At any hearing involving a rate increased or sought to be increased after this section shall have become effective, the burden of proof to show that the increased rate or the proposed increased rate is just and reasonable shall be upon the public utility and the commission shall give to the hearing and decision of such question, preference over other questions pending before it, and decide the same as speedily as possible. (110 v. 364; 108 (Pt. 2) v. 1194; 102 v. 555, § 22.)

A consumer, having a contract with an electric power company at certain rates, was held not entitled to an injunction restraining the company from refusing further service because of the consumer's refusal to pay higher rates approved by the commission. *Glass Co. v. Power Co.*, 11 Ohio App. 80; 29 O. C. A. 265 (1918). Motion to certify record overruled, 16 O. L. R. 364.

Section 614-21. (Complaint. Notice of complaint and time and place of hearing. Rights of parties.) Upon complaint in writing, against any public utility, by any person, firm or corporation, or upon the initiative or complaint of the commission that any rate, fare, charge, toll, rental, schedule, classification or service, or any joint rate, fare, charge, toll, rental, schedule, classification or service rendered, charged, demanded, exacted or proposed to be rendered, charged, demanded, or exacted, is in any respect unjust, unreasonable, unjustly discriminatory, or unjustly preferential or in violation of law, or that any regulation,

measurement or practice affecting or relating to any service furnished by said public utility, or in connection therewith, is, or will be, in any respect unreasonable, unjust, insufficient or unjustly discriminatory or unjustly preferential, or that any service is, or will be, inadequate or can not be obtained, the commission shall notify the public utility complained of that complaint has been made, and of the time and place when the same will be considered and determined, which notice shall be served upon the public utility not less than fifteen days before such hearing, and shall plainly state the matters or things complained of. The commission shall, if it appear that there are reasonable grounds for the complaint, at such time and place proceed to consider such complaint and may adjourn the hearing thereof from time to time. The parties thereto shall be entitled to be heard, represented by counsel and to have process to enforce the attendance of witnesses. A public utility may make complaint as to any matter affecting its own product or service with like effect as though made by a person, firm or corporation, in which event the commission shall publish notice thereof for ten days prior to such hearing in a newspaper of general circulation at the situs of such public utility. (May 31, 1911, 102 v. 556, § 23.)

This section does not apply to rates fixed by municipal ordinance, under §§ 3644, 3982 and 3983, nor to rates fixed by the commission on appeal from such ordinance. *Cleveland v. Commission*, 100 O. S. 121 (1919).

The laws giving the commission power over rates do not deprive the courts of equitable jurisdiction. Where a municipality brought suit to enforce an unaccepted ordinance fixing the rate of gas, an answer of the gas company alleging facts showing the rate to be confiscatory, states a case of which a court of equity has jurisdiction. *State v. Ct. of App.*, 104 O. S. 96 (1922).

Where it is shown that an order, sought in an application filed with the commission, will affect rights which are involved in an action pending in a court of general jurisdiction at the time of the filing of the application, it is the duty of the commission to dismiss the application. *New Bremen v. Commission*, 103 O. S. 23 (1921).

A municipal corporation can not make complaint under this section. 15 O. L. R. 330, 363.

Section 614-22. (Separate hearings.) When complaint is made of more than one rate, charge, or service, the commission may order separate hearings thereon and may consider and determine the matters complained of separately and at such times and places as it may prescribe. No complaint shall necessarily be dismissed because of the absence of direct damage to the complainant. (May 31, 1911, 102 v. 556, § 24.)

Section 614-23. (May fix reasonable rate.) Whenever the commission shall be of the opinion, after hearing, that any rate, fare, charge, toll, rental, schedule, classification or service, or any joint rate, fare, charge, toll, rental, schedule, classification, or service rendered, charged, demanded, exacted or proposed to be rendered, charged, demanded, or exacted, is, or will be, unjust, unreasonable, unjustly discriminatory or unjustly preferential or in violation of law, or the service inadequate, or that the maximum rates, charges, tolls or rentals chargeable by any such public utility are insufficient to yield reasonable compensation for the service rendered, and are unjust and unreasonable, the commission shall, with due regard among other things, to the value of all of the property of the public utility actually used and useful for the convenience of the public, excluding therefrom the value of any franchise or right to own, operate or enjoy the same in excess of the amount, (exclusive of any tax or annual charge) actually paid to any political subdivision of the state or county, as the consideration for the grant of such franchise or right; and exclusive of any value added thereto by reason of a monopoly or merger and to the necessity of making reservation out of the income for surplus, depreciation and contingencies, and all such other matters as may be proper, according to the facts in each case, fix and determine the just and reasonable rate, fare, charge, toll, rental or service to be thereafter rendered, charged, demanded, exacted or collected for the performance or rendition of the service, and order the same substituted therefor; and thereafter, no change in the rate, fare, toll, charge, rental, schedule, classification or service, shall be made, rendered, charged, demanded, exacted or changed by such public utility without the order of the commission and any other rate, fare, toll, charge, rental, classification or service shall be deemed and held to be unjust and unreasonable, prohibited and unlawful. Upon application of any person or any public utility, and after notice to the parties in interest and opportunity to be heard as provided in this act for other hearings, has been given, the commission may rescind, alter or amend an order fixing any rate or rates, fare, toll, charge, rental, classification or service, or any other order made by the commission. Certified copies of such orders shall be served and take effect as provided for original orders. (May 31, 1911, 102 v. 556, § 25.)

This act provides an adequate remedy for discrimination and unjust or unreasonable rates and classifications, and courts have no original jurisdiction with reference thereto.

Publishing Co. v. Express Co. 13 N. P. n. s. 403 (1911).

The commission, and not the municipality in which a telephone company furnishes service, has power to regulate telephone rates. *Telephone Co. v. Cleveland*, 98 O. S. 358 (1918).

The regulation of rates to be charged by a public utility is an exercise of the police power. *Telephone Co. v. Cleveland*, 98 O. S. 358 (1918).

The commission has no power to change rates fixed in a valid franchise contract between a public utility and a municipality. *Interurban Railway v. Commission*, 98 O. S. 287 (1918); *Columbus v. Telephone Co.*, 13 Ohio App. 232; 28 O. C. A. 102 (1917).

Where, during the pendency of a complaint before the commission, an agreement as to rates is effected, and an order is made by the commission establishing the rates as agreed upon, a binding contract is concluded, and the commission has no power to set aside the order and relieve one party from its obligations thereunder. *State v. Marshall*, 98 O. S. 467 (1918).

This section requires the commission, in fixing rates, to consider the value of the property of the utility, necessary or useful for the convenience of the public, and to exclude the value of franchise and monopoly rights, and reserves for surplus, depreciation and contingencies, and to consider other proper matters according to the facts in each case. *Lima Tel. Co. v. Commission*, 98 O. S. 110 (1918).

Valuation may be waived by the complainant and the utility, with the consent of the commission. *Lima v. Commission*, 103 O. S. 501 (1921).

Measured telephone service, authorized by the commission, sustained. *Cleveland v. Commission*, 102 O. S. 341 (1921).

The commission has no power to grant franchises or make contracts between a public utility and other parties. *Oak Harbor v. Commission*, 98 O. S. 275 (1919); *Stuver v. Gas Co.*, 13 Ohio App. 276, 31 O. C. A. 554 (1920).

Federal income tax is a proper operating expense, to be deducted from gross revenue, in determining whether the rates yield reasonable compensation for the service rendered. *Ohio Bell Tel. Co. v. Commission*, 106 O. S. 266 (1922).

Efficient operation is a factor to be considered. *Lima v. Commission*, 106 O. S. 559 (1922).

Fair return on investment as a factor in fixing rates. See *Cincinnati v. Commission*, 105 O. S. 181, 208.

Whether a rule or regulation of a telephone company is reasonable is a question which must be raised before the public utilities commission, before it becomes a judicial question. *Telephone Co. v. Hussey*, 13 O. L. R. 77, 79 (Municipal Court 1915).

Section 614-27. (Power to change rules and prescribe equipment.) Whenever the commission shall be of the opinion, after hearing had upon complaint, as in this act provided, or upon its own initiative or complaint, served as in this act provided, that the rules, regulations, measurements or practices of any public utility with respect to its public service are unjust or unreasonable, or that the equipment or service thereof is inadequate, inefficient, improper or insufficient, or can not be obtained, it shall determine the regulations, practices and service thereafter to be installed, observed, used and rendered, and fix and prescribe the same by

order to be served upon the public utility. It shall thereafter be the duty of such public utility and all of its officers, agents and official employes to obey the same and do everything necessary or proper to carry the same into effect and operation; provided, that nothing herein contained shall be so construed as to give to the commission power to make any order requiring the performance of any act or the doing of anything which is unjust or unreasonable or in violation of any law of the state or the United States. (May 31, 1911, 102 v. 557, § 29.)

Section 614-28. (May order repairs, improvements, etc.)

Whenever the commission shall be of the opinion, after hearing had, as in this act provided, or upon its own initiative or complaint, as in this act provided, that repairs or improvements to the plant or equipment of any public utility, should reasonably be made, or that any additions thereto should reasonably be made, in order to promote the convenience or welfare of the public, or of employes, or in order to secure adequate service or facilities, the commission may make and serve an appropriate order with respect thereto, directing that such repairs, improvements, changes or additions be made within a reasonable time, and in a manner to be specified therein. Every such public utility, its officers agents and official employes shall obey such order and make such repairs, improvements, changes and additions required of such public utility by such order. (May 31, 1911, 102 v. 558, § 30.)

The word "additions" in this section is not synonymous with the word "extensions" in G. C. § 614-51. The commission is not authorized to order an extension of the lines of a gas company. The power to order extensions is in the council. Rep. Atty. Gen. 1912, p. 653.

That a telephone company is contemplating a merger with another company was said to be no defense against an order of the commission requiring additions, although compliance with the order would involve duplication and expense. Rep. Atty. Gen. 1913, p. 687.

Section 614-29. (Use of equipment over street, etc., by other public utility.) Every public utility having any equipment on, over or under any street, or highway, shall, subject to the provisions of section 9103 of the General Code, for a reasonable compensation, permit the use of the same by any other public utility whenever the commission shall determine as provided in section 32 hereof [G. C. § 614-30] that public convenience, welfare and necessity require such use, or joint use, and such use or joint use will not result in irreparable injury to the owner or other users of such equipment, nor in

any substantial detriment to the service to be rendered by such owners or other users. (May 31, 1911, 102 v. 558, § 31.)

A municipality owning a utility can not compel the joint use of equipment under this section. Rep. Atty. Gen. 1912, p. 1783, citing G. C. § 614-2a. See 12 O. L. R. 554 (Atty. Gen. 1915).

Section 614-30. (Application on failure to agree.) In case of failure to agree upon such use or joint use or the conditions or compensation for such use or joint use, any public utility may apply to the commission, and if after investigation the commission shall ascertain that the public convenience, welfare and necessity require such use or joint use and that it would not result in irreparable injury to the owner or other users of such property or equipment, nor in any substantial detriment to the service to be rendered by such owner or other users of such property or equipment, said commission shall by order direct that such use or joint use be permitted and prescribe reasonable conditions and compensation for such joint use. (May 31, 1911, 102 v. 558, § 32.)

Section 614-31. (Conditions and compensation.) Such use or joint use so ordered shall be permitted and such conditions and compensation so prescribed shall be the lawful conditions and compensation to be observed, followed and paid, subject to recourse to the courts by any interested party as provided in this act. Any such order made by the commission may be revoked or from time to time revised by the commission. (May 31, 1911, 102 v. 558, § 33.)

Section 614-32. (Power to amend, alter or suspend schedule of rates.) The commission shall have power, when deemed by it necessary to prevent injury to the business or interests of the public or any public utility of this state in case of any emergency to be judged by the commission, to temporarily alter, amend, or with the consent of the public utility concerned suspend any existing rates, schedules or order relating to or affecting any public utility or part of any public utility in this state. Such rates so made by the commission shall apply to one or more of the public utilities in this state or to any portion thereof as may be directed by the commission, and shall take effect at such time and remain in force for such length of time as may be prescribed by the commission. (May 31, 1911, 102 v. 559, § 34.)

Where a municipal ordinance fixed a rate for gas, but a referendum petition was filed which suspended the operation of the ordi-

nance, the commission is not authorized to summarily fix a rate for the period of the suspension. Such circumstances do not constitute an emergency contemplated by § 614-32. The rate should be fixed under § 614-16 et seq. *Cincinnati v. Commission*, 96 O. S. 270 (1917); affirming 14 O. L. R. 477.

Section 614-33. (Construction accounts.) The commission shall keep informed of all new construction, extensions and additions to the property of such public utilities and may prescribe the necessary forms, regulations and instructions to the officers and employes of such public utilities for the keeping of construction accounts, which shall clearly distinguish all operating expenses and new construction. (May 31, 1911, 102 v. 559, § 35.)

Section 614-34. (Standard units.) The commission shall ascertain and prescribe suitable and convenient standard commercial units of the product or service of any public utility, when the character of its product or service is such that it can be determined, and such units shall be the lawful units for the purposes of this act. (May 31, 1911, 102 v. 559, § 36.)

Section 614-35. (Report, etc.) Each such utility shall furnish to the commission in such form and at such times as the commission may require such accounts, reports and information as shall show completely and in detail the entire operation of the public utility in furnishing the unit of its product or service to the public. (May 31, 1911, 102 v. 559, § 37.)

Section 614-36. (Standards of measurement.) The commission may ascertain and fix adequate and serviceable standards for the measurement of quality, pressure, initial voltage or other condition pertaining to the supply or quality or the product or service rendered by any public utility and prescribe reasonable regulations for examination and testing of such product or service and for the measurements thereof. It may establish reasonable rules, regulations, specifications and standards to secure the accuracy of all meters and appliances for measurements, and every public utility is required to carry into effect all orders issued by the commission relative thereto. (May 31, 1911, 102 v. 559, § 38.)

Section 614-37. (Examination and test.) The commission may provide instruments for and carry on the examination and testing of any and all appliances used for the measurement of any product or service of a public utility or for the

examination and testing of any devices or appliances of such public utility used for testing for accuracy any and all appliances used for the measurement of any product or service of such public utility. Any consumer or user may have any such appliance tested upon payment of the fees fixed by the commission. The commission may declare and establish reasonable fees to be paid for testing such appliances on the request of the consumers or users, the fees to be paid by the consumer or user at the time the request is made, but to be paid by the public utility and repaid to the consumer or user if the appliance be found commercially defective or incorrect to the disadvantage of the consumer or user. (106 v. 554; 102 v. 559, § 39.)

Section 614-38. (Facts shall be public and records open.)

All facts and information in the possession of the commission shall be public, and all reports, records, files, books, accounts, papers and memoranda of every nature whatsoever in their possession shall be open to inspection by the public at all reasonable times, except when the commission shall determine it to be necessary to withhold for a reasonable time from the public any facts or information in its possession. (May 31, 1911, 102 v. 560, § 40.)

Section 614-39. (Incrimination no excuse.) No person shall be excused from testifying or from producing accounts, books and papers, in any hearing before the commission, or any member thereof, or any person appointed by it to investigate any matter or thing under its jurisdiction, on the ground or for the reason that the testimony or evidence might tend to incriminate him, or subject him to a penalty or forfeiture, but no such person shall be prosecuted or subjected to any penalty or forfeiture for, or on account of, any transaction, matter or thing concerning which he may have testified or produced any documentary evidence; provided, that no person so testifying shall be exempted from prosecution or punishment for perjury in so testifying. (May 31, 1911, 102 v. 560, § 41.)

Section 614-40. (Supplemental order.) Whenever any rate, toll, charge or service, ordered substituted by the commission, shall be a joint rate, toll, charge or service, and the public utilities parties thereto, fail to agree upon the apportionment thereof within twenty days after the service of such order, the commission may, after hearing, make and issue a supplemental order fixing the apportionment of such

joint rate, toll, charge or service between such public utilities, and the same shall take effect of its own force as a part of the original order. (May 31, 1911, 102 v. 560, § 42.)

Section 614-41. (All orders take effect, when.) All orders made by the commission shall, of their own force, take effect and become effective operative thirty days after service thereof, unless a different time be provided in the order. (May 31, 1911, 102 v. 560, § 43.)

Section 614-42. (Railroad track connection. Complaint on failure. Hearing—order. Interchange of traffic.) When the tracks of a steam railroad, the tracks of an interurban or suburban railroad cross, connect or intersect and such tracks are of the same gauge, the companies owning such roads may connect the tracks of the roads so connecting, crossing or intersecting, so as to admit the passage of cars from one road to the other with facility. If any such road or roads fail, neglect or refuse to make such connection, upon complaint of any party authorized by the provisions of this chapter to file complaint, the commission shall proceed to hear and determine the same in a manner provided for making investigations, upon complaint. If upon such hearing the commission shall find it is practicable and reasonably necessary to accommodate the public to connect such tracks and that when so connected, it will be practicable to transport over such road, cars without endangering the equipment, tracks or appliances of either company, then the commission shall make an order requiring such railroads to make connection, describing the terms and condition, and apportion the cost thereof between the railroads. When such connection is made, the railroads parties thereto, according to their respective powers, shall afford all reasonable and proper facilities for the interchange of traffic between their respective lines for forwarding and delivering passengers and property, and without unreasonable delay or discrimination shall transfer, switch and deliver cars, freight or passenger, destined to a point on its own or connecting lines; but precedence may be given to live stock and perishable freight over other freight. Whenever a derailing device is required at the intersection of any railroads herein mentioned the same shall be installed, maintained and operated as required by such commission, which shall have full power and authority to prescribe the necessary rules and regulations for the operation of the same, and designate the company or companies that shall be responsible for the operation thereof. (May 31, 1911, 102 v. 560, § 44.)

The Ohio statutes do not make it the duty of a railroad company, whose tracks intersect those of another company, to establish physical connections. But the commission is authorized by §§ 614-42 and 522 to require such connection, if it finds the same practicable and reasonably necessary to accommodate the public. The mere fact of a previous connection with tracks of one company and a refusal to connect with those of another company does not establish a charge of unjust discrimination. *Railway Co. v. Commission*, 96 O. S. 359 (1917). See also *Penna. Co. v. Commission*, 14 N. P. n. s. 262; 58 Bull. 185 (1913).

The test is whether the connection is practicable and reasonably necessary to accommodate the public. *Railroad Co. v. Commission*, 96 O. S. 370 (1917); *Railway Co. v. Commission*, 96 O. S. 359 (1917).

A state, acting within its jurisdiction and not in hostility to a federal regulation of interstate commerce, may make a reasonable order for interchange of traffic, without violating the federal constitution. *Michigan Co. v. Mich. R. R. Com.*, 236 U. S. 615 (1915).

The commission may require connection between the tracks of a railroad and an interurban railway. *H. V. Ry. Co. v. Commission*, 107 O. S. 43 (1923).

An order requiring three railroad companies, whose tracks intersect in a city, to construct transfer or connecting tracks at a cost of \$14,000 in order to accommodate manufacturers and other shippers whose traffic approximates two thousand cars per year, is not so unreasonable as to violate a constitutional right. *Penna. Co. v. Commission*, 14 N. P. n. s. 262 (C. P. 1913).

Section 614-43. (Rehearing.) Upon the application of any person, public utility or railroad aggrieved thereby, the commission may, upon written petition therefor, filed within thirty days after any order made by the commission shall have been entered upon its records, grant a rehearing of the matter upon which such order was based. Notice of such rehearing shall be given as required with respect to original hearings, of the time and place for the rehearing thereon. Upon such rehearing any party may offer additional evidence which could not, with reasonable diligence, have been offered on the former hearing. Upon such rehearing, the commission may change, modify, vacate or affirm its former order and make and enter such new order as may be deemed necessary. (May, 31, 1911, 102 v. 561, § 45.)

Section 614-44. (Power of municipality to fix rate, price, change, etc. Written complaint; hearing. When commission shall fix rates. Hearing upon accepted rates; procedure. Filing complaint held to be consent to continue to furnish product or service.) Any municipal corporation in which any public utility is established may, by ordinance, at any time within one year before the expiration of any contract entered into under the provisions of sections 3644, 3982 and 3983 of the General Code between the municipality and

such public utility with request to the rate, price, charge, toll or rental to be made, charged, demanded, collected, or exacted, for any commodity, utility or service by such public utility, or at any other time authorized by law proceed to fix the price, rate, charge, toll or rental that such public utility may charge, demand, exact or collect therefore for an ensuing period, as provided in sections 3644, 3982 and 3983 of the General Code. Thereupon, the commission, upon complaint in writing of such public utilities or upon complaint of one percentum of the electors of such municipal corporation, which complaints shall be filed within sixty days after the passage of such ordinance, shall give thirty days' notice of the filing and pendency of such complaint to the public utility and the mayor of such municipality, of the time and place of the hearing thereof, and which shall plainly state the matters and things complained of.

Provided, however, if the council of any municipality fails by ordinance to regulate the rates to be charged by any public utility engaged in business of supplying water for public or private consumption within sixty days after the expiration of any lawful rate, such water company or one percentum of qualified electors of the municipality may petition the public utilities commission to fix the just and reasonable rates for the furnishing of such services, and the public utilities commission may thereupon proceed to fix the just and reasonable rates, tolls and charges for such services which may be charged for a period of two years from the date of the filing of such petition and thereafter until changed, altered or modified by the council of such municipality or further order of the commission upon like application.

If any public utility shall have accepted any rate, price, charge, toll, or rental fixed by ordinance of such municipality, the same shall become operative, unless within sixty days after such acceptance there shall have been filed with the commission, a complaint signed by not less than three percentum of the qualified electors of such municipality. Upon such filing, the commission shall forthwith give notice of the filing and pendency of such complaint to the mayor of such municipality and fix a time and place for the hearing thereof. The commission shall, at such time and place, proceed to hear such complaint, and may adjourn the hearing thereof from day to day.

The filing of a complaint by a public utility, as herein provided, shall be taken and held to be the consent of such public utility to continue to furnish its product or service,

and devote its property engaged therein to such public use during the term so fixed by ordinance or by the provisions of this act. Parties thereto shall be entitled to be heard, represented by counsel, and to have process to force the attendance of witnesses. (109 v. 217; 108 (Pt. 1) v. 428; 102 v. 561, § 46.)

The regulation of rates by a municipality must not be in conflict with the general laws of the state. *Telephone Co. v. Cleveland*, 98 O. S. 358 (1918).

Under the public utilities act, the commission, and not the municipality, has authority to fix telephone rates. *Telephone Co. v. Cleveland*, 98 O. S. 358 (1918).

Filing schedules with the public utilities commission is not an acceptance of a price-fixing ordinance, although the schedules contain the same rates as those fixed in the ordinance. *Newcomerstown v. Gas Co.*, 100 O. S. 494 (1919); affirming, 30 O. C. A. 283.

If a utility believes that an ordinance fixing rates is indefinite, it may attack its validity in court, or by an appeal to the commission, but it has no right to ignore the ordinance and file schedules of other rates with the commission. *Washington v. Commission*, 99 O. S. 70 (1918).

Before the commission may proceed on a complaint by a public utility under this section, it is necessary that an ordinance should be in existence, fixing the rate complained of, and that the commission shall find that the rate "is or will be unjust or unreasonable, or insufficient to yield reasonable compensation for the service or product." *Oak Harbor v. Commission*, 99 O. S. 275 (1919).

The laws giving the commission power over rates do not deprive the courts of equitable jurisdiction. Where a municipality brought suit to enforce an unaccepted ordinance fixing the rate of gas, an answer of the gas company alleging facts showing the rate to be confiscatory, states a case of which a court of equity has jurisdiction. *State v. Ct. of App.*, 104 O. S. 96 (1922).

Courts have jurisdiction over a controversy between a municipality and a public utility, as to rates which have been fixed by contract, although the commission may also have jurisdiction. *New Lexington v. Ohio Co.*, 24 C. C. n. s. 537 (1913).

But an injunction suit by the public utility against the municipality, at the time of filing the appeal to the commission, does not deprive the commission of jurisdiction. *Lima v. Commission*, 106 O. S. 379 (1922).

This section does not apply to a contract made prior to its enactment and which, by its terms, does not expire for more than one year. *Cincinnati v. Commission*, 98 O. S. 320 (1918).

But in the absence of a contract an appeal may be taken under this section. *Telephone Co. v. Cleveland*, 98 O. S. 358, 384 (1918).

An appeal to the commission lies although the municipality operates under a home-rule charter. *Lima v. Commission*, 106 O. S. 379 (1922).

A contract between a municipality and a utility company, for its product or service, authorized by Section 1, Article XVIII of the Ohio Constitution, is not subject to review by the commission. *Link v. Commission*, 102 O. S. 336 (1921). See *Marysville Co. v. Commission*, 93 O. S. 480, 98 O. S. 382.

The commission has no power to grant franchises or make contracts between a public utility and other parties. *Oak Harbor v.*

Commission, 98 O. S. 275 (1919); *Stuver v. Gas Co.*, 13 Ohio App. 276, 31 O. C. A. 554 (1920).

In the absence of municipal regulation, rates are subject to the regulation of the commission. *Universal Machine Co. v. Public Service Co.*, 32 O. C. A. 525 (1919).

An ordinance ordering the director of public service to advertise for bids and contract for street lighting does not limit the power of the commission to fix a higher rate to private consumers. *Universal Machine Co. v. Public Service Co.*, 32 O. C. A. 525 (1919).

Power of commission to review action of council of a municipality ordering extensions. See § 614-51.

Section 614-44a. (Hearing of complaints may be held in community in which cause of action arose.) In all cases arising under the preceding section and other sections providing for the hearing of complaints or protests against rates, such hearings, when feasible and proper, may be held in the community in which the cause of action arose. (110 v. 451.)

Section 614-45. (Rate will not be suspended or vacated, etc., without bond.) No such complaint or appeal to the commission shall suspend, vacate, or set aside the rate, price, charge, toll or rental fixed by ordinance unless such public utility shall elect to charge the rate, price, charge, toll or rental in force and effect immediately prior to the taking effect of the regulation complained of and appealed from, and shall give an undertaking in such amount as the commission shall determine. The undertaking shall be filed with the commission and shall be payable to the state of Ohio for the use and benefit of the consumers affected by the regulation in question. The condition of the undertaking shall be that such public utility shall refund to each of its consumers, public or private, the amount collected by it in excess of the amount which shall finally be determined it was authorized to collect from such consumers. The commission shall make all necessary orders in respect to the form of such undertaking and the manner of making such refunders. (May 31, 1911, 102 v. 562, § 47.)

Section 614-46. (Finding as to rate.) If the commission, after such hearing, shall be of the opinion that the rate, price, charge, toll or rental, so fixed by ordinance is or will be unjust or unreasonable, or insufficient to yield reasonable compensation for the service, the commission shall, with due regard to the value of all the property of the public utility actually used and useful for the convenience of the public, excluding therefrom the value of any franchise or right to own, operate or enjoy the same in excess of the amount (exclusive of any tax or annual charge) actually paid to any

political subdivision of the state or county as a consideration or the grant of such franchise or right; and exclusive of any value added thereto by reason of a monopoly or merger and to the necessity of making reservations from the income for surplus, depreciation and contingencies, and such other matters as may be proper, according to the facts in each case, fix and determine the just and reasonable rate, price, charge, toll or rental to be charged, demanded, exacted or collected by such public utility, during the period so fixed by ordinance, which shall not be less than two years, and order the same substituted for the rate, price, charge, toll or rental so fixed by ordinance or the commission may find and declare that the rate, price, charge, toll or rental, so fixed by ordinance, is just and reasonable, and ratify and confirm the same.

No such rate, price, charge, toll or rental so determined by the commission shall become effective or valid until after the commission shall have ascertained and determined the valuation upon which such price, charge, toll or rental is based as provided in this act. And such valuation so determined shall be, at all times, open to public inspection. Thereupon the commission shall make inquiry and investigation with respect to the ability of such public utility to furnish its product during such period, if it be found that it is able so to do, the commission shall order the public utility in question to continue to furnish the same for the period and at the rate, price, charge, toll or rental so fixed and determined, and such public utility shall continue to furnish its product as provided in such order. (May 31, 1911, 102 v. 562, § 48.)

The commission has no authority to fix maximum rates only, leaving the utility to file schedules of other rates. Section 614-46 makes it the duty of the commission to fix the rates. *Cleveland v. Commission*, 100 O. S. 121 (1919).

Section 614-46a. (Written opinions filed by commission in all contested cases.) In all contested cases heard by the commission, it shall be the duty of the commission to file with the records thereof, written opinions setting forth the reasons prompting the decisions arrived at by the commission, together with a resume from the record of the facts upon which such decisions are based. (110 v. 452.)

Section 614-47. (When act not applicable.) This act shall not apply to any rate, fare or regulation now or hereafter prescribed by any municipal corporation granting a right, permission, authority or franchise, to use its streets, alleys, avenues or public places, for street railway or street

railroad purposes, or to any prices so fixed under sections 3644, 3982 and 3983 of the General Code, except as provided in sections 46, 47 and 48 of this act. (G. C. §§ 614-44, 614-45 and 614-46.) (May 31, 1911, 102 v. 563, § 49.)

The commission has no power to change rates which have been fixed by valid contract between a municipality and a public utility. *Interurban Railway v. Commission*, 98 O. S. 287 (1918).

Such contracts are exempted, by this section, from the public utilities commission act. *Ohio River Power Co. v. Steubenville*, 99 O. S. 421 (1919).

Section 614-48. (Annual report.) Every public utility shall file with the commission, at such times and in such form as it may prescribe, an annual report, duly verified, covering the yearly period fixed by the commission. The commission shall prescribe the character of the information to be embodied in such annual report, and shall furnish to each public utility a blank form therefor. If any such report is defective or erroneous, the commission may order the same to be amended within a prescribed time. Such annual reports shall be preserved in the office of the commission. The commission may, at any time, require specific answers to questions upon which it may desire information. (May 31, 1911, 102 v. 563, § 50.)

Although one public utility controls another by stock ownership, each company should file a report, so long as they remain distinct companies. *Rep. Atty. Gen. 1913, p. 701.*

The commission may use funds raised under § 606 for the purchase of blanks from the interstate commerce commission for use of utilities in making reports. *Rep. Atty. Gen. 1913, p. 700.*

Section 614-49. (Depreciation account.) Every public utility shall carry a proper and adequate depreciation or deferred maintenance account, whenever the commission after investigation shall determine that a depreciation account can be reasonably required. The commission shall ascertain, determine and prescribe what are proper and adequate charges for depreciation of the several classes of property for each public utility. The charge for depreciation shall be such as will provide the amount required over and above the cost and expense of maintenance to keep the property of the public utility in a state of efficiency corresponding to the progress of the art or industry. The commission may prescribe such changes in such charges for depreciation from time to time as it may find necessary. (May 31, 1911, 102 v. 563, § 51.)

While a reasonable depreciation reserve is sound policy, an un-

reasonably large reserve can not be made the basis for increased rates. *Cincinnati v. Commission*, 105 O. S. 181, 201, 202, 217 (1922).

Distribution of depreciation reserve on mortgage foreclosure, see *Trust Co. v. Traction Co.*, 106 O. S. 577, 618 (1922).

Section 614-50. (Depreciation fund.) The moneys for depreciation charges thus provided for shall be set aside out of the earnings and carried as a depreciation fund. The moneys in such fund may be expended in new construction, extensions or additions to the property of the public utility, or invested, and if invested, the income from the investment shall also be carried in the depreciation fund. Such fund and the proceeds thereof, may be used for the purpose of renewing, restoring, replacing or substituting depreciated property in order to keep the plant in a state of efficiency. Such fund and the proceeds or income therefrom shall be used for no purpose other than as provided in this section, except upon the approval of the commission. (May 31, 1911, 102 v. 564, § 52.)

When extraordinary repairs, substitutions or restorations are made, the cost should be charged against the reserve. *Cincinnati v. Commission*, 105 O. S. 181, 199, 200.

This section does not authorize the addition of the depreciation reserve to capital account. *Ib.*, pp. 202-204, 209, 218.

Section 614-51. (Power to require additions and extensions.) The council of any municipality shall have the power upon filing of an application therefor by any person, firm or corporation, to require of any public utility, by ordinance or otherwise, such additions or extensions to its distributing plant within such municipality as shall be deemed reasonable and necessary in the interest of the public, and, subject to the provisions of section 9105 of the General Code, to designate the location and nature of all such additions and extensions, the time within which they must be completed, and all conditions under which they must be constructed and operated. Such requirements and orders of the council shall be subject to review by the commission, as provided in sections 46 and 48 hereof. (G. C. §§ 614-44 and 614-46.) The council and commission in determining the practicability of such additions and extensions, shall take into consideration the supply of the product furnished by such public utility available, and the returns upon the cost and expense of constructing said extension and the amount of revenue to be derived therefrom, as well as the earning power of the public utility as a whole. (May 31, 1911, 102 v. 564, § 53.)

This section and section 614-28 do not authorize the commission to compel a street railway company to extend its line beyond its terminal points, but merely to compel additions and facilities between such points.

Rep. Atty. Gen. 1911-12, p. 716.

The power to order "extensions" of the lines of a gas company is vested in the council, and not in the commission. Rep. Atty. 1912, p. 653.

But the action of a village council, ordering extensions, is subject to review by the commission. The commission, under § 614-51, may determine the practicability of the additions and extensions of street railway lines so ordered. It may consider the physical conditions of the proposed line as well as the necessary plan of operation of cars thereover, and may relieve the railway company of the obligations if it finds that operation of cars would entail unusual dangers and jeopardize lives of passengers. *Cincinnati v. Commission*, 91 O. S. 331 (1915).

It has been said that it is not a violation of the public utilities act for a public utility to refuse to comply with an order of a municipal council made under § 614-51. Rep. Atty. Gen. 1913, p. 1551.

Section 614-52. (Company not permitted to exercise right of franchise where another is giving adequate service.) No telephone company shall exercise any permit, right, license or franchise that may have been heretofore granted but not actually exercised or that may hereafter be granted to own or operate a plant for the furnishing of any telephone service, thereunder in any municipality or locality, where there is in operation a telephone company furnishing adequate service, unless such telephone company first secures from the commission a certificate after public hearing of all parties interested that the exercising of such license, permit, right or franchise is proper and necessary for the public convenience. (May 31, 1911, 102 v. 564, § 54.)

This section is constitutional. *Celina Co. v. Union Central Co.*, 102 O. S. 487 (1921); *Local Telephone Co. v. Mutual Co.*, 102 O. S. 524 (1921).

This section goes to the capacity of a telephone company, as a contractual party, to enter into and perform a contract or service. It does not limit the right or power of a municipality to contract for a product or service under Article XVIII, Section 4, of the Ohio Constitution. *Local Telephone Co. v. Mutual Co.*, 102 O. S. 524 (1921).

A telephone company can not extend its lines into territory, already occupied by another company, without a certificate from the commission. An attempt to so extend its lines may be enjoined by the other company. *Telephone Co. v. Telephone Co.*, 13 N. P. n. s. 61 (1912); *Telephone Co. v. Telephone Co.*, 14 N. P. n. s. 616; 24 L. D. 77 (1913).

A certificate of necessity must be secured by a telephone company not for profit. This section applies to such corporations as well as to other telephone companies. *Telephone Co. v. Telephone Co.*, 92 O. S. 336 (1915).

The commission has no power to order a company, which is operating without a certificate of necessity, to cease operations or to apply for a certificate. *Telephone Co. v. Telephone Co.*, 97 O. S. 203 (1918).

Proof of the incorporation of a telephone company and purchase of telephone equipment is not sufficient to sustain an allegation that the company is about to exercise a franchise and engage in public service, as distinguished from providing private lines for the use of stockholders and others residing within a short distance.

Gratiot, etc., Telephone Co. v. Brownsville, etc., Co., 13 N. P. n. s. 429 (C. P. 1911); affirmed, 15 C. C. n. s. 508 and 89 O. S. 418.

But the acceptance of a franchise from a municipality, permitting the use of its streets for telephone lines, is sufficient to show that the company is about to furnish service. Paulding Co. v. Telephone Co., 14 N. P. n. s. 616; 24 L. D. 77 (1913).

An allegation by an existing telephone company that it is rendering adequate service must be proved, when traversed by the defendant.

Gratiot Co. v. Brownsville, etc., Co., 13 N. P. n. s. 429 (C. P. 1911); affirmed, 15 C. C. n. s. 508; aff'd, no rep. 89 O. S. 418.

A telephone company, upon which both primary and secondary franchises had been conferred prior to the enactment of this section, need not secure a certificate from the commission.

Gratiot Co. v. Brownsville, etc., Co., 15 C. C. n. s. 508 (1912); affirming, 13 N. P. n. s. 429; aff'd, no rep. 89 O. S. 418.

But it has been held that a company, in existence and operation before the enactment of this section, can not extend its lines into territory covered by another company, without a certificate from the commission. Clinton Co. v. Telephone Co., 13 N. P. n. s. 61; 24 L. D. 44; Rep. Atty. Gen. 1912, p. 666. *Contra*, Sidney Co. v. Commission, 14 N. P. n. s. 337; 23 L. D. 639 (1913).

This section does not apply to utilities other than telephone companies. 12 O. L. R. 471 (Com. 1915).

A new company which has solicited and obtained subscribers from an existing company is not entitled to a certificate of necessity where the only complaint as to inadequate service by the existing company is the loss of such subscribers. Citizens Co. v. Metamora Co., 17 O. L. R. 368 (Com. 1919).

For facts showing adequate service, see Citizens Telephone Co. v. Commission, 102 O. S. 570 (1921).

Section 614-53. (When public utility may issue stocks, bond, notes, etc. How and for what purposes commission may authorize issue.) A public utility or a railroad, as defined in this act, may, when authorized by order of the commission, and not otherwise, issue stocks, bonds, notes and other evidences of indebtedness, payable at periods of more than twelve months after date thereof, when necessary for the acquisition of property, the construction, completion, extension or improvement of its facilities or for the improvement or maintenance of its service, or for the reorganization or readjustment of its indebtedness and capitalization, or for the discharge or lawful refunding of its obligations, or for the reimbursement of moneys actually expended from income or from any other moneys in the treasury of the public utility or railroad not secured or obtained from the issue of stocks, bonds, notes or other evidences of indebtedness of such public utility or railroad within five years next prior to the filing of an application therefor as herein provided,

or for any of the aforesaid purposes except maintenance of service and except replacements in cases where the applicant shall have kept its accounts and vouchers of such expenditures in such manner as to enable the commission to ascertain the amount of money so expended and the purposes for which said expenditure was made.

The commission may, by order duly made, authorize the issue of bonds, notes, or other evidences of indebtedness, for the reimbursement of money heretofore actually expended from income for any of the aforesaid purposes, except maintenance of service and replacements prior to five years next preceding the filing of an application therefor, if such application for such consent be made prior to January 1, 1913. Any bonds, notes, or other evidences of indebtedness, payable at periods of more than twelve months after date thereof, may be issued as herein provided, regardless of the amount of the capital stock of the public utility or railroad, subject to the approval of the commission to the excess of such bonds, notes, or other evidences of indebtedness above the amount of the capital stock of such public utility or railroad, notwithstanding any provisions of the General Code of Ohio now in force to the contrary.

Provided, however, that it shall be the duty of the commission to authorize on the best terms obtainable, such issues of stocks, bonds and other evidence of indebtedness as shall be necessary to enable any public utility to comply with the provisions of any contract heretofore made between such public utility and any municipality. (May 9, 1913, 103 v. 841; May 31, 1911, 102 v. 565, § 56.)

This section does not permit the capitalization of replacements of equipment or physical property. These must be kept up from income. The question as to what expenditures shall form the basis of permanent capitalization is one for the commission as well as for the corporation. The question of fact as to whether the expenditures are for replacements of equipment or physical property is for the determination of the commission. *Pollitz v. Commission*, 97 O. S. 191 (1918); 99 O. S. 449.

Application by a railroad company for permission to guarantee the bonds of another company. See *Pollitz v. Commission*, 96 O. S. 49 (1917).

The commission may authorize an issue of stock or bonds to discharge or refund indebtedness incurred for acquisition, development, etc., more than five years prior to the application. *Water Co. v. Commission*, 104 O. S. 90 (1922).

Section 614-54. (Proceedings to obtain authority to issue stocks, bonds, etc.) The proceedings for obtaining the consent and authority of the commission for such issue as provided in the next preceding section of this act, shall be as follows:

(a) In case the stocks, bonds, notes, or other evidence of indebtedness are to be issued for money only, the public utility or railroad shall file with the commission a statement, signed and verified by the president and secretary thereof, setting forth:

(1) The amount and character of the stocks, bonds or other evidence of indebtedness.

(2) The purposes for which they are to be issued.

(3) The terms upon which they are to be issued.

(4) The total assets and liabilities of the public utility or railroad in such detail as the commission may require.

(5) If the issue is desired for the purpose of the reimbursement of money expended from income, as herein provided, the amount expended, when and for what purposes expended.

(6) Such other facts and information pertinent to the inquiry as the commission may require.

(b) If the stocks, bonds, notes or other evidence of indebtedness are to be issued, partly or wholly for property or services or other consideration than money the public utility or railroad shall file with the commission a statement, signed and verified by its president and secretary, setting forth:

(1) The amount and character of the stocks, bonds or other evidence of indebtedness proposed to be issued.

(2) The purposes for which they are to be issued.

(3) The description and estimated value of the property or services for which they are to be issued.

(4) The terms on which they are to be issued or exchanged.

(5) The amount of money, if any, to be received from the same in addition to the property, service or other consideration.

(6) The total assets and liabilities of the public utility or railroad in such detail as the commission may require.

(7) Such other facts and information pertinent to the inquiry as the commission may require. Provided, however, that this section or the preceding section shall not apply to union depot companies heretofore organized and under contract until the same are completed. (May 31, 1911, 102 v. 565, § 57.)

Section 614-55. (Hearings. Order. Application of proceeds. Issue without authority, void.) For the purpose of enabling the commission to determine whether it should issue such order, it shall hold such hearings, make such inquiries or investigation, examine such witnesses, books,

papers, documents and contracts as it may deem proper. The order of the commission shall fix the amount, character and terms of any such issue, and the purposes to which the issue or any proceeds thereof shall be applied, and recite that the money, property, consideration or labor procured or to be procured or paid for by such issue, has been, or is reasonably required for the purposes specified in the order, and the value of any property, consideration or service as the case may be, as found by the commission for which in whole or in part, such issue is proposed to be made. No such public utility or railroad shall, without the consent of the commission, apply any such issue or its proceeds to any purpose not specified in the order. Such public utilities or railroads may issue notes for proper corporate purposes, and not in violation of any provision of this act, payable at periods of not more than twelve months without the consent of the commission, but no such notes shall, in whole or in part, directly or indirectly, be refunded by any issue of stocks or bonds, or by any evidence of indebtedness, running for more than twelve months without the consent of the commission. All stocks, bonds, notes or other evidence of indebtedness, issued by any public utility or railroad without the consent or permission of the commission, as herein provided, shall be void and of no effect. No interstate railroad or public utility shall be required, however, to apply to the commission for authority to issue stock, bonds, notes or other evidence of indebtedness for the acquisition of property, the construction, completion, extension or improvement of its facilities or the improvement or maintenance of its service outside the state, or for the discharge or refunding of obligations issued or incurred for such purposes or for reimbursement of moneys actually expended for such purposes outside of the state. (May 31, 1911, 102 v. 566, § 58.)

An order of the commission authorizing an issue of securities is not invalidated by the fact that a part of the proceeds are to be used within, and a part without, the state. Rep. Atty. Gen. 1912, p. 651.

A utility company (not a telephone company) will not be refused authority to issue securities because another public utility is doing business in the same locality and furnishing adequate service. 12 O. L. R. 471 (Pub. Util. Com. 1915).

Interstate railroad. Whether the exception as to interstate railroads applies only to physical property, or includes intangible property as well, is a question raised but not decided in *Pollitz v. Commission*, 96 O. S. 560 (1917).

The commission has jurisdiction of an application by a railroad company to issue stock to reimburse it for expenditures in acquiring the securities of other companies other than the expenditures referred

to in the exception of this section. Railroad Co. v. Commission, 97 O. S. 344 (1918).

Section 614-56. (Public utility in hands of receiver, etc., exempt from this act.) Where a public utility or railroad is, at the time this act takes effect, in the possession of one or more receivers or its property is under foreclosure, and a reorganization thereof is pending, any new company or companies that may hereafter be organized to acquire such property or any part thereof, shall be exempt from all the provisions of this act with respect to the issue of bonds, stocks and evidences of debt, provided that the total debts, obligations and securities of such new or reorganized company or companies exclusive of bonds, obligations, stocks, and other securities that may be issued or authorized for additional capital shall not exceed the debts, obligations, stocks and other securities of the existing company or companies, and provided further that from and after its organization and the issue of such bonds, obligations, stocks and other securities as hereby permitted, all the provisions of this act shall apply to such new or reorganized company or companies. (May 31, 1911, 102 v. 567, § 59.)

Section 614-57. (Penalty for false statement.) Any director, president, secretary, manager, officer or other official of any public utility or railroad who shall knowingly make any false statement to secure the issue of any stock, bond, note or other evidence of indebtedness, or who shall, by such false statement, procure the order of the commission for the issue of any stock, bond, note or other evidence of indebtedness, or issue with knowledge of such fraud, negotiate, or cause to be negotiated any such stock, bond, or other evidences of indebtedness in violation of this act, shall upon conviction thereof, be fined not less than five hundred dollars, or be imprisoned in the penitentiary for not less than one year or more than ten years. (May 31, 1911, 102 v. 567, § 60.)

Section 614-57a. (Endorsement of public utility or railroad securities.) Public utility or railroad corporations may, as incident to the sale or pledge of bonds, notes or other securities owned by them, jointly or severally endorse the same and guarantee due payment thereof, in any case in which such endorsement and guarantee has been or may hereafter be duly authorized by the public utilities commission or the interstate commerce commission. (110 v. 404.)

Before the enactment of this section a railroad company owning

bonds, had power to guarantee the same, on a sale thereof, in order to make a sale at an adequate price. *Pollitz v. Commission*, 96 O. S. 49 (1917).

Section 614-58. (Dividend must be authorized.) No public utility or railroad shall declare any stock, bond or scrip dividend or divide the proceeds of the sale of any stock, bond, or scrip among its stockholders, unless authorized by the commission so to do. (May 11, 1911, 102 v. 567, § 61.)

Section 614-59. (Capitalization.) The commission shall not have power to authorize the capitalization of any franchise or right to own, operate or enjoy any franchise whatsoever in excess of the amount (exclusive of any tax or annual charge) actually paid to any political subdivision of the state or county as the consideration for the grant of such franchise or right, nor shall the capital stock of a corporation formed by the merger or consolidation of two or more corporations exceed the sum of the capital stock of the corporation or corporations so consolidated or merged, at the par value thereof, and such sum or any additional sum actually paid in cash; nor shall any contract for consolidation or lease be capitalized in the stock of any corporation whatever; nor shall any such corporation hereafter issue any bonds against or as a lien upon any contract for consolidation or merger; nor shall the aggregate amount of the debt of such consolidated companies by reason of such consolidation be increased. (May 31, 1911, 102 v. 567, § 62.)

Section 614-60. (Consent and approval of commission. Petition. Hearing.) With the consent and approval of the commission, but not otherwise:

(a) Any two or more public utilities, furnishing a like service or product and doing business in the same municipality or locality within this state, or any two or more public utilities whose lines intersect or parallel each other within this state, may enter into contracts with each other that will enable such public utilities to operate their lines or plants in connection with each other.

(b) Any public utility may purchase, or lease the property, plant or business of any other such public utility.

(c) Any such public utility may sell or lease its property or business to any other such public utility.

(d) Any such public utility may purchase the stock of any other such public utility.

The proceedings for obtaining the consent and approval of the commission for such authority, shall be as follows:

There shall be filed with the commission a petition, joint or otherwise, as the case may be, signed and verified by the president and secretary of the respective companies, clearly setting forth the object and purposes desired, stating whether or not it is for the purchase, sale, lease or making of contracts or for any other purpose in this section provided and also the terms and conditions of the same. The commission shall, upon the filing of such petition, if it deem the same necessary, fix a time and place for the hearing thereof. If, after such hearing or in case no hearing is required, the commission is satisfied that the prayer of such petition should be granted and the public will thereby be furnished adequate service for a reasonable and just rate, rental, toll, or charge therefor, it shall make such order in the premises as it may deem proper and the circumstances require, and thereupon it shall be lawful to do the things provided for in such order. (May 31, 1911, 102 v. 568, § 63.)

A valuation of properties by the commission is probably not a condition precedent to granting an application under this section, but the commission may make such valuation at any time.

Rep. Atty. Gen. 1911-12, p. 729, 739.

See G. C. § 499-8.

This section applies to physical connections and is independent of § 614-61.

Rep. Atty. Gen. 1911-12, p. 729.

A public utility property may be sold to a corporation, not an existing utility, without the consent of the commission. Rep. Atty. Gen. 1912, p. 661.

Orders of the commission under this section need not be filed with the secretary of state. Opins. Atty. Gen. 1916, p. 1547.

This section does not apply to a lease of a street railway. Where the rate of fare is fixed by franchise agreement, the commission has no jurisdiction of a proposed lease of a street railway line. 16 O. L. R. 151 (Com. 1918).

Order of commission approving sale of telephone properties. 14 O. L. R. 426.

Section 614-61. (Merger. Petition. Order. Valuation, rates, etc.) With the consent and approval of the commission, but not otherwise, any two or more telephone companies, defined in this act, and doing business in this state or partly within and partly without this state, may consolidate with each other, when such telephone companies shall have complied with the orders and requirements of the commission and the provisions of this act.

Such telephone companies shall file with the commission a joint petition for such consolidation, signed and verified by the president and secretary of the respective companies, in which shall be set forth in detail, all of the terms, conditions and proceedings pertaining to such consolidation and

in such form as the commission may require, and thereupon the commission shall fix a time and place for the hearing of such petition.

If, after such hearing, the commission is satisfied that such consolidation will promote public convenience, and will furnish the public adequate service for a reasonable rate, rental, toll or charge therefor, it shall make an order authorizing such consolidation, which order before taking effect shall be filed with the secretary of state. Other proceedings relating to such consolidation shall be in the manner and with the effect, not inconsistent with the provisions of this act, as is provided for in the consolidation of railroad companies under the laws of this state.

No consolidation, purchase, lease or contract by which two or more telephone companies merge or operate their lines or plants jointly or in connection with each other, shall become valid or effective until after the commission shall have ascertained and determined the valuation as provided in this act upon which the rates, tolls, charges and rentals are based and also shall have fixed and determined such rates, tolls, charges and rentals so to be charged.

All valuations so ascertained and determined shall be at all times open to public inspection. (May 31, 1911, 102 v. 568, § 64.)

See § 9190.

The terms "consolidation" and "merger" are not synonymous.

Rep. Atty. Gen. 1911-12, p. 729.

A valuation of properties by the commission is a condition precedent to the granting of an application under this section.

Rep. Atty. Gen. 1911-12, p. 729.

And upon the basis of such valuation, the commission should fix the rates to be charged. Opins. Atty. Gen. 1916, p. 209.

Section 614-62. (Void contracts.) All such contracts, leases, purchases, sales or consolidations not made pursuant to the provisions of this act or contrary hereto shall be void and of no effect. (May 31, 1911, 102 v. 569, § 65.)

Section 614-63. (Power to form continuous line. Charges, rates, etc.) The commission shall have the power upon complaint, in writing, by any person, or on its own initiative, by order, to require any two or more telephone companies whose lines or wires form a continuous line of communication, or could be made to do so by the construction and maintenance of suitable connections or the joint use of equipment, or the transfer of messages at common points, between different localities which can not be communicated with or

reached by the lines of either company alone, where such service is not already established or provided for, unless public necessity requires additional service, to establish and maintain through lines within the state between two or more such localities. The joint rate or charges for such service shall be just and reasonable and the commission shall have power to establish the same, and declare the portion thereof to which each company affected thereby shall be entitled and the manner in which the same shall be secured and paid. All necessary construction, maintenance and equipment in order to establish such service shall be constructed and maintained in such manner and under such rules, with such division of expense and labor as shall or may be required by the commission. (May 31, 1911, 102 v. 569, § 66.)

Where two telephone companies are competing for business in a locality, one of them providing adequate long distance service between the locality and a neighboring city, offering the service to residents of the locality, and public necessity does not require additional long distance service, this section does not apply. *Shafor v. Commission*, 94 O. S. 231 (1916); affirming, 13 O. L. R. 461.

Orders of the commission, requiring connections. See 12 O. L. R. 591.

Where one company alone serves other localities as well as all the localities served by another company, the latter company is not entitled to an order for connections enabling it to reach the localities served exclusively by the other company. Rep. Atty. Gen. 1912, p. 658.

Two mutual telephone companies, incorporated not for profit, but which furnish service to nonmembers, and charge therefor, are subject to an order of the commission under this section. Rep. Atty. Gen. 1912, p. 645.

Section 614-64. (Penalty on failure to comply with orders.) Every public utility or railroad and every officer thereof, shall obey, observe, and comply with every order, direction and requirement of the commission, made under authority of this act, so long as the same shall be and remain in force. Any public utility or railroad herein defined which violates any provision of this act, or which after due notice fails, omits or neglects to obey, observe or comply with any order or any direction or requirement of the commission officially promulgated shall forfeit and pay to the state not to exceed one thousand dollars for each such failure, omission or neglect and each day's continuance thereof shall be deemed and held to be a separate offense. (May 31, 1911, 102 v. 570, § 67.)

The attorney general has no authority to institute a proceeding to recover penalties and forfeitures, in the absence of an order to him from the commission. Rep. Atty. Gen. 1913, p. 1551.

Section 614-65. (Penalty.) Whoever being an officer, agent or employe in an official capacity, of a public utility or railroad defined in this act, knowingly violates any provisions of this act, or wilfully fails, omits or neglects to obey, observe or comply with any lawful order or direction of the commission made with respect to any public utility or railroad shall be fined not less than one hundred dollars nor more than one thousand dollars, or imprisoned not more than two years, or both, and each day's continuance of such failure, omission or neglect shall constitute a separate offense. (May 31, 1911, 102 v. 570, § 68.)

Section 614-66. (Title of action.) Actions to recover penalties and forfeitures provided for in this act, shall be prosecuted in the name of the state and may be brought in the court of common pleas of any county in which the public utility or railroad may be located. Such action shall be commenced and prosecuted by the attorney general, when directed so to do by the commission. Moneys recovered by such action shall be deposited in the state treasury to the credit of the general revenue fund. (May 31, 1911, 102 v. 570, § 69.)

Section 614-67. (Mandamus—injunction.) Whenever the commission shall be of the opinion that any public utility or railroad has failed, omitted or neglected to obey any order made with respect thereto, or is about to fail or neglect so to do, or is permitting anything, or about to permit anything contrary to, or in violation of law, or an order of the commission, duly authorized under the provisions of this act, the attorney general, upon the request of the commission, shall commence and prosecute such action, actions, or proceedings in mandamus or by injunction in the name of the state, as may be directed by the commission, against such public utility or railroad, alleging the violation complained of and praying for proper relief, and in such case the court may make such order as may be proper in the premises. (May 31, 1911, 102 v. 570, § 70.)

The common pleas court and court of appeals have no jurisdiction to restrain the erection of safety gates ordered by the commission, on the ground that they were not being erected at the proper location, where the commission has taken no action under § 614-67. *Railway v. Railway*, 5 Ohio App. 151; 25 C. C. n. s. 572 (1916).

Section 614-68. (Treble damages on violations.) If any public utility or railroad does, or causes to be done, any act, matter, or thing prohibited by this act, or declared to be un-

lawful, or shall omit to do any act, matter or thing required by this act, or by order of the commission, such public utility or railroad shall be liable to the person, firm or corporation injured thereby in treble the amount of damages sustained in consequence of such violation, failure or omission; provided, that any recovery under this section shall in no manner affect a recovery by the state for any penalty provided for in this act. (May 31, 1911, 102 v. 570, § 71.)

Section 614-71. (Service of order.) Every order provided for in this act, shall be served upon every person or corporation to be affected thereby, either by personal delivery or a certified copy thereof, or by mailing a certified copy thereof, in a sealed package with postage prepaid, to the person to be affected thereby, or in the case of a corporation, to any officer or agent thereof, upon whom a summons may be served. It shall be the duty of every person and corporation to notify the commission forthwith, in writing, of the receipt of the certified copy of every order so served, and in the case of a corporation such notification must be signed and acknowledged by a person or officer duly authorized by the corporation to admit such service. Within a time specified in the order of the commission every person or corporation upon whom it is served must if so required in the order notify the commission in like manner whether the terms of the order are accepted and will be obeyed. (May 31, 1911, 102 v. 572, § 74.)

Section 614-72. (Free service or reduced rates valid, when.) Nothing in this act contained shall prevent any public utility or railroad from granting the whole or any part of its property for any public purpose, or granting reduced rate or free service of any kind to the United States government, the state government or any political division or subdivision thereof, or for charitable purposes or for fairs or expositions or to any officer or employe of such public utility or railroad or his family and all contracts and agreements made or entered into by such public utility or railroad for such use, reduced rates, or free service shall be valid and enforceable at law. (May 31, 1911, 102 v. 572, § 75.)

Section 614-73. (Limitation.) No franchise, permit, license or right to own, operate, manage or control any public utility, herein defined as an electric light company, gas company, water works company or heating and cooling company, shall be hereafter granted or transferred to any corporation

not duly incorporated under the laws of Ohio. (May 31, 1911, 102 v. 572, § 76.)

A foreign corporation may hold and vote a majority of the capital stock of an Ohio public utility corporation. Such stock control is not equivalent to a transfer of its franchise to the foreign corporation prohibited by this section.

Toledo T. L. & P. Co. v. Smith, 205 Fed. 643 (D. C. 1913); Rep. Atty. Gen. 1912, p. 674.

Section 614-74. (Companies subject to act.) Companies formed to acquire property or to transact business which would be subjected to the provisions of this act, and companies owning or possessing franchises for any of the purposes contemplated in this act, shall be deemed and held to be subject to the provisions of this act, although no property may have been acquired, business transacted or franchises exercised. (May 31, 1911, 102 v. 572, § 77.)

Section 614-75. (Liability for act of officer, etc.) The act, omission or failure of any officer, agent or other person, acting for or employed by a public utility or railroad, while acting within the scope of his employment, shall be deemed and held to be the act or failure of the public utility or railroad. (May 31, 1911, 102 v. 572, § 78.)

Section 614-76. (Fees.) The commission shall charge and collect for furnishing any copy of any paper, record, testimony or writing made, taken or filed under the provisions of this act, except such transcripts and other papers as are required to be filed in any court proceedings herein authorized, whether under seal and certified to or otherwise, the same fees now charged by the secretary of state, and such fees itemized shall be paid into the state treasury on the first day of each month. Upon application of any person, and payment of the proper fee therefor, the commission shall furnish certified copies under the seal of the commission, of any order made by it, which shall be prima facie evidence in any court of the facts stated therein. The copies of schedules and classifications and tariffs of rates, tolls, prices, rentals, regulations, practices, services, fares and charges, and of all contracts, agreements and arrangements between public utilities and railroads, or either, filed with the commission as herein provided, and the statistics, tables and figures contained in the annual or other reports of such companies made to the commission as required under the provisions of this act, shall be preserved as public records in the custody of the commission and shall be received as prima

facie evidence of what they purport to be, for the purpose of investigations and prosecutions by the commission and in all judicial proceedings; and copies of and extracts from any of such schedules, classifications, tariffs, contracts, agreements, arrangements, or reports, made public records as aforesaid, certified by the commission under the seal of such commission, shall be received in evidence with like effect as the originals. Also copies of any order made by such commission certified under the seal of such commission, shall be furnished to any person upon application. (May 31, 1911, 102 v. 573, § 80.)

Section 614-77. (Information furnished by commission.)

The commission shall, whenever called upon by any officer, board or commission now existing or hereafter created in the state or any political subdivision thereof, furnish any data or information to such officer, board or commission and shall aid or assist any such officer, board or commission in performing the duties of his or its office, and all officers, boards or commissions now existing or hereafter created in the state or any political subdivision thereof, shall furnish to the commission, upon request, any data or information which will assist such commission in the discharge of the duties imposed upon it by this act. (May 31, 1911, 102 v. 573, § 81.)

The mayor of a municipality is entitled to copies of applications and papers filed with the commission, but must pay the fee for making the copies. Rep. Atty. Gen. 1912, p. 648.

Section 614-78. (Costs and expenses.) If the commission after investigating shall find that any rate, joint rate, fare, charge, toll, rental, schedule or classification of service is unjust, unreasonable and insufficient or unjustly discriminatory or unjustly preferential or in violation of law or otherwise in violation of any provisions of this act or that any service is inadequate or can not be obtained the public utility found to be at fault shall pay the expenses incurred by the commission upon such investigation.

All fees, expenses and costs of or in connection with any hearing or investigation may be imposed by the commission upon any party to the record, or may be divided between any or all parties to the record in such proportion as the commission may determine. (May 31, 1911, 102 v. 574, § 82.)

Section 614-79. (Penalty for wilful over or under valuation.) Whoever, being a member of the commission, shall wilfully overvalue the property of a public utility for the

purpose of enabling such public utility to exact a higher rate for service than could lawfully be exacted, or, shall willfully undervalue such property for the purpose of preventing such public utility from charging a lawful rate for such service shall be fined not to exceed one thousand dollars or be imprisoned not more than two years or both. (May 31, 1911, 102 v. 574, § 83.)

Section 614-82. (Each section of act independent.) Each section of this act, and every part thereof, is hereby declared to be independent sections and parts of sections and the holding of any section or part thereof to be void or ineffective for any cause, shall not be deemed to affect any other section or part thereof. (May 31, 1911, 102 v. 574, § 86.)

MOTOR TRANSPORTATION COMPANIES.

Section 614-84. (Definitions.) (a) The term "corporation", used in this chapter, means a corporation, a company, an association or a joint stock association.

(b) The term "person", when used in this chapter, means an individual, a firm or co-partnership.

(c) The term "motor transportation company", when used in this chapter, means every corporation or person, their lessees, trustees, receivers or trustees appointed by any court whatsoever, owning, controlling, operating or managing any motor propelled vehicle not usually operated on or over rails, used in the business of transportation of persons or property or both, as a common carrier for compensation, over any public highway in this state; provided, however, that the term "motor transportation company" as used in this chapter shall not include any person or persons, firm or firms, co-partnership or voluntary association, joint stock association, company or corporation, wherever organized or incorporated, in so far as they own, control, operate or manage a motor vehicle or motor vehicles used exclusively for the transportation of property and which are operated exclusively within the limits of a municipal corporation, and municipal corporations contiguous thereto, or in so far as they own, control, operate or manage taxicabs, hotel busses, school busses or sight-seeing busses, or busses owned and used exclusively in the promotion of city and suburban home development, or in so far as they own, control, operate or manage motor propelled vehicles, the major use of which is for the private business of the owners and the

use of which for hire is casual or disassociated from such business.

(d) The term "public highway", when used in this chapter, means any public street, road or highway in this state, whether within or without the corporate limits of a municipality.

(e) The words "fixed termini", when used in this act shall be understood to refer to the points between which any motor transportation company usually or ordinarily operates or manages any motor propelled vehicle, and the words "regular route" shall be understood to refer to that portion of the public highway over which any motor transportation company usually or ordinarily operates or manages any motor propelled vehicle. Whether or not any motor propelled vehicle is operated by such motor transportation company "between fixed termini or over a regular route" within the meaning of this chapter shall be a question of fact and the finding of the commission thereon shall be a final order which may be reviewed as provided in section 614-89 of the General Code. (110 v. 213.)

Section 614-85. (Motor vehicles.) No corporation or person, their lessees, trustees, receivers or trustees appointed by any court whatsoever, shall operate any motor propelled vehicles for the transportation of persons or property or both, for compensation, on any public highway in this state except in accordance with the provisions of this chapter. (110 v. 214.)

Section 614-86. (Jurisdiction vested with "the public utilities commission". Scope of jurisdiction.) The public utilities commission of the state of Ohio is hereby vested with power and authority to supervise and regulate each such motor transportation company in this state; to fix, alter and regulate rates; to regulate the service and safety of operation of each such motor transportation company; to prescribe safety regulations, and designate stops for service and safety on established routes; to require the filing of annual and other reports and of other data by such motor transportation companies; to provide uniform accounting systems; and to supervise and regulate motor transportation companies in all other matters affecting the relationship between such companies and the public to the exclusion of all local authorities in this state. The commission, in the exercise of the jurisdiction conferred upon it by this chapter, shall

have the power and authority to prescribe rules and regulations affecting such motor transportation companies, notwithstanding the provisions of any ordinance, resolution, license or permit heretofore enacted, adopted or granted by any incorporated city or village, city and county, or county, and in case of conflict between any such ordinance, resolution, license or permit, the order, rule or regulation of the public utilities commission shall, in each instance prevail; provided that such local subdivisions may make reasonable local police regulations within their respective boundaries not inconsistent with the provisions of this chapter. (110 v. 214.)

Section 614-87. (Conditions governing securing certificate of convenience and necessity. Cancellation of certificate.)

No such motor transportation company shall begin to operate any motor propelled vehicle for the transportation of persons or property, or both, for compensation, between fixed termini or over a regular or irregular route in this state, without first obtaining from the public utilities commission a certificate declaring that public convenience and necessity require such operation. The commission shall have the power, after hearing, when the applicant requests a certificate to operate in a territory already served by a motor transportation company holding a certificate of public convenience and necessity from the commission, to grant a certificate only when the existing motor transportation company or companies serving such territory do not provide the service required or the particular kind of equipment necessary to furnish such service to the satisfaction of the commission, and in all other cases, with or without hearing, to issue such certificates as prayed for, or to refuse to issue the same, or to issue them for the partial exercise only of the privileges sought or to issue such certificates for the use of certain kinds of equipment and for the handling of certain kinds of material or merchandise over such route, and may attach to the exercise of the rights granted by such certificates such terms and conditions as, in its judgment, the public convenience and necessity may require. Where a motor transportation company has been actually operating in good faith upon the date of filing this act in the office of the secretary of state, it shall file with the commission an affidavit showing its principal place of business, full information concerning the physical property, the route over which it has been operating, the schedule or schedules, together with a map of its route, showing the number of miles of route in

each municipality and county into, through or along which such route runs or extends, a statement that it has been actually operating over such route or routes in good faith, together with the liability insurance policy or policies required under section 614-99 of the General Code, and thereupon a certificate of public convenience and necessity shall issue, if the commission shall find the statements in said affidavit to be true.

Upon the payment of the fee provided under section 614-94 of the General Code to the commission, such motor transportation company may continue to operate and shall be governed in all respects as if such motor transportation company had made a written application.

The commission may at any time for a good cause suspend, and upon at least five days' notice to the grantee of any certificate and an opportunity to be heard, revoke, alter or amend any certificate issued under the provisions of this act.

On finding of the public utilities commission that any motor transportation company does not give convenient and necessary service in accordance with the order of such commission such motor transportation company shall be given a reasonable time, not less than sixty days, to provide such service before any existing certificate is cancelled or a new one granted over the route mentioned in the finding and order of or hearing before the public utilities commission. (110 v. 215.)

Section 614-88. (Consent to operate must be first secured.) Except as provided in section 614-84, no corporation or person, their lessees, trustees, receivers or trustees appointed by any court whatsoever, shall operate any automobile, jitney, bus, truck, stage, auto stage, or rent for hire car, for the transportation of persons or property or both, for compensation, over any public street, road or highway in this state between fixed termini or over a regular or irregular route, over which any motor transportation company is operating under a certificate of convenience and necessity issued by the commission as provided in this act, until such corporation or person, their lessees, trustees, receivers or trustees appointed by any court whatsoever, shall have secured a certificate of public convenience and necessity or permission from the commission to so operate, and then only in strict accordance with such rules as the commission may prescribe for such operation. (110 v. 216.)

Section 614-89. (Applications and complaints made and filed with commission.) In all respects in which the public utilities commission has power or authority under this act, applications and complaints may be made and filed with such commission, processes issued, hearings held, opinions, orders and decisions made and filed, petitions for re-hearings filed and acted upon, and all proceedings before the supreme court of this state considered and disposed of by such court in the manner, under the conditions and subject to the limitations and with the effect specified in the sections of the General Code governing the supervision of other public utilities by the commission. (110 v. 216.)

Section 614-90. (Rules governing application for certificates of public convenience and necessity.) The commission shall adopt rules prescribing the manner and form in which such motor transportation companies as defined in this act shall apply for the certificates of public convenience and necessity. Among other rules adopted there shall be the following:

(a) Application shall be made in writing on the blanks furnished by the commission and shall show the principal office or place of business and residence of such motor transportation company.

(b) Shall contain full information concerning the physical property used or to be used by the applicant.

(c) The complete route over which the applicant operates or desires to operate, showing the number of miles of said route in each municipality and county.

(d) The proposed time schedule or schedules or time cards of the applicant, if operating between fixed termini or over a regular route.

(e) The schedule or tariff showing the passenger or freight rates to be charged between the several points, if operating between fixed termini or over a regular route. (110 v. 216.)

Section 614-91. (Publication of notice of application. Hearing.) Such application shall contain a map, showing the highway or highways and public places upon and over which such motor transportation company is to operate, and the number and kind of motor vehicles to be used in carrying on the business of such motor transportation company. The applicant shall give notice of the filing of such application by publication made once a week for three weeks immediately prior to the day set for said hearing, in a news-

paper of general circulation published at the county seat of each county in or through which the applicant proposes to operate, or in one newspaper published in and of general circulation throughout the territory in or through which the applicant proposes to operate. Such published notice shall state the fact that such application has been made, the route proposed to be operated, the number of motor vehicles to be used, the number of trips to be made daily, and the name and address of the applicant. The commission shall, after the filing of such application, fix a date within thirty days for hearing upon the same, unless the commission in its discretion deems such hearing unnecessary and the best interests of the public require that said application be granted or rejected without such hearing. When a date for the hearing is fixed the commission shall give the applicant at least ten days' notice of such hearing. The applicant shall have the right, either before or after hearing or action by the commission to amend, modify or alter such application by filing with the commission an amendment to such application or a supplemental application which shall in turn be considered by the commission and be governed in the same manner as is provided in case of an original application. (110 v. 217.)

Section 614-92. (Operation restricted to specified routes.)

Except as otherwise expressly provided, it shall be unlawful for any motor transportation company as defined in this act to operate in this state on any route, other than the route provided for in the certificate granted by the commission; or to fail or refuse to operate on the whole of the route, in the manner and at the time specified in the certificate; except in case of emergency due to the act of God or unavoidable accident or casualty or the route becoming impassable, or in case it becomes necessary to make temporary detours; and it shall be unlawful for any such motor transportation company to neglect or refuse to comply with and obey any and all regulations and orders of the commission and other statutory laws and regulations of the state of Ohio governing and applying to such motor vehicles, provided, however, that nothing in this act shall prohibit a motor transportation company as defined hereunder and not operating between fixed termini from making casual trips over routes established hereunder. (110 v. 217.)

Section 614-93. (New application may be filed.) Any motor transportation company as defined in this chapter

may, at any time after a certificate is granted or refused, file a new application or supplement any former application, for the purpose of changing, extending or shortening the route, or increasing or decreasing the number of vehicles, or for the doing of any other act or thing which the applicant might be permitted to do under the general statutory laws and regulations of the state of Ohio. (110 v. 218.)

Section 614-94. (Taxes paid to treasurer of state. Rates. Trailer.) Every motor transportation company now operating or which shall hereafter operate in this state shall at the time of the issuance of such certificate, and annually thereafter on or between January 1st and January 15th of each calendar year, pay to the treasurer of state the following taxes for the expense of the administration and enforcement of the provisions of sections 614-84 to 614-102 of the General Code, and for the maintenance and repair of the highways of the state; all taxes levied upon the issuance of a certificate to any motor transportation company shall be reckoned as from the beginning of the quarter in which such certificate is issued.

For each motor propelled vehicle operating between fixed termini or over a regular route, carrying seven passengers or less, forty dollars; for each such motor propelled vehicle carrying more than seven but not more than twelve passengers, ninety dollars; for each such motor propelled vehicle carrying more than twelve but not more than eighteen passengers, one hundred and forty dollars; for each such motor propelled vehicle carrying more than eighteen but not more than twenty-four passengers, one hundred and eighty dollars; and for each such motor propelled vehicle carrying more than twenty-four passengers, two hundred and thirty dollars.

For each motor propelled vehicle not operating between fixed termini or over a regular route, carrying seven passengers or less, twenty dollars; for each such motor propelled vehicle carrying more than seven but not more than twelve passengers, fifty dollars; for each such motor propelled vehicle carrying more than twelve but not more than eighteen passengers, ninety dollars; for each such motor propelled vehicle carrying more than eighteen but not more than twenty-four passengers, one hundred and fifteen dollars; and for each such motor propelled vehicle carrying more than twenty-four passengers, one hundred and fifty dollars.

For each motor propelled vehicle used for transporting

property between fixed termini or over a regular route the manufacturer's rated carrying capacity of which is one and three-fourths tons or less, forty dollars; for each such motor propelled vehicle the manufacturer's rated carrying capacity of which is more than one and three-fourths tons but not more than two and one-half tons, eighty dollars; for each such motor propelled vehicle the manufacturer's rated carrying capacity of which is more than two and one-half but not more than three and one-half tons, one hundred and forty dollars; and for each such motor propelled vehicle the manufacturer's rated carrying capacity of which is more than three and one-half tons, two hundred dollars.

For each motor propelled vehicle used for transporting property not between fixed termini or over a regular route the manufacturer's rated carrying capacity of which is one and three-fourths tons or less, twenty dollars; for each such motor propelled vehicle the manufacturer's rated carrying capacity of which is more than one and three-fourths but not more than two and one-half tons, fifty dollars; for each such motor propelled vehicle the manufacturer's rated carrying capacity of which is more than two and one-half but not more than three and one-half tons, one hundred dollars; and for each such motor propelled vehicle the manufacturer's rated carrying capacity of which is more than three and one-half tons, one hundred and fifty dollars.

For each motor propelled vehicle used by any such company for transporting both persons and property simultaneously the tax shall be computed on the basis of either tonnage or passenger capacity and the basis which yields the greater revenue shall apply.

A trailer used by a motor transportation company hereunder shall be taxed at a rate equal to twenty percent of that levied upon the vehicle by which it is drawn.

In case of emergency, or unusual temporary demands for transportation, the taxes for additional motor propelled vehicles for limited periods shall be fixed by the commission in such reasonable amounts as may be prescribed by general rule or temporary order. (110 v. 218.)

Section 614-95. (Division of tax. Duties of treasurer of state with regard to taxes.) The treasurer of state shall open an account with each municipal corporation and county into, through or along which the route of each such motor transportation company runs or extends, and shall apportion fifty percent of the taxes imposed by section 614-94 in accordance with the lineal miles of route in each municipi-

pal corporation and county. The remaining fifty percent of such taxes shall belong to the state of Ohio and shall be paid into the state treasury to the credit of the state maintenance and repair fund.

The treasurer of state shall be the custodian of such funds and shall disburse the same in the manner provided in section 614-96 of the General Code. The treasurer of state is hereby authorized to deposit any portion of the funds due municipal corporations and counties into, through or along which the route runs or extends, not needed for immediate distribution, in the same manner and subject to all the provisions of law with respect to the deposit of active state funds by such treasurer; and all interest earned by such funds so deposited shall be collected by him and placed in the state treasury to the credit of the "state maintenance and repair fund." On the first business day of each month, the auditor of state on the requisition of the treasurer of state shall draw and transmit to the auditor of each county a warrant on the treasurer of state for the amount of the tax collections apportioned to the municipal corporations and counties into, through or along which the route of such motor transportation company runs and extends, accompanying the same with a statement showing the distribution of the amount represented thereby to each such municipal corporation or county. The county auditor shall certify the amount so transmitted into the county treasury to be disposed of as herein provided (110 v. 219.)

Section 614-96. (Distribution of revenue.) The revenue collected under the provisions of section 614-94 of the General Code shall be distributed as follows:

(1) Fifty percentum of all taxes collected under section 614-94 of the General Code shall be for the use of the municipal corporations or counties into, through and along which the route of such motor transportation company runs and extends. Such moneys shall be paid into the treasury of the proper county as provided herein and the proper portions distributed to the municipal corporations in accordance with the miles of route in such municipal corporation. In the treasuries of such municipal corporations and counties, such money shall constitute a fund which shall be used for the maintenance and repair of public roads, highways and streets and for no other purpose, and shall not be subject to transfer to any other fund. "Maintenance and repair" as used in this section includes all work done upon

any public road or highway or upon any street, in which the existing foundation thereof is used as the sub-surface of the improvement thereof, in whole or in substantial part.

(2) The "state maintenance and repair fund" shall be available for the use of the public utilities commission of Ohio in defraying the expenses incident to maintaining the bureau of the department for carrying out and enforcing the provisions of sections 614-84 to 614-102, inclusive, of the General Code, including the payment of salaries, traveling expenses, printing and other expenses, and for the use of the director of highways and public works in the manner provided by law. The General Assembly shall make appropriations therefrom for such purpose. (110 v. 220.)

Section 614-97. (Qualifications of chauffeur or driver. Examination and license of drivers.) It shall be unlawful for any motor transportation company as defined in this chapter to cause, allow or permit any motor propelled vehicle operated by it as a motor transportation company to be driven by any person under the age of twenty-one years; and such person shall be an American citizen and shall be skilled in the art of driving such public motor vehicle, and without physical disabilities or personal habits which would disqualify him or make him an unsuitable person to serve as driver of such public motor vehicle.

For the purpose of determining the qualifications of such chauffeur or driver, the secretary of state shall be governed by section 6302 of the General Code, in so far as the same may be applicable. Upon the issuance of the certificate to drive, the applicant shall pay the registration fee and no further fee shall be charged or examination required by the state or any local authorities in the state. The term "local authorities" as used herein means all officers, boards and commissions of counties, cities, villages or townships. In case of sickness, accident or other emergency, any other licensed driver may be substituted. (110 v. 221.)

Section 614-98. (Fees, Charges, etc.) The fees and charges provided under section 614-94 of the General Code shall be in addition to taxes, fees and charges fixed and exacted by other provisions of the general laws of Ohio; except the assessments required by section 606 of the General Code, but all fees, license fees, annual payments, license tax, or taxes or other money exactions, except the general property tax, assessed, charged, fixed or exacted by local authorities, such as municipalities, townships, counties, or other

local boards, or the officers of such subdivisions shall be deemed to be illegal and be superseded by this act. On such motor transportation company complying with the provisions of this act, all local ordinances, resolutions, by-laws and rules in force shall cease to be operative as to them, except that such local subdivisions may make reasonable local police regulations within their respective boundaries not inconsistent with the provisions of this act. (110 v. 221.)

Section 614-99. (Insurance policy or bond must be filed with commission.) No certificate of convenience and necessity shall be issued by the commission to any motor transportation company until such motor transportation company shall have filed with the commission a liability insurance policy or bond satisfactory to the commission in such sum and with such other terms and provisions as the commission may deem necessary adequately to protect the interests of the public having due regard for the number of persons and amount of property affected, which policy, policies or bonds shall insure the motor transportation company against loss sustained by reason of the death of or injuries to persons and for loss of or damage to property resulting from the negligence of such motor transportation company.

Such policy or bond shall further provide that ten days' notice in writing shall be given to the public utilities commission of intention to cancel such policy of insurance.

If such policy or bond is cancelled during the term thereof or in event the same should lapse for any reason, the commission shall require such motor transportation company to replace such policy or bond with another fully complying with the requirements of this section, and in default thereof the certificate shall be deemed revoked. (110 v. 221.)

Section 614-100. (Penalty for violation.) Every officer, agent or employe of any corporation, and every other person who violates or fails to comply with or who procures, aids or abets in the violation of any provision of sections 614-84 to 614-102, inclusive, of the General Code, or who fails to obey, observe or comply with any order, decision, rule or regulation, direction, demand or requirement, or any part or provision thereof, of the public utilities commission, or who procures, aids or abets any corporation or person in his failure to obey, observe or comply with any such order, decision, demand or regulation, or any part or provision

thereof, shall be deemed guilty of a misdemeanor and, upon conviction, shall be punished by a fine not exceeding one thousand dollars, or by imprisonment in the county jail not exceeding one year, or by both such fine and imprisonment. (110 v. 222.)

Section 614-101. (Interstate commerce only.) Neither sections 614-84 to 614-102, inclusive, of the General Code, nor any provisions thereof, shall apply or be construed to apply to commerce with foreign nations or countries, or among the several states of this Union, except in so far as the same may be permitted under the provisions of the constitution of the United States and the acts of congress. (110 v. 222.)

Section 614-102. (Each section and part thereof independent.) Each section of this act [G. C. §§ 614-84 to 614-102], and every part thereof, is hereby declared to be independent sections and parts of sections, and the holding of any section or part thereof to be void or ineffective for any cause shall not affect any other section or part thereof. (110 v. 222.)

PART VII.

SUPERINTENDENT OF INSURANCE.

- § 615. Superintendent of insurance.
- § 617. Duties of superintendent.
- § 623. Powers to compel attendance of witnesses.
- § 624. Instruments under seal of the superintendent.
- § 625. Examination of insurance companies.
- § 626. Authority of examiners.
- § 627-1. Authority and power of superintendent of insurance.
- § 627-2. Duty of bank officers.
- § 627-3. Penalty.
- § 628. Unsound companies.
- § 629. Restrictions on unsound companies.
- § 633. Action by attorney general.
- § 634. Dissolution of unsound companies.
- § 634-1. Application of sections 634-1 to 634-7.
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Section 615. (Superintendent of insurance.) This section which provided for the appointment and term of office of the superintendent of insurance was repealed in 1921. (109 v. 132.) By section 154-39 the powers of the superintendent of insurance are vested in the department of commerce.

Section 617. (Duties of superintendent.) The superintendent of insurance shall see that the laws relating to insurance are duly executed and enforced. When violation of a law relating to insurance is reported to him, he shall take or cause to be taken the testimony under oath of any and all persons supposed to have knowledge of such violation, and cause such testimony to be reduced to writing. If of opinion that there is sufficient evidence, he shall cause the person suspected of such violation to be arrested and charged with such offense, and furnish the proper prosecuting attorney all information obtained by him, the names of witnesses and a copy of all material testimony taken in the case. (R. S. Sec. 268; April 2, 1906, 98 v. 265; March 12, 1872, 69 v. 32, § 3.)

See § 154-39.

This section authorizes the superintendent to revoke the license of a foreign insurance company for violations of the Ohio insurance laws, although such violation is not, by statute, expressly made a cause of forfeiture. *State v. Tomlinson*, 101 O. S. 459 (1920).

The license of a foreign insurance broker (see § 644-2) may be revoked if the broker uses his license in the interest of an unlicensed foreign broker. Opins. Atty. Gen. 1922, p. 909.

Quo warranto is the proper remedy to test the validity of a license issued to an insurance company. *State v. Gearheart*, 104 O. S. 422 (1922).

Section 623. (Powers to compel the attendance of witnesses.) The superintendent of insurance, or when directed by him under his official seal, the deputy superintendent or warden, may summon and compel by order or subpoena the attendance of witnesses to testify in relation to any matter, which, by the laws of this state relating to insurance, is the subject of inquiry and investigation, and require the production of any book, paper or document pertaining to such matter. For such purpose they shall have the same power which is by law vested in justices of the peace to compel the attendance of witnesses and punish them for refusal to testify. Sheriffs and constables are required to serve and return any such process, and shall receive the same fees therefor as are allowed by law for like services. Witnesses shall receive the fees and mileage allowed in civil actions in courts of common pleas. All such fees, upon the presentation of proper vouchers approved by the superintendent of insurance, shall be paid out of the appropriation for the contingent fund of the insurance department. The fees and mileage of witnesses not summoned by the superintendent of insurance, deputy superintendent or warden shall not be paid by the state. (May 6, 1913, 103 v. 543; R. S. Sec. 269; April 2, 1906, 98 v. 265; May 12, 1902, 95 v. 549; April 26, 1898, 93 v. 292; March 12, 1872, 69 v. 32, § 4.)

Section 624. (Instruments under seal of the superintendent.) A certificate, assignment or conveyance executed in pursuance of law by the superintendent of insurance with the seal of his office thereto affixed shall be received as evidence and may be recorded in the same manner and with like effect as a deed duly acknowledged by an officer authorized by law. In all cases copies of papers in the office of the superintendent, certified by him under the seal of his office, shall be equal to the original as evidence. (R. S. Sec. 271; March 12, 1872, 69 v. 32, § 5.)

Section 625. (Examination of insurance companies.) The superintendent of insurance, or a person appointed by him for that purpose, may make an examination of the affairs of any insurance company doing business in this state. Such company, its officers and agents shall submit their books and

business to such examination and in every way facilitate it. The superintendent shall make or cause to be made each year an examination of the assets of every life insurance company organized under the laws of this state, and ascertain whether such assets are invested in the manner prescribed by law at the date such investments were made, and whether the last preceding annual statement of assets and unpaid death claims was correct. (R. S. Sec. 272; April 25, 1904, 97 v. 415; May 12, 1902, 95 v. 549; May 15, 1878, 75 v. 576, § 7; March 12, 1872, 69 v. 32, § 12.)

Insurance companies organized under special charters prior to the constitution of 1851 are subject to this section.

State v. Eagle Insurance Co. 50 O. S. 252 affirmed 153 U. S. 446.

Section 626. (Authority of examiners.) For the purpose of such examination, the superintendent, or other person so appointed, shall have authority to administer oaths to and examine the officers and agents of such insurance company relating to its business and affairs. If he deems it to the interest of the public, the superintendent may publish the result of such investigation in a newspaper printed at the seat of government and of general circulation in the state, and also a newspaper printed in the county where the principal office of such company is located. (R. S. Sec. 273; March 12, 1872, 69 v. 32, § 8.)

Section 627-1. (Authority and power of superintendent of insurance.) The superintendent of insurance is authorized and empowered to make written requisitions upon the officers or directors of any national bank, state bank, state bank and trust company or private bank, of this state, for such information as he may require relating to the financial transactions of any of such institutions with any insurance company, fraternal beneficiary association or assessment association authorized to do business in this state. (May 14, 1910, 101 v. 102, § 1.)

Section 627-2. (Duty of bank officers.) It shall be the duty of any officer or director of any such bank or trust company upon the receipt of such requisition, or within five days thereafter, to furnish to such superintendent in writing all the information called for in such requisition and in such manner and form as therein directed. (April 14, 1910, 101 v. 102, § 2.)

Section 627-3. (Penalty.) Any officer or director of any such bank or trust company who fails, neglects or refuses

to comply with the provisions of section two of this act shall be guilty of a misdemeanor and on conviction shall be fined not more than \$500.00 nor less than \$25.00. (April 14, 1910, 101 v. 103, § 3.)

Section 628. (Unsound companies.) If it appears to the superintendent of insurance upon satisfactory evidence that the assets of an insurance company organized under the laws of this state after deducting therefrom all liabilities including reinsurance, reserve or unearned premium fund, computed according to the laws of this state, are reduced twenty per cent or more below the capital required by law, he shall require such company to restore such deficiency within such period as he designates in such requisition. (R. S. Sec. 274; April 25, 1904, 97 v. 416; April 26, 1873, 70 v. 165, § 9.)

This section and § 629 confer powers and duties upon the superintendent of insurance, but do not confer power upon a court of equity, in the first instance, at the suit of stockholders and creditors, to wind up the affairs of an insurance company.

Benson v. Columbia Life Ins. Co., 7 N. P. n. s. 113.

Illegal method of restoring impaired capital. An insurance company can not make good its impaired capital stock by organizing a holding company, transferring its stock to the holding company, and having the holding company borrow the amount of the impairment on the stock so transferred.

Rep. Atty. Gen. 1910-1911, pp. 558, 561.

Unpaid assessment on stock. Right of company to withhold dividends. Where a stockholder, liable to assessment on his stock, failed to pay an assessment under this section, it was held that the insurance company had a right to withhold dividends subsequently declared, and to credit them on the unpaid assesment.

Rhodes v. Equitable, etc., Co., 3 C. C. 501; 2 C. D. 288.

A reinsurance reserve fund is not a debt which may be deducted in making returns for taxation.

Insurance Co. v. Cappellar, 38 O. S. 560.

Section 629. (Restrictions on unsound companies.) If such deficiency is more than forty per cent of the capital required by law, such company shall not thereafter issue any new policies or transact any new business until it receives from the superintendent of insurance a license authorizing it to do business, or until so authorized by a court in a proper proceeding therein. If the deficiency is more than twenty per cent and less than forty per cent of the capital required by law, and the officers of the company certify that the deficiency will be restored by the company, such company may continue business for thirty days from the date of such requisition. If at the expiration of the thirty days

any portion of the deficiency is not restored, the company shall not thereafter issue new policies or transact new business until authorized by the superintendent or by a court in a proper proceeding therein. (R. S. Sec. 274; April 25, 1904, 97 v. 416; April 26, 1873, 70 v. 165, § 9.)

Section 633. (Action by attorney general.) Upon default of a company to comply with such requisition of the superintendent of insurance, the superintendent shall communicate the fact to the attorney general, who shall apply to the court of common pleas of the county in which the principal office of the company is located for an order requiring such company to show cause why its business should not be closed. The attorney general shall give the company such notice of the pendency of the application as the court directs, and thereupon the court shall hear the allegations and proof of the respective parties, or refer the application of the attorney general to a referee. (R. S. Sec. 276; April 25, 1904, 97 v. 416; April 26, 1873, 70 v. 165, § 11.)

Section 634. (Dissolution of unsound companies.) If it appears to the satisfaction of the court that the assets of such company are reduced below the amount so required by law, or that the interest of the public so requires, the court shall decree a dissolution of the company and a distribution of its assets. A transfer of stock of a company made during the pendency of such investigation shall not release the party making the transfer from his liability for losses which have occurred previous to the transfer. (R. S. Sec. 276; April 25, 1904, 97 v. 416; April 26, 1873, 70 v. 165, § 11.)

Section 634-1. (Application of sections 634-1 to 634-7.) This act shall apply to all domestic corporations, associations, societies and orders to which any insurance law of this state is applicable; the words "corporation" or "corporations" herein shall also include all such associations, societies or orders. (April 12, 1910, 101 v. 114, § 1.)

Section 634-2. (Superintendent to take charge of property in certain cases. Attorney general to represent superintendent.) Whenever any such corporation (a) is insolvent; or (b) has refused to submit its books, papers, accounts or affairs to the reasonable inspection of the superintendent of insurance of this state, or his deputy or examiner; or (c) has neglected or refused to observe an order of the superintendent to make good within the time prescribed by law any deficiency, whenever its capital, if it be a stock

corporation, or its reserve, if it be a mutual corporation, shall have become impaired to the extent of twenty per cent.; or (d) has, by contract or reinsurance or otherwise, transferred or attempted to transfer substantially its entire property or business, or entered into any transaction the effect of which is to merge substantially its entire property or business in the property or business of any other corporation, association, society or order, without having first obtained the written approval of the superintendent; or (e) is found, by the superintendent of insurance to be in such condition that its further transaction of business will be hazardous to its policy holders, or to its creditors, or to the public; or (f) has willfully violated its charter or any law of the state; or (g) whenever any officer thereof has refused to be examined under oath by the superintendent of insurance touching its affairs, the superintendent may, the attorney general representing him, apply to the supreme court or any judge thereof or to the court of appeals of Franklin county or to the court of appeals of the county in which the principal office of such corporation is located for an order directing such corporation to show cause why the superintendent should not take possession of its property and conduct its business, and for such other relief as the nature of the case and the interests of its policy holders, creditors, stockholders or the public may require. (May 6, 1913, 103 v. 407; April 12, 1910, 101 v. 115, § 2.)

Section 634-3. (Injunction.) On such application or at any time thereafter, such court may, in its discretion, issue an injunction restraining such corporation from the transaction of its business or disposition of its property until the further order of the court. On the return of such order to show cause, the court shall either deny the application or direct the superintendent forthwith to take possession of the property and conduct the business of such corporation, and retain such possession and conduct such business until, on the application either of the superintendent, the attorney general representing him, or of such corporation, it shall, after a like hearing, appear to the court that the ground for such order directing the superintendent to take possession has been removed and that the corporation can properly resume possession of its property and the conduct of its business, and such corporation shall have the right to prosecute appeal or error from such order as provided in other cases. (April 12, 1910, 101 v. 115, § 3.)

Section 634-4. (Order of liquidation.) If, on a like ap-

plication and order to show cause, and after a full hearing, the court shall order the liquidation of the business of such corporation, such liquidation shall be made by and under the direction of the superintendent, who may deal with the property and business of such corporation in his own name as superintendent or in the name of the corporation, as the court may direct, and shall be vested by operation of law with title to all of the property, contracts and rights of action of such corporation as of the date of the order so directing him to liquidate. The filing or recording of such order in any record office of the state shall impart the same notice that a deed, bill of sale or other evidence of title duly filed or recorded by such corporation would have imparted. (April 12, 1910, 101 v. 116, § 4.)

Section 634-5. (Special deputy, clerks, etc. Special counsel.) For the purposes of this act, the superintendent shall have power to appoint, under his hand and official seal when necessary, a special deputy superintendent of insurance, as his agent, and to employ such clerks as may by him be deemed necessary, and give each of such persons such powers to assist him as he may consider wise. The compensation of such special deputy superintendent, and clerks, and all expenses of taking possession of and conducting the business or of liquidating any such corporation shall be fixed by the superintendent, subject to the approval of the court, and shall, on certificate of the superintendent, be paid out of the funds or assets of such corporation. The attorney general shall act as counsel for the superintendent under this act and neither shall receive any compensation therefor in addition to their regular salary as fixed by law. Provided, however, that the attorney general may, whenever it shall become necessary in the course of his duties hereunder, employ special counsel to aid him, and the compensation of such special counsel shall be fixed by the attorney general, subject to the approval of the court and shall, on certificate of the superintendent of insurance, be paid out of the funds or assets of such corporation. (April 12, 1910, 101 v. 116, § 5.)

Section 634-6. (Rules and regulations.) For the purposes of this act, the superintendent shall have power, subject to the approval of the court, to make and prescribe such rules and regulations as to him shall seem proper, provided however that summons as in other cases shall first be served upon such corporation. (April 12, 1910, 101 v. 116, § 6.)

Section 634-7. (Annual report; contents.) The superintendent shall, in his annual report include the names of the corporations so taken possession of, whether the same have resumed business or have been liquidated, and such other facts as shall acquaint the policyholders, creditors, stockholders and the public with his proceedings in respect to such corporations so taken possession of, and, to that end, the special deputy superintendent in charge of any corporation shall file annually with the superintendent on the first day of July or sooner if the situation so requires, a report of the affairs of such corporation similar to that required by law to be filed by such corporation. (106 v. 513; April 12, 1910, 101 v. 116, § 7.)

Section 634-8. (Unpaid losses are preferred claims.) When a domestic fire insurance company, whether stock or mutual becomes insolvent, or is unable to pay in full its liabilities, unpaid losses arising from the contingencies insured against by the contracts shall, in the distribution of its assets, whether liquidation is affected by a receiver or otherwise, be deemed and treated as preferred claims over claims for return premiums on uncompleted contracts. But nothing in this act shall impair the obligations imposed by law upon the officers of a mutual company to make assessments to pay all legal obligations of the company. (April 12, 1910, 101 v. 108.)

Section 635. (Authority of unsound insurance company revoked.) If it appears to the superintendent of insurance upon satisfactory evidence that the affairs of an insurance company, partnership, or association, not organized under the laws of this state, are in an unsound condition, he shall revoke the authority granted to such company to do business in this state, and cause a notice thereof to be published in at least one newspaper published at the seat of government, and in a newspaper published in the county of this state where the general agency is located. After the publication of such notice, it shall be unlawful for the agents of such company to procure applications for insurance or to issue policies. (R. S. Sec. 277; March 12, 1872, 69 v. 32, § 12.)

See *State v. Moore* 42 O. S. 103, 106.

Injunction, not mandamus, is the proper remedy to prevent wrongful revocation of the license of an insurance company.

State v. Hahn 50 O. S. 714, 718.

Revocation of authority does not prevent a company from winding up old business. *State v. Insurance Co.*, 22 C. C. n. s. 52 (1907).

Section 636. (Annual valuation of policies.) Each year the superintendent of insurance shall make or cause to be made net valuations of all outstanding policies, additions thereto, unpaid dividends, and all other obligations of each life insurance company transacting business in this state. For the purpose of such valuations, and for making special examinations of the condition of life insurance companies, as provided in the laws of this state relating to life insurance companies, and for valuing all policies of whatever description, and for any purpose whatever, the rate of interest shall be four per cent per annum, and the rate of mortality shall be established by the table known as the American Experience Table, but such valuations may be made according to the standards of valuation adopted by the company for the obligations to be valued, if the total valuation determined by any such standards for the obligations for which they have been adopted shall not be less than that determined by the legal minimum standard herein prescribed, and if such standards of valuation adopted by the company for the obligations to be valued shall not be less than the standards adopted by the company in computing its premiums and guarantees. (R. S. Sec. 279; April 22, 1908, 99 v. 178; April 26, 1904, 97 v. 437; February 7, 1889, 86 v. 11; Rev. Stat. 1880; May 15, 1878, 75 v. 580, § 14.)

Section 637. (When valuation of an officer of another state shall be received.) When the laws of any other state of the United States authorize a valuation of life insurance policies by some designated state officer, according to the standard prescribed in the next preceding section, or according to any other standard which makes the value of the policy not less than that of the standard so prescribed, the valuation made according to such standard, by such officer of the policies and other obligations of any life insurance company not organized under the laws of this state, and certified by such officer, shall be received as true and correct and the superintendent shall require no further valuation of such policies, if such officer accepts a like certificate from the superintendent of insurance of this state of the valuation of the policies of any life insurance company incorporated under the laws of this state. (R. S. Sec. 279; April 22, 1908, 99 v. 178; April 26, 1904, 97 v. 437; February 7, 1889, 86 v. 11; Rev. Stat. 1880; May 15, 1878, 75 v. 580, § 14.)

Section 638. (When valuation of an officer of another state shall not be received.) If such officer of another state of the United States is prohibited by law from accepting

the certificate of valuation of the superintendent of insurance of this state, the superintendent shall require the officers of all companies located in such state to submit to him within a reasonable time the description of the policies thereof for valuation, and shall make, or cause to be made, a valuation thereof according to the standard prescribed. If such descriptions are not submitted to the superintendent within the time fixed by him, he shall revoke the license of such company and shall not renew it until such descriptions are submitted and a valuation by him is completed. (R. S. Sec. 279; April 22, 1908, 99 v. 178; April 26, 1904, 97 v. 437; February 7, 1889, 86 v. 11; Rev. Stats. 1880; May 15, 1878, 75 v. 580, §-14.)

Section 639. (When valuation of an officer of another state or country shall be received.) If by the laws of any other state or country an annual valuation of the policies of life insurance companies of such state or country is required to be made by a state officer of such state or by an officer of such country, the valuation so made by such state officer or officer of such country of the policies of any company organized under the laws of the state or country in which such valuation is made in accordance with the standards prescribed by the laws of such state or country may be accepted by the superintendent of insurance of this state, and if so accepted by the superintendent of insurance, such valuation shall stand in the place of any valuation of such policies required to be made by the superintendent of insurance of this state. (R. S. Sec. 279; April 22, 1908, 99 v. 178; April 26, 1904, 97 v. 437; February 7, 1889, 86 v. 11; Rev. Stats. 1880; May 15, 1878, 75 v. 580, § 14.)

See *State v. Reinmund*, 45 O. S. 214.

Section 640. (Securities to be deposited with state treasurer.) All securities deposited with the superintendent of insurance shall be deposited by him with the treasurer of state, and the treasurer shall not deliver such securities or coupons attached thereto, except upon the written order of the superintendent. No security shall be accepted for deposit by the superintendent unless it is of par and market value of one thousand dollars or more. (R. S. Sec. 281; April 25, 1904, 97 v. 410; April 26, 1873, 70 v. 165, § 16.)

For exceptions see §§ 9459 to 9461.

Attachment of securities. See 3 Opins. Attys. Gen. 531.

Taxation of securities deposited by foreign companies, see § 5437.

Section 641. (Sale and distribution of securities of defaulting companies.) If any company, corporation, or association required by law to make a deposit with the superintendent of insurance, or other state officer, to secure the contracts of such company, corporation, or association, or for any other purpose, fails to pay any of its liabilities upon such contracts, or other obligations, according to the terms thereof after the liability thereon has been determined, or if such company, corporation, or association, having ceased to do business within this state, leaves unpaid any such liability or has become insolvent, the attorney general of the state, on behalf of the superintendent of insurance, or such other officer, and upon the application of any person entitled to participate in such deposit, or the proceeds arising therefrom, shall commence a civil action in the court of common pleas of Franklin county, making the company, corporation, or association, a party defendant, to determine the rights of all parties claiming any interest in such deposit, to subject the deposit to the payment or satisfaction of all liabilities and to distribute such fund among the persons entitled thereto. (R. S. Sec. 281-1; 95 v. 480, § 1.)

See 3 Opins. Attys. Gen., 531.

Upon insolvency of a company, its deposit should be administered by the superintendent of insurance under direction of the Ohio court, for the benefit of Ohio policyholders. The deposit should not be turned over to the legal representatives of the company in the state of its domicile. *Turner v. Insurance Co.*, 8 Ohio App. 285; 28 O. C. A. 113 (1917); *Hogan v. Surety Co.*, 8 Ohio App. 172; 28 O. C. A. 139 (1916); s. c., 18 N. P. n. s. 380.

Section 642. (Notice to claimants.) Upon the filing of the petition in such case, the superintendent of insurance, or other officer, shall cause to be published for six consecutive weeks in three papers of general circulation within the state, one of which shall be published at the seat of government, a notice containing a succinct statement of the object and prayer of the petition in such action, and the time within which persons claiming to have an interest in such fund shall be required to answer. (95 v. 481, § 2; R. S. Sec. 281-2.)

The provision fixing the time for filing claims is not a statute of limitations. The court may, in its discretion, open up a default and permit a tardy claimant to set up his claim. *Turner v. Ins. Co.*, 8 Ohio App. 285; 28 O. C. A. 113 (1917).

Section 643. (Procedure in such case.) The clerk of such court shall forward a copy of such notice to the last known address of such company, corporation or association. The code of civil procedure shall govern such proceedings in

so far as it is applicable, and upon the hearing of the cause, such order, judgment or decree shall be entered by the court as is deemed just and equitable. (95 v. 481, §§ 2, 3; R. S. Secs. 281-2, 281-3.)

Section 644. (Agents license; appointment upon written notice; revocation or cancellation; renewal.) No person shall procure, receive, or forward applications for insurance unless a resident of this state and duly licensed by the superintendent of insurance. Upon written notice by an insurance company authorized to transact business in this state of its appointment of a person to act as its agent the superintendent of insurance shall, if he is satisfied that the appointee is a suitable person, and intends to hold himself out in good faith as an insurance agent, issue to him a license which shall state, in substance, that the company is authorized to do business in this state and that the person named therein is the constituted agent of the company in this state for the transaction of such business as it is authorized to transact therein. Such notice shall be upon a form furnished by the superintendent of insurance and shall be accompanied by a statement under oath by the appointee which shall give his name, age, residence, present occupation, his occupation for the five years next preceding the date of the notice, and such other information, if any, as the superintendent of insurance may require, upon a blank furnished by him. The superintendent of insurance after the granting of such license, for cause shown, and after a hearing may determine any person so appointed, or any person heretofore appointed as agent, to be unsuitable to act as such agent, and shall thereupon revoke such license and notify both the company and the agent of such revocation. Unless revoked by the superintendent of insurance, or unless the company by written notice to the superintendent cancels the agent's authority to act for it, such license and any other license issued to an agent or any renewal thereof shall expire on the last day of February next after its issue. But any license issued and in force when this act takes effect or thereafter issued, may, in the discretion of the superintendent, be renewed for a succeeding year or years by a renewal certificate without the superintendent's requiring the detailed information required by this act. A foreign company shall pay a fee of two dollars for every such license and for each renewal thereof. While such license remains in force, a foreign company shall be bound by the acts of

the person named therein within his apparent authority as its acknowledged agent. (107 v. 698; R. S. Sec. 283; April 25, 1904, 97 v. 411; March 12, 1872, 69 v. 32, § 18.)

The sale of a fire insurance agency business, with good will, does not affect the right of the insurance companies to revoke the authority of the purchaser and to appoint a new agent. Custom of insurance agents does not entitle the purchaser to an injunction against the new agent, to prevent the securing of renewals by the new agent. *Bryson Co. v. Archer*, 18 C. C. n. s. 437 (1912); *aff'd*, no rep. 89 O. S. 413.

Where a life insurance agent promises to pay another person a commission upon the first premiums paid by persons recommended by him to the agent, this section does not bar a recovery on such promise.

Connelly v. Pickard, 4 N. P. n. s. 294; 17 L. D. 116.

The superintendent of insurance has discretion to refuse a license to an agent who has previously solicited insurance without a license and offered rebates of premium.

Vorys v. State, 67 O. S. 15.

Agent of foreign assessment or co-operative life associations.

See 4 Opins. Attys. Gen., 329.

License refused because of objectionable agency contract.

See Rep. of Atty. Gen., 1908, p. 163.

5 Opins. Attys. Gen., 942.

Insurance policies may be sold by means of automatic vending machines, providing sample copies of policies are displayed and all persons in charge of the machines are licensed as agents.

Rep. Atty. Gen., 1910-1911, p. 563.

A "life insurance club," the members of which receive compensation for procuring new members, and additional compensation if such new members take insurance, can not act as agent without a license.

Rep. Atty. Gen., 1904-1905, p. 112.

In the articles of incorporation of an insurance agency company, the corporate purpose can not be expressed as a "business of general insurance underwriters."

Rep. Atty. Gen., 1911-1912, p. 60.

Section 644-1. (Employment of solicitors by agents; solicitor's license; revocation.) Any agent duly authorized and licensed as provided in the preceding section, and representing one or more insurance corporations within this state, may employ such solicitors as he may desire to represent him and his agency, but such solicitors shall not represent themselves, by advertisement or otherwise, as agents of insurance companies for which their employer may be the authorized agent, and such solicitors shall in all instances represent themselves only as solicitors for said authorized agent. Upon written notice by any such duly authorized and licensed agent that he has employed such person as a solicitor, the superintendent of insurance shall, if he is satisfied that such solicitor is a suitable person, and intends to hold himself out in good faith as a solicitor of insurance, issue to him a license in such form as may be prepared by

the superintendent, and such notice shall be upon a form furnished by the superintendent of insurance and shall be accompanied by a statement under oath by the solicitor which shall give his name, age, residence, present occupation, his occupation for the five years next preceding the date of the notice, and such other information, if any, as the superintendent of insurance may require, upon a blank furnished by him. The superintendent of insurance may at any time after the granting of such license, for cause shown, and after a hearing determine any person so employed to be unsuitable to act as such solicitor and shall thereupon revoke such license and notify both the agent and the solicitor of such revocation. Unless revoked by the superintendent of insurance, or unless the agent by written notice to the superintendent cancels the solicitor's authority as such solicitor, such license and any other license issued to a solicitor or any renewal thereof shall expire on the last day of February next after its issue. But any license may, in the discretion of the superintendent, be renewed for a succeeding year or years by a renewal certificate without the superintendent's requiring the detailed information required in this section. The agent giving such notice shall pay to the superintendent of insurance a fee of two dollars for every such license and for each renewal thereof. The issuance of a solicitor's license shall be limited to natural persons who shall be residents of the state of Ohio. (107 v. 698.)

Section 644-2. (Broker's license, resident and outside state. Application in writing; contents; revocation of license.) The superintendent of insurance may upon the payment of ten dollars issue to any suitable person resident in any other state, a license to act as an insurance broker to negotiate contracts of insurance or reinsurance or place risks or effect insurance or reinsurance, with any qualified domestic insurance company or its agent or with the authorized agent in this state of any foreign insurance company duly admitted to do business in this state and not otherwise upon the following conditions: The applicant for such a license shall file with the superintendent of insurance an application which shall be in writing upon a form to be provided by the superintendent, and shall be executed by the applicant under oath and kept on file by the superintendent of insurance. Such application shall state the name, age, resident and occupation of the applicant at the time of making application, his occupation for the five years next preceding the date of filing the application, and shall state that the applicant

intends to hold himself out and carry on business in good faith as an insurance broker, and shall give such other information as the superintendent may require. The application shall be accompanied by a statement upon a blank furnished by the superintendent of insurance as to the trustworthiness and competency of the applicant, signed by at least three reputable citizens of this state. If the superintendent of insurance is satisfied that the applicant is trustworthy and competent and intends to hold himself out and carry on business in good faith as an insurance broker, he may issue to him the license applied for. The superintendent may at any time after the granting of a broker's license, for cause shown, and after a hearing, determine that the licensee has not complied with the insurance laws or is not trustworthy or competent, or is not holding himself out and actually carrying on business as an insurance broker, or is not a suitable person to act as such broker, or has placed insurance on risks in this state in companies or other insurers not authorized to transact business in this state, and he shall thereupon revoke the license of such broker and notify him that the license has been revoked. Such broker's license shall expire on the last day of February next after its issue, unless sooner revoked by the superintendent of insurance for cause. The superintendent of insurance shall publish a notice of the revocation of a broker's license in such manner as he deems proper for the protection of the public. Brokers' licenses issued on application as herein provided may, in the discretion of the superintendent of insurance, be renewed upon the payment of the proper fees without his requiring anew the details required in the original application. (107 v. 698.)

A foreign broker licensed under this section is not authorized to maintain a resident representative in Ohio. He is authorized to deal only with the parties specified in § 644-2. An Ohio corporation, organized and controlled by such a foreign broker, engaged in soliciting business for him, is not entitled to a license. Opins. Atty. Gen. 1922, p. 909.

A licensed foreign broker is not authorized to negotiate insurance contracts in Ohio for an unlicensed foreign broker. Opins. Atty. Gen. 1922, p. 909.

Section 644-3. (When license shall be refused or revoked.) It shall be the duty of the superintendent of insurance to withhold any license applied for, or revoke any license to any agent, solicitor or broker when he is satisfied that the principal use of such license is to effect insurance upon the property of such agent, broker or solicitor, or to

evade or violate the provisions of section 9589-1 of the General Code. (107 v. 698.)

Section 644-4. (Payment of commission, etc., except to licensed agent prohibited.) It shall be unlawful for any insurance company authorized to do business in this state to pay or allow or cause to be paid or allowed for negotiating any contract of insurance on any property within the state of Ohio any commission, consideration, money or other thing of value to any person, firm or corporation not licensed in accordance with the provisions of this act. [G. C. §§ 644 to 644-5.] (107 v. 698.)

Section 644-5. (Application of act.) Nothing in this act shall be construed as modifying or repealing the provisions of section 654-1 and section 5438 of the General Code nor shall the provisions hereof apply to insurance companies other than companies organized or admitted for the purposes provided in sub-division 1 of section 9510 of the General Code, nor shall it apply to mutual protective associations nor to companies operating on the mutual or assessment plan, organized under the laws of Ohio. (107 v. 698.)

Section 645. (When non-residents may not act as agent.) The superintendent of insurance shall issue no license to any person as agent of an insurance company if such person is a resident of a state which by its laws, prohibits residents of this state from acting as agents of insurance companies in such state, and if the superintendent is satisfied that any person holding a license as such agent is a resident of such state, he shall revoke such license. (R. S. Sec. 283a; April 22, 1904, 97 v. 152.)

Section 646. (Certificate of compliance.) Upon the filing of each of its annual statements or as soon thereafter as practicable, the superintendent of insurance shall issue to each insurance company or association authorized to do business in this state, a certificate that it has complied with the laws of this state. Such certificate of compliance shall also contain a statement of the amounts of its paid up capital stock, assets, liabilities, income and expenditures for the preceding year, as shown by its annual statement for that year. The superintendent shall issue to each newly applying company or association which he finds should be authorized to do business in this state, a certificate that it has complied with the laws of this state, which certificate shall contain

a statement of the amounts of its paid up capital stock, assets, liabilities, income and expenditures as shown by a financial statement submitted by it under the oath of its officers. (R. S. Sec. 284; April 25, 1904, 97 v. 405; March 12, 1872, 69 v. 32, §§ 19, 21; S. & S. 227.)

It is said that the superintendent of insurance should refuse a certificate to an insurance company, the majority of whose stock is owned by a holding company.

Rep. Atty. Gen. 1910-1911, pp. 540, 558, 561.

Mandamus against the superintendent will not lie to test the validity of a certificate issued by him. Quo warranto is the proper remedy. State v. Gearheart, 104 O. S. 422 (1922).

Discretion of superintendent in refusing to issue certificate.

State v. Moore 42 O. S. 103.

Vorys v. State 67 O. S. 15.

See also note to § 9365.

Expiration of certificates.

See § 667.

Sections 646 et seq., 9365 et seq. and 9559 et seq. are statutes in pari materia and should be construed together.

5 Opins. Atty. Gen. 658 (1902).

Section 647. (Copy of certificate to be filed with county recorder.) Each insurance company and association not incorporated under the laws of this state, before it does any business under authority of its certificate of compliance in any county of this state in which it has an agency, shall file a copy of such certificate duly certified by the superintendent with the recorder of such county. For filing each certificate of compliance and each license, the recorder shall receive ten cents. (R. S. Sec. 284; April 25, 1904, 97 v. 405; March 12, 1872, 69 v. 32, §§ 19, 21; S. & S. 227.)

Section 648. (Publication of certificate.) Annually, and before the time of making its report to the superintendent of insurance as hereafter provided, such company or association shall publish its certificate of compliance in every county, where it has an agency, in a newspaper published and of general circulation in such county. (R. S. Sec. 284; April 25, 1904, 97 v. 405; March 12, 1872, 69 v. 32; §§ 19, 21; S. & S. 227.)

This section applies to assessment associations as well as to companies doing business on the stock or mutual plan; but does not apply to fraternal benefit societies.

5 Opin. Attys. Gen., 343 (1900).

The publication should be in a newspaper published in the English language.

4 Opins. Attys. Gen., 922 (1899).

Section 649. (When newspaper deemed of general circulation.) No newspaper shall be deemed to be a newspaper

of general circulation as defined in the preceding section unless it has been established for at least one year, is printed in the English language and has a circulation in the county in which it is published as follows: In a county having at the last preceding federal census a population not more than thirty thousand, six hundred; in a county having a population of over thirty thousand and not more than fifty thousand, eight hundred; in a county having a population of over fifty thousand and not more than one hundred thousand, twelve hundred; in a county having a population of over one hundred thousand and not more than one hundred and fifty thousand, two thousand; in counties having a population of more than one hundred and fifty thousand, three thousand. (R. S. Sec. 284; April 25, 1904, 97 v. 405; March 12, 1872, 69 v. 32, §§ 19-21; S. & S. 227.)

Section 650. (Certificate as to circulation of newspaper.)

Before publication of any such certificate, the manager, editor or proprietor of a newspaper shall certify under oath on a prepared blank, furnished him on application by the superintendent of insurance, the information prescribed in the preceding section, and if such affidavit shows that such newspaper is one of general circulation under the provisions of such section, the superintendent shall deliver to him a certificate that such newspaper is one of general circulation, as defined by the preceding section. (R. S. Sec. 284; April 25, 1904, 97 v. 405; March 12, 1872, 69 v. 32, §§ 19, 21; S. & S. 227.)

Section 651. (Report of publication by foreign company.) On or before October first of each year, each insurance company and association doing business in this state which is not incorporated under the laws thereof, shall file with the superintendent of insurance, upon blanks prepared and upon application furnished by him, a report in writing under oath of its president and secretary showing the counties in which publication of its certificate of authority to do business was made, the counties in which it had agencies at the time of such publication, and the names of the newspapers in which the publication was made, with a copy of the certificate so published attached thereto. (R. S. Sec. 284; April 25, 1904, 97 v. 405; March 12, 1872, 69 v. 32, §§ 19, 21; S. & S. 227.)

Section 652. (Penalty for failure to make publication.)

If any such company or association fails to comply with the laws relating to the publication of such certificate, the super-

intendent shall suspend its authority to do business in any county where such publication has not been made, until such publication is made; provided that if it appears that through mistake or oversight such publication has not been made in any county, such authority shall not be suspended in such county if such publication is made within a time designated by the superintendent. (R. S. Sec. 284; April 25, 1904, 97 v. 405; March 12, 1872, 69 v. 32, §§ 19, 21; S. & S. 227.)

Section 653. (Approval of publication.) Publication in a newspaper shall not be approved by the superintendent of insurance unless prior to such publication he has certified that such newspaper is one published and of general circulation in the county, but if publication has been made in any such newspaper without such certificate and a report as herein provided filed and such certificate of the superintendent is procured within such time as he designates, publication in such newspaper shall be approved. The superintendent shall keep a book in which shall be recorded the names of the newspapers so certified as newspapers of general circulation, which book shall be open to inspection, and every such certificate of circulation shall remain in force until revoked, provided that whenever he deems proper the superintendent may demand further certificates as to the circulation of any such newspaper. (R. S. Sec. 284; April 25, 1904, 97 v. 405; March 12, 1872, 69 v. 32, §§ 19, 21; S. & S. 227.)

A certificate from the superintendent of insurance certifying that a newspaper is of general circulation is conclusive evidence of that fact. Rep. Atty. Gen., 1910-1911, p. 559.

Section 654. (Foreign company may appoint general and other agents.) By resolution of its board of directors or managers, an insurance company not organized under the laws of this state may appoint one or more general agents with authority to appoint other agents in this state. A certified copy of such resolution and appointment shall be filed with the superintendent of insurance, and agents so appointed by such general agents, shall be deemed to be the agents of such company as if directly appointed by such company. Agents for such company may be appointed in writing by the president, vice-president, chief manager or secretary thereof, and when so appointed shall be deemed to be the agents of such company as fully as if appointed by the board of directors or managers thereof. (R. S. Sec. 285; April 22, 1904, 97 v. 152; March 12, 1872, 69 v. 32, § 20.)

Agent's license, see §§ 644 to 644-5.

Taxation of insurance agent's balances. See Opins. Atty. Gen. 1916, pp. 1307, 1889.

Section 654-1. (Certificate of authority to agents. Record of names and addresses of agents. Conviction for violation of law cause for revocation of agent's certificate.) Every insurance company organized under the laws of this state and transacting the business of life insurance, or the business of casualty insurance, shall certify under the hand of one of its principal officers or of its duly authorized officer or agent, to the superintendent of insurance of this state, the names and addresses of the persons authorized by it, as its agents, to solicit or place insurance. The authority of such agent shall continue until cancelled by the company by like certificate filed with the superintendent of insurance, unless the authority of the agent shall be revoked by the superintendent of insurance.

The superintendent of insurance shall record the names and addresses so certified in such manner that duly authorized agents and their respective companies may conveniently be inspected.

No person shall act as agent for such company in soliciting or placing insurance, unless the unrevoked certificate of his authority is so filed with the superintendent of insurance.

Upon the conviction of any such insurance agent, for the violation of any insurance law of this state, the superintendent of insurance may revoke the authority of such agent for not more than one year and cancel his name on the records of the superintendent of insurance, and notify the agent and his company or companies of such revocation; and thereafter, such agent shall not act as an insurance agent or transact any insurance business for or on behalf of any insurance company until new certificate or certificates of his authority, by the company or companies thereafter appointing him, shall be duly filed with and approved by the superintendent of insurance.

No other license or evidence of authority of such insurance agent shall be required, and there shall be no fee or other expense in connection with such certificates of authority. (106 v. 241.)

Section 655. (Discontinuance of business by life insurance company.) When a life insurance company doing business in this state decides to discontinue its business, the superintendent of insurance upon application of such company or association shall give notice, at its expense, of such intention at least once a week for six weeks in a paper published and of general circulation in the county in which

such company or its general agency is located. After such publication the superintendent shall deliver to such company or association its securities held by him, if he is satisfied on an exhibition of its books and papers, and on an examination made by himself or by some competent disinterested person or persons appointed by him, and upon the oath of the president, or principal officer, and the secretary or actuary of such company, that all debts and liabilities due or to become due upon any contract or agreement made with any citizen or resident of the United States are paid and extinguished; but the superintendent from time to time may deliver to such company or association or its assigns any portion of such securities on being satisfied that an equal proportion of the debts and liabilities due or to become due upon any such contract or agreement have been satisfied, if the amount of securities retained by him is not less than twice the amount of the remaining liabilities. (R. S. Sec. 286; March 12, 1872, 69 v. 32, § 22.)

Where a company reinsured all its unmatured risks in conformity with statute, the policyholders having notice thereof and making no objection but paying subsequent premiums to the second company, and a rider was placed by the second company upon each policy, assuming the obligations, the first company is presumably released, and the superintendent of insurance is justified in considering such obligations released and extinguished under § 655. Rep. Atty. Gen. 1914, p. 588.

Section 656. (Discontinuance of insurance companies other than life. Notice. Superintendent may deliver securities to companies under certain conditions.) When any insurance company or corporation other than life, which has made a deposit with the superintendent of insurance, intends to discontinue its business in this state, the superintendent upon application of such company or corporation, shall give notice at its expense of such intention at least once a week for six weeks in three newspapers of general circulation in the state. After such publication, the superintendent shall deliver to such company or association its securities held by him, if he is satisfied by the affidavits of the principal officers of the company and on an examination made by him or by some competent, disinterested person or persons appointed by him, if he deems it necessary, that all liabilities and obligations which said deposit has been made to secure have been paid and extinguished; but the superintendent may, from time to time, deliver to such company or its assigns, under like condition, any portion of such securities on being satisfied that an equal proportion of said liabilities and obligations have been satisfied, if the amount of securities re-

tained by him is not less than twice the amount of the remaining liabilities and obligations. (March 21, 1913, 103 v. 135; April 28, 1910, 101 v. 147; R. S. Sec. 286a; March 22, 1893, 90 v. 103.)

Securities deposited prior to the amendment of this section (101 v. 147) can not be withdrawn until its liabilities on contracts with non-residents, incurred prior to the amendment, are satisfied.

Rep. Atty. Gen. 1910-1911, pp. 554, 556.

The amendment of this section (101 v. 147) did not repeal §§ 9373 and 9565.

Rep. Atty. Gen., 1911-1912, p. 817.

Section 657. (Fees of superintendent.) There shall be paid to the superintendent of insurance the following fees:

By each insurance company doing business in this state;

For filing copy of its charter or deed of settlement, twenty-five dollars;

For filing each statement, twenty dollars;

For each certificate of authority or license, and certified copy thereof, two dollars;

For each copy of a paper filed in his office, twenty cents per folio;

For affixing the seal of office and certifying any paper, one dollar.

By each life insurance company doing business in this state;

For annual valuation of its policies, one cent on every one thousand dollars of insurance.

By foreign insurance companies doing business in this state;

For making and forwarding annually, semi-annually and quarterly the interest checks and coupons accruing upon bonds and securities deposited, twenty-five dollars each year, on each one hundred thousand dollars so deposited. (R. S. Secs. 269, 282; April 2, 1906, 98 v. 265; May 12, 1902, 95 v. 549; April 26, 1898, 93 v. 292; March 30, 1892, 89 v. 167; March 25, 1891, 88 v. 196; March 12, 1872, 69 v. 32, §§ 4, 17.)

Valuation of policies.

State v. Reinmund, 45 O. S. 214.

The charge of \$25.00 per year for collecting and forwarding coupons and interest checks is for each \$100,000.00 of securities per calendar year, although the deposit may not have been held for the entire year. Rep. Atty. Gen. 1914, p. 834.

Section 658. (Retaliatory provision.) When by the laws of any other state, district, territory or nation, any taxes, fines, penalties, license fees, deposits of money, securities, or other obligations, or prohibitions are imposed on insurance

companies of this state doing business in such state, district, territory or nation, or upon their agents therein, the same obligations and prohibitions shall be imposed upon insurance companies of such other state, district or nation doing business in this state and upon their agents. (R. S. Sec. 282; May 12, 1902, 95 v. 549; March 30, 1892, 89 v. 167; March 25, 1891, 88 v. 196; March 12, 1872, 69 v. 32, § 17.)

See § 5436.

The provisions of this section are retaliatory and must, therefore, be confined to such cases as fairly fall within the letter of the statute.

State v. Insurance Co., 49 O. S. 440.

See also State v. Reinmund, 45 O. S. 214.

3 Opins. Attys. Gen. 199.

Section 659. (Forms of statements to be furnished.) In November of each year, the superintendent of insurance shall furnish each insurance company doing business in this state two or more printed copies of the forms of statements required by law to be made by them, and from time to time he may make such changes in such forms or such additions thereto as he deems best adapted to secure a true statement of the condition of such companies. (R. S. Sec. 280; April 25, 1904, 97 v. 410; March 12, 1872, 69 v. 32, § 15.)

Section 660. (Licenses to solicit certain insurance. Penalty for unauthorized company, agent, etc., doing business.)

The superintendent of insurance may issue licenses to citizens of this state, subject to revocation at any time, permitting the person named therein to solicit and issue, fire, lightning, tornado, explosion, automobile or marine insurance on property in this state in insurance companies not authorized to transact business in this state. Each such license shall expire on the thirty-first day of March next after the year in which it is issued, and may be then renewed;

Provided, however, any officer, agent, solicitor, broker, inspector, adjuster, or employee of any unauthorized insurance company not licensed under section 660, or any agent, broker or other representative of the owner of property in this state, or any adjuster, agent or person who shall take or receive any application for insurance upon property in this state, or receive or collect a premium or any part thereof for any unauthorized insurance company, or adjust any loss thereon, or make any inspection thereof, or shall attempt or assist in any such act, or perform any act in this state relating to or concerning any policy or contract of insurance of any unauthorized insurance company, shall be punished by a fine of not less than \$25.00 nor more than

\$500.00 or by imprisonment in the state penitentiary for not exceeding one year, or by both such fine and imprisonment. (108 (Pt. 1) v. 420; R. S. Sec. 3656-1; April 22, 1904, 97 v. 157, § 1.)

Section 661. (Fee.) For each such license and renewal, the superintendent of insurance shall collect ten dollars, and such licenses and renewals shall be filed with the recorder and published annually in the county where such agent's office is located in the same manner as certificates of compliance are filed and published. (R. S. Sec. 3656-1; April 22, 1904, 97 v. 157, § 1.)

Section 662. (Affidavit to be filed before issuing such insurance.) Before the person named in such license shall solicit or issue any insurance in such companies on any such property, he shall in every case file with the superintendent of insurance his own affidavit and the affidavit of the person, or of the president or secretary of the corporation, owning the property on which the insurance is to be placed, which shall have force and effect one year only from the date thereof, that such owner is unable to procure from companies authorized to do business in this state the amount of insurance necessary to protect such property. (R. S. Sec. 3656-1; April 22, 1904, 97 v. 158, § 1.)

Section 663. (Separate accounts.) Each person so licensed shall keep a separate account of the business done under his license, a certified copy of which account he shall forthwith, on issuing any such policy, file with the superintendent of insurance, showing the amount of such insurance, the name of the owner, brief description and location of the property, gross premium charged, name of company in which the insurance is placed, date of policy and term thereof, and, also, a report in the same detail of all such policies cancelled and gross return premiums thereon. (R. S. Sec. 3656-2; April 22, 1904, 97 v. 158, § 2.)

Section 664. (Bond, where filed.) Before receiving such license such person shall execute and deliver to the superintendent of insurance a bond in the sum of two thousand dollars, payable to the state, with at least two sureties, approved by the superintendent and conditioned that he will faithfully comply with all the requirements of this law, and will annually file with the superintendent of insurance in January, a sworn statement of the gross premiums charged for insurance procured or placed, and the gross premiums

on such insurance cancelled under such license during the year ending on the thirty-first day of December last preceding and at the time of filing such statement will pay to the superintendent of insurance an amount equal to five per cent. of the balance of such gross premiums after deducting such return premiums so reported. Such bond shall be deposited with the secretary of state and kept in his office. (May 6, 1913, 103 v. 530; R. S. Sec. 3656-2: April 22, 1908, 97 v. 158, § 2.)

Section 664-1. (Unauthorized insurance company provision. Tax of 5 per cent.) That all persons, companies, associations or corporations residing or doing business in this state that enter into any agreements with any insurance company, association, individual, firm, underwriter or Lloyd, not authorized to do business in this state, whereby said person, company, association or corporation shall enter into contracts of insurance covering risks within this state, with said unauthorized association, individual, firm, underwriter, or Lloyd, for which there is a premium charged or collected, the said person, company, association or corporation so insured shall, annually on the first day of July or within ten days thereafter return to the superintendent of insurance of this state, a statement under oath of all actual cost of indemnity and gross premiums paid or payable for the twelve months preceding on policies or contracts of insurance taken by the said person, company, association or corporation and shall at the same time pay to said superintendent of insurance a tax of five per centum of the actual cost of indemnity paid or payable to any such association, firm, or individual, or a tax of five per centum of the gross premiums paid or payable to any such insurance company, underwriter or Lloyd. All taxes collected under the provisions of this section by the superintendent of insurance shall be paid by him, upon the warrant of the state auditor, into the general revenue fund of the state. (May 10, 1910, 101 v. 373, § 1.)

Section 664-2. (Penalty.) Any person, company, association or corporation failing or refusing to make the report required in section one of this act and to furnish all the data and information that may be required by the superintendent of insurance to determine the amount due, shall be deemed guilty of a misdemeanor and upon conviction, be fined not less than one hundred dollars, nor more than five hundred dollars for each offense. (May 10, 1910, 101 v. 373, § 2.)

Section 664-3. (Citizens, etc., exempt from § 664-1 to 664-3.) No provision of this act shall be construed as extending to private citizens, firms or corporations, residents of this state, who seek to provide indemnity among themselves from fire loss or other casualty, by exchange of private contracts for protection only and not for profit. Nor shall any provision of this act be construed as extending to fraternal beneficiary associations or members thereof. (May 10, 1910, 101 v. 374, § 3.)

Section 665. (Insurance business must be authorized.) No company, corporation, or association whether organized in this state or elsewhere, shall engage either directly or indirectly in this state in the business of insurance, or enter into any contracts substantially amounting to insurance, or in any manner aid therein, or engage in the business of guaranteeing against liability, loss or damage, unless it is expressly authorized by the laws of this state, and the laws regulating it and applicable thereto, have been complied with. (R. S. Sec. 289; April 9, 1908, 99 v. 131; April 23, 1904, 97 v. 287; May 12, 1902, 95 v. 533; March 12, 1872, 69 v. 32, § 25.)

The right to transact insurance business is not a private right but a franchise. *Robbins v. Hennessey*, 86 O. S. 181 (1912).

Foreign companies. This section applies to foreign insurance companies, whether incorporated or not. *State v. Ackerman*, 51 O. S. 163, 169.

A foreign insurance company may transact in Ohio only those classes of business which are authorized by the Ohio statutes. *Rep. Atty. Gen. 1912*, p. 721.

A contract of reinsurance of liability risks made in another state by a foreign company which has not made the deposit required by § 9510(2) is a violation of the Ohio laws for which its license to do other insurance in Ohio may be revoked. *State v. Tomlinson*, 101 O. S. 459 (1920).

"Business of insurance." An insurance contract, other than that of life and accident, where the injury results in death, is one of indemnity.

State v. Laylin 73 O. S. 97.

For various definitions see

State v. Railway Co. 68 O. S. 9, 30 (Life and accident).

State v. Laylin 73 O. S. 90, 97.

State v. Amazon Insurance Co., 1 C. C. n. s. 4, 9; 14 C. D. 387.

Keckley v. Coshocton Glass Co., 86 O. S. 213 (Life).

A burial association, which, for a fee, issues a certificate entitling the holder to a 50 percent reduction upon the funeral expenses of a member of his family, is engaged in the business of indemnity insurance. *Rep. Atty. Gen. 1912*, p. 717.

An undertaker who makes contracts termed "mutual notes", agreeing to provide a respectable burial in consideration of periodical

payments, is engaged in insurance business. *Renschler v. State*, 90 O. S. 363 (1914); affirming, 4 Ohio App. 413, 25 C. C. n. s. 218.

A contract of sale of a cash register whereby the seller agrees to reimburse the purchaser for its failure to protect its contents against destruction by fire, is a contract of insurance. Rep. Atty. Gen. 1914, p. 1773.

Inter-insurance exchange. See Opins. Atty. Gen. 1915, p. 729.

A contract by a real estate agent, guaranteeing that property listed with him shall be kept rented and that the tenants will pay the rent, is not a contract of insurance. Rep. Atty. Gen. 1914, p. 584.

Nor is an agreement by a religious society, in consideration of a gift, obligating itself to pay an annuity to the giver. Rep. Atty. Gen. 1914, p. 1655; 12 O. L. R. 493.

Physicians' defense company. A foreign corporation the sole business of which is to defend physicians against civil actions for malpractice, but which does not assume or agree to pay any judgment which may be rendered against its contract holders, is not engaged in the business of insurance.

State v. Laylin 73 O. S. 90.

Railway relief association. An association established by a railway company, composed of employes and the company, to maintain a relief fund created by voluntary contributions is not engaged in the insurance business.

State v. Railway Co. 68 O. St. 9.

See also as to what constitutes the business of insurance.

Rep. Atty. Gen. 1906, p. 40.

5 Opins. Attys. Gen. 975.

Rep. Atty. Gen., 1911-1912, p. 803.

Transacting business in the state. What constitutes. A foreign fire insurance company which maintains an office in Ohio in which contracts of insurance are made respecting property in other states, is engaged in the insurance business in Ohio, although it insures no property in Ohio and makes no contracts with citizens of this state.

State v. Amazon Insurance Co. 1 C. C. n. s. 4; 14 C. D. 387.

The acceptance by a foreign insurance company in its home state of an application for insurance sent by mail by a resident of Ohio is not the transaction of business in Ohio.

Rep. Atty. Gen. 1904-1905, p. 121.

Rep. Atty. Gen. 1906, p. 146.

Failure to obtain authority. Effect on contracts.

See *Insurance Co. v. McMillen* 24 O. S. 67.

Insurance Co. v. Ellis 32 O. S. 388.

Suit by unlicensed company for premiums. A foreign insurance company issuing policies in another state, upon property in Ohio, can not maintain an action in the state courts of Ohio to recover premiums on such policies.

Bankers Casualty Co. v. Richland County Banking Co. 12 C. C. n. s. 200; 21 C. D. 428 (1908). *Contra*, *Brand v. Murray*, 7 Ohio App. 175; 28 O. C. A. 37 (1916).

Suit brought in another state.

See *Insurance Co. v. Parks*, 1 C. S. C. R. 574 (1871).

Penalty for engaging in the business of insurance without authority, see § 672.

Section 666. (Insurance of burial and funeral expenses.)

No company, corporation or association engaged in the business of providing for the payment of the funeral, burial or other expenses of deceased members, or certificate holders therein or engaged in the business of providing any other kind of insurance shall contract to pay or pay such insurance or its benefits or any part of either to any official undertaker or to any designated undertaker or undertaking concern or to any particular tradesman or business man, so as to deprive the representative or family of the deceased from, or in any way to control them in, procuring and purchasing such supplies and services in the open market with the advantages of competition, unless expressly authorized by the laws of this state and all laws regulating such insurance or applicable thereto have been complied with. (R. S. Sec. 289; April 9, 1908, 99 v. 131; April 23, 1904, 97 v. 287; May 12, 1902, 95 v. 533; March 12, 1872, 69 v. 32, § 25.)

This section is constitutional.

Robbins v. Hennessey, 86 O. S. 181 (1912).

The assignment of the benefit certificate or policy to an undertaker or to any particular tradesman or business man is in violation of this section and void.

Robbins v. Hennessey, 86 O. S. 181 (1912).

A burial association which issues, for a fee, a certificate entitling the holder to a 50 percent discount upon the funeral expenses of a member of his family, is engaged in the business of insurance, and is required to comply with the insurance laws before commencing business. Rep. Atty. Gen. 1912, p. 717.

An undertaker who makes contracts termed "mutual notes", agreeing to provide a respectable burial in consideration of periodical payments, is engaged in insurance business. Renschler v. State, 90 O. S. 363 (1914); affirming, 4 Ohio App. 413, 25 C. C. n. s. 218.

It has been said that this section does not prohibit the organization of funeral benefit associations, but merely prohibits the designation of an undertaker. Rep. Atty. Gen. 1908, p. 178. See also Rep. Atty. Gen. 1909, p. 340; State v. Burial Ass'n, 8 C. C. n. s. 233; 18 C. D. 397; compare, Rep. Atty. Gen. 1912, pp. 57, 58.

For contract deemed in violation of this section, see Opins. Atty. Gen. 1915, p. 340.

Section 667. (When certificates shall expire.) All certificates of authority and licenses of companies, organized or admitted to do business under the provisions of the revised statutes relating to life insurance companies and of their agents, shall expire on the first day of April next after they are issued, and all certificates of authority and licenses of companies organized or admitted to do business under the provisions of the revised statutes relating to insurance companies other than life, and of their agents, shall expire on the first day of March next after they are issued. (R. S.

Sec. 284; April 25, 1904, 97 v. 405; March 12, 1872, 69 v. 32, §§ 19, 21; S. & S. 227.)

Section 668. (How certain provisions shall apply.) The provisions of this chapter, relating to insurance companies organized under the laws of any other state of the United States shall apply to any company organized under the laws of the United States, for any of the purposes specified in this chapter. The provisions of this chapter relating to agents of companies organized under the laws of any state shall apply to the agents of such companies organized under the laws of the United States. Any violation of the provisions of this chapter by any person, or agent, in the employment of any such company, organized under the laws of the United States, shall subject the offender to the same penalties provided by this chapter for a violation of its provisions by persons acting for similar companies organized under the laws of any other state of the United States. (R. S. Sec. 287; March 12, 1872, 69 v. 32, § 23.)

Section 669. (To what associations insurance laws shall not apply.) No law of this state pertaining to insurance shall be construed to apply to the establishment and maintenance by individuals, associations or corporations, of sanatoriums or hospitals for the reception and care of patients for the medical, surgical or hygienic treatment of any and all diseases, or for the instruction of nurses in the care and treatment of diseases and in hygiene, or for any and all such purposes, nor to the furnishing of any or all such services, care or instruction in or in connection with any such institution, under or by virtue of any contract made for such purposes, with residents of the county in which such sanatorium or hospital is located. (R. S. Sec. 289; April 9, 1908, 99 v. 131; April 23, 1904, 97 v. 287; May 12, 1902, 95 v. 533; March 12, 1872, 69 v. 32, § 25.)

See Rep. of Atty. Gen. 1909, p. 108.

Section 670. (How provisions of this chapter shall apply.) The provisions herein relating to the superintendent of insurance shall apply to all persons, companies and associations, whether incorporated or not, engaged in the business of insurance. (R. S. Sec. 289; April 9, 1908, 99 v. 131; April 23, 1904, 97 v. 287; May 12, 1902, 95 v. 533; March 12, 1872, 69 v. 32, § 25.)

By this section, the insurance laws are made applicable to individuals. It may be questioned whether authority to carry on the

business of insurance could be granted to an individual. But if this section be construed to authorize it, the individual would be subject to all the restrictions and requirements of an incorporated company. *Renschler v. State*, 90 O. S. 363 (1914).

Section 671. (Record of proceedings of superintendent; report.) The superintendent of insurance shall keep and preserve a full record of his proceedings, including a concise statement of the condition of each insurance company or association authorized to transact business in this state. Each year in his annual report, he shall report their general conduct and condition, including the information contained in the statement required of them, arranged in tabular form in two separate reports, one pertaining to life insurance companies and the other to insurance companies other than life. (106 v. 509; May 21, 1910, 101 v. 347; R. S. Sec. 278; March 12, 1872, 69 v. 32, § 13.)

Section 672. (Penalty.) Whoever violates any provision herein relating to the superintendent of insurance or any provision of an insurance law of this state, for the violation of which no penalty is elsewhere provided, shall be fined not more than one thousand dollars or imprisoned not more than six months or both. (R. S. Sec. 288; May 19, 1894, 91 v. 331; April 17, 1885, 82 v. 138; 69 v. 32, § 24.)

This section does not preclude a quo warranto proceeding against an unauthorized association.

State v. Ackerman 51 O. S. 163.

Section 673. (Forfeiture.) Any association, company or corporation which violates any provision herein relating to the superintendent of insurance or any insurance law of this state, for the violation of which no forfeiture or penalty is elsewhere provided, shall forfeit and pay not less than one hundred dollars nor more than one thousand dollars to be recovered by an action in the name of the state and on collection paid to the superintendent of insurance to be paid by him into the state treasury. (R. S. Sec. 288; May 19, 1894, 91 v. 331; April 17, 1885, 82 v. 138; 69 v. 32, § 24.)

This section does not preclude a quo warranto proceeding against an unauthorized association.

State v. Ackerman 51 O. S. 163.

BUREAU OF BUILDING AND LOAN ASSOCIATIONS.

Section 674. (Inspector of building and loan associations.) This section was repealed in 1921. (109 v. 132.) By section 154-39 the powers of the inspector of building and loan associations are vested in the department of commerce.

Section 676. (Duties of inspector.) The inspector of building and loan associations shall see that the laws relating to building and loan associations are duly executed and enforced. When a violation of a law relating to building and loan associations is reported to him he shall take, or cause to be taken, the testimony, under oath, of any and all persons supposed to have any knowledge of such violation, and cause such testimony to be reduced to writing. If he be of the opinion that there is sufficient evidence, he shall cause the person suspected of such violation to be arrested and charged with such offense, and shall furnish the attorney general or the proper prosecuting attorney with the information obtained by him, the names of the witnesses and a copy of all material testimony taken in the case. (April 23, 1913, 103 v. 181, § 3; May 11, 1908, 99 v. 532, § 30.)

See § 154-39.

Section 677-2a. (Divulging information; penalty.) Whoever, being the superintendent of building and loan associations, a deputy, assistant or clerk in his employ or an examiner, fails to keep secret the facts and information obtained in the course of an examination, or by reason of his official position, except when the public duty of such officer requires him to report upon or take official action regarding the affairs of the association so examined, or wilfully makes a false official report as to the condition of such association, shall be removed from office and shall be fined not more than five hundred dollars or, imprisoned in the penitentiary not less than one year nor more than five years, or both. Nothing in this section shall prevent the proper exchange of information relating to building and loan associations and the business thereof, with the representatives of building and loan departments of other states, but in no case shall the private business or affairs of any individual, association or company be disclosed. Any official, violating any provision of this section, in addition to the penalties therein provided shall be liable, with his bondsmen, in damages to the person or corporation injured by the disclosure of such secrets. (110 v. 63, § 2.)

Section 677-6. (All instruments sealed with the seal, received in evidence.) Every certificate or other instrument executed, or order made, by the inspector of building and loan associations, in pursuance of any authority conferred upon him by law, and sealed with the seal of his office, or copies thereof duly authenticated under such seal, shall be received in evidence in all courts of this state. (April 23, 1913, 103 v. 182, § 10.)

Section 678. (Requirements from foreign associations.) Foreign building and loan associations doing business in this state shall conduct such business in accordance with the laws governing domestic associations. No foreign building and loan association shall do business in Ohio until it procures from the inspector of building and loan associations a certificate of authority to do business in this state after complying with the following provisions:

1. It shall deposit with the inspector one hundred thousand dollars, in cash or bonds of the United States or this state, or of a county or municipal corporation therein, satisfactory to the inspector.

2. It shall file with the inspector a certified copy of its charter, constitution and by-laws, and other rules and regulations showing its manner of conducting business together with a statement such as is required annually from all associations.

3. It shall also file with the inspector a written instrument, duly executed, agreeing that a summons may issue against it from any county in this state directed to the sheriff of the county in which the office of inspector is situated, commanding him to serve it by certified copy personally upon the inspector or by leaving a copy thereof at his office. The inspector shall mail a copy of any papers served on him to the home office of such association. (May 11, 1908, 99 v. 533, § 31; see R. S. Sec. 3836-12; May 1, 1891, 88 v. 469.)

Foreign associations defined, G. C. § 9643.

Where stock in a foreign association was subscribed for and issued, and a loan made by the foreign association, before enactment of §§ 678 to 681, a subsequent change in the form of the certificate of stock was held not to invalidate the transaction. *Demland v. Loan Co.*, 20 C. C. 223; 11 C. D. 249 (1899).

An advertisement in an Ohio newspaper, by a foreign building and loan association, offering "6% on savings and paid-up stock" is not "doing business" in violation of this section. *Rep. Atty. Gen.* 1914, p. 335.

Section 679. (Certificate of authority to do business.) When a foreign building and loan association has complied

with the provisions of the preceding section, and the inspector is satisfied that it is doing business according to the laws of Ohio and is in sound financial condition, he shall issue his certificate of authority to the association to do business in this state. Annually thereafter, upon filing the annual statement herein provided for, if the inspector is satisfied as herein provided, he shall issue a renewal of such certificate. (May 11, 1908, 99 v. 533, § 32; see R. S. Sec. 3836-13; May 1, 1891, 88 v. 469.)

Section 680. (Collection of interest and exchange of securities.) A foreign building and loan association may collect and use the interest on securities deposited as provided by law so long as it fulfills its obligations and complies with the laws of this state. It may also exchange them for other securities of equal value satisfactory to the inspector. (May 11, 1908, 99 v. 534, § 33; see R. S. Sec. 3836-14; May 1, 1891, 88 v. 469.)

Section 681. (Securities liable for claimants.) The deposit made by a foreign building and loan association with the inspector of building and loan associations shall be held as a security for all claims of residents of this state against such association, and be liable for all judgments or decrees thereon, and subjected to the payment thereof in the same manner as the property of other non-residents. Should an association cease to do business in this state, the inspector may release securities in his discretion, retaining sufficient to satisfy all outstanding liabilities. (May 11, 1908, 99 v. 534, § 34; see R. S. Sec. 3836-15; May 1, 1891, 88 v. 469.)

Section 682. (Report.) Every building and loan association doing business in this state, annually at the end of each fiscal year or within forty days thereafter shall make a full and detailed report in writing of the affairs and business of the association for the preceding year, showing its financial condition at the end thereof. (110 v. 64; May 11, 1908, 99 v. 534, § 35; see R. S. Sec. 3836-16; May 1, 1891, 88 v. 469.)

An officer of an association making a false report of assets or liabilities, under oath, may be guilty of perjury. *State v. Williams*, 104 O. S. 232 (1922).

Section 683. Form and contents of report. Time of filing ing report.) The report required in the preceding section shall be in such form and contain such information as is prescribed by the superintendent of building and loan as-

sociations. It shall be sworn to by the secretary and its correctness attested by at least three directors or an auditing committee appointed by the board. The original shall be filed with the superintendent of building and loan associations within forty days after the close of the fiscal year. Such an abstract thereof as the superintendent requires shall be posted for sixty days in the office or meeting place of such association and a statement of assets and liabilities shall be published in a newspaper or periodical, regularly issued and of general circulation in the county in which such association is located. Where an association is in process of liquidation the liquidating officer or officers shall make all reports to the superintendent of building and loan associations that are required by law from solvent associations. (110 v. 64; May 11, 1908, 99 v. 534, § 36; see R. S. Sec. 3836-17; May 1, 1891, 88 v. 469.)

A monthly magazine is not such a newspaper as is contemplated by this section. Rep. Atty. Gen. 1913, p. 863.

Section 684. (Annual examination.) At least once each year the inspector of building and loan associations shall make an examination into the affairs of each such association, or cause it to be made by a person appointed by him for that purpose. (May 11, 1908, 99 v. 534, § 37; see R. S. Sec. 3836-18; May 12, 1902, 95 v. 614; May 1, 1891, 88 v. 469.)

Section 685. (Expenses of examination.) The expenses of all examinations shall be paid by the state, except that when, by the laws of any other state, district, territory or nation, examinations of such associations of this state are required or permitted to be made by any official or other authority of such other state, district, territory or nation at the expense of such associations, then the expenses of all such examinations made by the inspector of this state, of such associations of that state, district, territory or nation, must be respectively charged to and collected from such associations so examined. (May 11, 1908, 99 v. 534, § 37; see R. S. Sec. 3836-18; May 12, 1902, 95 v. 614; May 1, 1891, 88 v. 469.)

Section 686. (Revocation of charter for illegal practices.) If upon examination, the inspector of building and loan associations finds any domestic association conducting its business in whole or part contrary to law, or failing to comply therewith, he shall notify the board of directors of such

association of such fact in writing. If, after thirty days, such illegal practices or failure continues, he shall communicate the facts to the attorney general, who shall cause proceedings to be instituted in the proper court to revoke the charter of such association. (May 11, 1908, 99 v. 535, § 38; see R. S. Sec. 3836-18; May 12, 1902, 95 v. 614; May 1, 1891, 88 v. 469.)

Suit by the attorney general is not authorized, unless notice is given to the directors as required by this section. Opins. Atty. Gen. 1916, p. 648.

If an association is illegally organized or misusing its franchises, the proper remedy is quo warranto. A suit can not be maintained by one stockholder for an accounting of corporate funds and a receiver. *Ellis v. Savings Co.*, 104 O. S. 599 (1922).

Section 687. (Dissolution if condition unsound.) If, upon examination, the inspector of building and loan associations finds that the affairs of a domestic building and loan association are in an unsound condition, and that the interests of the public demand its dissolution and the winding up of its business, he shall so report to the attorney general, who shall institute the proper proceedings for that purpose. (May 11, 1908, 99 v. 535, § 39; see R. S. Sec. 3836-18; May 12, 1902, 95 v. 614; May 1, 1891, 88 v. 469.)

Where the inspector finds the affairs of an association in an unsound condition it is improper for him to permit an officer of the association to personally advance funds to declare and pay a dividend.

Webb v. Stasel 4 N. P. n. s. 587, 589; 17 L. D. 317 (C. P. 1906).

On liquidation, depositors are entitled to interest up to the date of insolvency at the rate agreed upon with the association. After the date of insolvency, they are entitled to six percent interest, if the funds are sufficient. One association having funds in another association has no priority over other depositors unless the deposit was under a trust arrangement. Rep. Atty. Gen. 1914, p. 1020.

Section 688. (Powers of examiners.) An examiner appointed by the inspector of building and loan associations under the provisions herein relating to such associations, shall have access to and may compel the production of all books, papers, securities, moneys and other property of an association under examination. He may administer oaths to, and examine the officers and agents of such association as to its affairs. (May 11, 1908, 99 v. 535, § 40; see R. S. Sec. 3836-19; May 1, 1891, 88 v. 469.)

Section 689. (Inspector may publish result.) If the inspector of building and loan associations deems it to the interest of the public, he may publish the results of such examination in a newspaper of general circulation in the

county in which such association is located, if it is a domestic association, and in some newspaper in the city of Columbus if it is a foreign association. (May 11, 1908, 99 v. 535, § 41; see R. S. Sec. 3836-20; May 1, 1891, 88 v. 469.)

Section 690. (May cancel authority of foreign association.) If upon examination the inspector of building and loan associations finds that a foreign association does not conduct its business in accordance with law, or that its affairs are in an unsound condition, or if it refuses to permit an examination to be made, he may cancel its authority to do business in this state, and cause a notice thereof to be mailed to the home office of the association and published in at least one newspaper published in the city of Columbus. After the publication of such notice no such association or agent thereof shall receive further stock deposits from members residing in this state, except payments on stock on which a loan has been taken. (May 11, 1908, 99 v. 535, § 42; see R. S. Sec. 3836-21; May 1, 1891, 88 v. 469.)

Section 691. (Fees to be collected.) Foreign building and loan associations shall pay to the superintendent of building and loan associations the following fees:

For filing an application for admission to do business in this state, five hundred dollars.

For each certificate of authority and annual renewal thereof, two hundred dollars.

Every building and loan association doing business in this state, whether foreign or domestic, shall pay to the superintendent of building and loan associations, for filing each annual report, at the time said annual report is filed, the sum of ten dollars, and in addition thereto, one-eightieth of one percent of its assets, as shown in such report unless omitted as hereinafter provided. All such fees collected shall be paid into the state treasury to the credit of a fund for the use of the department of building and loan associations, and shall be used upon the order of the superintendent of building and loan associations, and shall not be used or paid out or appropriated for any other purpose.

(Collection omitted.) In any year when in the opinion of the superintendent of building and loan associations the amount of such fund on hand at the close of business, June 30, is sufficient for maintaining the department of building and loan associations for the ensuing year, then the fees provided for in this section to be paid at the time of the filing of annual reports shall be omitted for such year. (110 v. 64;

106 v. 236; April 23, 1913, 103 v. 191; May 11, 1908, 99 v. 535, § 43; see R. S. Sec. 3836-22; May 12, 1902, 95 v. 615; May 1, 1891, 88 v. 469.)

Section 692. (Securities to be deposited with treasurer of state.) All securities or cash deposited with the inspector of building and loan associations shall be deposited with the treasurer of state, who, with his sureties, shall be responsible for the safe keeping thereof. The treasurer shall deliver such securities only upon the written order of the inspector. (May 11, 1908, 99 v. 536, § 44; see R. S. Sec. 3836-23; May 1, 1891, 88 v. 469.)

Section 693. (Dissolution or consolidation of building and loan associations.) A building and loan association or a savings association may provide in its constitution and by-laws for the time and terms of its dissolution and for its consolidation with one or more of such corporations on terms and conditions to be determined upon by their board of directors. In case of the dissolution of such a corporation its board of directors by a majority vote may be authorized to sell and transfer its mortgage securities or other property, or both, to another corporation, person or persons, subject to the vested and accrued rights of the mortgagors. (May 11, 1908, 99 v. 537, § 48; see R. S. Sec. 3836-27; April 27, 1893, 90 v. 315; May 1, 1891, 88 v. 469; April 11, 1889, 86 v. 238, § 3835j.)

See § 9665.

Section 694. (Forfeiture for non-compliance.) A building and loan association which does business in this state without first complying with the provisions herein or which violates or fails to comply with provisions of law relating to building and loan associations shall forfeit and pay not less than fifty dollars nor more than one thousand dollars, to be recovered by an action in the name of the state and on collection paid into the state treasury. (May 11, 1908, 99 v. 536, § 45; see R. S. Sec. 3836-24; May 1, 1891, 88 v. 469.)

Section 695. (Annual report.) The superintendent of building and loan associations shall keep and preserve in permanent form a full record of his proceedings, including a concise statement of each association examined, and make an annual report to the governor of the general conduct and condition of the building and loan associations doing busi-

ness in this state, with such suggestions as he may deem proper. The report shall include such information contained in the statements required of the associations as he may deem necessary. He shall also include in said report a statement of the building and loan associations whose business has been closed during the year, the amount of their assets and liabilities, and the amount paid to the creditors thereof. He shall also include a statement of the building and loan associations liquidated or in the process of liquidation and the status of the affairs of each of such building and loan associations at the time of said report, including the amount of their assets and liabilities and the nature of the same and the amounts paid to the creditors. He shall report the names and compensation of the clerks employed by him, the whole amount of income of his office, the source thereof, and the expenditures of his department during the year ending the thirtieth of June. (110 v. 64; 106 v. 510; May 21, 1910, 101 v. 348; May 11, 1908, 99 v. 537, § 47; see R. S. Sec. 3836-26; May 1, 1891, 88 v. 469.)

SUPERVISOR OF BOND INVESTMENT COMPANIES.

Section 696. (Supervisor of bond investment companies.)

By virtue of his office, the deputy inspector of building and loan associations shall be the supervisor of bond investment companies. He shall see that the laws of this state relating to such companies are strictly enforced. (R. S. Sec. 3821x; May 12, 1902, 95 v. 642; April 14, 1900, 94 v. 149; April 25, 1898, 93 v. 403.)

See § 154-39.

Section 697. (Definition.) Every corporation, partnership or association other than a building and loan association, which places or sells certificates, bonds, debentures or other investment securities of any kind, on the partial payment or installment plan, and every investment guaranty company doing business on the service dividend plan shall be deemed a bond investment company. (R. S. Sec. 3821r; April 25, 1898, 93 v. 402; April 14, 1900, 94 v. 147, § 1.)

A corporation which, in consideration of installment payments, delivers a bond entitling the payor upon conditions named, to receive an article of value, and requiring the payer to contribute to the expenses of the corporation, is a bond and investment company.

State ex rel. v. Tontine Surety Co. 62 O. S. 428.

See also Rep. Atty. Gen. 1908, p. 65.

5 Opins. Attys. Gen. 32, 1048.

A company which makes loans on indorsed notes at a rate in

excess of 8 percent, in addition to selling certificates, must comply with the chattel loan law (G. C. § 6345-1 et seq.) as well as § 698 et seq. Opins. Atty. Gen. 1921, p. 812.

Section 698. (Deposit with treasurer of state.) Before doing business in this state, every bond investment company shall deposit with the treasurer of state on hundred thousand dollars in cash or bonds of the United States or of the state of Ohio, or of any county or municipal corporation in Ohio, for the protection of investors in the securities of such company. Such deposit shall be made out of the paid-up capital stock of such bond investment company. (R. S. Sec. 3821r; April 14, 1900, 94 v. 147, § 1; April 25, 1898, 93 v. 402.)

Penalty for violation of this act, G. C. § 13151.

Construction of former act.

State v. Matthews 62 O. S. 147.

Section 699. (Purpose of such deposit.) The deposit made by a bond investment company with the treasurer of state shall be held as security for all claims of residents of this state against such company, and shall be liable for all judgments and decrees thereon, and subject to the payment of such decrees in the same manner as the property of other non-residents. If such company ceases to do business in this state, the treasurer of state may release securities, in his discretion, retaining sufficient to satisfy all outstanding liabilities. (R. S. Sec. 3821r; April 14, 1900, 94 v. 147, § 1; April 25, 1898, 93 v. 402.)

Taxation of deposit of foreign companies. See § 5437 and cases cited in note.

Collection of claims from deposit, § 641.

Power of a court of equity to appoint a receiver and wind up an unlawful or fraudulent business.

See Woods v. Equitable etc. Co. 8 N. P. 125; 11 L. D. 154.

Stevens v. Times-Star Co. 72 O. S. 112.

Shaw v. Interstate etc. Co. 5 N. P. 411; 8 L. D. 510.

The state treasurer is a necessary party to an action to wind up a bond and investment company.

Everhardt v. U. S., etc., Co., 8 N. P. 525.

Section 700. (Interest on securities.) A bond investment company may collect and use the interest on any securities deposited as required by the preceding section so long as it fulfills its obligations and complies with the provisions herein relating to such companies. It may exchange such securities for others of equal value and satisfactory to the treasurer of state. (R. S. Sec. 3821u; April 14, 1900, 94 v. 149, § 4; April 25, 1898, 93 v. 402.)

Section 701. (Requirements before doing business.) Before doing business in this state every bond investment company shall comply with the following conditions:

1. It shall file with the supervisor of bond investment companies certified copies of its charter and articles of incorporation, constitution and by-laws, and other rules and regulations showing its manner of doing business.

2. It shall file with the supervisor a statement, under oath of its president and secretary, or other managing officer of its business for the preceding year, in a form required by the supervisor.

3. It shall file with the supervisor a written instrument, duly executed, agreeing that a summons may issue against it from any county in this state, directed to the sheriff of the county in which the office of the supervisor is situated, commanding the sheriff to serve such summons by certified copy, personally upon the supervisor, or by leaving a copy thereof at his office. The supervisor shall mail a copy of any papers served on him to the home office of such bond investment company. (R. S. Sec. 3821s; April 14, 1900, 94 v. 148, § 2; April 25, 1898, 93 v. 401.)

Section 702. (Certificate of authority to do business.) When a bond investment company has complied with the provisions herein relating to such companies, and the supervisor of bond investment companies is satisfied that it is doing business in accordance with law, he shall issue it a certificate of authority to do business in Ohio. Thereafter, upon the filing of its annual statement, as herein provided, if the supervisor is satisfied that such company has complied with all the provisions of law, he shall issue a renewal of such certificate. (R. S. Sec. 3821t; April 14, 1900, 94 v. 148, § 3; April 25, 1898, 93 v. 402.)

A certificate of authority to do business does not authorize the transaction of unlawful or fraudulent business.

State v. Investment Co., 64 O. S. 283, 318.

See also Shaw v. Interstate etc. Co. 5 N. P. 411; 8 L. D. 510.

Lottery contracts. Contracts of investment security which contain elements of chance and prize constituting a lottery are unlawful.

State v. Investment Co. 64 O. S. 283.

Fraudulent contracts. Contracts of investment security, etc., which can not reasonably be expected to accumulate a reserve fund equal to the stipulated endowment values, without aid from lapses or premiums on new business, are fraudulent and unlawful.

State v. Investment Co. 64 O. S. 283.

See also Woods v. Equitable Debenture Co. 8 N. P. 125; 11 L. D. 154.

Section 703. (Revocation of certificate.) The supervisor of bond investment companies shall revoke the authority of such a company to do business, if, on investigation or examination, he finds that it is not transacting its business in accordance with law, or that its statement of the condition and affairs required under the provisions herein relating to such companies, are false and fraudulent, or for its failure to file an annual statement. (R. S. Sec. 3821t; April 14, 1900, 94 v. 148, § 3; April 25, 1898, 93 v. 402.)

Section 704. (License fees.) A bond investment company shall pay to the supervisor of such companies the following fees:

For filing each application for admission to do business in this state, one hundred dollars;

For filing each certificate of authority and annual renewal of certificate, fifty dollars;

For filing each annual statement, twenty-five dollars;

For issuing license to each agent, two dollars;

For each copy of paper filed in his office, fifty cents per folio;

For affixing seal and certifying any paper, one dollar.

The fees provided for herein shall be deposited by the supervisor with the treasurer of state, upon the certificate of the auditor of state. (R. S. Sec. 3821y; May 12, 1902, 95 v. 642; April 14, 1900, 94 v. 150; April 25, 1898, 93 v. 403.)

Section 705. (Annual statement of companies.) On or before the tenth day of January of each year, each bond investment company doing business in this state shall file with the supervisor of bond investment companies, under oath of its president, secretary or other managing officer, and in a form required by the supervisor, a statement of its business for the twelve months next preceding the thirty-first day of December. Such abstract thereof as the supervisor may require shall be posted for sixty days in the principal office of such company and published in a newspaper of general circulation in the county in which its principal office is situated. (R. S. Sec. 3821w; May 12, 1902, 95 v. 642; April 14, 1900, 94 v. 149; April 25, 1898, 93 v. 402.)

Section 706. (Supervisor may verify statements.) The supervisor of bond investment companies shall verify the annual statement required by the preceding section, by an examination of the affairs of such company. He may make quarterly examinations of the affairs of such company if he

deems it necessary. (R. S. Sec. 3821w; May 12, 1902, 95 v. 642; April 14, 1900, 94 v. 149; April 25, 1898, 93 v. 402.)

Section 707. (Proceedings in quo warranto.) If, upon examination of a bond investment company by the supervisor of bond investment companies, it appears that such company is not carrying on its business in accordance with law, or that its affairs are being improperly managed, the supervisor, after ten days' notice to such company, shall institute proceedings in quo warranto against it in the manner provided by law. (R. S. Sec. 3821w; May 12, 1902, 95 v. 642; April 14, 1900, 94 v. 149; April 25, 1898, 93 v. 402.)

See *State v. Investment Co.* 64 O. S. 283.

Section 708. (Expenses of examination.) The expenses of all examinations provided for by the laws relating to bond investment companies shall be paid by the state of Ohio, except that, if by the laws of any other state, district, territory or nation, examinations of such companies of this state are required or permitted to be made by any officer or other authority of such state, district, territory or nation at the expense of such company, then the expenses of such examination made by the supervisor of this state of a bond investment company of such state, district, territory or nation, shall be charged to and collected from such company. (R. S. Sec. 3821w; May 12, 1902, 95 v. 642; April 14, 1900, 94 v. 149; April 25, 1898, 93 v. 402.)

Section 709. (Agent must be licensed.) An agent of a bond investment company shall not transact business in this state without being first regularly appointed by such company and licensed by a certificate of authority issued by the supervisor of bond investment companies. (R. S. Sec. 3821v; April 14, 1900, 94 v. 149; April 25, 1898, 93 v. 402.)

Penalties for violation of this act, G. C. § 13151.

PART VIII.

BANKS AND BANKING.

- § 710-1. Definitions of terms.
- § 710-2. What the term "bank" shall include. All banks subject to examination and regulation.
- § 710-3. Words "bank", "banker", etc., in foreign language restricted to definition. Persons, firms, etc., prohibited from using "bank", "banker", etc.; penalty. When and how long the word "trust" may be used.
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BANKS AND BANKING.

Section 710-1. (Definitions of terms.) The following definitions shall be applied to the terms used in this act:

The term "surplus" means a fund created pursuant to the provisions of section 130 (G. C. § 710-130) of this act by a bank or trust company from its net earnings or undivided profits, which to the amount specified and any additions thereto set apart and designated as such is not available for the payment of dividends and cannot be used for the payment of expenses or losses so long as such bank or trust company has undivided profits.

The term "undivided profits" means the credit balance of the profit and loss account of any bank or trust company.

The term "net earnings" means the excess of the gross earnings of any bank or trust company over expenses and

losses chargeable against such earnings during any dividend period.

The term "time deposits" means all deposits the payment of which cannot legally be required within thirty days.

The term "demand deposits" means all deposits the payment of which can legally be required within thirty days.

The term "unincorporated bank" shall include every unincorporated person, firm or association transacting banking business in this state; and the term "board of directors" shall include the owner or owners of such banks. (108 (Pt. 1) v. 80.)

The banking code (§§ 710-1 to 710-189, inclusive) was enacted April 4, 1919, filed in the office of the secretary of state April 12, 1919, and became effective July 11, 1919.

Section 710-2. (What the term "bank" shall include. All banks subject to examination and regulation.) The term "bank" shall include any person, firm, association, or corporation soliciting, receiving or accepting money, or its equivalent, on deposit as a business, whether such deposit is made subject to check or is evidenced by a certificate of deposit, a passbook, a note, a receipt, or other writing, and unless the context otherwise requires as used in this act includes commercial banks, savings banks, trust companies and unincorporated banks; provided that nothing herein shall apply to or include money left with an agent pending investment in real estate or securities for or on account of his principal; nor to building and loan associations or title guarantee and trust companies incorporated under the laws of this state. All banks, including the trust department of any bank, organized and existing under laws of the United States, shall be subject to inspection, examination and regulation as provided by law. (108 (Pt. 1) v. 80.)

A national bank must comply with § 710-150 et seq., before it is authorized to accept trusts in Ohio. Opins. Atty. Gen. 1915, pp. 1244, 957; Opins. Atty. Gen. 1921, p. 854; 19 O. L. R. 421.

A national bank is subject to examination by the superintendent. Opins. Atty. Gen. 1915, p. 1244.

A company incorporated for the purpose of "contracting for and buying and selling securities and bonds, also borrowing and loaning on same and making loans on real estate security" is not authorized to engage in the business of banking. The solicitation and receipt of government bonds on deposit at its Ohio place of business, upon an agreement to return the same or like bonds on demand, at stipulated interest, for use as collateral, may be enjoined. Security Co. v. State, 105 O. S. 113 (1922); 20 O. L. R. 113.

The mere making of loans is not the transacting of banking business. A company may be incorporated for the purpose of making loans and investments under the general corporation law. Rep. Atty.

Gen. 1905-1906, p. 50. See *Bates v. Association*, 42 O. S. 655 (1885); *Bank v. Insurance Co.*, 41 O. S. 1 (1885); *Hall v. Kummer*, 7 N. P. 394; 5 L. D. 176 (1897).

A mercantile or manufacturing corporation is not authorized to accept deposits from employees under usual savings bank rules. *Opins. Atty. Gen.* 1915, p. 1777.

Section 710-3. (Words "bank", "banker", etc., in foreign language restricted to definition. Persons, firms, etc., prohibited from using "bank", "banker", etc.; penalty.) The use of the word "bank", "banker" or "banking", or "trust", or words of similar meaning in any foreign language, as a designation or name, or part of a designation or name, under which business is or may be conducted in this state, is restricted to banks as defined in the preceding section. All other persons, firms or corporations are prohibited from soliciting, accepting or receiving deposits, as defined in section 2 of this act (G. C. § 710-2) and from using the word "bank", "banker", "banking", or "trust", or words of similar meaning in any foreign language, as a designation or name, or part of a designation or name, under which business may be conducted in this state. Any violation of this prohibition, after the day when this act becomes effective, shall subject the party chargeable therewith, to a penalty of \$100.00 for each day during which it is committed or repeated. Such penalty shall be recovered by the superintendent of banks by an action instituted for that purpose, and in addition to said penalty, such violation may be enjoined and the injunction enforced as in other cases.

(When and how long the word "trust" may be used.) Provided, however, that any corporation now incorporated under the name which includes the word "trust", and which is qualified to transact a trust business, may continue the use of such word so long as it complies with the requirements of this act; provided, that every corporation incorporated under a name which includes the word "trust" and is not qualified to transact a trust business is required to change its name so as to eliminate the word "trust" therefrom within two years from the date when this act becomes effective during which period such company shall not be subject to the penalty of this section, but nothing herein shall prevent a title, guaranty and trust company from continuing the use of the word "trust" in its name provided such company is qualified to do business under the provisions of section 9851 of the General Code. (108 (Pt. 2) v. 1191; 108 (Pt. 1) v. 81; G. C. § 744-1; 103 v. 379, § 1.)

See Constitution, Article 13, Section 3.

This section is constitutional. *Inglis v. Pontius*, 102 O. S. 140 (1921); affirming, 15 Ohio App. 228.

The designation "Investment Bankers", on letter heads and in advertisements, is a violation of this section, although not a part of the name or business title of the party using the designation. *Inglis v. Pontius*, 102 O. S. 140 (1921); affirming, 15 Ohio App. 228.

The designation "bank", etc., is unlawful unless the institution submits to regulation under the superintendent and pays the fees. Rep. Atty. Gen. 1913, p. 826; Rep. Atty. Gen. 1914, p. 192.

A bank incorporated prior to July 11, 1919, with a name containing the word "trust", which failed to qualify to transact a trust business by making the deposit required by § 710-150, was required to change its name by eliminating the word "trust" within two years from the effective date of the original act, rather than the effective date of the amendment of this section. 108 (Pt. 2) 1911; Opins. Atty. Gen. 1920, p. 1223.

Section 710-4. ("Federal Reserve Act," "Federal Land Banks" and "Joint Stock Land Banks" defined.) Wherever the term "Federal Reserve Act" is used in this act the same shall be held to mean the act of the 63rd congress of the United States, entitled "An act to provide for the establishment of federal reserve banks, to furnish an elastic currency, to afford means of rediscounting commercial paper, to establish a more effective supervision of banking in the United States, and for other purposes," approved by the President of the United States on December 23rd, 1913, and subsequent amendments thereto; and wherever the terms "Federal Land Banks" and "Joint Stock and Banks" are used in this act the same shall be held to mean banks organized under the act of the 64th congress of the United States approved by the president July 17, 1916, and known by the short title of "The Federal Farm Loan Act," and subsequent amendments thereto. (108 (Pt. 1) v. 81; G. C. § 9796-1; 104 v. 185.)

Section 710-5. (Every bank may become member under Federal Reserve Act; rights and powers of member banks. Subject to state supervision and examination of Federal Reserve Board.) Every bank, in addition to the powers, rights and privileges possessed by it under the laws of Ohio shall have the right and power to become a member bank under the federal reserve act upon the terms and conditions set forth in said federal reserve act, or hereafter provided by law. Every bank which becomes a member bank shall have the right and power to do everything required of or granted by said federal reserve act to member banks which are organized under state laws; and compliance by banks with the reserve requirements of said federal reserve act, shall be accepted in lieu of the reserve requirements provided by the

laws of Ohio. Any such bank or trust company shall continue to be subject to the supervision and examinations required by the laws of this state, except that the federal reserve board shall have the right, if it deems necessary, to make examinations; and the authorities of this state having supervision over such bank or trust company may disclose to the federal reserve board, or to examiners duly appointed by it, all information in reference to the affairs of any bank or trust company which has become, or desires to become, a member of a federal reserve bank. Nothing contained in this section shall in any way or manner affect or have reference to banks which do not become member banks under said federal reserve act except as provided in this act. (108 (Pt. 1) v. 81; G. C. § 9796-2; 104 v. 185.)

Section 710-6. (Superintendent of banks; appointment, term, duties.) The governor, with the advice and consent of the senate, shall appoint the superintendent of banks in the department of commerce, who shall hold his office for the term of two years unless sooner removed at the will of the governor.

The superintendent of banks shall execute the laws in relation to banks. (109 v. 125; 108 (Pt. 1) v. 82; G. C. § 710; 99 v. 287, § 78.)

Section 710-11. (Superintendent nor employes shall be interested in nor borrow from banks.) Neither the superintendent of banks, nor any deputy, assistant, clerk, examiner or employe appointed by him, shall be interested, directly or indirectly, in any national bank or in any bank under his supervision, or be engaged in the business of banking, or directly or indirectly borrow money from any bank or person under his supervision. (108 (Pt. 1) v. 83; G. C. § 717; 103 v. 384, § 12; 99 v. 288, § 87.)

This section does not apply to loans made before it took effect, but does apply to renewals made subsequently. Rep. Atty. Gen. 1913, p. 822.

Section 710-14. (How and by whom proceedings shall be brought.) All suits or proceedings brought by the superintendent of banks under authority of law, or to collect any penalty or forfeiture, shall be brought in the name of the state upon his relation, and shall be conducted under the direction and supervision of the attorney general. Such suit or proceeding may be prosecuted in the common pleas court of Franklin county, or of any other county in which

the defendant or one or more of the defendants reside or may be found. In all suits or proceedings instituted by the superintendent of banks the writ may be sent by mail to the sheriff of any county, and returned by him in like manner. For such service the sheriff shall be allowed the same mileage and fees as if the writ had been issued from the common pleas court of his county and made returnable thereto. (108 (Pt. 1) v. 83; G. C. § 732; 99 v. 291, § 102.)

Suits to collect notes and claims of a bank under liquidation by the superintendent should under this section be brought in the name of the state on relation of the superintendent. Rep. Atty. Gen. 1911-1912, p. 759.

Section 710-16. (Copies of records and papers, under seal, evidence.) Copies of all certificates, records and papers in the office of the superintendent of banks, duly certified by him and authenticated by his seal of office, shall be evidence in all courts of this state, of every matter which could be proved by the production of the original. (108 (Pt. 1) v. 84; G. C. §§ 718, 733; 99 v. 288, §§ 89, 103.)

Section 710-17. (Fees paid to superintendent of banks.) That for the purpose of maintaining the department of the superintendent of banks and the payment of expenses incident thereto, and especially the expenses of inspection and examination, the following fees shall be paid to the superintendent of banks of Ohio:

(Fees of banks subject to inspection and examination.)

(A) Each bank, which under the laws of Ohio is subject to inspection and examination by the superintendent of banks and is authorized to do business, or is in process of voluntary liquidation on the day preceding the first Monday in May in each year, shall pay to the superintendent of banks on or before the fifteenth day of June in each year, the sum of twenty dollars, and in addition thereto one one-ninetieth of one per cent of the total aggregate resources of such bank in excess of fifty thousand dollars as shown by the report of the condition of each such bank, made upon call by the superintendent of banks last before such day preceding the first Monday in May of such year; provided however, that in no event shall such total fee exceed the sum of two thousand dollars in any one year; provided, that all banks which operate a branch bank or branch banks in addition to the charges above to be paid, shall pay at the time prescribed above the sum of fifty dollars for each branch bank operated by it; provided, also, that in addition to the

fees prescribed herein, the actual cost of the examination of the trust department of a bank, or of any bank organized under the laws of the United States, as fixed by the superintendent of banks, shall be paid by such bank.

(Fees of bank, company, corporation, person, association or co-partnership.) (B) Each bank, company, corporation, person, association and co-partnership desiring and intending to transact business in this state, which will be subject to inspection and examination by the superintendent of banks, shall pay to the superintendent of banks for the preliminary examination required by law to be made by the superintendent of banks a fee of seventy-five dollars, such fee to be paid prior to the consideration of such application as provided in sections 42 et seq. of this act [G. C. § 710-42].

(Fee of foreign trust company.) (C) Each foreign trust company desiring and intending to do business in this state shall annually pay to the superintendent of banks a fee of one hundred dollars for issuance to it of a certificate authorizing it to transact business in this state, and such fees shall be paid before such certificate is issued.

(Fee of railroad, steamship or express company.) (D) Every railroad, steamship or express company transacting business in this state under section 181 of this act [G. C. § 710-181] shall pay to the superintendent of banks on or before the fifteenth day of June in each year a fee of two hundred and fifty dollars.

(Monies collected by superintendent of banks paid into the state treasury.) (E) All fees, charges and penalties required by law to be paid to the superintendent of banks, and collected by him, shall be paid by him into the state treasury to the credit of a fund for the use of the department of banks, and shall be used upon the order of the superintendent of banks, but shall not be used or paid out or appropriated for any other purpose.

In any year when such fund is sufficient for maintaining the department of banks for the ensuing year then the assessment provided for in paragraph (A) hereof shall be omitted for such year. (110 v. 448; 108 (Pt. 1) v. 84; 106 v. 361; G. C. § 736; 103 v. 180, § 1; 99 v. 292, § 107.)

Section 710-18. (Annual report of superintendent of banks to governor.) Omitted.

Section 710-19. (Examination of banks, when.) At least once each year and as often as the superintendent of banks

may deem necessary, the superintendent of banks or an examiner appointed for that purpose shall thoroughly examine the cash, bills, collaterals, securities, books of account and affairs of each bank. He shall also ascertain if such bank is conducting its business in the manner prescribed by law and at the place designated in its articles of incorporation, if incorporated, and if unincorporated, then at the place authorized. (108 (Pt. 1) v. 85; G. C. § 724; 106 v. 360; 99 v. 289, § 96.)

Section 710-20. (Doubtful or disputed assets; appraisal of.) If any assets of a bank are of doubtful or disputed value an appraisal of such assets may be had for which purpose one appraiser shall be chosen by the bank, one by the superintendent of banks, and the two so chosen shall choose the third. The valuation as fixed by two appraisers shall be accepted as the probable value of such assets for the purposes of such examination. No appraiser shall be in any way interested in such bank or be connected with the banking department. All expenses of such appraisal shall be paid by such bank. (108 (Pt. 1) v. 86.)

Section 710-21. (Examination upon written request.) When requested in writing upon the authority of the board of directors or stockholders of any bank to make an examination of such bank, the superintendent of banks shall do so. (108 (Pt. 1) v. 86; G. C. § 721; 99 v. 289, § 93.)

Section 710-22. (Expense of special examination.) Whenever the superintendent of banks makes a special examination of any bank at the request of the directors or stockholders, or upon his own determination, the expense thereof shall be paid by the bank. Such expenses shall be collected by the superintendent of banks and paid into the state treasury as provided by law. (108 (Pt. 1) v. 86; G. C. § 720; 99 v. 289, § 92.)

Section 710-23. (Special examination defined.) Any examination made by the superintendent of banks otherwise than in the ordinary routine of the department and because in his opinion the condition of the bank requires such examination, and every examination made at the request of the board of directors or stockholders of any bank, shall be deemed a special examination within the meaning of the preceding section. (108 (Pt. 1) v. 86.)

Section 710-24. (Power to administer oaths.) For the purpose of such examination, the superintendent of banks or such examiner may administer oaths to and examine any officer, agent, clerk, customer, depositor, shareholder of such bank or other person touching its affairs and business. (108 (Pt. 1) v. 86; G. C. § 725; 99 v. 289, § 96.)

Section 710-25. (Authority to summon officer, agent, clerk, etc.) The superintendent of banks may summon in writing under his seal any such officer, agent, clerk, customer, depositor, shareholder or any person resident of the state to appear before him or a deputy or examiner and testify in relation thereto. If a person so summoned to appear and give testimony, fails to appear or neglects or refuses to answer any pertinent or legal question that may be put to him by the superintendent of banks or such examiner or deputy, touching the matter under examination, the superintendent shall apply to the probate court of the county in which such inquiry is conducted to issue a subpoena to such person to appear before him. (108 (Pt. 1) v. 86; G. C. § 726; 99 v. 290, § 97.)

This section contemplates an oral examination and does not authorize the superintendent to require affidavits. Rep. Atty. Gen. 1914, p. 32.)

Section 710-26. (Probate judge shall issue subpoena, when.) Upon such application, the probate judge shall issue a subpoena for the appearance forthwith of such person or persons before him to give testimony. Whoever, being so subpoenaed, fails to appear, or appearing, refuses to testify, shall be subject to like proceedings and penalties for contempt as witnesses in actions pending in the probate court. (108 (Pt. 1) v. 86; G. C. § 727; 99 v. 290, § 98.)

Section 710-27. (Witness fees and mileage.) Each witness who appears before the superintendent of banks, or before such deputy or examiner, by order of the superintendent of banks, shall receive for his attendance, the fees and mileage provided for witnesses in civil cases in the common pleas court, which shall be audited and paid by the state out of moneys appropriated for the department of banks for the purpose of transportation, upon the presentation of proper voucher, sworn to by such witness and approved by the superintendent of banks. (108 (Pt. 1) v. 87.)

Section 710-28. (Books, assets, papers, etc., shall be submitted; possession taken of bank on refusal.) The officers

of every bank shall submit its books, assets, papers and concerns to the inspection and examination of the superintendent of banks or any deputy, or duly appointed examiner, and on refusal so to do or to be examined on oath touching the affairs of such bank, the superintendent of banks may forthwith take possession of the property and business of such bank and liquidate its affairs and remain in possession of its property and business until its affairs be finally liquidated, as hereinafter provided. (108 (Pt. 1) v. 87; G. C. § 729; 101 v. 277; 99 v. 290, § 99.)

Section 710-29. (Examinations made without previous notice.) All examinations required to be made by the superintendent of banks under the provisions of this act shall be made without previous notice to the bank, to be examined. (108 (Pt. 1) v. 87; G. C. § 734; 99 v. 291, § 104.)

Section 710-30. (Assessments to pay deficiencies in capital. Sale of stock at auction, on refusal. Possession taken on failure to pay deficiency within three months.) Every bank whose capital stock has not been paid in as required by law, and every bank whose capital shall have become impaired by losses or otherwise, shall within three months after receiving notice from the superintendent of banks, cause the deficiency in such capital to be paid in by assessment upon the stockholders pro rata for the amount of capital stock held by each. If any stockholder of such bank neglects or refuses to pay such assessment as herein provided, it shall be the duty of the board of directors to cause a sufficient amount of the capital stock of such stockholder or stockholders to be sold at public auction, upon thirty days' notice given by posting such notice of sale in the office of the bank and by publishing such notice in a newspaper in the place where the bank is located, and if none, then in a newspaper published nearest thereto, to make good the deficiency, and the balance, if any, shall be returned to such delinquent shareholder or shareholders. If any bank shall fail to cause to be paid in such deficiency in its capital stock for three months after receiving such notice from the superintendent of banks, the superintendent of banks may forthwith take possession of the property and business of such bank until its affairs be finally liquidated as provided by law.

(Sale shall effect cancellation.) A sale of stock as provided in this section, shall effect an absolute cancellation of the outstanding certificate, or certificates, evidencing the

stock so sold, and shall make said certificate null and void, and a new certificate shall be issued by the bank to the purchaser of such stock. (108 (Pt. 1) v. 87; G. C. §§ 730, 731; 99 v. 291, §§ 100, 101.)

Where directors, in order to make good a loss, execute a note to the bank and the bank in consideration thereof executes a note of the same amount to the directors, one obligation offsets the other.

Rep. Atty. Gen. 1911-1912, p. 765.

Under § 710-30 the superintendent may, in his discretion, permit the voluntary liquidation of a bank, although its capital stock is impaired, if he is satisfied that it is solvent. Rep. Atty. Gen. 1910-1911, p. 568.

Sale of stock for failure to pay installment. § 710-53.

Section 710-31. (Number of reports required yearly to superintendent; what reports shall exhibit; publication of summary.) Every bank shall make to the superintendent of banks four, and if the superintendent of banks so orders, then five reports during each calendar year, according to and in the form which may be prescribed by him, verified by the oath or affirmation of the president, vice-president, cashier, secretary or treasurer of such bank. Each such report shall exhibit in detail and under appropriate heads, the resources, assets and liabilities of such bank at the close of business on any past day by the superintendent of banks specified, and shall be transmitted to the superintendent of banks within ten days after the receipt of a request or requisition therefor, from him; and in the form prescribed by the superintendent of banks, a summary of such report shall be published in a newspaper published in the place where such bank is established, or if there is no newspaper in the place, then in the one published nearest thereto in the same county, at the expense of such bank; and such proof of such publication shall be furnished the superintendent of banks as may be required by him. So far as possible the day specified by the superintendent of banks, shall be the same as that specified by the comptroller of the currency for reports from national banking associations. (108 (Pt. 1) v. 88; G. C. §§ 737, 739; 99 v. 292, §§ 108, 110.)

A former statute (R. S. §§ 2759 to 2761) which required banks to make statements to the county auditor, was held constitutional.

Treasurer v. Bank 47 O. S. 503 (1890).

Collett v. Springfield Sgs. Soc. 13 C. C. 131; 7 C. D. 146 (1896); affirmed 56 O. S. 776.

This statute was construed in

Exchange Bank v. Hines 3 O. S. 1 (1853).

Ellis v. Linck 3 O. S. 66 (1853).

Bank v. McGregor 6 O. S. 45.

Patton v. Bank, 7 N. P. 401; 10 L. D. 321 (1900).

Chapman v. Bank 56 O. S. 310, 329 (1897); 173 U. S. 205.

Cleveland Trust Co. v. Lander 19 C. C. 271; 10 C. D. 451; s. c. 62 O. S. 266; 184 U. S. 111.

Section 710-32. (Special report may be required.) The superintendent of banks may call for a special report whenever in his judgment it is necessary to inform him fully of the condition of any bank; which report shall be in and according to the form prescribed by the superintendent of banks, shall be transmitted to him within five days after the receipt of a requisition therefor from him, shall be verified as provided in the last preceding section, and shall be published as therein provided if required by the superintendent of banks. (108 (Pt. 1) v. 88; G. C. § 740; 99 v. 292, § 111.)

Section 710-33. (Penalty for failure to make or publish reports.) Every bank failing to make and transmit to the superintendent of banks any of the reports required by this act and in and according to the form prescribed by the superintendent of banks therefor, or failing to publish the reports as required by law, shall forthwith be notified by the superintendent, and, if such failure continues for five days after receipt of such notice, such delinquent bank shall be subject to a penalty of one hundred dollars for each day thereafter that such failure continues, such penalty to be recovered by the superintendent of banks and paid into the fund provided for by section 17 of this act (G. C. § 710-17). (108 (Pt. 1) v. 88; G. C. § 741; 99 v. 202, § 112.)

Section 710-34. (Official communication submitted to board of directors; record; certification.) Each official communication directed by the superintendent of banks or one of his deputies to a bank or to any officer thereof, relating to an examination or investigation conducted by the banking department or containing suggestions or recommendations as to the conduct of the business of the bank, shall if required by the superintendent of banks be submitted by the officer receiving it to the executive committee or board of directors of such bank, and duly noted in the minutes of such meeting. The receipt and submission of such notice to the executive committee or board of directors shall be certified within five days thereafter to the superintendent of banks by three members of such committee or board. (108 (Pt. 1) v. 88.)

Section 710-35. (Facts and information obtained in examination kept secret; penalty for violation.) Whoever, being the superintendent of banks, a deputy, assistant, clerk in his employ or an examiner, fails to keep secret

the facts and information obtained in the course of an examination, except when the public duty of such officer requires him to report upon or take official action regarding the affairs of the person, partnership, corporation, company, society or association so examined, or wilfully makes a false official report as to the condition of such person, partnership, corporation, company; society or association, shall be fined not more than five hundred dollars or imprisoned in the penitentiary not less than one year nor more than five years, or both. Nothing in this section shall prevent the proper exchange of information relating to banks and the business thereof, with the representatives of the banking departments of other states, with the national bank authorities, or with clearing house association examiners.

(Removal.) Any official, violating any provision of this section, in addition to the penalties therein provided shall be removed from office and be liable, with his bondsmen, in damages to the person or corporation injured by the disclosure of such secrets. (108 (Pt. 1) v. 88; G. C. §§ 12898, 12899; 106 v. 360; 102 v. 171; 101 v. 276; 99 v. 291, § 106.)

Under an earlier form of this section, information could not be disclosed to clearing house examiners and audit companies. Rep. Atty. Gen. 1914, p. 1649.

It was said that the superintendent could testify as to affairs of a defunct bank. Opins. Atty. Gen. 1915, p. 151.

Section 710-36. (Signing and verifying papers in proceedings.) In proceedings connected with any authority exercised under this act, all accounts and other papers may be signed and sworn to in behalf of such bank by any officer thereof duly authorized by it. The answers and examinations under oath, of such officer, shall be received as the answers and examinations of the bank. A court may order and compel any officers of such bank to answer and attend such examination the same as if they, instead of the bank, were parties to the proceedings or inquiry. (108 (Pt. 1) v. 88; G. C. § 9791; 99 v. 286, § 74.)

Section 710-37. (Minimum capital of commercial or savings banks and trust corporations.) The capital of a commercial or savings bank or a combination of both shall be not less than twenty-five thousand dollars; provided that in cities the population of which exceeds ten thousand such capital shall be not less than fifty thousand dollars.

The capital of a corporation transacting a trust business shall be not less than one hundred thousand dollars

and if such business is combined with that of a commercial or savings bank, or a combination of both, such capital shall be in addition to the capital required for such commercial or savings bank, or a combination of both, as provided herein. (108 (Pt. 1) v. 88; G. C. § 9704; 99 v. 269, § 2.)

Preferred stock is not authorized. Rep. Atty. Gen. 1911-1912, p. 777.

This section does not apply to national banks. Opins. Atty. Gen. 1921, p. 854; 19 O. L. R. 421.

Section 710-38. (Existing banks must increase capital within three years.) Every incorporated bank now having a lesser capital than that required by section 37 (G. C. § 710-37), except societies for savings and savings societies heretofore chartered and incorporated under a special act, shall within three years from the enactment of this act cause the amount of its capital to be increased and paid up to the amount of said minimum capital prescribed in said section. (108 (Pt. 1) v. 89.)

Section 710-39. (When articles of incorporation may be filed and recorded.) All corporations hereafter incorporated as commercial banks, savings banks, trust companies, or a corporation having departments for two or more, or all such classes of business, shall be incorporated and organized with a capital stock, and under the provisions of this act. The secretary of state shall not file or record articles of incorporation for any such proposed corporation, unless in accordance therewith, and only upon certificate of the superintendent of banks, as provided in sections 44 and 46 of this act [G. C. §§ 710-44, 710-46]. (108 (Pt. 1) v. 90; G. C. § 9723; 99 v. 272, § 18.)

Section 710-40. (Foreign bank prohibited from doing other than loan business.) No bank or banking institution incorporated under the laws of any other state shall be permitted to receive deposits or transact any banking business of any kind in this state, except to lend money, or as otherwise provided by law in relation to trust companies. (108 (Pt. 1) v. 90; G. C. § 9796; 99 v. 287, § 80.)

Foreign trust companies, see § 710-150 et seq.

A state may prohibit, altogether, the banking institutions of other states from exercising corporate powers within its territorial limits, and this right to exclude necessarily involves the power to specify the terms and conditions upon which the privilege may be exercised.

Bank v. Prather, 12 O. S. 497, 507 (1861).

Ashley v. Ryan, 153 U. S. 436; affirming, 49 O. S. 504.

Section 710-41. (Number and qualifications of persons required to establish bank.) Any number of persons, not less than five, a majority of whom are citizens of this state, may associate and become incorporated to establish a commercial bank, a savings bank, a trust company, or to establish a bank having departments for two or more or all of such classes of business, upon the terms and conditions and subject to the limitations hereinafter and by law prescribed.

(Requisites of articles of incorporation.) Such persons shall subscribe and acknowledge before an officer authorized to take acknowledgment of deeds, articles of incorporation, the form of which shall be prescribed by the secretary of state, which must contain:

a. The name by which such corporation is to be known, which shall begin with the word "The" and end with the word "bank" or "company."

b. The place where its business is to be transacted, designating the particular city, village or township.

c. The purpose for which it is formed, whether that of a commercial bank, savings bank, trust company, or a combination of two or more or all, of such classes of business, or a special plan bank, as provided in section 180 of this act (G. C. § 710-180).

d. The amount of its capital, which shall be divided into shares of one hundred dollars each. (108 (Pt. 1) v. 90; G. C. §§ 9702, 9703; 99 v. 269, §§ 1, 2; 102 v. 171.)

A bank should be incorporated under this chapter, not under the general corporation law. The articles must definitely state the nature of the banking business to be transacted.

Rep. Atty. Gen. 1908-1909, p. 80.

Sections 710-41 et seq. provide a method of organization, similar to, but exclusive of, the general corporation law.

Rep. Atty. Gen. 1910-1911, p. 570.

The purpose clause of the articles of a trust company should not include power to act as a real estate or insurance agent.

Rep. Atty. Gen. 1909-1910, pp. 326, 330.

If the articles of incorporation state that the corporation is formed for the purpose of a commercial bank and a savings bank, the fact that it may not transact any commercial business does not relieve it from complying with the legal obligations of a commercial bank, such as reserve requirements. The articles of incorporation control in determining the corporate purpose. Rep. Atty. Gen. 1914, p. 85.

Name.

See also § 710-44.

A banking corporation organized prior to the enactment of this chapter, which has not availed itself of the provisions of this chapter, can not change its name to end with the word "Bank."

Rep. Atty. Gen. 1910-1911, p. 566.

Place of business.

Power to maintain branches. See § 710-73.

Capital stock.

Preferred stock is not authorized. Rep. Atty. Gen. 1911-1912, p. 777.

Minimum capital stock, § 710-37.

Section 710-42. (Certificate of clerk of court. Authority of superintendent required before record of articles.) The official character of the officer before whom the acknowledgment of articles of incorporation is made, shall be certified by the clerk of courts of common pleas of the county in which the acknowledgment is taken and the articles shall be filed in the office of the secretary of state. The secretary of state shall forthwith transmit to the superintendent of banks a copy of such articles of incorporation and shall not record the same until duly authorized so to do by the superintendent of banks as hereinafter provided. (108 (Pt. 1) v. 90; G. C. § 9705; 99 v. 269, § 3.)

Section 710-43. (Publication of notice of proposed bank.) Such persons shall, at or before the time such articles of incorporation are forwarded to the secretary of state, cause notice to be published in a newspaper published in the place where such bank is to be located, and if no newspaper is published in such place, then in one published nearest thereto. Such notice shall specify the name of the proposed bank, its location, the amount of its proposed capital and the names of the persons who propose to incorporate the same. Such notice shall be published for two weeks and a certified copy thereof furnished to the superintendent of banks. (108 (Pt. 1) v. 90.)

Section 710-44. (Duties of superintendent relative to proposed bank.) Upon receipt of a copy of the articles of incorporation of such proposed bank, the superintendent of banks shall at once examine into all the facts connected with the formation of such proposed corporation including its location and proposed stockholders and if it appears that such corporation, if formed, will be lawfully entitled to commence the business of banking, the superintendent of banks shall so certify to the secretary of state, who shall thereupon record such articles of incorporation. But the superintendent of banks may refuse to so certify to the secretary of state, if upon such examination and investigation he has reason to believe that the proposed corporation

is to be formed for any other than legitimate banking business, or that the character and general fitness of the persons proposed as stockholders in such corporation, are not such as to command the confidence of the community in which such bank is proposed to be located or that the public convenience and advantage will not be promoted by its establishment, or that the name of the proposed corporation is likely to mislead the public as to its character or purpose; or if the proposed name is the same as one already adopted, or appropriated by an existing bank in this state, or so similar thereto as to be likely to mislead the public, unless the place of business of such proposed corporation is to be located in a county other than the one in which the corporation bearing such similar name is then doing business and the corporation so adopting such name adds thereto the word "of _____." (Indicating thereby the name of the city, village or township in which its place of business is situated.) (108 (Pt. 1) v. 91; G. C. § 9921; 102 v. 171; 99 v. 272, § 16.)

This section authorizes the superintendent of banks, in his discretion, to withhold a certificate. The remedy for abuse of discretion is by appeal under § 710-45. Opins. Atty. Gen. 1915, p. 272.

Name.

See also § 710-41.

The name "Trust Company" should not be used unless the corporation possesses trust powers.

Rep. Atty. Gen. 1909-1910, p. 111.

The name may be changed by amendment of the articles of incorporation.

Rep. Atty. Gen. 1910-1911, p. 572.

Where it is desired to adopt a name already adopted by another bank, the name of the city or village where located must be added.

Rep. Atty. Gen. 1908-1909, p. 80.

Use of word "State" restricted.

§ 710-178.

Use of words "bank," "banker" and "banking" restricted.

Const Art. 13, § 3.

The superintendent of banks, and not the secretary of state, determines whether the name of a proposed bank infringes the name of an existing bank. After he has certified approval of a name and the articles have been recorded by the secretary the superintendent cannot revoke his certificate, unless it has been obtained by fraud. Opins. Atty. Gen. 1919, p. 1485; 11 Dept. Rep. 272.

Section 710-45. (Appeal when certificate withheld; hearing.) If the superintendent of banks withholds such certificate an appeal may be made to a board composed of the governor, superintendent of banks and the attorney general. The decision of such board in the matter shall be final.

Such board shall prescribe the rules and procedure under which all appeals shall be heard, and may from time to time amend the same. Upon its order, the superintendent of banks shall summon in writing, under his seal, any person resident of this state, to appear before such board and testify in relation to any such appeal, and in the event of the failure of any person summoned to appear before such board and to testify as herein provided, such board shall proceed in all respects as provided in sections 25, 26 and 27 of this act. (108 (Pt. 1) v. 91; G. C. §§ 710-25, 710-26, 710-27.)

Section 710-46. (Duties of secretary of state.) Upon receipt of such certificate from the superintendent of banks the secretary of state shall record said articles of incorporation; one copy thereof, duly certified by the secretary of state shall thereupon be furnished to the incorporators of such corporation, and one copy to the superintendent of banks, to be by him filed in his office. All certificates thereafter filed in the office of the secretary of state relating to such corporation shall be recorded, and a certified copy thereof forthwith furnished to the superintendent of banks and filed in his office. (108 (Pt. 1) v. 91.)

Section 710-47. (Enumeration of powers.) When such articles of incorporation are so recorded, the persons who subscribe them, their associates, successors and assigns, by the name designated therein, shall become a body corporate with succession, and, as such, shall have power:

(a) To adopt and use a corporate seal, and to alter it at will;

(b) To contract and be contracted with;

(c) To sue and be sued;

(d) To adopted regulations for the government of the corporation, not inconsistent with the constitution and laws of this state;

(e) To do all needful acts, to carry into effect the objects for which it was created. (108 (Pt. 1) v. 92; G. C. § 9708; 99 v. 270, § 4.)

Powers of banks. The phrase "associations with banking powers," as used in section 7, article 13 of the constitution, relates only to banks of issue.

Dearborn v. Bank, 42 O. S. 617 (1885).

A bank has no power to deal in hay. *Bank v. High*, 20 C. C. n. s. 432 (1914).

— **To maintain branch banks.** The power of a bank to maintain branches is restricted by § 710-73.

— To acquire stock in other corporations, or its own stock. A bank has no power to purchase its own stock. G. C. § 710-114. Rep. Atty. Gen. 1910-1911, p. 569.

See also note to § 8627.

To save itself from loss on a preexisting debt, a bank may acquire stock in other banks or its own stock.

G. C. § 710-114.

Taylor v. Miami Exporting Co., 6 Ohio 177 (1833).

State v. Franklin Bank, 10 Ohio 91, 97 (1840).

See notes to §§ 8627 and 8683.

For power of commercial banks to make loans on corporate stock as collateral, see note to § 710-136.

Power of savings banks to invest in stocks. § 710-140.

— To guarantee payment of bonds or commercial paper. A banking corporation selling bonds, not belonging to it, has no power to guarantee their payment. But it may, in making the sale, obligate itself to repurchase them at the same price on demand and such a contract will be enforced. Bank v. Schaeffer, 16 C. C. 457; 9 C. D. 182 (1898). See Pollitz v. Commission, 96 O. S. 49 (1917).

A bank authorized to buy, sell or negotiate paper may guarantee that the same is collectible.

Sturges v. Bank, 11 O. S. 153 (1860).

Bank v. Bank, 45 O. S. 236 (1887).

G. C. § 710-136.

— To take over and conduct the business of a debtor. A bank may, to save itself from loss on a preexisting debt, take over and conduct, temporarily, the business of its debtor. Bank v. Kehnast, 11 N. P. n. s. 417; 22 L. D. 15 (C. P. 1910).

But a national bank has no power to obligate itself to operate a street or interurban railway. Gress v. Fort Loramie, 100 O. S. 35 (1919); reversing, 21 N. P. n. s. 81.

— To act as real estate or insurance agent. A banking company probably has no power to act as real estate or insurance agent.

Rep. Atty. Gen. 1913, p. 42.

Rep. Atty. Gen. 1908-1909, p. 195.

Rep. Atty. Gen. 1909-1910, pp. 326, 330.

— To borrow money. See § 710-126.

— As to deposits. See note to § 710-117.

— To furnish surety bond. A bank may furnish a surety bond for the protection of its depositors, other than public bodies, and may pay the premiums therefor. Rep. Atty. Gen. 1912, p. 707.

And may deposit collateral with the surety signing its bond. Rep. Atty. Gen. 1913, p. 794.

— As to loans and investments.

Authorized investments and loans.

Commercial banks: §§ 710-136, 710-111, 710-122.

Savings banks: §§ 710-139, 710-140.

Limitation as to one loan or stock: §§ 710-121, 710-122.

Discounts. See note to § 710-136.

The mere making of loans is not transacting the business of banking, although it is an incident of banking. A company may be incorporated under the general corporation law for the purpose of making loans.

Rep. Atty. Gen. 1905-1906, p. 50.

See Bank v. Insurance Co., 41 O. S. 1 (1885).

Hall v. Kummero, 7 N. P. 394; 5 L. D. 176 (1897).

Contracts for usurious interest. A stipulation for interest, to be received or paid by a corporation, at a rate higher than permitted by the usury laws, does not render the loan or debt void. The principal may be recovered together with interest at the lawful rate.

National Bank v. Insurance Co., 41 O. S. 1 (1884).

Larwell v. Hanover, etc., Soc., 40 O. S. 274 (1883).

Ewing v. Toledo Sav. Bank, 43 O. S. 31 (1885).

State v. Urbana, etc., Co., 14 Ohio 6 (1846).

First N. B. v. Garlinghouse, 22 O. S. 492 (1872).

Under former statutes and certain special charters which expressly prohibited corporations from charging more than a certain rate of interest, it was held that a contract for a higher rate was wholly void and that neither principal nor interest could be recovered.

Bank v. Swayne, 8 Ohio 257 (1838).

Miami Exporting Co. v. Clark, 13 Ohio (1844).

Preble County v. Russell, 1 O. S. 313 (1853).

Bank of Wooster v. Stevens, 1 O. S. 233 (1853).

Russell v. Failor, 1 O. S. 327, 329 (1853).

Union Bank v. Bell, 14 O. S. 200, 209 (1863).

Kilbreth v. Bates, 38 O. S. 187 (1882).

See Laskey v. Board of Education, 35 O. S. 519 (1880).

Southern Bank v. Gassoway, 1 Dis. 207 (1856).

Kilbreth v. Wright, 1 W. L. B. 1; 4 Am. L. R. 449 (1876).

Creed v. Commercial, etc., Bank, 11 Ohio 489 (1842).

Spaulding v. Bank, 12 Ohio 544 (1841).

Dunkle v. Renick, 6 O. S. 527 (1856).

McLean v. Lafayette, 3 McLean (U. S.) 587; 2 O. F. D. 412.

Discount and exchange as usury, see note to § 710-136.

Purchase of bonds for less than par as usury, see note to § 8797.

— **Foreign exchange.** A bank received \$71 for transmission of its equivalent of 475 kronen to Austria, but its delivery was prevented by an existing state of war. Held, that the duty of the bank was to return to the sender 475 kronen or its equivalent in money of the United States, as of the time when with due diligence, it should have ascertained and notified the sender of its failure to deliver. Spira v. Eisen, 15 Ohio App. 511 (1922).

Liability for fraud. An incorporated bank is liable to a person who has been deprived of his property by the fraud of its officers acting within the scope of their authority.

Bank v. Kehnast, 11 N. P. n. s. 417; 22 L. D. 15 (1910).

Banking usages and customs. Usage of banks prevalent in the vicinity, and generally followed, are presumed to be reasonable, and the burden of showing them unreasonable is upon the one who assails them, the question being not is the custom reasonable, but has it been shown to be unreasonable.

Hilsinger v. Trickett, 86 O. S. 286 (1912).

A person choosing a bank as a collecting agent impliedly agrees that the agency may be performed in accordance with such reasonable methods prevailing at the place of collection as have ripened into usage, not in conflict with the general law, although he has no knowledge of their existence.

Hilsinger v. Trickett, 86 O. S. 286 (1912).

See Bank v. Butler, 41 O. S. 519 (1885).

Section 710-48. (Opening books of subscription.) The persons named in the articles of incorporation of any such company, or a majority of them, shall order books to be opened for subscription to the capital stock of the company in the manner provided for other corporations. An installment of ten per cent. on each share of stock shall be payable at the time of making the subscription, and the balance shall be payable as soon thereafter as may be required by the board of directors. (108 (Pt. 1) v. 92; G. C. § 9710; 99 v. 270, § 5.)

Section 710-49. (Certificate of subscription; choosing directors.) As soon as the capital stock of such corporation is fully subscribed, the subscribers of the articles of incorporation, or a majority of them, shall so certify in writing to the secretary of state, who shall transmit a copy thereof to the superintendent of banks, and such subscribers shall thereupon give notice to the stockholders, in the manner provided for other corporations, to meet for the purpose of choosing not less than five directors, who shall continue in office until the time fixed for the annual election, and until their successors are elected and qualified. But if all subscribers are present in person or by proxy, such notice may be waived in writing. (108 (Pt. 2) v. 1155; 108 (Pt. 1) v. 92; G. C. § 9711; 102 v. 171; 99 v. 271, § 6.)

Cumulative voting is not authorized. Rep. Atty. Gen. 1914, p. 445; Opins. Atty. Gen. 1916, p. 1804; *Contra*. Rep. Atty. Gen. 1908-1909, p. 195. See § 710-64.

Section 710-50. (Regulations, how adopted or changed.) Regulations of the corporation may be adopted or changed by the assent thereto, in writing, of two-thirds of the stockholders in number and amount; or by a majority of the stockholders in number and amount, at a meeting held for that purpose, notice of which has been given for that purpose by the president or secretary or any two directors personally or by written notice to each stockholder, and by publication, for thirty days, in some newspaper of general circulation in the county in which the corporation is located. (108 (Pt. 1) v. 92; G. C. § 9709.)

Regulations under General Corporation Law, §§ 8701, 8703, 8704.

Section 710-51. (Fiscal year; annual meeting for election of directors.) The fiscal year of each bank shall end on the 31st day of December in each year, and unless the regulations of the corporation otherwise provide the annual

meeting for the election of directors of every such bank shall be held on the second Wednesday of January in each year. (108 (Pt. 1) v. 93; G. C. § 9713; 99 v. 271, § 9.)

Section 710-52. (General provisions applicable, when.) Such corporation shall be created, organized, governed and conducted, and directors shall be chosen in all respects in the same manner as provided by law for corporations organized under the general incorporation laws of this state, in so far as the same shall not be inconsistent with the provisions of this act. (108 (Pt. 1) v. 93; G. C. § 9714; 99 v. 271, § 9.)

See § 8737.

The name of a bank may be changed by amendment of the articles of incorporation under the general corporation law. (§ 8719 et seq.)

Rep. Atty. Gen. 1910-1911, p. 572.

This section does not authorize banks to issue preferred stock.

Rep. Atty. Gen. 1911-1912, p. 777.

The identity of a bank is not affected by a change of its name, and it is not necessary to change its name as payee on notes. Rep. Atty. Gen. 1913, p. 795.

Section 710-53. (Failure to pay installment; sale of stock.) When a stockholder or his assigns fails to pay an installment on his stock, as required by the board of directors, the directors for such company may sell his stock at public sale for not less than the amount due thereon, including cost incurred, to the person who will pay the highest price therefor, having first given the delinquent stockholder five days' notice of such sale personally, or if no personal notice can be given, then by mail at his last known address as appears from the corporate record, and having advertised the sale for a like period in a paper of general circulation within the county in which the corporation is located. If no bidder can be found who will pay for such stock the amount due thereon, with costs incurred, such stock shall be sold as the directors may order, for not less than the amount then due thereon with all costs of sale. (108 (Pt. 1) v. 93; G. C. § 9717; 99 v. 271, § 12.)

Assessment on stock to restore impaired capital. § 710-13.

The bank may either sue the subscriber at law or sell his stock under this section, but cannot pursue both remedies. Rep. Atty. Gen. 1914, p. 87.

When stock has been paid for in full the bank has no lien thereon for other indebtedness as against a bona fide purchaser unless notice of the lien is stated on the stock certificate as required by § 8673-15. Rep. Atty. Gen. 1913, p. 817.

Under the former free banking act a bank had a lien, for claims other than subscriptions, on stock owned by its debtors (G. C. § 9683).

State v. Davis, 85 O. S. 44; Conant v. Reed, 1 O. S. 298, 304; Bank v. Hunt, 16 N. P. n. s. 65 (1914).

Section 710-54. (No commission for sale of stock allowed.) The stock sold by any bank in process of organization or for an increase of capital stock shall be accounted for to the bank in the full amount paid for the same. No commission or fee shall be paid to any person, association or corporation for selling such stock. The superintendent of banks shall refuse authority to commence business to any bank, if commissions or fees have been paid, or have been contracted to be paid, directly or indirectly by the bank, or by anyone in its behalf, to any person, association or corporation for securing subscriptions for or selling stock in such bank. (108 (Pt. 1) v. 93.)

Section 710-55. (Examination on certificate of notification of compliance with law.) When a certificate is transmitted to the superintendent of banks, signed by the president, secretary or treasurer of such corporation, notifying him that the entire capital stock of such corporation is subscribed, and paid in, and that such corporation has complied with all the provisions of law required to be done before it can be authorized to commence business, the superintendent of banks shall examine into its affairs, ascertain especially the amount of money paid in on account of its capital, the name and place of residence of each director, the amount of capital stock of which each is the owner in good faith, and whether such corporation has complied with all the provisions of law required to entitle it to engage in business. (108 (Pt. 1) v. 93; G. C. § 9720; 99 v. 272, § 15.)

Section 710-56. (Certificate of authorization by superintendent.) If upon such examination of the facts referred to in section 55 (G. C. § 710-55), and of any other facts which may come to the knowledge of the superintendent of banks, he finds that such corporation is lawfully entitled to commence business, he shall give it a certificate under his hand and official seal that it has complied with all the provisions required by law and is authorized to commence business. (108 (Pt. 1) v. 94; G. C. § 9721; 102 v. 171; 99 v. 272, § 16.)

Before issuing a certificate to a bank whose articles of incorporation confer trust powers, the superintendent may require the deposit to be made under § 710-150. Opins. Atty. Gen. 1920, p. 124.

Section 710-57. (Publication of certificate of authority.) The corporation shall cause such certificate to be published

in some newspaper printed in the city, village or county where it is located, once a week for four successive weeks or if no newspaper is published in such county, then in a newspaper published at the nearest county seat. (108 (Pt. 1) v. 94; G. C. § 9722; 99 v. 272, § 17.)

Section 710-58. (Business prohibited until authorized by superintendent.) No such corporation shall transact business except such as is incidental and necessarily preliminary to its organization, until it has been authorized by the superintendent of banks. (108 (Pt. 1) v. 94; G. C. § 9715; 99 v. 271, § 10).

This section applies to every bank organized under this chapter and positively prohibits the transaction of banking business by it without authority from the superintendent.

Rep. Atty. Gen. 1908-1909, p. 189.

Section 710-59. (Increase of capital stock.) A corporation doing business under the provisions of this act, may increase its capital stock as provided by law for other corporations. Such increase in the capital stock of any bank shall be fully paid in within six months from the date when such increase is authorized. (108 (Pt. 1) v. 94; G. C. § 9725; 99 v. 273, § 20.)

Under an earlier form of this section it was said that all of the increased stock need not be subscribed, but that a portion thereof might be held as unissued stock. Rep. Atty. Gen. 1912, p. 703.

Section 710-60. (Reduction of capital stock.) Such a corporation may reduce its capital stock in the manner provided for other corporations, but notice of such reduction shall be published in a newspaper of general circulation in the city, village or county, in which it is doing business. No reduction shall be made to an amount less than the minimum amount of capital stock required for such bank by law, nor shall such reduction be valid or warrant the cancellation of stock certificates until it has been approved by the superintendent of banks. Such approval shall not be given except upon a finding by him that the security of existing creditors of the corporation will not be impaired. (108 (Pt. 1) v. 94; G. C. § 9726; 99 v. 273, § 21.)

Minimum capital stock. § 710-37. Proceedings to reduce capital stock under General Corporation Law. § 8700.

The capital stock may be reduced before business is commenced but not until the entire original capital stock has been subscribed, and directors and officers elected. Rep. Atty. Gen. 1910-1911, p. 570; §§ 710-49, 8700.

Section 710-61. (Corporate powers exercised by board of directors.) The corporate powers, business and property of banks formed under this chapter, shall be exercised, conducted and controlled by the board of directors, which shall meet at least once each month. Such board shall consist of not less than five directors, to be chosen by the stockholders, who shall hold office for one year and until their successors are elected and qualified. (108 (Pt. 2) v. 1155; 108 (Pt. 1) v. 94; G. C. § 9727; 9 v. 273, § 22.)

Powers and duties of directors under General Corporation Law. See note to § 8660.

Where stockholders have fixed the number of directors, that number should be elected at each regular election, until the stockholders change the number. Rep. Atty. Gen. 1913, p. 792.

A quorum consists of a majority of the whole number of directors. Vacancies on the board do not reduce the number necessary to constitute a quorum. Rep. Atty. Gen. 1914, p. 31.

Section cited in *State v. Cox*, 16 N. P. n. s. 513, 531 (1913), upon question of authorization by directors of improper loan, as a defense to an officer charged with misapplication of funds under G. C. § 12473.

Section 710-62. (Executive committee, powers and duties.) The board of directors may appoint an executive committee to consist of at least three of its members, with such duties and powers as are defined by the regulations or by-laws, who shall serve until their successors are appointed. Such executive committee shall meet as often as the board of directors require, which shall not be less frequently than once each month, and approve or disapprove all loans and investments. All loans and investments shall be made under such rules and regulations as the board of directors prescribe. (108 (Pt. 1) v. 94; G. C. § 9728; 99 v. 273, § 23.)

The appointment of a bank cashier by the finance committee, subject to the approval of the board at its semi-annual meeting, was held to be a valid appointment.

Fancher v. Kaneen, 5 N. P. n. s. 614; 18 L. D. 834 (C. P. 1907). Powers of executive committee in general.

See note to § 8660.

Section 710-63. (Minutes of meetings; what record shall show.) Minutes shall be kept of all meetings of the board of directors and of the executive committee, and the same shall be recorded in a book which shall be kept on file in the bank. Such minutes shall show a record of the action of the board of directors or executive committee on all loans, discounts and investments made or authorized, and the minutes of the executive committee shall be submitted to the board of directors for approval at each meeting of the board. (108 (Pt. 1) v. 95; G. C. § 9729; 99 v. 273, § 23.)

Cited in *State v. Cox*, 16 N. P. n.s. 513, 518 (1913), upon approval by executive committee of an improper loan, as a defense to an officer charged with misapplication of funds under G. C. § 12473.

Section 710-64. (Elections; proxy.) In elections of directors, and in deciding questions at meetings of stockholders, each stockholder shall be entitled to one vote for each share of stock held by him. Any stockholder also may vote by proxy duly authorized in writing. (108 (Pt. 1) v. 95; G. C. § 9730; 99 v. 274, § 24.)

The stockholders may, by regulation, require proxies to be deposited with the secretary at least one day before the meeting. Rep. Atty. Gen. 1913, p. 798.

An officer or director of a bank may act as a proxy. Rep. Atty. Gen. 1912, p. 681.

This section does not authorize cumulative voting. Rep. Atty. Gen. 1914, p. 445; Opins. Atty. Gen. 1916, p. 1804. *Contra*. Rep. Atty. Gen. 1908-1909, p. 195.

Section 710-65. (Qualifications of a director.) Every director of a bank shall be the owner and holder of shares of stock in the bank having a par value of at least \$500.00, and every such director shall hold such shares in his own name unpledged and unincumbered in any way. Any director at any time violating any of the provisions of this section shall be removed from office by the board of directors or by the superintendent of banks. At least three-fourths of the directors of every bank shall be residents of this state. (108 (Pt. 1) v. 95; G. C. § 9731; 99 v. 274, § 25.)

Section 8 of the Act of Congress known as the Clayton Act provides that a director of a state bank having deposits, capital, surplus and undivided profits aggregating more than \$5,000,000 shall be ineligible to be a director of a bank organized under the laws of the United States. 38 U. S. Stat. 730.

A common pleas judge is not disqualified from acting as a director.

Rep. Atty. Gen. 1909-1910, p. 331.

Section 710-66. (Oath of director.) Every director shall within thirty days after his election, take and subscribe in duplicate, an oath that he will diligently and honestly perform his duties in such office, not knowingly violate, or permit to be violated, any provisions of this act, and that he is the owner in good faith of the shares of stock of the company required to qualify him for such office, standing in his own name, on its books, and one of such oaths shall be forthwith filed with the superintendent of banks. (108 (Pt. 1) v. 95; G. C. § 9732; 99 v. 274, § 26.)

An officer or employe of the bank may not administer the oath. Rep. Atty. Gen. 1913, p. 804.

Section 710-67. (Liability of director for violations.)

Any director of a bank who shall knowingly violate, or who shall knowingly permit any of the officers, agents or employees of a bank to violate any of the provisions of this act shall be held liable in his personal and individual capacity for all damages which the bank, its stockholders, or any other person shall have sustained in consequence of such violation. (108 (Pt. 1) v. 95.)

Directors who, in settlement of their personal liability for making unauthorized loans, paid the amount thereof to the liquidating authorities and took an assignment thereof, were held not entitled to maintain, for their own benefit, an action to recover the loan from the borrowers. *Lewis v. Bank*, 274 Fed. 587 (C. C. A. 6th Cir. 1921). Powers and duties of directors in general, see note to § 8660. Liability of bank directors and officers.

See note to § 8660.

Section 710-68. (Bond of officers.) The officers of such bank, before entering upon the discharge of their duties, shall give bond to the bank in the amount required by the directors and to the satisfaction of the superintendent of banks and with surety to be approved by them, for the faithful performance of their duties as such officers. The superintendent of banks or directors may require an increase of the amount of such bonds whenever they deem it necessary. The directors as such shall not be required to give bond. (108 (Pt. 1) v. 95; G. C. § 9734, 99 v. 274, § 28.)

Executive officers under the general corporation law, see §§ 8661 to 8664.

Powers of president and cashier, see note to § 8664.

Bond. When the terms of a bond clearly indicate the intention of the obligor and obligee that there shall be an indemnity to the latter on account of the default of an employe, doubtful terms will be so construed as to effectuate rather than to defeat that intention.

A bond being executed for one year to indemnify a bank against the dishonesty of its cashier occurring during the term of the bond, or any renewal thereof, and discovered within six months of such term, or renewal, and there being a subsequent instrument to continue the former in force for another year according to its terms and conditions the instruments will be construed as though the bond had been originally executed for two years, there being no terms employed in either instrument to indicate the intention that an act of dishonesty occurring in the first year must be discovered within six months from the expiration of that year.

Rankin v. Guaranty Co., 86 O. S. 267 (1912).

Cutts v. Spear, 8 N. P. n. s. 445; 19 L. D. 608 (C. P. 1909).

When the cashier of a bank, by a certificate which he knows to be false, extends to one as a depositor of the bank a credit to which he is not entitled, and this is done pursuant to an arrangement that the cashier shall derive financial benefit from the transaction, and loss to the bank results, there arises a liability upon a bond to indemnify the bank for all losses

arising "from the fraud or dishonesty of the cashier amounting to embezzlement or larceny."

Rankin v. Guaranty Co., 86 O. S. 267 (1912).

"Fraud or dishonesty" of a bank cashier "amounting to embezzlement or larceny" which a surety company promises "to make good and reimburse" comprehends such dishonest and fraudulent conduct resulting in loss as is equivalent to embezzlement or larceny, and is not confined to the technical offenses mentioned, or such misappropriation as would subject the cashier to a conviction for embezzlement or larceny.

Cutts v. Spear, 8 N. P. n. s. 445; 19 L. D. 608 (C. P. 1909).

See Rankin v. U. S. F. & G. Co., 86 O. S. 267 (1912).

A provision in a bond of that character requiring the obligee upon the discovery of an act which may create a liability under the instrument to give notice thereof to the obligor at "the earliest practical moment" contemplates such and only such delay as in view of all circumstances may be reasonably necessary for the directors to acquire precise information respecting the default of the cashier and to enable them to determine whether it is of the grave character contemplated by the terms of the bond; and whether the giving of a notice 45 days after the first information of the bank's condition is a compliance with the provision should be determined by the jury under proper instructions.

Rankin v. Guaranty Co., 86 O. S. 267 (1912).

Where a bond was given "to the directors" of a bank, as obligees, the bank is the real party in interest and may sue thereon.

Fancher v. Kaneen, 5 N. P. n. s. 614; 18 L. D. 834 (C. P. 1907).

Where a bond, silent as to the time for which it shall run, is given by a cashier, appointed by a finance committee to fill a vacancy, it will be held to cover the period intervening between such appointment and its confirmation by the directors, but not thereafter, where the directors on confirming the appointment, failed to provide for a new bond.

Fancher v. Kaneen, 5 N. P. n. s. 614; 18 L. D. 834 (C. P. 1907).

See Thompson v. Young, 2 Ohio 335 (1826).

Where it is admitted that certain property was embezzled by a bank officer during the term of his bond, the burden is on his sureties to show that such property was subsequently returned to the bank.

Fancher v. Kaneen, 5 N. P. n. s. 614; 18 L. D. 834 (C. P. 1907).

Where a bank officer transferred to the president, as trustee, property to partially secure the bank against loss through his embezzlement, without designating to what part of his indebtedness it should be applied, it was held that it should be applied on that portion of his indebtedness which was the most precarious.

Fancher v. Kaneen, 5 N. P. n. s. 614; 18 L. D. 834 (C. P. 1907).

President. A bankrupt who conducted a private bank gave permission to the president of a national bank, who had no account with the bankrupt, to draw checks on him to the amount of \$25,000. These checks, by an arrangement between the two banks, were cleared through the clearing house by the national bank, which charged them to the bankrupt. Later the bankrupt gave his note to the national bank for the amount of the checks and the president of the bank gave the bankrupt his note for the same amount. Held, the note to the national bank, as between it and the bankrupt, was not an accommodation note, the transaction being for the benefit of the president individually.

Bank v. Galbraith, 157 Fed. 208; 16 O. F. D. 195 (C. C. A. 1907).

Treasurer. The treasurer need not be a director. Rep. Atty. Gen. 1913, p. 793.

Section 710-69. (Annual examination; report to superintendent.) A committee of at least three directors or stockholders annually shall be appointed by the board of directors to examine, or to superintend the examination of, the assets and liabilities of the bank and to report to the board of directors the result of such examination, and the board of directors may provide for such examination by a certified public accountant, or a clearing house examiner in any city where such examination is provided by the rules of such clearing house association. A copy of such report attested and verified under oath by the signatures of at least three members of such committee, shall be forthwith filed with the superintendent of banks. (108 (Pt. 1) v. 95; G. C. § 9736; 99 v. 274, § 30.)

The penalty provided in G. C. § 710-33 can not be imposed upon directors for failure to make and file reports under this section. Directors failing to make the report under this section, however, may be personally liable to stockholders for losses caused thereby and the superintendent may, by action, compel the directors to comply with this section.

Rep. Atty. Gen. 1911-1912, p. 786.

Section 710-70. (Record of stock; transfers.) A book shall be provided and kept by every such bank, in which shall be entered the name and residence of each stockholder, the number of shares held by each, the time when each person became a stockholder; together with all transfers of stock, stating the time when made, the number of shares and by whom transferred, which book shall be subject to the inspection of the directors, officers and stockholders of the bank at all times during the usual hours of transacting business. (108 (Pt. 1) v. 95; G. C. § 9738; 99 v. 275, § 34.)

The bank has no lien on full paid stock for indebtedness of the stockholder to it, as against a bona fide purchaser, unless the lien is stated on the certificate as required by § 8673-15. Rep. Atty. Gen. 1913, p. 817.

Section 710-71. (Books and accounts; form prescribed by superintendent.) The superintendent of banks may prescribe the manner and form of keeping the books and accounts of banks, so that the books and accounts of banks of the same class may be as nearly uniform as circumstances permit. All entries in all books of banks and in pass books of depositors shall be made in ink. (108 (Pt. 1) v. 96.)

Section 710-72. (Fee, gift, etc., prohibited; penalty.) No gift, fee, commission or brokerage charge shall be received directly or indirectly by any officer, director or em-

ployee of a bank, on account of any transaction to which the bank is a party unless duly authorized by the directors. Whoever violates this provision shall be subject to a penalty of \$100 for each violation to be recovered by the superintendent of banks, and shall be and thereafter remain ineligible as an officer, director or employee of such bank. (108 (Pt. 1) v. 96.)

Section 710-73. (Books and records shall be kept in bank and open to inspection of stockholder.) The books and records, except books and records of deposit and trust, of every bank, at all reasonable times shall be open to the inspection of every stockholder. All books and records of the bank shall be kept at all times in the bank. No branch bank shall be established until the consent and the approval of the superintendent of banks has been first obtained, and no bank shall establish a branch bank in any place other than that designated in its articles of incorporation, except in a city or village contiguous thereto. If such consent and approval is refused, an appeal may be taken therefrom in the same manner as is provided in section 45 of this act (G. C. § 710-45). (108 (Pt. 1) v. 96; G. C. § 9795; 99 v. 288, § 91.)

A stockholder may examine the books although the bank is in the hands of a receiver.

Rep. Atty. Gen. 1911-1912, p. 747.

A bank may establish branches only in cities and villages which touch or abut upon the place designated in the articles of incorporation for the transaction of its business. Opins. Atty. Gen. 1920, p. 1066.

Where two banks, located in two nonabutting cities or villages in the same county, consolidate, banking business may not be conducted at both locations. Opins. Atty. Gen. 1920, p. 1189.

A bank may appoint an agent to transact a foreign exchange business at a place other than its regular place of business. Opins. Atty. Gen. 1919, p. 1338.

Prior to the enactment of this chapter it was held that a bank was not "situated" within a county within the meaning of the county depository law (G. C. § 2715 et seq.) by having a branch bank therein, its principal office being in another county.

State v. Oviatt, 4 N. P. n. s. 481; 17 L. D. 451 (C. P. 1906); affirmed, 8 C. C. n. s. 567.

Section 710-74. (Penalty for failure to comply with order or requisition.) Any bank which fails or neglects to comply with any lawful order or requisition of the superintendent of banks within the time specified by him in such order or requisition, if no penalty has been specifically provided, shall be subject to a penalty of \$100, for each day after the expiration of five days from said date so specified

by the superintendent of banks, that it fails or neglects to comply with such order or requisition; such penalty to be recovered by the superintendent of banks, by suit against such bank. (108 (Pt. 1) v. 96.)

Section 710-75. (Individual liability of stockholders.) Stockholders of banks shall be held individually responsible, equally and ratably, and not one for another, for all contracts, debts and engagements of such bank, to the extent of the amount of their stock therein, at the par value thereof, in addition to the amount invested in such shares. The stockholders in any bank who shall have transferred their shares or registered the transfer thereof within sixty days next before the failure of such bank to meet its obligations, or with knowledge of such impending failure, shall be liable to the same extent as if they had made no such transfer, to the extent that the subsequent transferee fails to meet such liability; but this provision shall not be construed to affect in any way recourse which such stockholders might otherwise have against those in whose names such shares are registered at the time of such failure. At any time after taking possession of a bank for the purpose of liquidation when the superintendent of banks ascertains that the assets of such bank will be insufficient to pay its debts and liabilities he may enforce the individual liability of the stockholders." (108 (Pt. 1) v. 97.)

The liability of bank stockholders is for double the amount of their subscriptions, not merely double the amount paid in. Rep. Atty. Gen. 1912, p. 708.

See Constitution of Ohio, Article 13, Section 3 and notes, *supra*.
See also §§ 8686 to 8697.

Section 710-76. (Duly organized corporation only shall transact banking business.) No authority to transact a banking business in this state shall be granted, except to a corporation duly organized and qualified for that purpose. Unincorporated banks now authorized to transact and actually transacting a banking business may continue such banking business in the city, village, or township in which they are now located so long as they comply with the provisions of this act. (108 (Pt. 1) v. 97.)

The Thomas banking act of 1908 did not affect the legal existence of banks organized under the free banking act. *State v. Barkman*, 91 O. S. 248 (1915).

Section 710-77. (Unincorporated banks; detailed statement by, required.) Every unincorporated bank now trans-

acting a banking business in this state, shall, under oath file with the superintendent of banks, a full, complete detailed statement of,

1. Name of the bank.

2. A copy of the articles of co-partnership or agreement, under which the business of the bank is being conducted, which shall be executed and acknowledged by all of the parties interested therein, and at least one of whom shall be at all times a resident of the state of Ohio. If the banking business is being transacted or carried on by an individual, such individual shall at all times, while engaged in such banking business, be a resident of the state of Ohio.

3. The county and city or village in which the bank is located, and the business carried on.

4. The amount of permanent capital actually paid in and remaining in its possession, bona fide, as its property, for the sole purposes of the bank.

5. A statement of the responsibility and the net worth of the individual members of such unincorporated bank.

6. If not disclosed in the articles of co-partnership or agreement, then the name of the officers, agents or employes in active charge of the management of the business of the bank.

Every such unincorporated bank shall on or before January 1, 1920, and annually thereafter, file with the superintendent of banks a detailed statement as provided herein. (108 (Pt. 1) v. 97.)

Section 710-78. (Minimum of capital stock of unincorporated banks. Segregated capital and unimpaired security.)

Every unincorporated bank transacting a banking business in this state shall have a capital actually paid in and remaining in its possession, bona fide, as the property of such bank and to be used for its sole purposes and for the security of its creditors, of not less than \$10,000.00; in villages, and cities the population of which exceeds two thousand and does not exceed ten thousand, such paid in capital shall be not less than twenty-five thousand dollars; in cities, the population of which exceeds ten thousand, such paid in capital shall be not less than fifty thousand dollars.

Such capital shall at all times be segregated from all other property or business of the owner or owners of such bank, and shall be kept and maintained unimpaired for the security of the creditors of such bank.

All such unincorporated banks shall comply with the

provisions of this section within one year from the day this act goes into effect. (108 (Pt. 1) v. 98.)

Section 710-79. (Property of bank shall be held, how; assets subject to execution, when.) All property, real or personal, owned by an unincorporated bank, shall be held in the designated name of such bank or in the name of an individual as trustee therefor and not in the name of the owner or owners of such bank. All the assets of such bank shall be exempt from attachment or execution by any creditor of such owner or owners until all the liabilities of such bank shall have been paid in full. No person, firm or association owning or conducting an unincorporated bank shall use any of the fund of such bank for his or their private business, except as a borrower in due course of business. (108 (Pt. 1) v. 98.)

Section 710-80. (Depositors have first lien on assets.) The depositors in any unincorporated bank shall have first lien on the assets of such bank, in case it is wound up, to the amount of their several deposits, and for any balance remaining unpaid, such depositors shall share in the general assets of the owner or owners alike with the general creditors. (108 (Pt. 1) v. 98; G. C. § 744-6; 103 v. 381, § 6.)

As to general assets of the owner, bank depositors pro rate with general creditors. Rep. Atty. Gen. 1914, p. 29.

Section 710-81. (List of owners and persons interested must be posted conspicuously.) Every such unincorporated bank shall post in the room in which it transacts its business, and in plain view of its customers a printed list of all the owners of, and parties interested in, such bank, and a statement that the bank is an unincorporated bank. Should the interests of any members of such bank, or, of an individual doing a banking business under the provisions of this act, change either by death, devise, sale or otherwise, then and in that case the superintendent of banks of the State of Ohio shall be notified of such change and printed notice shall be posted in the room of any such bank. No such bank shall advertise by newspaper, letterhead, or in any other way, a larger capital than has been actually paid in. (108 (Pt. 1) v. 98; G. C. § 744-5; 103 v. 381, § 5.)

Section 710-82. ("Unincorporated" must be printed on advertising and stationery.) Every unincorporated bank

shall have printed on all its advertising matter and business stationery, the word "unincorporated" immediately following the name of the firm or business title. (108 (Pt. 1) v. 99; G. C. § 744-6; 103 v. 381, § 6.)

"Stationery" includes letter heads, checks, notes, deposit slips, notices and all other business paper on which the name of the bank appears. Rep. Atty. Gen. 1913, p. 819.

Section 710-83. (Reports shall be kept on file and open for inspection.) All reports received from unincorporated banks shall be kept on file in the office of the superintendent of banks, and open to the inspection of all persons, at the discretion of the superintendent of banks. The provision of section 31 of this act (G. C. § 710-31) as to publication of reports of banks shall apply to unincorporated banks. (108 (Pt. 1) v. 99; G. C. § 744-7; 103 v. 382, § 7.)

Section 710-84. (Permitted to bid upon public funds.)

Whenever any of the funds of the state, or any of the political subdivisions of the state, shall be deposited under any of the depositary laws of the state, every unincorporated bank shall be permitted to bid upon and be designated as depository of such funds, upon furnishing such surety or securities therefor as is prescribed by the law. (108 (Pt. 1) v. 99.)

Section 710-85. (When and how bank may go into liquidation.) A bank may go into liquidation and be closed by the vote of its stockholders owning two-thirds of its stock, in number and amount. When a vote to go into liquidation is so taken, the board of directors shall cause notice of such fact to be certified under seal of the bank, by its president or vice president and secretary, treasurer or cashier, to the superintendent of banks, together with certified copies of all proceedings had by directors and stockholders of such bank, which such stockholders' proceedings shall set forth that stockholders owning at least two-thirds of the capital stock voted in favor of placing the bank in liquidation and shall also set forth the reasons for placing the bank in liquidation. After such certified copies have been filed with the superintendent of banks, he shall make an examination of the bank, to determine whether or not the interests of its depositors and creditors will suffer by such liquidation and his consent to or rejection of such liquidation shall be based thereon and no such liquidation shall be made without the consent of the super-

intendent of banks. The expenses of such examination shall be paid by such bank. In case the superintendent of banks consents to such liquidation, such bank shall make a report to the superintendent of banks, at least once each thirty days from and after the date when the bank ceased to transact business as such, which report shall give a list of assets wholly or partially realized upon, together with the amount of each so remaining uncollected, and also a list of the liabilities retired by application of such amount so realized. The superintendent of banks shall have power to examine into the affairs of the bank so liquidated, at any time, to determine whether the rights of creditors and depositors are being protected, and if at any time he finds that such liquidation is being improperly conducted, or that the interests of the depositors and creditors are not being properly protected, he may forthwith take possession of the property and business of such bank and complete the liquidation thereof in the same manner as is provided in other cases. All unclaimed deposits and dividends remaining in the hands of such bank, shall be subject to the provisions of sections 9864, 9866, 9868 and 9869 of the General Code of Ohio, except that the time of the payment to the treasurer of the county shall be subject to the order of the superintendent of banks. When the superintendent of banks consents to such liquidation, such bank shall immediately publish notice thereof in a newspaper published in the place in which such bank is located, and if none is there published, then in the place nearest thereto, that it is closing up its affairs and notifying creditors to present their claims against the bank for payment. Such notice shall be published for four consecutive weeks. (108 (Pt. 1) v. 99; G. C. § 9747; 99 v. 277, § 39.)

Section 710-86. (Consolidation with or transfer of assets to another bank; procedure.) A bank may consolidate with or transfer its assets and liabilities to another bank. Before such consolidation or transfer shall become effective, each bank concerned in such consolidation or transfer, shall file, or cause to be filed, with the superintendent of banks, certified copies of all proceedings had by its directors and stockholders which such stockholders' proceedings shall set forth that holders of at least two-thirds of the stock, voted in the affirmative on the proposition of consolidation or transfer. Such stockholders' proceedings shall also contain a complete copy of the agreement made and entered into between said banks, with reference to such consolidation or transfer.

Upon the filing of such stockholders' and directors' proceedings as aforesaid the superintendent of banks shall cause to be made an examination of each bank to determine whether the interests of the depositors and creditors and stockholders of each bank are protected and that such consolidation or transfer is made for legitimate purposes, and his consent to or rejection of such consolidation or transfer shall be based upon such examination. No such consolidation or transfer shall be made without the consent of the superintendent of banks. If such consent is refused, an appeal may be taken therefrom in the same manner as is provided in section 45 of this act (G. C. § 710-45). The expenses of such examination shall be paid by such banks. Notice of such consolidation or transfer, shall be published for four weeks, before or after the same is to become effective, at the discretion of the superintendent of banks, in a newspaper published in a city, village or county, in which each of such banks is located, and a certified copy thereof shall be filed with the superintendent of banks. (108 (Pt. 1) v. 100; G. C. § 9748; 99 v. 277, § 40.)

A bank has power to purchase the assets of another bank, and to agree to discharge its liabilities. *Stetson v. Bank*, 12 O. S. 577 (1861).

Where two banks, situated in noncontiguous cities or villages, consolidate, banking business may not be conducted at both places. *Opins. Atty. Gen.* 1920, p. 1189.

Section 710-87. (Rights of creditors protected.) In case of either transfer or consolidation, the rights of creditors shall be preserved unimpaired and the respective companies deemed to be in existence, to preserve such rights. (108 (Pt. 1) v. 100.)

Section 710-88. (Copy of agreement of consolidation and approval filed with secretary of state. Property and rights transferred. When secretary of state shall refuse to file articles of incorporation.) In case of consolidation, when the agreement of consolidation is made and a duly certified copy thereof is filed in the office of the secretary of state, together with a certified copy of the approval of the superintendent of banks to such consolidation, the banks, parties thereto, shall be held to be one company possessed of the rights, privileges, powers and franchises of the several companies, but subject to all provisions of law relating to the different departments of its business. The directors and other officers named in the agreement of consolidation shall serve until the first annual election, the date for which shall

be named in the agreement. On filing such agreement all and singular the property and rights of every kind of the several companies, including the exclusive right in and to the corporate name of each of the banks parties to such agreement shall thereby be transferred to and vested in such new company, and be as fully its property as they were of the companies parties to such agreement. The secretary of state shall not file or record any articles of incorporation of any company organized to do the business of a bank, a building and loan association, or a mortgage or investment company, within the county within which said consolidated bank is situated, if such name, or the distinguishing part thereof, is that of any bank party to such agreement, or so similar thereto as to be likely to mislead the public, unless the written consent of the consolidated bank, signed by its president and secretary, be filed with such articles. (109 v. 56; 108 (Pt. 1) v. 100.)

Section 710-89. (Superintendent may take possession of bank, when.) The superintendent of banks may forthwith take possession of the business and property of any bank to which this act is applicable, whenever it shall appear that such bank:

1—Has violated its charter or any law applicable thereto;

2—Is conducting its business in an unauthorized or unsafe manner;

3—Is in an unsound or unsafe condition to transact its business;

4—Has an impairment of its capital for a period of ninety days;

5—Has refused to pay its depositors in accordance with the terms on which such deposits were received;

6—Has become otherwise insolvent;

7—Has neglected or refused to comply with the terms of a duly issued order of the superintendent of banks;

8—Has refused, upon proper demand, to submit its records and affairs for inspection to an examiner of the banking department; or

9—Its officers have refused to be examined upon oath regarding its affairs.

Such bank may with the consent of the superintendent of banks, resume business upon such conditions as may be approved by him. (108 (Pt. 1) v. 101; G. C. § 9749; 101 v. 283; 99 v. 277, § 41.)

The superintendent may combine two or more liquidations under one head when they reach a point where the services of special agents and other help can be dispensed with. Rep. Atty. Gen. 1913, p. 788.

Section 710-90. (Notice of taking possession of bank.)

Upon taking possession of the property and business of any such bank, the superintendent of banks shall forthwith give written notice of such fact to all banks, companies, associations and individuals holding or in possession of any assets of such bank. The superintendent of banks shall cause notice to be given by advertisement in such newspapers as he may direct weekly for four consecutive weeks, calling on all persons who may have claims against such bank to present the same to the superintendent of banks, and to make legal proof thereof at a place and within a time not later than the last day therein specified. The superintendent of banks shall mail a similar notice to all persons whose names appear as creditors upon the books of said bank. (108 (Pt. 1) v. 101; G. C. § 9750; 99 v. 278, § 42; G. C. § 742-1; 106 v. 360, 742-3; 101 v. 277, 278.)

Depositors who fail to present claims within the time specified are not barred from subsequently presenting them. Rep. Atty. Gen. 1913, p. 820; § 710-106.

Franchise taxes. Liability for franchise taxes (§ 5495 et seq.) continues, after possession taken by the superintendent, until dissolution. If the bank is hopelessly insolvent, the superintendent may obtain an order of dissolution under § 11975. Rep. Atty. Gen. 1914, p. 1065.

Section 710-91. (Rights and liabilities after possession taken.) No bank, trust company, corporation, firm, association or individual knowing that the superintendent of banks has taken possession of such bank, shall have a lien or charge for any payment advanced or any clearance thereafter made, or liability thereafter incurred against any of the assets of the bank of whose property and business the superintendent of banks shall have taken possession. (108 (Pt. 1) v. 102; G. C. § 742-1; 101 v. 277.)

Section 710-92. (Adjustment of claims.) If the superintendent of banks doubts the justice and validity of any claim, he may reject the same and serve notice of such rejection upon the claimant, either by mail or personally, an affidavit of the service of such notice, which shall be prima facie evidence thereof, shall be filed in his office. An action upon a claim so rejected must be brought within six months after such service. Claims presented and allowed after the expiration of the time fixed in the notice to creditors, shall be entitled to be paid the amount of all prior dividends thereon if there be funds sufficient therefor and share in the distribu-

tion of the remaining assets in the hands of the superintendent of banks equitably applicable thereto. (108 (Pt. 1) v. 102; G. C. § 742-3; 106 v. 360; 101 v. 278.)

An action for the allowance of a rejected claim is not triable by jury, and is appealable. *In re Metropolitan Bank*, 1 Ohio App. 409; 17 C. C. n. s. 324; 34 C. D. 381 (1913).

In an action on a claim for money loaned to the bank, evidenced by a promissory note signed by "H. H. F., Cashier, T. F. M., Trustee" and other individuals, the name of the bank not appearing, the minutes of a director's meeting at which the loan was authorized and parol evidence in explanation of the signature of the cashier are competent evidence. *In re Metropolitan Bank*, 1 Ohio App. 409; 17 C. C. n. s. 324; 34 C. D. 381 (1913).

Section 710-93. (Inventory of assets; filing copies. Duties of auditor of state. List of claims; supplemental lists; filing of same. Book of depositors and other creditors; final distribution.) Upon taking possession of the property and assets of such bank the superintendent of banks shall make an inventory of the assets of such bank in triplicate, one copy to be filed in the office of the superintendent of banks, one in the office of the clerk of the county in which the office of such bank was located, and one with the auditor of state. It shall be the duty of the auditor of state to have such inventory immediately verified by comparison with the current books of the bank. Upon the expiration of the time fixed for the presentation of claims, the superintendent of banks shall make in triplicate a full and complete list of the claims presented, including and specifying such claims as have been rejected by him, of which one copy shall be filed in the office of the superintendent of banks, one in the office of the clerk of the county in which the office of such bank was located, and one with the auditor of state. And the superintendent of banks shall in like manner make and file supplemental lists showing all claims presented subsequent to the filing of the first list, such supplemental lists to be filed at least fifteen days before the declaration of any dividend, and in any event such supplemental lists shall be filed at intervals of not exceeding six months. The superintendent of banks shall cause to be entered in a book prepared for that purpose, the names of all depositors and other creditors of such bank, together with the amount due each as shown by the books of such bank, said book to be one of the permanent records of such liquidation. At the time of the order for final distribution of any such bank, the superintendent of banks shall make a detailed report in triplicate of its liquidation, showing the disposition of each asset and acquired asset, one copy to be

filed in the office of the superintendent of banks, one in the office of the clerk of the county in which such bank was located, and one with the auditor of state. Such report, inventory and list of claims shall be open at all reasonable times for inspection. (108 (Pt. 1) v. 102; G. C. § 742-5; 106 v. 360; 101 v. 279.)

Franchise taxes, see note to § 710-90.

Interest accrued on deposits, not entered on the books of the bank, should be credited by the superintendent up to the interest date preceding the time possession was taken by the superintendent.

Rep. Atty. Gen. 1911-1912, p. 753.

Creditors are entitled to legal interest on book accounts from the date of suspension of payment.

Rep. Atty. Gen. 1911-1912, p. 797, citing *Richmond v. Irons* 121 U. S. 27.

Claims presented after the time mentioned in the published notice, but prior to final distribution, are entitled to allowance. Rep. Atty. Gen. 1912, p. 713. See also § 710-106.

On deposits for a specified time, depositors are entitled to the contract rate only until payment of the deposit is due. Thereafter the rate is 6 percent. Claims other than deposits bear interest from the date of proof and allowance. Rep. Atty. Gen. 1912, p. 685.

Section 710-94. (Special deputy superintendents; appointments of.) The superintendent of banks may under his hand and official seal appoint one or more special deputy superintendents of banks as agent or agents to assist him in the duty of liquidation and distribution, a certificate of such appointment to be filed in the office of the superintendent of banks and a certified copy in the office of the clerk of the county in which the office of such bank was located. The superintendent of banks shall require from such agent or agents such surety for the faithful discharge of their duties as he may deem proper. All bonds given shall be deposited with the superintendent of banks and kept in his office. (108 (Pt. 1) v. 103; G. C. § 742-2; 103 v. 530; 101 v. 278.)

Employees of the liquidating department are in the employ of the state and are subject to the civil service act. Rep. Atty. Gen. 1914, p. 1619; 12 O. L. R. 447. See Opins. Atty. Gen. 1921, p. 738.

The superintendent of banks may, with the approval of the common pleas court, employ expert accountants. Opins. Atty. Gen. 1915, p. 251.

A special deputy can not be appointed by the superintendent to act as attorney. Special counsel can under G. C. §§ 333, 336, be appointed only by the attorney general. The fees of counsel so appointed may be paid under § 710-97.

Rep. Atty. Gen. 1911-1912, p. 795.

Section 710-95. (Powers and duties after taking possession.) Upon taking possession of the property and business

of such bank, the superintendent of banks is authorized to collect money due to such bank, and to do such other acts as are necessary to preserve its assets and business, and shall proceed to liquidate the affairs thereof, as hereinafter provided. The superintendent of banks shall collect all debts due and claims belonging to it, and upon the order of the common pleas court in and for the county in which the office of such bank was located, may sell or compound all bad or doubtful debts, and on like order may sell the real estate and personal property of such bank, on such terms as the court shall direct. The superintendent of banks shall give notice to such bank of the time and place of making application to said court for such order. The superintendent of banks upon the terms of sale or compromise directed by the court, shall execute and deliver to the purchaser of such real and personal property such deeds or instruments as shall be necessary to evidence the passing of the title; and if said real estate is situated outside the county in which the office of the bank was located, a certified copy of such order authorizing and ratifying said sale shall be filed in the office of the recorder of the county within which said property is situated; and may, if necessary to pay the debts of such bank, enforce the individual liability of the stockholders. (108 (Pt. 1) v. 103; G. C. § 742-2; 103 v. 530; 101 v. 278.)

An order of court is necessary before a sale of real or personal property, and before compromising bad or doubtful claims. A sale or composition without a court order is a nullity. Opins. Atty. Gen. 1915, p. 633.

Actions to collect claims should, under § 710-14, be brought in the name of the state on relation of the superintendent.

Rep. Atty. Gen. 1911-1912, p. 759.

Where public deposits are secured by bonds exceeding in value the amount of such deposits, the superintendent is authorized by this section to pay such deposits and redeem the bonds, in order to prevent loss by a forced sale thereof.

Rep. Atty. Gen. 1911-1912, p. 785.

Where loans are secured by assignments of construction contracts, the superintendent is authorized by this section to make further advances to the contractors if necessary to preserve the securities. It is possible that under this section, the superintendent may obtain the approval of the common pleas court to such action. The court has power to order a sale of "doubtful debts" and perhaps has power to authorize proper steps to preserve the same.

Rep. Atty. Gen. 1911-1912, p. 767.

Section 710-96. (Disposition of moneys on liquidation.)

The moneys collected in process of such liquidation by the superintendent of banks shall be from time to time deposited in one or more banks organized under the laws of this state,

subject to his order as herein provided. (108 (Pt. 1) v. 103; G. C. § 742-6; 101 v. 280.)

Use by the superintendent of banks, for the payment of a private debt, of funds of a bank in his possession for liquidation, constitutes embezzlement, although he replaces the same before his breach of trust became known. *State v. Baxter*, 89 O. S. 269 (1914); reversing, 14 N. P. n. s. 223.

Section 710-97. (Expenses of liquidation; how paid.)

The expenses incurred by the superintendent of banks in the liquidation of any bank in accordance with the provisions of this act, shall include the expenses of deputies or assistants, clerks and examiners employed in such liquidation, together with reasonable attorney fees for counsel employed by said superintendent of banks in the course of such liquidation. Such compensation of counsel, deputies, assistants, clerks and examiners in the liquidation of any such bank, and all expenses of supervision and liquidation shall be fixed by the superintendent of banks, subject to the approval of the common pleas court of the county in which the office of such bank was located, on notice to such bank. The expense of such liquidation shall be paid out of the property of such bank in the hands of said superintendent of banks, and such expenses shall be a valid charge against the property in the hands of said superintendent of banks and shall be paid first in the order of priority; provided, however, that no such expense shall be paid out of the property of such bank until an account of such expense shall have been filed with and approved by the common pleas court of the county in which such bank is located, and the superintendent of banks shall give notice, by publication of the application for the approval of such expense account, in a newspaper of general circulation in the community in which such bank is located at least ten days before such court shall pass upon such application. (108 (Pt. 1) v. 103; G. C. § 742-4; 106 v. 360; 101 v. 279.)

The notice to the corporation should state the time when the statement of expenses will be submitted to the common pleas court for approval. Such notice may be served upon an officer of the bank corporation in accordance with the method prescribed for service of summons on corporations (G. C. § 11288).

Rep. Atty. Gen. 1911-1912, p. 757.

The notice should be served at such time prior to submitting the expenses to the court as will give all parties a reasonable time for filing objections thereto. The superintendent of banks need not employ an attorney to present the account. Opins. Atty. Gen. 1915, p. 25.

Liquidation expenses are payable from the bank assets and not from the state treasury. Expenses cannot legally be paid until approved by the court. Opins. Atty. Gen. 1915, pp. 193, 633.

The superintendent is personally liable for expenses paid by him out of bank funds, which are disallowed by the court. Opins. Atty. Gen. 1917, p. 1458.

Approval by the common pleas court of the compensation of a deputy, before services are rendered, is not a compliance with the section. State v. Hall, 96 O. S. 487 (1917).

Section 710-98. (Dividends, when and how paid; unclaimed deposits.) At any time after the expiration of the date fixed for the presentation of claims, the superintendent of banks may, out of the funds remaining in his hands after the payment of expenses, declare one or more dividends, and after the expiration of one year from the first publication of notice to creditors, he may declare a final dividend, such dividends to be paid to such persons and in such amounts and upon such notice as may be directed by the common pleas court of the county in which the office of such bank was located. Dividends due to stockholders on claims as depositors or otherwise, to the extent of the individual liability of such stockholders shall be withheld by the superintendent of banks until it is ascertained that it will not be necessary to enforce their individual stock liability. The court shall make proper provision for unproved and unclaimed deposits. (108 (Pt. 1) v. 104; G. C. § 742-7; 101 v. 280.)

A final dividend may not be paid before the expiration of one year, except at the risk of the superintendent. Rep. Atty. Gen. 1914, p. 1635; 12 O. L. R. 449; Rep. Atty. Gen. 1912, pp. 685, 702.

Franchise taxes must be paid until dissolution. See note to § 710-90.

Section 710-99. (Objections to claims; how made; hearing.) Objection to any claim not rejected by the superintendent of banks may be made by any party interested by filing a copy of such objection with the superintendent of banks, who shall present the same to the common pleas court of the county in which the office of such bank was located, upon written notice to claimant and to the party filing the same, said notice setting forth the time and place of the presentation. The court upon return day of said notice shall hear the objections raised to said claim, or refer the determination of said objections to a referee for report, or upon demand of either the superintendent of banks or the party filing the objections may direct that the issues be tried before a jury. (108 (Pt. 1) v. 104; G. C. § 742-8; 101 v. 280.)

Section 710-100. (Application for injunction; proceedings; hearing.) Whenever any such bank of whose property and business the superintendent of banks has taken possession, as aforesaid, deems itself aggrieved thereby, it may at any time within thirty days after taking such possession apply to the common pleas court of the county in which the office of such bank was located, to enjoin further proceedings in liquidation, and said court, after citing the superintendent of banks to show cause why further proceedings should not be enjoined and hearing the allegation and proofs of the parties and determining the facts, may dismiss such application or enjoin the superintendent of banks from further proceedings, and direct him to surrender such such business and property to such person, partnership, corporation, company, society or association. (108 (Pt. 1) v. 104; G. C. § 742-9; 106 v. 360; 101 v. 280.)

Section 710-101. (Notice to superintendent before appointment of receiver or deed of assignment filed.) No receiver shall be appointed by any court, nor shall any deed of assignment for the benefit of creditors be filed in any probate court or court of insolvency within this state for any bank except upon notice to the superintendent of banks, unless in case of urgent necessity it becomes in the judgment of the court necessary so to do in order to preserve the assets of such bank. The superintendent of banks may within five days after the service of such notice upon him take possession of such bank, in which case no further proceedings shall be had upon such application for the appointment of receiver or under such deed of assignment, or, if a receiver has been appointed or such assignee shall have entered upon the administration of his trust, such appointment shall be vacated or such assignee shall be removed upon application of the superintendent of banks to the proper court therefor, and the superintendent of banks shall proceed in all such cases to administer the assets of such bank, as herein provided. (108 (Pt. 1) v. 105; G. C. § 742-10; 101 v. 281.)

Section 710-102. (Superintendent shall call meeting of stockholders; notice of meeting. When superintendent shall continue to administer assets.) Whenever the superintendent of banks shall have paid to each depositor and creditor of such bank, not including stockholders, whose claim or claims as such depositor or creditor shall have been duly proved and allowed, the full amount of such claims, and shall have made proper provision for unclaimed or unpaid deposits or div-

idents, and shall have paid all the expenses of the liquidation, the superintendent of banks shall call a meeting of the stockholders of such bank, by giving notice thereof for four consecutive weeks in one or more newspapers published in the county wherein the office of such bank was located. At such meeting the stockholders shall determine whether the superintendent of banks shall continue to administer its assets and wind up the affairs of such bank, or whether an agent or agents shall be elected for that purpose; and in so determining the said stockholders shall vote by ballot in person, or by proxy, each share entitling the holder to one vote and the majority of the stock shall be necessary to a determination. (108 (Pt. 1) v. 105; G. C. §§ 742-11; 710-12; 101 v. 281.)

A majority of the stock issued and outstanding is required by this section, and not merely a majority of the stock present and voting as in § 710-103. Rep. Atty. Gen. 1912, p. 698.

Liability for franchise taxes (§ 5495 et seq.) continues until the corporation has been dissolved. When there is a surplus of assets over liabilities, an order of dissolution under § 11975 may be procured after the stockholders meeting provided for in this section. Rep. Atty. Gen. 1914, p. 1065.

Before the enactment of the Banking Code of 1919 it was said that sections analogous to §§ 710-102 to 710-105 did not apply to unincorporated banks, and that, when depositors and creditors of such banks had been paid in full, the superintendent was authorized to turn over the assets, books and papers to the owners, or to a trustee named by them. Opins. Atty. Gen. 1915, p. 415.

Section 710-103. (Distribution upon completion of liquidation. Agent may be appointed to liquidate.) In case it is determined to continue the liquidation under the superintendent of banks, he shall complete the liquidation of the affairs of such bank, and after paying the expenses thereof shall distribute the proceeds among the stockholders in proportion to the several holdings of stock, in such manner and upon such notice as may be directed by the common pleas court of the county in which the office of such bank was located. In case it is determined to appoint an agent or agents to liquidate, the stockholders shall thereupon select such agent or agents by ballot, a majority of the stock present and voting, in person or by proxy, being necessary to a choice. Such agent or agents shall file with the superintendent of banks a bond to the state of Ohio in such amount and with such sureties as shall be approved by the superintendent of banks for the faithful performance of all the duties of his or their trust, and thereupon the superintendent of banks shall transfer to such agent or agents all the undivided or

uncollected or other assets of such bank then remaining in his hands; and upon such transfer and delivery the said superintendent of banks shall be discharged from all further liability to such bank and its creditors. (108 (Pt. 1) v. 105; G. C. § 742-13; 101 v. 282.)

Section 710-104. (Conversion of assets before distribution.) Such agent or agents shall convert the assets coming into his or their possession into cash, and shall account for and make distribution of the property of such bank as herein provided in the case of distribution by the superintendent of banks, except that the expenses thereof shall be subject to the direction and control of the common pleas court of the county in which the office of such bank was located. (108 (Pt. 1) v. 106; G. C. § 742-14; 101 v. 282.)

Section 710-105. (Successor in case of death or removal of agent.) In case of death or removal or refusal to act of any such agent, or agents, the stockholders may elect a successor as hereinbefore provided who shall have the same powers and be subject to the same liabilities and duties as the agent, or agents, originally elected. (108 (Pt. 1) v. 106; G. C. § 742-15; 101 v. 282.)

Section 710-106. (Deposit of dividends and unclaimed deposits with treasurer of state. Doubtful or conflicting claims.) Dividends and unclaimed deposits remaining in the hands of the superintendent of banks for six months after the order for final distribution shall be by him deposited with the treasurer of state who shall hold such funds as custodian, subject to the order of the superintendent of banks and without the necessity of appropriation by the general assembly. The superintendent of banks may pay over the moneys so held by the treasurer of state to the persons respectively entitled thereto, upon being furnished satisfactory evidence of their right to the same. In case of doubt or conflicting claims he may apply to the common pleas court of the county in which the office of such bank was located for an order authorizing and directing the payment thereof. All unclaimed deposits and uncalled for dividends for which no claim has been made within a period of five years, after the order of final distribution, shall be paid into the state treasury upon the warrant of the auditor of state. (108 (Pt. 1) v. 106; G. C. § 742-16; 106 v. 360; 101 v. 282.)

Unclaimed deposits and dividends must be deposited in accord-

ance with this section, and should not be distributed to stockholders. Rep. Atty. Gen. 1912, p. 713; Rep. Atty. Gen. 1913, p. 820.

Section 710-107. (Books and papers deposited with clerk of courts after liquidation.) All books, papers and records of a bank which has been finally liquidated by the superintendent of banks, shall be deposited by the superintendent of banks in the office of the clerk of courts for the county in which the office of such bank was located, such books, papers and records to be held by the clerk of courts of such county subject to the order of the court of common pleas for such county. (108 (Pt. 1) v. 106.)

Section 710-108. (Real estate bank may purchase, lease, hold or convey.) A bank may purchase, lease, hold and convey real estate only as follows:

(a) A building or quarters therein, or lands whereon is erected or may be erected a building or buildings useful for the transaction of its business and from portions of which, not required for its use, a revenue may be derived; but the cost of such building or buildings and the lands whereon they are erected, in no case shall exceed sixty per cent of its paid-in capital and surplus;

(b) Such as is mortgaged or conveyed to it in good faith by way of security for loans made by or money due to such corporation;

(c) Such as has been purchased by it at sales upon the foreclosure of mortgages owned by it, or on judgments or decrees obtained or rendered for debts due to it, or in settlements effected to secure such debts. All real property referred to in this paragraph shall be sold by such bank within five years after it is vested therein, unless upon application by the board of directors, the superintendent of banks extends the time within which such sales shall be made. (108 (Pt. 1) v. 107; G. C. § 9753; 99 v. 279, § 46.)

Real estate acquired under paragraph (c) of this section must be sold within five years after acquisition, unless the time is extended by the superintendent. Rep. Atty. Gen. 1913, p. 808.

Purchase of an undivided interest in real estate is not authorized by this section. Opins. Atty. Gen. 1918, p. 773.

Power to acquire and hold stock in a building company owning the building occupied by the bank. See § 710-121; Opins. Atty. Gen. 1917, p. 684.

Section 710-109. (Fire and burglar proof safes; safety deposit boxes.) A bank may provide fire and burglar proof safes and vaults in its banking premises and let out safety

deposit boxes and other receptacles therein for the uses, purposes and benefits of depositors. (108 (Pt. 1) v. 107.)

Where three individuals interested in a company rent a safe deposit box, and it is stipulated in the contract that said box shall not be opened except in the presence of such three persons, a receiver of the business of such company can not maintain an action in replevin to obtain the contents of the box, nor can service of summons be had by publication upon an absent member of the company.

Rose v. Union, etc., Co., 14 N. P. n. s. 143 (C. P. 1913).

Section 710-110. (Property bank may receive for safe keeping.) A bank may receive on deposit for safe keeping in its vaults and safes, securities, stocks, bonds, coins, plate, jewelry, books, papers, documents and other valuable papers and property, upon such terms and conditions as it may prescribe. (108 (Pt. 1) v. 107.)

Where a national bank has been accustomed to receive United States bonds, as special deposits, gratuitously, it is liable for any loss thereof occurring through the want of that degree of care which good business men would exercise in keeping property of such value.

Bank v. Zent, 39 O. S. 105 (1883).

See Griffith v. Zipperwick, 28 O. S. 388 (1876).

Bonds, enclosed in a tin box fastened with a padlock, were deposited with a bank, as gratuitous bailee, the plaintiff depositor keeping the key. The bank had a small burglar proof safe in its vault, in which it kept similar bonds of its own and other depositors, but plaintiff's box and bonds of another depositor, also enclosed in a box, were kept in the vault, outside the safe, the other depositor consenting that his box should be so kept. Upon a loss of plaintiff's bonds by burglary, it was held that these facts were not conclusive evidence of a want of good faith or of gross negligence, and that it was not error for the court to charge the jury that they might take the character of plaintiff's box into consideration.

Griffith v. Zipperwick, 28 O. S. 388 (1876).

Section 710-111. (Securities designated in which investment may be made.) A bank may invest its capital, surplus, undivided profits and deposits in the following securities:

(a) Bonds or other interest bearing obligations of the United States, the Philippines, Hawaii, Porto Rico, and the District of Columbia, or those for which the faith of the United States is pledged to provide payment of the interest and principal, and in farm loan bonds issued by federal land banks and joint stock land banks.

(b) Bonds or other interest-bearing obligations of any foreign government not at war with the United States since 1900, and of the Dominion of Canada and New Foundland, which has not defaulted in the payment of principal or interest on its bonds or obligations within the period of twenty years last prior thereto.

(c) Bonds or other interest-bearing obligations of any state or territory of the United States.

(d) Bonds or other interest-bearing obligations of any county, town, township, city, school district, improvement district or sewer district, or other organized or political subdivision in this state.

(e) Bonds or other interest-bearing obligations of any city, town, county or other legally constituted political or taxing subdivision situated in one of the states of the United States, or any cities of the Philippines, Hawaii or Porto Rico, which city, town, county or taxing subdivision has been in existence ten years and which for a period of ten years previously has not defaulted for a period of more than ninety days in the payment of any part of either principal or interest of any debt contracted by it and whose net indebtedness after deducting the amount of its water bonds and bonds issued for other self sustaining public utilities and the amount of sinking funds which are available for the payment of its bonds or interest bearing obligations other than water bonds and self sustaining public utilities, does not exceed ten per cent. of the value of taxable property in such city, town, county or political or taxing subdivision to be ascertained by the valuation of property therein for the assessment of taxes next preceding such investment; provided, that no bonds or other interest bearing obligations of any such county shall be eligible for investment unless such county has a population of not less than ten thousand inhabitants, and, provided, that no bonds or other interest bearing obligations of any such city, town or political or taxing subdivision shall be eligible for investment unless such city, town or political or taxing subdivision has a population of not less than one thousand inhabitants as ascertained by United States or state census or by any municipal census taken by authority of the state next preceding such investment, and, provided, further, that there shall be eligible hereunder the bonds or other interest bearing obligations of a political or taxing subdivision which has not been in existence for ten years, but which is erected out of another eligible subdivision or comprises in whole or in part another eligible subdivision or subdivisions or parts of eligible subdivisions if such subdivision shall comply with the other requirements of this paragraph.

But nothing herein contained shall authorize the investment of funds in any special assessment or improvement bonds or other bonds or other interest bearing obliga-

tions which are not the direct obligations of the district issuing same and for which the full faith and credit of the entire district are not pledged.

(f) Bonds or debentures of any Province of the Dominion of Canada.

Bonds or debentures of any city or town or district except school district in the Dominion of Canada having a population of not less than ten thousand inhabitants, as ascertained by official census next preceding such investment and which has not since 1900 defaulted for more than ninety days in the payment of any part of principal or interest of any debt authorized to be contracted by it and which has a net indebtedness exclusive of water debt and bonds issued for other self sustaining public utilities and the amount of sinking funds available for the payment of its bonds other than water bonds and bonds issued for public utilities, which net indebtedness does not exceed seven per cent of the last valuation of its taxable property for the assessment of taxes preceding such investment, and in all other respects such bonds shall conform to the requirements of clause E of this section; and in the bonds or obligations of any city, town or district therein unconditionally guaranteed as to payment of principal and interest by the Dominion of Canada or any province thereof.

(g) Bonds of cities of foreign countries that have not been at war with the United States since 1900, having a population of more than one hundred thousand inhabitants, whose net indebtedness does not exceed seven per cent. of the last valuation of its taxable property for the assessment of taxes preceding such investment, exclusive of bonds issued for public utilities and sinking funds other than for public utilities and which have no defaulted for more than ninety days on any installment of any part of principal or interest of any debt authorized to be contracted by it for twenty-five years preceding such investment.

(h) Bankers acceptances of the kind and maturity made eligible by law for re-discount with federal reserve banks, provided the same are accepted by a bank incorporated under the laws of this state or any member bank of the federal reserve system.

(i) Mortgage bonds, collateral trust bonds, debenture bonds or notes of any regularly incorporated company which, or the constituent companies comprising which for four years (4) prior to the date of purchase has earned over and above all fixed charges other than interest on indebtedness, an amount equal to at least double the interest

charges which it will be required to pay upon its outstanding obligations; or mortgage bonds, collateral trust bonds debenture bonds or notes of any regularly incorporated company, which bonds or notes plus all prior incumbrances are outstanding in an amount not in excess of 50% of the actual value of the property securing said bonds or notes.

(j) Railroad equipment bonds or car trust certificates issued in the United States or Canada, and bonds secured by first mortgage on steel steamships, in an amount not exceeding 50% of the value of such vessels.

(k) Bonds or notes secured by first mortgage on improved real estate as defined in section 113 hereof (G. C. § 710-113) of not more than 60% of the value thereof.

(Securities shall be charged on books at cost.) All securities as enumerated above, having a fixed maturity shall be charged and entered upon the books of the bank at their cost to the bank, and when a premium is paid therefor an annual amortization charge shall be made thereon so as to bring the cost of same to the face value of said bonds at maturity. The superintendent of banks shall have the power to require any security to be charged down to such sum as in his judgment represents its value. The superintendent of banks may order any securities which he deems undesirable removed from the assets of a bank. (108 (Pt. 1) v. 107; G. C. § 9758; 107 v. 147; 102 v. 173; 99 v. 280, § 50.)

Limit of investment in any one security. Investment in any one security is limited by § 710-121. Opins. Atty. Gen. 1917, p. 664; Rep. Atty. Gen. 1911-1912, p. 788; Rep. Atty. Gen. 1908, p. 192.

Other investments. Real estate mortgages, §§ 710-112, 710-113. Collateral security, §§ 710-136, 710-139, 710-140. Stock in other banks, unauthorized, § 710-140. Stock in lending bank, no loans on, § 710-114. Stock in other corporations, § 710-140. Personal security, § 710-136. Commercial paper and trade acceptances, §§ 710-136, 710-124, 710-139.

Mortgage bonds. Limit on loans on collateral enumerated in clauses (i), (j) and (k). See § 710-112.

Bonds of a building company secured by real estate, under former statute. Rep. Atty. Gen. 1913, p. 802.

Section 710-111a. (Application to superintendent to exercise certain powers.) Any bank organized under this act may file application with the superintendent of banks for permission to exercise, upon conditions and under such regulations as may be prescribed by the said superintendent of banks, either or both of the following powers:

(A) To invest its capital, surplus, undivided profits and deposits in bonds, notes, acceptances, debentures or first lien

securities of one or more banks or corporations, chartered or incorporated under the laws of the United States and principally engaged in international or foreign banking, or banking in a dependency or insular possession of the United States either directly or through the agency, ownership or control of local institutions in foreign countries, or in such dependencies or insular possession; including the bonds, notes, trade acceptances, debentures or first lien securities of one or more banks or corporations chartered or incorporated under section 25a of the Federal Reserve Act, as approved December 24, 1919.

(B) To invest an amount not exceeding in the aggregate ten per centum of its capital stock and surplus in the stock of one or more banks or corporations chartered or incorporated under the laws of the United States and principally engaged in international or foreign banking, or banking in a dependency or insular possession of the United States either directly or through the agency, ownership or control of local institutions in foreign countries or in such dependencies or insular possessions; including the stock of one or more banks or corporations chartered or incorporated under section 25a of the Federal Reserve Act, as approved December 24, 1919.

(Information furnished superintendent.) Every bank organized hereunder and investing in the capital stock of banks or corporations as provided herein, shall be required to furnish information concerning the condition of such banks or corporations to the superintendent of banks upon demand. (109 v. 97.)

Where a savings bank made a loan to jewelers on pledges of jewelry and merchandise, the fact that the bank had not complied with statutes regulating pawn brokers was held not to affect its lien upon the property pledged, as against general unsecured creditors.

Griffith v. Goldsoll, 42 W. L. B. 264 (Supreme Ct., without report, 1899).

Section 710-112. (Loans upon mortgage; limitations.)

Loans by banks upon mortgage notes shall be made upon first mortgage upon real estate situated in this state, or in states contiguous thereto, and shall not exceed forty per cent (40%) of the value of such real estate if unimproved, and sixty per cent (60%) of such value if improved, and the improvements shall be kept adequately insured. In the case of commercial banks not more than fifty per cent (50%) and in the case of savings banks and trust companies, not more than sixty per cent (60%) of the amount of the paid in capital, surplus and deposits of such bank or trust com-

pany at any time shall be invested in such real estate securities. Loans on collateral enumerated in clauses (i), (j) and (k) of section 111 of this act (G. C. § 710-111), shall not exceed eighty per cent. of the value of such collateral. (108 (Pt. 1) v. 110; G. C. § 9758; 107 v. 147; 102 v. 173; 99 v. 280, § 50.)

A bank may not make loans upon real estate in states which do not bound or abut upon Ohio. Opins. Atty. Gen. 1920, p. 1066.

Under former statutes, it was said that a mortgage on a leasehold for ninety-nine years, not renewable forever, was not authorized. Such a mortgage, however, could be accepted by a savings bank as collateral security under § 710-139. Rep. Atty. Gen. 1912, p. 677.

Section 710-113. ("Improved" real estate defined.) The term "improved" real estate as used in this act shall be held to mean land upon which buildings have been erected suitable and intended to be used for residence, business or other purposes and fit for use and occupancy, or under construction for such purposes; and in the case of farm property shall mean tillable land with farm buildings thereon and actually under use for farm purposes, and when so used the same may include pasture and wood lands. (108 (Pt. 1) v. 110:)

Section 710-114. (Loans may not be made upon shares of its capital stock; sale of pledged stock, when.) No bank shall loan money on the security or pledge of the shares of its capital stock; nor be the purchaser or holder of any such shares, unless such security or purchase be necessary to prevent loss upon debt previously contracted in good faith. Stock so acquired shall, within six months from the time of its purchase, be sold or disposed of at public sale on thirty days' notice from the superintendent of banks, and in default thereof the superintendent of banks may forthwith take possession of the property and business of such bank until its affairs be finally liquidated, as herein provided. (108 (Pt. 1) v. 110; G. C. § 9761; 101 v. 284; 99 v. 281, § 53.)

Power of savings bank to invest in stock of other corporations. § 710-140.

A bank has no power to purchase stock in itself for the purpose of reselling at a profit. Rep. Atty. Gen. 1913, p. 796.

A note given by a subscriber for national bank stock, in the amount of his subscription, secured by the stock as collateral was held not ultra vires or illegal. Bank v. McDonald, 2 Ohio App. 497; 21 C. C. n. s. 245 (1913).

Under the former free banking act a bank had a statutory lien, for claims other than subscriptions, on stock of its debtors, although it was prohibited from loaning money thereon (G. C. §§ 9683, 9684). State v. Davis, 85 O. S. 44; Conant v. Reed, 1 O. S. 298, 304.

Although certificates issued after July 1, 1911, were required to

contain a notice of the lien. § 8673-15; *Bank v. Hunt*, 16 N. P. n. s. 65 (1914).

In the absence of a prohibitory statute a bank may acquire its own stock in payment of a debt from a stockholder, although he is solvent. *Taylor v. Miami Exporting Co.*, 6 Ohio 176 (1833).

Under this section it is said that a bank has no power to reserve a lien on its stock by express stipulation on the certificates, to secure the indebtedness of its stockholders to it, and that such a lien is invalid.

Rep. Atty. Gen. 1911-1912, p. 775.

Compare, *Stafford v. Banking Co.*, 61 O. S. 160, 169 (1899).

Conant v. Reed, 1 O. S. 298, 304 (1853).

Agreement of corporation to sell stock for stockholder. Liability for breach. Where a bank stockholder, who is indebted to the bank, is about to sell his stock through a broker to raise funds to pay the debt, and the bank agrees to sell the stock for him for the same price at which he has authorized the broker to sell, the bank is liable to him for such price, where it fails to sell the stock or to notify him of its failure. *Brown v. Ginn*, 21 C. C. n. s. 85 (1907); *aff'd*, no rep. 80 O. S. 718.

Section 710-115. (Loans to officer, director, etc., prohibited, unless authorized.) No loan shall be made, directly or indirectly to any officer, director or member of the executive committee of any bank unless duly authorized or approved by the directors. Such authorization or approval shall be recorded in the records of their proceedings, and all loans when so authorized and made to officers, directors or members of the executive committee shall be made and secured in the same manner as loans to other persons. (108 (Pt. 1) v. 110; G. C. § 9729; 99 v. 273, § 23.)

In the absence of statute, a bank may make loans to its officers.

State v. Bank, 10 Ohio 535, 541 (1841).

Directors who participate in the making of a loan to another director, in violation of statute, are individually liable for losses incurred thereby.

Conant v. Reed, 1 O. S. 298 (1853).

See *Arnold v. Reid*, 7 West L. J. 410 (C. P. 1850).

Purpose of restriction.

See *State v. Bank*, 5 O. S. 171, 177 (1855).

Section 710-116. (Separate books shall be kept, when.) A corporation formed to combine two or more classes of business under this act, shall keep separate books of accounts for each class. Receipts, investments and transactions relating to each of such classes of business shall be governed by the provisions and restrictions herein specifically provided therefor. (108 (Pt. 1) v. 110; G. C. § 9740; 99 v. 275, § 35.)

Section 710-117. (How deposits shall be entered.) All deposits of money, or its equivalent, made with a bank shall

be entered on its books, in terms of lawful money of the United States, and in no other way, and shall be payable at the authorized place of business of such bank. (108 (Pt. 1) v. 110.)

Deposits.

A banking corporation has implied power to receive funds on deposit. See *Corwin v. Insurance Co.*, 14 Ohio 6, 12 (1846).

Huber v. Congregation, 16 O. S. 371 (1865).

Power to receive deposits.

Commercial banks, § 710-135.

Savings banks, § 710-141.

Authority of bank employe to receive deposit. Where a prospective depositor called at the "New Accounts" window of a bank and inquired for an employe with whom she was acquainted, and such employe, being called from another part of the bank, accepted her deposit and issued a pass book, the bank was held to be estopped from denying the authority of the employe to receive it. *Toole v. Trust Co.*, 22 C. C. n. s. 112 (1908).

Special deposits. A deposit is presumed to be general and not special, unless it otherwise appear.

Bank v. Brewing Co., 50 O. S. 151, 159 (1893).

State v. Perrin, 9 N. P. n. s. 97; 19 L. D. 416 (C. P. 1909).

But where a trustee, having no authority to make a general deposit, deposits trust money, taking a certificate of deposit certifying that he as trustee has deposited the fund payable to himself on return of the certificate properly endorsed, the same not being subject to check, and no stipulation for interest being made, the presumption, in the absence of proof to the contrary, is that the trustee intended to perform and not violate his duty and that the deposit was intended as a special, and not a general deposit.

Smith v. Fuller, 86 O. S. 57 (1912).

See *Towson v. Cole*, 6 N. P. n. s. 388; 17 L. D. 282 (1906).

Money paid to a bank, by a subscriber for a liberty loan bond, to be transmitted to the government, is a special deposit. *Opins. Atty. Gen.* 1919, p. 728.

General deposits. Money received by a bank on general deposit becomes the property of the bank, and its relation to the depositor is that of a debtor, and not of bailee or trustee of the money.

Bank v. Brewing Co., 50 O. S. 151 (1893).

Niles v. Olszak, 87 O. S. 229 (1912).

The bank agrees with its depositor to receive his deposits, to account with him for the amount, to repay to him on demand, and to honor his checks to the amount of his credit when the checks are presented, and for any breach of that agreement the bank is liable in an action by him. The deposits become the absolute property of the bank, impressed with no trust, and the bank's right to use the money for its own benefit is immediate and continuous, which right constitutes the consideration for the bank's promise to the depositor.

Spear, J., in *Railroad Co. v. Bank*, 54 O. S. 60, 71, 72 (1896).

If the money is stolen, or destroyed, the loss must be borne by the bank, though it is free from negligence or fault.

Bank v. Brewing Co., 50 O. S. 151, 157 (1893).

The statute of limitations does not run against a deposit until a demand for payment has been made on the bank.

Armstrong v. Warner, 21 W. L. B. 136 (Super. Ct. Cin.); aff'd, 49 O. S. 376.

Insolvency of the bank, and suspension of payments, dispenses with the necessity of a demand.

Armstrong v. Law, 27 W. L. B. 100 (Super. Ct. Cin. 1892).

Armstrong v. Warner, 21 W. L. B. 136.

General or special deposit. Presumptions. A deposit is presumed to be a general one, unless it otherwise appear.

Bank v. Brewing Co., 50 O. S. 151, 159 (1893).

State v. Perrin, 9 N. P. n. s. 97; 19 L. D. 416 (C. P. 1909).

But where a trustee, having no authority to make a general deposit, deposits trust money, taking a certificate of deposit certifying that he as trustee has deposited the fund payable to self on return of the certificate properly endorsed, the same not being subject to check, and no stipulation for interest being made, the presumption, in the absence of proof to the contrary, is that the trustee intended to perform and not violate his duty, and that the deposit was intended as a special, and not a general, deposit.

Smith v. Fuller, 86 O. S. 57 (1912).

When is a deposit for collection only? In the absence of special agreement, the deposit of an uncertified check by the holder, whether drawn on that bank or another, is deemed to be for collection only, and if there be no funds to meet it, or if it is returned dishonored, the deposit bank may return it to the depositor and cancel the credit.

Blake v. Bank, 79 O. S. 189, 195 (1908); *Bank v. Enright*, 23 C. n. s. 381 (1915); motion to certify record overruled.

A deposit with a bank of a certificate of deposit issued by a distant bank, by the payee, with a request to credit the same, no other request or instruction being given, implies that the proceeds of the certificate, when collected, are to be deposited to the party's credit, and then subject to his check, and not remitted otherwise to the depositor.

Hilsinger v. Trickett, 86 O. S. 286 (1912).

A bank received by mail, from the payee, a certificate of deposit issued by a distant bank, the payee stating in the accompanying letter that it was for deposit to his credit, and asking for a deposit slip and two or three checks, the payee never having had previous dealings with the bank. The bank, by mail, acknowledged receipt of the certificate and advised that credit had been given to the account of the payee, and enclosed a slip advising that the certificate had been deposited to his credit, and also enclosed two or three checks, no other request being made or answer given. Held, that the transaction did not amount in law to a purchase of the certificate, but as a receipt of the same for collection only, the bank agreeing to use due diligence in efforts to collect and to be responsible for the proceeds in case of collection, and assuming responsibility for the paper only in case of its negligence by which the payee suffered loss.

Hilsinger v. Trickett, 86 O. S. 286 (1912).

See *Warner v. Armstrong*, 21 W. L. B. 124 (Super. Ct. Cin.).

Miles v. Reiniger, 39 O. S. 499 (1883).

Deposits by trustees. See § 710-131.

Deposits by commission merchants. Although a bank is charged with constructive notice that deposits made by commission merchants are largely the proceeds of sales of property of other parties, yet a bank is not constructively charged with knowledge of the particular ownership

of deposits on any one day, so as to be liable for the payment in good faith of checks drawn against such deposits.

Smith v. City Hall Bank, 13 C. C. n. s. 122; 22 C. D. 342 (1910).

But a bank can not apply such deposits, belonging to other parties, on overdrafts of the commission merchant.

Sutliff v. Bank, 6 N. P. n. s. 177; 18 L. D. 354 (C. P. 1907).

Smith v. Bank, 13 C. C. n. s. 122; 22 C. D. 342 (1910); s. c., 7 O. L. R. 290.

Deposits in insolvent bank. Where a bank is hopelessly insolvent, within the knowledge of its officers, it is a fraud for such bank to thereafter receive deposits, and title to deposits thereafter made does not vest in the bank. As a general rule a person, in order to recover a deposit made in an insolvent bank, must trace and identify his particular deposit.

Orme v. Baker, 74 O. S. 337, 356 (1906); affirming 6 C. C. n. s. 289; 17 C. D. 465.

In re Commercial Bank, 2 N. P. 170; 4 L. D. 108 (1895).

Howe v. Bank, 16 C. C. n. s. 320 (1905); Warner v. Urfer, 22 C. C. n. s. 59 (1908).

(Deposits of public funds.)

Commissioners v. Strawn, 6 O. L. R. 309 (U. S. C. C. A. 1907).

Towson v. Cole, 6 N. P. n. s. 388; 17 L. D. 282 (C. P. 1906).

Commissioners v. Patterson, 4 O. L. R. 583 (U. S. C. C. 1906).

But where on the last day on which the bank was open for business and two days before the receiver took possession, a person made a deposit of checks and cash, which was not credited on the books of the bank, and the checks were not collected, until after the receiver took possession, the depositor was permitted to recover the full amount of his deposit, although the cash had been mixed with other moneys.

Orme v. Baker, 74 O. S. 337 (1906).

See Warner v. Armstrong, 21 W. L. B. 124 (Super. Ct. Cin.).

A depositor in an insolvent bank, who is also indebted to the bank, may set off his deposit against his indebtedness to the bank.

Armstrong v. Warner, 49 O. S. 376 (1892).

Bank v. Hemingray, 34 O. S. 381 (1878).

A subscriber to stock in a savings and loan association may set off his deposit against his liability as a subscriber, as against the assignee for creditors of the corporation.

Niles v. Olszak, 87 O. S. 229 (1912).

A special deposit may be recovered, after insolvency, although it has been mingled with other funds of the bank.

Smith v. Fuller, 86 O. S. 57 (1912).

Where an insolvent bank received a check on deposit a few minutes before its doors were closed, the check being turned over to the S. bank which credited the insolvent bank with the amount thereof, on an overdraft, but with knowledge of its condition, it was held that the S. bank could not recover on the check against its drawer, who had deposited the same in the insolvent bank. Bank v. Enright, 23 C. C. n. s. 381 (1915); motion to certify record overruled.

Right of bank to apply deposits to payment of debts due bank. A bank may apply a deposit to the payment of indebtedness of the depositor of a bank. Where the deposit is a general deposit, the right of the bank is that of set-off. Where the deposit is special, the bank has a lien thereon.

Bank v. Brewing Co., 50 O. S. 151, 158, 159 (1893).

The bank may assert such rights, although checks have been issued by the depositor against the deposit.

Bank v. Brewing Co., 50 O. S. 151 (1893).

And although the indebtedness of the depositor is not yet due.

Bank v. Grossman, 15 C. C. 378; 8 C. D. 682 (1897).

Rep. Atty. Gen. 1914, p. 1652; 12 O. L. R. 493.

But where the funds deposited do not belong to the depositor, of which fact the bank has notice, the bank can not apply the deposit to its debt.

Gibsonburg Bkg. Co. v. Wakeman Bkg. Co., 20 C. C. 591, 595; 10 C. D. 574 (1900).

Where the deposit is made in the name of an individual as executor, agent, sheriff, etc., this is notice to the bank of the ownership of the deposit, and it can not apply such deposit to the payment of its claim against the individual.

Stasel v. Daugherty, 7 N. P. n. s. 424; 19 L. D. 720 (C. P. 1910).

Bank v. Bank, 58 O. S. 207 (1898).

McMillan v. Boyd, 40 O. S. 35 (1883).

Appropriation of deposit as a preference under the bankruptcy act.

See In re Medaris, etc., Co., 4 O. L. R. 661; 15 O. F. D. 467 (1906).

Withdrawal of deposits.

Savings deposits. See §§ 710-142, 710-143.

Commercial deposits, see note to § 710-133.

Section 710-118. (Records preserved six years.) Every bank shall preserve all of its records, including cards used under a card system, and deposit tickets, for at least six years from the time of making same, and from the date of the last entry thereon. (108 (Pt. 1) v. 111.)

Section 710-119. (Accounts in name of minors.) When an account is opened in any bank by or in the name of a minor it shall be payable to such minor, and such payment shall be as valid as if such minor were of legal age. (108 (Pt. 1) v. 111; G. C. § 9770; 99 v. 283, § 62.)

Section 710-120. (Deposits in name of two or more persons.) When a deposit has been made, or shall hereafter be made in any bank or trust company transacting business in this state in the name of two or more persons, payable to either, or the survivor, such deposit or any part thereof, or any interest or dividend thereon, may be paid to either of said persons whether the other be living or not; and the receipt or acquittance of the person so paid shall be a valid and sufficient release and discharge to the bank for any payments so made. (108 (Pt. 1) v. 111; G. C. § 9790-1; 101 v. 120, § 1.)

This section was not repealed by the inheritance tax law. Opins. Atty. Gen. 1921, p. 143.

This section is for the protection of the bank and payment by the bank does not determine the title to the fund. Estate of Morgan, 28 O. C. A. 22 (1918).

Presumably the interests of the nominal depositors in a joint

deposit are equal, in the absence of any declaration of trust or agreement on the subject. Opins. Atty. Gen. 1920, p. 473.

For inheritance tax see § 5348-2.

Section 710-121. (Limitation of capital and surplus invested in one stock or security.) Not more than twenty per cent of the capital and surplus of a bank doing business under this charter shall be invested in any one stock or security unless it be in bonds or other interest bearing obligations enumerated in paragraphs a, b, c, d, e and h of section 111 of this act (G. C. § 710-111); or in the stock of a corporation owning the land, building or buildings occupied by such bank for its banking quarters, and then not exceeding sixty per cent of its capital and surplus shall be so invested, which shall be carried on the books of the bank as an investment or equity in real estate; or in the bonds, notes, acceptances, debentures or first lien securities of banks or corporations chartered or incorporated under the laws of the United States and principally engaged in international or foreign banking, or banking in a dependency or insular possession of the United States either directly or through the agency, ownership or control of local institutions in foreign countries or in such dependencies or insular possessions; including the bonds, notes, acceptances, debentures or first lien securities of one or more banks or corporations chartered or incorporated under section 25a of the Federal Reserve Act, as approved December 24, 1919. (109 v. 97; 108 (Pt. 1) v. 111; G. C. § 9790; 99 v. 283, § 64.)

Collateral deposited to secure a loan is not an "investment", and a bank may accept, as security for a loan under the 20 percent limit, one security in excess thereof, as collateral. Opins. Atty. Gen. 1917, p. 750.

In the absence of a statute, the selection of debtors and distribution of loans are within the discretion of the directors.

State v. Commercial Bank, 10 Ohio 535, 541 (1841).

In an action by a national bank on a note given as a renewal for a balance due on a previous loan, which had been reduced by renewals and payments below the maximum loan authorized to a single borrower, it is no defense that the original loan was for a larger sum than the bank was authorized to make.

Allen v. First N. B., 23 O. S. 97 (1872).

Section 710-122. (Limitation of loans to company, firm or corporation.) A bank shall not lend, including overdrafts, to any one person, company, corporation or firm, more than twenty per cent of its paid-in capital and surplus, unless such loan be secured by first mortgage upon improved farm property in a sum not to exceed sixty per cent of its value.

The total liabilities, including overdrafts, of any one per-

son, company, corporation or firm, to any bank, either as principal debtor or as security or indorser for others, for money borrowed, except as additional security for a liability previously incurred, at no time shall exceed twenty per cent of its paid-in capital stock and surplus; provided, however, that (1) the discount of bills of exchange drawn in good faith against actually existing values, (2) the discount of trade-acceptances or other commercial and business paper actually owned by the person, company, corporation or firm, negotiating the same, and (3) the purchase or discount of any note or notes secured by not less than a like face amount of bonds of the United States, or certificates of indebtedness of the United States, shall not be considered as money borrowed within the meaning of this section. (108 (Pt. 1) v. 111; G. C. 9754; 99 v. 279, § 47.)

One who has obtained a loan from a bank, exceeding the legal limit in amount, cannot defend against a suit thereon, on the ground of *ultra vires*. And where such a loan is secured by notes or other obligations as collateral, the obligors on such collateral obligations can take no advantage of such violation of law. *Mutual Bank v. Trust Co.*, 17 C. C. n. s. 306, 308, 309 (1911).

Section 710-123. (Loans to which limitations not applicable.) The limitations provided in section 122 (G. C. § 710-122) shall not be applicable to loans made by unincorporated banks for agricultural, industrial or commercial purposes or the proceeds of which have been used or are to be used for such purposes; but such loans shall not include notes, drafts or bills of exchange issued or drawn for the purpose of carrying or trading in stocks, bonds or other investments, except bonds and notes of the United States; provided, the total liabilities, including overdrafts of a person, company, corporation or firm to any unincorporated bank, either as principal debtor or as security or indorser for others, for money borrowed, except as additional security for a liability previously incurred, at no time shall exceed twenty per cent of the net worth of the owners of such bank, as shown by the report last filed in accordance with section 77 of this act (G. C. § 710-77). (108 (Pt. 1) v. 111.)

Section 710-124. ("Commercial or business paper" and "trade acceptance" defined.) As used in this act the term "commercial or business paper" is hereby defined to mean a promissory note, and the term "trade acceptance" to mean a draft or bill of exchange issued or drawn for agricultural, industrial or commercial purposes, or the proceeds of which

have been used or are to be used for such purposes, but such definition shall not include notes, drafts or bills of exchange covering merely investments, or issued or drawn for the purpose of carrying or trading in stocks, bonds or other investment securities, except bonds and notes of the government of the United States. Such notes, drafts and bills of exchange shall have a maturity at the time of discount of not more than ninety days except when drawn or issued for agricultural purposes or based on live stock, when such maturities shall not exceed six months from the date thereof. (108 (Pt. 1) v. 112.)

Section 710-125. (Unauthorized deposits deemed loans.)

The deposit of funds by any bank in another bank or trust company, not duly designated as a depository by its board of directors as hereinafter provided, shall be held to be a loan within the meaning of section 122 of this act (G. C. § 710-122). (108 (Pt. 1) v. 112; G. C. § 9755; 99 v. 279, § 47.)

Section 710-126. (Borrowing of money and securities limited.) No bank may borrow money, bonds or other securities in any sum exceeding the amount of its capital stock and surplus, except with the written consent of the superintendent of banks, provided that the rediscount of notes, bills of exchange and acceptances shall not be considered money borrowed. Every such re-discount shall be entered upon the books of the bank, and the total amount thereof shall appear as a contingent liability upon every report of condition made to the superintendent of banks or published by said bank. (108 (Pt. 1) v. 112.)

Power to borrow money under general corporation law, § 8705.

Where a bank borrowed money from one of its directors, under an agreement to deliver him certain collateral securities therefor, an equitable lien was held to have been created upon the securities, enforceable against the assignee for creditors of the bank, where through no fault of the lender, the securities were not delivered. *Klaustermeyer v. Trust Co.*, 89 O. S. 142 (1913).

Section 710-127. (Reserve banks may be designated; resolution certified to superintendent.) A bank may by resolution of its board of directors designate other banks organized under the law of this state, or of another state, or of the national banking act of the United States, as reserve banks in which such part of its reserve not required to be kept by it may be deposited, subject to payment upon demand. A copy of such resolution shall upon its adoption be forthwith certified to the superintendent of banks and the depository

so designated shall be subject to the approval of the superintendent of banks. (108 (Pt. 1) v. 112; G. C. § 9759; 107 v. 186; 102 v. 173; 99 v. 281, § 51.)

Section 710-128. (Deposit in other bank as reserve, etc., limited.) No bank shall deposit as a reserve or otherwise in any other bank or national bank an amount in excess of 50% of the capital stock and surplus of such depository bank; nor shall any two banks be reciprocal depositories each for the other. (108 (Pt. 1) v. 113.)

Unauthorized deposits. § 710-125.

Section 710-129. (Loans, discounts or dividends of profits, prohibited, when.) When the reserve of a bank falls below the amount required by law, it shall not make new loans or discounts, otherwise than by discounting or purchasing bills of exchange, payable at sight or on demand, nor make dividends of its profits, until the reserve required by law is restored. The superintendent of banks shall require any bank whose reserve falls below the amount required, immediately to make such reserve good. In case the bank fails for thirty days thereafter to make good its reserve, the superintendent of banks may forthwith take possession of the property and business of such bank until its affairs be adjusted or finally liquidated, as provided by law. (108 (Pt. 1) v. 113; G. C. § 9760; 101 v. 284; 99 v. 281, § 52.)

Section 710-130. (Dividend of undivided profits may be declared, when. Undivided profits, how ascertained.) The board of directors of any bank may declare a dividend of so much of its undivided profits as they deem expedient. Before such dividend is declared, not less than one-tenth of the net earnings of the company for the preceding half-year, or for such period as is covered by the dividend, shall be carried to surplus until such surplus amounts to fifty per cent of its capital stock.

In order to ascertain the undivided profits from which such a dividend may be made, in the account of profit and loss there shall be charged and deducted from the actual profits:

(1) All ordinary and extraordinary expenses, paid or incurred, in managing the affairs and transacting the business of the bank,

(2) Interest paid or then due, on debts which it owes,

(3) All taxes due,

(4) All losses sustained by the corporation. In computing its losses, debts owing to it which have become due and which are not in process of collection and on which interest for one year or more is due and unpaid, unless same are well secured, and debts upon which final judgment has been recovered, but has been for more than one year unsatisfied, and on which also for said period of one year, no interest was paid, unless same are well secured, shall be included. (108 (Pt. 1) v. 113; G. C. § 9735; 103 v. 270; 99 v. 274, § 29.)

“Well secured” in clause 4 of this section means secured so that the entire debt could be collected from the security, without regard to the financial ability of the principal debtor. Rep. Atty. Gen. 1914, p. 1482.

Section 710-131. (Deposits in trust for another; to whom paid.) Whenever any deposit shall be made in a bank by any person in trust for another, and no other or further notice of the existence and terms of a legal and valid trust shall have been given in writing to the bank, in the event of the death of the trustee, the same, or any part thereof, together with the dividends or interest thereon, may be paid to the person for whom said deposit was made. (108 (Pt. 1) v. 113.)

Deposits by trustees. An assignee, receiver or trustee of an insolvent has no authority to make a general deposit, the title to which passes to the bank. Such a deposit is in legal effect a loan to the bank, and is unauthorized.

Smith v. Fuller, 86 O. S. 57 (1912).

Such a deposit may be authorized by a proper order of court.

Smith v. Fuller, 86 O. S. 57 (1912).

G. C. § 710-157 provides that a court may authorize deposits in a trust company on such terms and subject to such restrictions as may be deemed expedient.

A trustee may make a special deposit.

Smith v. Fuller, 86 O. S. 57 (1912).

Section 710-132. (Non-payment of check through error or mistake, bank not liable to depositor, when.) No bank shall be liable to a depositor because of the non-payment through mistake or error and without malice of a check which should have been paid unless the depositor shall allege and prove actual damage by reason of such non-payment and in such event the liability shall not exceed the amount of damage so proved. (108 (Pt. 1) v. 113.)

Checks.

A check is a bill of exchange drawn on a bank payable on demand, G. C. § 8290.

A check is an order which may be countermanded and payment forbidden by the drawer any time before it is actually cashed or accepted. *Railroad Co. v. Bank*, 54 O. S. 60, 72 (1896).

After the death of the drawer, a bank has no right to pay or certify a check.

Covert v. Rhodes, 48 O. S. 66, 72 (1891).

The holder of a check has no priority over other creditors of its drawer, upon his bankruptcy or insolvency.

Covert v. Rhodes, 48 O. S. 66, 72 (1891).

Chaffee v. Bank, 40 O. S. 1 (1883).

Smith v. Bank, 13 C. C. n. s. 122; 22 C. D. 342 (1910).

A check does not of itself operate as an assignment of any part of the deposit, and the bank is not liable to the holder of the check unless and until it accepts or certifies the check.

G. C. § 8294.

Railroad Co. v. Bank, 54 O. S. 60 (1896).

Covert v. Rhodes, 48 O. S. 66 (1891).

But the depositor may arrange with the cashier that his deposits shall be used to pay certain checks only. In such case, the deposits are appropriated to such checks and may not be applied to the payment of other checks. *Paige v. Bank*, 12 Ohio App. 196; 30 O. C. A. 53 (1919); motion to certify record overruled. 17 O. L. R. 312.

A check drawn to order should be paid only to, or on the genuine and authorized endorsement of, the payee. *Goldberg v. Bank*, 17 N. P. n. s. 398 (1913).

After a check has been certified, the drawer of the check can not revoke or stop payment upon it. The certifying bank is liable on the check to another bank that has received it for deposit and given credit therefor to its depositor, although before payment to its depositor, it received notice that the check had been fraudulently obtained by the depositor.

Blake v. Bank, 79 O. S. 189 (1908).

See G. C. §§ 8292, 8293.

It is the duty of a bank to honor checks to the amount of the depositor's credit, when the checks are presented.

Railroad Co. v. Bank, 54 O. S. 60, 71 (1896).

The bank may decline payment of a check because of insufficient funds, and may pay out of the depositor's balance from time to time, smaller checks, although drawn subsequent to the dishonored check. If, when the larger check was first presented, the bank undertook the duties of a collection agent, its liability depends upon the terms of the agency. *Paige v. Bank*, 12 Ohio App. 196; 30 O. C. A. 53 (1919); motion to certify record overruled, 17 O. L. R. 312.

Forged checks. A bank is bound to know the signature of its depositor on a check and makes payment at its own peril.

Bank v. Bank, 58 O. S. 207 (1898).

See *Ellis v. Ohio, etc., Co.*, 4 O. S. 628 (1855).

A bank may, and should, withhold payment of a check until fully satisfied as to the genuineness of the endorsements.

Armstrong v. Bank, 46 O. S. 512 (1889).

The duty of a bank is to pay checks, drawn payable to order, to the person who becomes the holder by genuine endorsement. The depositor can not be charged with payments made otherwise unless the circumstances amount to a direction from the depositor to the bank to pay the check without reference to the genuineness of the endorsement, or are equivalent to a subsequent admission that the endorsement is genuine, in reliance on which the bank is induced to alter its position.

When there has been no fraud, or special understanding between bank and depositor, the liability of the bank can not be affected by conduct of the depositor in drawing the check, of which the bank had no notice.

Dodge v. Bank, 20 O. S. 234 (1870).

Dodge v. Bank, 30 O. S. 1 (1877).

Armstrong v. Bank, 46 O. S. 512 (1889).

Goldberg v. Bank, 17 N. P. n. s. 398 (1913).

The rightful possession of a check, payable to order, confers no authority on the bank to pay it to the person having such possession, without the genuine endorsement of the payee.

Dodge v. Bank, 30 O. S. 1 (1877).

Where, by the fraud of a third person, a depositor is induced to draw his check to the order of a fictitious person, or order, the drawer being in ignorance of the fact and intending no fraud, the bank is not authorized to pay the check and charge it to the account of the depositor.

Armstrong v. Bank, 46 O. S. 512 (1889).

Jones Sons v. Bank, 14 N. P. n. s. 129 (C. P. 1913).

Estoppel of depositor. It has been held that a depositor is not bound to look for forged signatures among his checks when his book is balanced, and the checks returned to him, and is not presumed to have acquiesced in the account charging him with the payment of such a check, where he failed for seventeen days to examine the checks and discover the forgery.

Bank v. Creasy, 18 W. L. B. 410 (Super. Ct. Cin. 1887).

See G. C. § 11225-1.

It is a depositor's duty, when his pass book has been written up and returned to him with the checks charged to his account, to examine them within a reasonable time thereafter, and report any forgeries discovered. After the lapse of a reasonable time, a presumption arises that the checks are correct, and the depositor having failed to examine them at a proper time can not recover from the bank the amount paid on checks subsequently discovered to be forgeries without proving that the bank could have, by the use of ordinary care, detected such forgery.

Jones Sons v. Bank, 14 N. P. n. s. 129; 23 L. D. 353 (C. P. 1913).

See Cumberland v. Bank, 20 C. C. n. s. 31.

A stranger, introduced to plaintiff by one W., who was known to plaintiff, represented that he was A. B., owner of a farm and applied for a loan. Plaintiff, finding the title to be in A. B., took a mortgage from the stranger on the farm, and gave him a check on defendant payable to A. B. The stranger was identified as A. B. at the bank by W. and the bank cashed the check. Held, that the bank was not liable to plaintiff.

McHenry v. Bank, 85 O. S. 203 (1911).

See Winters N. B. v. Roberts, 8 N. P. n. s. 294 (C. P. 1909).

A depositor drew a check to the order of M. R., who lived in New York, but by mistake mailed it to M. R. at Cleveland, where it was received by a person of the same name, who cashed the check. Held, the bank was not liable to the depositor.

Weisberger Co. v. Bank, 84 O. S. 21 (1911).

A check properly endorsed in blank was obtained without authority by a partner of its owner, and cashed. Held, as between the bank and depositor, the check was properly charged to his account.

Bowden v. Bank, 12 W. L. B. 184 (Dist. Ct. 1883).

Limitation of action against bank.

See § 11225-1.

Recovery of money paid on forged check. Where a bank pays a check to a bona fide holder, it can not recover the money back upon discovering the check to be a forgery. This rule has not been modified in Ohio except by local custom in *Ellis v. Ohio, etc., Co.*, 4 O. S. 628.

Bank v. Bank, 58 O. S. 207, 211-212 (1898).

To shift the loss sustained upon a forged check the holder must give prompt notice of the forgery, when discovered, and return the check to the party upon whom the loss is sought to be cast, and reasonable opportunity should, if possible, be given such party to protect himself against loss.

Bank v. Bank, 6 C. C. 130; 3 C. D. 380 (1891); aff'd, no rep., 52 O. S. 630.

Where a bank paid a forged check to a bona fide holder, and upon discovery of the forgery, did not notify the party to whom it had been paid, but, on inquiry by such holder, assured him that the check was "all right," the bank is estopped from subsequently recovering the amount paid.

Bank v. Bank, 6 C. C. 130; 3 C. D. 380 (1891); aff'd, no rep., 52 O. S. 630.

Section 710-133. (What deemed due diligence in forwarding check, notes, etc., for collection.) Any bank, banker or trust company, organized under the laws of or doing business in this state, receiving for collection or deposit, any check, note or other negotiable instrument drawn upon or payable at any other bank, located within or without this state, may forward such instrument for collection direct to the bank on which it is drawn or at which it is made payable and such method of forwarding direct to the payor, shall be deemed due diligence and the failure of such payor bank, because of its insolvency or other default, to account for the proceeds thereof, shall not render the forwarding bank liable therefor, provided, however, such forwarding bank shall have used due diligence in other respects in connection with the collection of such instrument. (108 (Pt. 1) v. 114.)

Collections.

Powers of bank as to. Where a negotiable promissory note is endorsed for collection and sent to the place of payment, the bank receiving such note, with such indorsement, has no power to sell or transfer the note. Its power is limited to collection.

Bank v. Craig, 63 O. S. 374 (1900).

A bank having a "collateral note" in its possession, for collection, is not a "holder" thereof, within the meaning of a clause in the note authorizing its "holder" to become the purchaser of the securities pledged. Such bank has no right to purchase the securities at its own sale.

Moore v. Bank, 12 C. C. n. s. 529; 21 C. D. 614 (1910).

Where payment of a check is refused because of insufficient funds, the bank may agree to hold and undertake to collect it. *Paige v. Bank*, 12 Ohio App. 196; 30 O. C. A. 53 (1919); motion to certify record overruled, 17 O. L. R. 312.

Method of collection. A person selecting a bank as a collecting agent impliedly agrees that the agency may be performed in accordance with such reasonable methods prevailing at the place of collection as have

ripened into usage, not in conflict with the general law, although he has no actual knowledge of their existence.

Hilsinger v. Trickett, 86 O. S. 286 (1912).

See *Bank v. Butler*, 41 O. S. 519 (1885).

It is not negligence per se for a bank which has received a certificate of deposit, issued by a distant bank, for collection, to send it by mail to the bank issuing the same, with a request for payment, where such is the custom among banks, and there is no other bank in the town where the certificate was issued.

Hilsinger v. Trickett, 86 O. S. 286 (1912).

Bridge Co. v. Bank, 46 O. S. 224, 230 (1889).

It is not negligence per se for a collecting bank, in the absence of instructions to the contrary, to accept in conditional payment of a certificate of deposit, a draft or check of the issuing bank where such is the custom of banks in the vicinity.

Hilsinger v. Trickett, 86 O. S. 286 (1912).

When is a deposit for collection only? See note to § 710-117.

Title to paper held for collection and its proceeds. Where a draft is lodged for collection, the relation between the bank and the owner of the draft is that of principal and agent, and not that of creditor and debtor; and a trust character is impressed upon the draft and its proceeds.

Jones v. Kilbreth, 49 O. S. 401 (1892).

Bank v. Melhorn, 8 C. C. 191; 4 C. D. 401 (1894).

An indorsement "for collection" is notice to the drawee that the indorsee is not the owner of the paper, but only the agent of the owner authorized to receive payment for him.

Bank v. Bank, 58 O. S. 207 (1898).

Payment of note or draft by bank. Where a bank, holding a note for collection, pays the same out of its own funds, the transaction is a payment and extinguishment of the note and not a transfer thereof.

Bank v. Craig, 63 O. S. 374 (1900).

Where a bank pays a note held for collection, out of its own funds, it does not become the owner of the note unless payment is made with the assent of the maker of the note. If the maker assents, he is liable to the bank, but if he does not assent the bank can not recover from him.

Bank v. Craig, 63 O. S. 374 (1900).

Where a note is made payable at a bank designated therein, such bank may pay the note out of a general deposit of the maker of the note.

Francis v. Bank, 1 N. P. 281; 3 L. D. 185 (C. P. 1895).

Liability. Negligence. A bank holding for collection commercial paper, on which there are indorsers, is bound to take the proper steps to charge the endorsers and if, by its negligence, an endorser is discharged the bank is liable for the resulting damages.

Bank v. Bank, 49 O. S. 351 (1892).

Huff v. Hatch, 2 Dis. 63 (Super. Ct. Cin. 1858).

White v. Bank, 4 W. L. B. 791 (Super. Ct. Cin. 1879).

But where the bank, in accordance with a general usage of the place, hands a note to a reputable notary for presentment and protest it is not liable for negligence of the notary, whereby the endorser was released.

Bank v. Butler, 41 O. S. 519 (1885).

— **On endorsement "for collection."** An endorsement of a check, draft or bill of exchange "for collection" by one other than the payee, does not guarantee that the signature of the drawer is genuine. But

such endorsement is a guaranty that the signatures of prior endorsers are genuine.

Bank v. Bank, 58 O. S. 207 (1898).

See G. C. § 8142.

— **For default of correspondent.** Where a bank receives for collection a draft payable in another place, and for the same purpose forwards the draft to its correspondent in such other place, it is responsible to the owner for the conduct of the correspondent and for the proceeds, immediately upon collection by the correspondent. The correspondent is the agent of the forwarding bank, and not the subagent of the owner of the draft. Payment to the correspondent is payment to the bank, unless there was some agreement or authority between the owner and the bank beyond the mere fact of the draft being received for collection.

Reeves v. Bank, 8 O. S. 465 (1858).

Bank v. Bank, 10 C. C. 233; 6 C. D. 452 (1895).

But where the correspondent is selected by the owner of the draft, and not by the forwarding bank, the bank is not liable for the acts of the correspondent.

Bridge Co. v. Bank, 46 O. S. 224 (1889).

And where the forwarding bank sends the check for collection with due diligence, and according to the prevailing banking custom or usage, the forwarding bank is not liable for loss arising from insolvency of the correspondent bank after it had collected the check. Iron Works v. Bank, 17 N. P. n. s. 365 (1915); affirmed by Court of Appeals without opinion.

— **To whom liable.** A bank receiving commercial paper, for collection, from another bank is liable only to the bank from which it received the paper. It is not liable to the person depositing, or placing, the paper with the forwarding bank.

Bank v. Bank, 10 C. C. 233; 6 C. D. 452 (1895).

See Cornwell v. Kinney, 1 Handy 496 (Super. Ct. Cin. 1855).

Pleading and evidence. Where the petition in a suit against a bank alleged that the plaintiff had deposited a sum of money, under an agreement whereby the bank was to safely keep the same and pay plaintiff's checks drawn against it, evidence tending to show that no money was deposited but that a certificate of deposit in a distant bank was endorsed by plaintiff to defendant, and was lost by negligence of defendant bank, is incompetent under the pleadings.

Hilsinger v. Trickett, 86 O. S. 286 (1912).

Section 710-134. (When and how surplus of bank may be used.) The surplus of any bank shall not be used for the payment of dividends nor shall the same be used for the payment of expenses or losses until the credit to undivided profits on the books of the bank has been exhausted. But any portion of such surplus may be converted into capital stock and distributed to stockholders by way of a stock dividend provided that such surplus shall not thereby be reduced below twenty per cent of the aggregate capital stock of said bank issued and outstanding after the payment of such dividend. (108 (Pt. 1) v. 114.)

Section 710-135. (Accounts subject to check may be received.) Commercial banks may receive deposits of funds

subject to withdrawal or to be paid upon check of the depositor. All deposits in such banks shall be payable on demand without notice except when the contract of deposit shall otherwise provide. (108 (Pt. 1) v. 114; G. C. § 9757; 107 v. 186; 99 v. 280.)

As to deposits, see note to § 719-117.

Section 710-136. (Loans and discounts may be made.)
Commercial banks may loan money upon personal or collateral security, discount, buy, sell or assign promissory notes, drafts, bills of exchange, trade and bank acceptances, and other evidences of debt and buy and sell exchange, coin and bullion. (108 (Pt. 1) v. 114; G. C. § 9757; 107 v. 186; 99 v. 280, § 49.)

Collateral securities. A bank making a loan on collateral security is a bona fide holder for value thereof.

Cleveland v. Shoeman, 40 O. S. 176 (1883).

Where a note or certificate of deposit is held as collateral security for a loan, and the maker of the note or certificate of deposit becomes insolvent, the holder thereof is entitled to a dividend upon the full amount of the collateral, although the debt secured by the collateral has been reduced by payments, but not below the amount of the dividend. Mutual Bank v. Trust Co., 17 C. C. n. s. 306 (1911).

In the absence of a special agreement, a bank has no lien on collaterals, for its general or unsecured claim against the pledgor.

Stowe v. Bank, 1 C. C. 524; 1 C. D. 292 (1886).

In re Meyers, 7 N. P. 262; 10 L. D. 121.

A "collateral note" in terms giving the pledgee bank a lien, on the collateral security deposited, for the amount of the note and every other liability of the maker of the note to the bank, is valid and the bank has a lien for all other indebtedness.

Bank v. Lumber Co., 194 Fed. 732; 17 O. F. D. 37 (1911).

Stock of corporation. A national bank may make loans on the stock of a corporation, as collateral.

Bank v. Bank, 37 O. S. 208, 215 (1881).

Bank v. Wehrman, 69 O. S. 160, 171 (1903); reversed, 202 U. S. 295. And on the stock of another national bank.

Bank v. Bank, 37 O. S. 208, 215 (1881).

Under the free banking act (G. C. §§ 9676 to 9701) a bank which had made a loan on stock of another bank was held not entitled to a transfer of the stock on the books of such other bank on the ground that a corporation has no power to acquire stock of other corporations.

Franklin Bank v. Commercial Bank, 36 O. S. 350 (1881).

For power of a corporation, under present statutes, to acquire stock in other corporations, see § 8683.

Power to acquire its own stock.
§ 710-114.

See also note to § 8627.

Rights and remedies of pledgees of stock.

See note to § 8682.

Commercial paper. Where commercial paper is pledged to a bank,

as collateral, it is the duty of the bank to use reasonable and ordinary care and diligence to collect the same.

Bridge Co. v. Bank, 46 O. S. 224 (1889).

Personal security. Under the national banking act which authorizes loans on "personal security" it is held that such banks are not limited to the personal undertaking of the borrower, or to the security afforded by the names of indorsers or personal sureties, but loans on a pledge of bonds, corporate stock, and other personal chattels are authorized.

Cleveland v. Shoeman, 40 O. S. 176, 181 (1883).

Where a savings bank made a loan to jewelers on pledges of jewelry and merchandise, the fact that the bank had not complied with statutes regulating pawn brokers was held not to affect its lien upon the property pledged, as against general unsecured creditors.

Griffith v. Goldsoll, 42 W. L. B. 264 (Supreme Ct. without report, 1899).

Discounts. The discounting of paper is only a mode of loaning money, with the right of taking the legal interest in advance.

Insurance Co. v. Carpenter, 40 O. S. 260, 265 (1883).

Bank v. Baker, 15 O. S. 68 (1864).

Usury. See also note to § 710-47. *Contracts for usurious interest.*

A bank authorized to discount paper may deduct interest in advance at the highest rate permitted by law.

McLean v. Lafayette, 3 McLean 587; 2 O. F. D. 412.

Insurance Co. v. Carpenter, 40 O. S. 260, 265 (1883).

See Ladow v. Bank, 51 O. S. 234 (1894).

But where an individual, in discounting paper, deducts interest in advance in such an amount that the interest on the money actually advanced exceeds eight percent, the transaction is usurious, and the lender can recover only the amount loaned, with interest at six percent.

Coppock v. Kuhn, 3 C. C. 599; 2 C. D. 347 (1889); aff'd, 50 O. S. 444.

The addition of the current rate of exchange to the legal rate of interest is not usury.

Bank v. Brashears, 1 Dis. 207 (Super. Ct. Cin. 1856).

Unless it is charged as a mere shift or device to obtain illegal interest.

Exporting Co. v. Clark, 13 Ohio 1 (1844).

See Bank v. Haynes, 23 O. S. 637.

Gebhart v. Sorrels, 9 O. S. 461 (1859).

Sale of corporate bonds at a discount, as usury, see note to § 8797.

A purchase of commercial paper, at a greater discount than the legal rate of interest, is not usury.

Dunkle v. Renick, 6 O. S. 527 (1856).

Section 710-137. (Drafts, bills of exchange of future date may be accepted. Letters of credit may be issued, when. Limitation of amount of accepted drafts or bills. Word "goods" defined.) A commercial bank may accept for payment at a future date, drafts or bills of exchange having not more than six months sight to run, drawn upon it by its customers under acceptance agreements and which grow out of transactions involving the importation or exportation of goods; and issue letters of credit authorizing the holders thereof to draw upon it or its correspondents, provided that there is a definite bona fide contract for the shipment

of goods within a specified reasonable time and the existence of such contract is certified in the acceptance agreement; or which grow out of transactions involving the domestic shipment of goods, provided that shipping documents conveying or securing to the accepting bank title to readily marketable goods, are attached or in the hands of an agent of the accepting bank, independent of the drawer, for its account, at the time of acceptance or which are secured at the time of acceptance, by warehouse receipts or other such documents conveying or securing to the accepting bank title to readily marketable goods fully covered by insurance, the warehouse receipts or other such documents to be those of a responsible warehouse independent of the drawer, the acceptor to remain so secured during the life of the acceptance unless other suitable security of the same character, or cash, be substituted; and, provided that no commercial bank shall accept drafts or bills under this section, to an aggregate amount at any time more than equal to the sum of its paid up and unimpaired capital stock and surplus; and provided further that no commercial bank shall accept whether in a foreign or domestic transaction, for any one person, firm or corporation, to an amount equal at any time to more than twenty per centum of its paid up and unimpaired capital stock and surplus, unless the accepting bank is secured either by the attached documents or those held for its account by its agent independent of the drawer, or by some other actual security of the same character. Should the accepting bank purchase or discount its own acceptances, such acceptances will be considered as a direct loan to the drawer and be subject to the limitation of section 122 of this act (G. C. § 710-122). The superintendent of banks may issue such further regulations as to such acceptances as he may deem necessary in conformity with this act.

As used herein, the word "goods" shall be construed to include goods, wares, merchandise or agricultural products, including live stock. (108 (Pt. 1) v. 114.)

A warehouse receipt for merchandise may be accepted by a national bank as collateral security.

Cleveland v. Shoeman, 40 O. S. 176 (1883).

Section 710-138. (Percentage of deposits kept as reserve.)

Commercial banks shall keep as reserve at least fifteen per cent of their total deposits; at least four per cent of that part of such deposits which is payable on demand, and at least two per cent of that part of such deposits which are

time deposits shall be kept in the vaults of the bank in lawful money, national bank notes, federal reserve notes, federal reserve bank notes, or bills, notes and gold and silver certificates issued by the United States. (108 (Pt. 1) v. 115; G. C. § 9759; 107 v. 186; 102 v. 173; 99 v. 281, § 51.)

Deficiency in reserve. § 710-129.

Reserve depositories. §§ 710-125, 710-127, 710-128.

Reserve of savings bank, § 710-144.

Reserve of member bank of federal reserve bank, § 710-5.

Where a bank has, by its articles of incorporation, commercial bank powers, it must comply with the reserve requirements of a commercial bank, although it transacts savings bank business only. Rep. Atty. Gen. 1914, p. 85.

Section 710-139. (Investments and loans by savings banks; enumeration of evidences of debt.) A savings bank may invest its funds in or loan money on, discount, buy, sell or assign promissory notes, drafts, bills of exchange, trade and bank acceptances and other evidences of debts; but all such investments or loans made except those secured by mortgages on real estate or pledge of collateral security shall be upon notes, drafts, bills of exchange, trade or bank acceptances, or other evidences of debt payable at a time not exceeding six months from the date thereof, but not more than thirty per cent. of the capital, surplus and deposits of such bank shall be so invested. (108 (Pt. 1) v. 115; G. C. § 765; 99 v. 282, § 57.)

Section 710-140. (Investment of funds by savings bank; securities enumerated.) A savings bank may invest its funds in:

(a) The securities mentioned in section 111 of this act (G. C. § 710-111) subject to the limitations and restrictions therein contained; except that investments in real estate securities shall be subject to the restrictions contained in section 112 of this act (G. C. § 710-112).

(b) Stocks of companies, upon which or the constituent companies comprising the same, dividends have been earned and paid for five consecutive years next prior to the investment; provided, every such investment shall be authorized by an affirmative vote of a majority of the board of directors of such savings bank.

No purchase or investment shall be made in the stock of any other corporation organized or doing business under the provisions of this act or of the national banking act of the United States.

(c) Promissory notes of individuals, firms or corpora-

tions when secured by a sufficient pledge of collateral approved by the executive committee or board of directors.

(d) Ground rents or certificates of participation or beneficial ownership in improved lands under lease for a period of not less than twenty-five years from the date thereof, and conditioned that the lessee shall pay all taxes and assessments thereon and keep and maintain said premises in full and complete repair, with insurance in an amount equal to the insurable value of the improvements thereon, provided that the aggregate par amount of such rents or certificates shall not exceed the value of the land nor sixty per cent of the total value of the land and improvements. But nothing in this section contained shall prevent the investment in such rents or certificates in unimproved lands, where by the terms of the lease thereof the construction of a new building thereon is provided for and funds have been deposited or will be deposited from the proceeds of the sale of such rents or certificates sufficient for the cost of such construction, and conditioned that such construction shall begin within six months thereafter and that the funds so deposited shall be paid out to meet the cost of such construction as the work progresses and for no other purpose. (108 (Pt. 1) v. 116; G. C. § 9765; 99 v. 282.)

Stock in a building and loan association is not an authorized investment, although paid up. Rep. Atty. Gen. 1914, p. 608.

Stock in a building company which has earned and paid dividends for five consecutive years last past is authorized. Rep. Atty. Gen. 1914, p. 1656; 12 O. L. R. 493.

A mortgage on a leasehold for ninety-nine years may be accepted as "collateral" under this section (c); although the bank is not authorized to make a direct loan thereon. Rep. Atty. Gen. 1913, p. 789; Rep. Atty. Gen. 1912, p. 677.

This section does not prohibit an unincorporated bank from holding stock in a state bank. Rep. Atty. Gen. 1914, pp. 162, 975.

Section 710-141. (Savings banks may receive deposits from whom.) A savings bank may receive on deposit any sum of money offered for that purpose by any person, firm, society or corporation, or by any municipal corporation, township, school district, taxing district, county or state, or other body politic, or which is ordered to be deposited by any court of this or any other state, or of the United States, having custody of money, and make investment or loans thereof in the manner provided herein. It also may credit and pay such rates of interest thereon as may be agreed upon. (108 (Pt. 1) v. 116; G. C. § 9763; 99 v. 281, § 55.)

A national bank has power to maintain a savings department and

pay interest on deposits. *Clement N. B. v. Vermont*, 231 U. S. 120, 139 (1913).

Section 710-142. (Terms upon which deposits received prescribed by directors.) The board of directors of a savings bank shall prescribe the terms upon which deposits shall be received and paid out and a pass book shall be issued to each savings depositor, containing the rules and regulations adopted by the board of directors governing such deposits, in which shall be entered each deposit made, the interest allowed thereon, and each payment made to such depositor. By accepting such book the depositor assents and agrees to the rules and regulations therein contained. (108 (Pt. 1) v. 117; G. C. §§ 9767, 9768; 99 v. 283, §§ 59, 60.)

Section 710-143. (Check against account may be paid, when and how.) No payment or check against any savings bank account shall be made or paid unless accompanied by and entered in the pass book issued therefor, except for good cause and on assurance satisfactory to the officers of the bank; but nothing herein shall prevent savings banks issuing time certificates of deposit or certificates for deposit specially issued according to the rules and regulations governing savings deposits. (108 (Pt. 1) v. 117; G. C. § 9769; 99 v. 283, § 61.)

In an action by a depositor to recover a balance of a savings account, the burden is on the bank to prove payment or withdrawal by the depositor. The burden is not on the depositor to show the balance claimed and that payment has not been made. *Robison v. Upton*, 12 C. C. n. s. 314; 21 C. D. 330 (1909); *Bank v. Cereguti*, 4 Ohio App. 1; 21 C. C. n. s. 38 (1914); *aff'd*, no rep. 92 O. S. 525.

Pass books.

Rules which require presentation of the pass book, or due notice to the bank in case of the loss of the book, as conditions precedent to payment to the depositor, or upon his written order, are reasonable conditions and become part of the contract between bank and depositor, when brought to the notice of the latter.

Where in such case the bank makes payment on presentation of the pass book, not to the depositor in person, but upon a written order, which turns out to be a forgery, the bank is at least bound to act in good faith and to exercise reasonable care with the view to avoid payment to a person who is not lawfully entitled to receive payment. If it does not act in good faith and exercise reasonable care, it is liable to pay again to the rightful owner of the deposit.

Savings Co. v. Anderson, 78 O. S. 341 (1908); *affirming*, 9 C. C. n. s. 13; 19 C. D. 107; 4 N. P. n. s. 22; 16 L. D. 490.

Whether the bank has exercised reasonable care is a question for the jury. *Bank v. Cereguti*, 4 Ohio App. 1; 21 C. C. n. s. 38 (1914); *aff'd*, no rep. 92 O. S. 525; *Bank v. Karas*, 14 Ohio App. 147 (1920).

Where the depositor signed only by mark, and the rules of the bank required identification in such cases, it was held that the identifying witness must know the man who signs by mark. *Bank v. Cereguti*, 4 Ohio App. 1; 21 C. C. n. s. 38 (1914); aff'd, no rep. 92 O. S. 525.

The bank is not authorized to require indemnity from the depositor. *Bank v. Karas*, 14 Ohio App. 147.

A delivery to a donee, of a savings pass book, containing entries of deposits to the credit of the donor, with the intention to give the donee the deposits represented thereby, with appropriate words of gift, is a sufficient delivery, as between the donee and the administrator of the donor, to constitute a valid gift of such deposits, without assignment or transfer in writing.

Polley v. Hicks, 58 O. S. 218 (1898).

Certificates of deposit. A certificate of deposit, payable to the order of the depositor, on return of the certificate, is, in effect, a negotiable promissory note.

Bank v. Brown, 45 O. S. 39 (1887).

Howe v. Hartness, 11 O. S. 449 (1860).

Where such a certificate is lost by the payee, and the same has never been endorsed by him, he may maintain an action at law against the bank which issued it, without tendering an indemnity against future liability.

Bank v. Brown, 45 O. S. 39 (1887).

Where a certificate, silent as to the time of maturity, bearing interest, is negotiated, two days after its date, to a bona fide holder, it will not be regarded as overdue at the time. To be regarded as overdue, a reasonable time must have elapsed for the purpose of negotiation or presentment for payment.

Howe v. Hartness, 11 O. S. 449 (1860).

A bank empowered to receive deposits is authorized to issue certificates therefor. Issuing, dealing in, buying and selling certificates of deposit is one of the incidents of, and properly pertains to, the business of banking.

Bank v. Blakesley, 42 O. S. 645, 651 (1885).

Where a banking partnership, on receipt of a deposit, issued a certificate therefor, and subsequently a savings bank was incorporated and carried on business in the rooms of the partnership, the former partners being the officers and managers of its business, and such officers issued a certificate of the savings bank to such depositor, in exchange for his former certificate, and the certificate was renewed several times, the savings bank was held liable thereon although the partnership had, in fact, no authority to exchange the certificate, and were indebted to the savings bank.

Bank v. Blakesley, 42 O. S. 645 (1885).

Where a bond or undertaking is required by statute a certificate of deposit can not be accepted in lieu thereof. A certificate of deposit is not a bond or undertaking.

Bank v. Street, 16 O. S. 1 (1864).

Certificates of deposit are not post notes within the meaning of U. S. Rev. Stats. § 5183.

Bank v. Williamson, 2 C. C. 118; 1 C. D. 395 (1887).

Where a trustee, having no authority to make a general deposit, deposits trust money, taking a certificate of deposit certifying that he as trustee has deposited the fund payable to himself on return of the certificate properly endorsed, the same not being subject to check, and no stipulation for interest being made, the presumption, in the absence of proof to the contrary, is that the trustee intended to perform his duty, and that the deposit was intended as a special, and not a general deposit.

Smith v. Fuller, 86 O. S. 57 (1912).

Section 710-144. (Percentages of deposits required as reserve.) Savings banks shall keep as reserve at least ten per cent of their time deposits, and at least fifteen per cent of their demand deposits; at least four per cent of that part of such deposits which is payable on demand, and at least two per cent of that part of such deposits which are time deposits shall be kept in the vaults of the bank in lawful money, national bank or federal reserve notes, federal reserve bank notes, and gold and silver certificates issued by the United States. (108 (Pt. 1) v. 117; G. C. § 9764; 104 v. 186; 99 v. 282, § 56.)

Reserve depositories. §§ 710-127, 710-128, 710-125.

Deficiency in reserve. § 710-129.

Reserve of commercial bank, § 710-138.

Reserve of member bank of federal reserve bank. § 710-5.

Where a bank has both commercial and savings bank powers, it is not entitled to maintain a reserve of only ten percent on its entire time deposits. The ten percent reserve applies only to its savings department. Rep. Atty. Gen. 1914, p. 874.

Section 710-145. (Associations and societies formerly incorporated may continue; election.) Associations incorporated under the act entitled "an act to incorporate savings societies," passed April 16, 1867, and the act passed March 19, 1868, entitled "an act to amend an act entitled, 'an act to incorporate savings societies,' passed April 16, 1867," may continue their business under such acts, and without prejudice to any rights acquired. Such institutions and other savings and loan institutions organized under the laws of this state, if they so elect may continue their business under this act, by signifying such election, under their seal, to the secretary of state, and conforming their action thereto. The secretary of state shall record it, and his certificate be evidence thereof. (108 (Pt. 1) v. 117; G. C. § 9810; R. S. § 3811; 70 v. 40, § 23.)

A society for savings cannot be incorporated under present laws. Rep. Atty. Gen. 1912, p. 66.

Deposits in a savings society belong to the depositors, and taxes thereon can not be assessed against the society.

Collett v. Savings Society, 13 C. C. 131; 7 C. D. 146 (1897); aff'd, no rep., 56 O. S. 776.

Such deposits should be returned for taxation by the depositors as "money" or "personal property". Rep. Atty. Gen. 1912, p. 575.

Trustees of a corporation organized under a former statute authorizing savings societies were held personally liable where such trustees made no attempt to organize or conduct it as a savings society, but instead carried on a general banking business.

Ridenour v. Mayo, 40 O. S. 9 (1884).

A society for savings is not taxable under § 5407 et seq. but is required to make returns to the auditor.

Rep. Atty. Gen. 1911-1912, p. 645.

See *Collett v. Society*, 13 C. C. 131; aff'd, no rep., 56 O. S. 776.

Section 710-146. (Investment of funds of such societies.)

Savings societies organized and doing business under the acts named in the preceding section, in addition to the investments authorized in such acts, may invest their funds in the bonds of a county or municipal corporation issued pursuant to any law of this state, and charge interest on loans of not more than eight per cent per annum payable semi-annually. (108 (Pt. 1) v. 117; G. C. § 9811; R. S. § 3812; 72 v. 150, §§ 1, 2.)

Section 710-147. (Investment of societies incorporated by general assembly.) Societies for savings, duly incorporated by the general assembly, and doing business under their respective acts of incorporation, may invest in land, and in the erection of buildings thereon, for the purpose of their own business, such sum as the trustees thereof deem necessary, not to exceed five per cent of the amount of deposits held by them and also rent any part of such buildings not needed for their own use. (108 (Pt. 1) v. 117; G. C. § 9812; R. S. § 3813; 63 v. 62, § 1; S. & S. 187.)

Section 710-148. (Dividends may be paid, when.) Before a dividend, or interest on deposits, is paid by such societies, they shall have a surplus fund equal to not less than five per cent of the whole amount of deposits, and gradually increase such fund to an amount equal to ten per cent of the amount of deposits. (108 (Pt. 1) v. 118; G. C. § 9814; R. S. § 3815; 74 v. 26, § 2.)

Section 710-149. (Societies whose charters are subject to alteration or repeal.) All "societies for savings" and "savings societies" now doing business, whose charters are subject to alteration or repeal, may continue their business under their respective charters, after the expiration thereof, subject, however, to the repeal of any such charter, and to such amendments, alterations, rules and regulations as may be prescribed, from time to time, by any laws of the state. (108 (Pt. 1) v. 118; G. C. § 9815; R. S. § 3814; 74 v. 26, § 1.)

Section 710-150. (Trust companies may accept trusts, when; capital; deposit with treasurer of state.) No trust company, or corporation, either foreign or domestic, doing a

trust business shall accept trusts which may be vested in, transferred or committed to it by a person, firm, association, corporation, court or other authority, of property within this state, until its paid in capital is at least one hundred thousand dollars, and until such corporation has deposited with the treasurer of state in cash the sum of one hundred thousand dollars, except that the full amount of such deposit by such corporation may be in bonds of the United States, or of this state or any municipality or county therein, or of any other state or any municipality or county therein, or in the first mortgage bonds of any railroad corporation that for five years last past has earned at least five per cent net on its issued and outstanding capital stock, which securities and the sufficiency thereof shall be approved by the superintendent of banks. From time to time said treasurer shall, with the approval of the superintendent of banks, permit withdrawals of such securities or cash, or part thereof, upon deposit with him and approval of the superintendent of banks, of cash or other securities of the kind heretofore named, so as to maintain the value of such deposits as herein provided, and so long as it continues solvent he shall permit it to collect the interest on its securities so deposited. (108 (Pt. 1) v. 118; G. C. §§ 9778, 9779; 99 v. 284, § 69.)

National banks must meet the requirements of this section before transacting trust business in Ohio. Opins. Atty. Gen. 1921, p. 854; 19 O. L. R. 421.

The superintendent may defer issuing certificate under § 710-56 to a new bank whose articles of incorporation confer trust powers, until it has made the deposit required by this section. Opins. Atty. Gen. 1920, p. 124.

The deposit may be in cash. Opins. Atty. Gen. 1915, p. 2479.

Where the full amount of the deposit is in cash, no interest may be paid to the trust company thereon. Opins. Atty. Gen. 1917, p. 539.

Only securities of the classes specified in this section may be deposited.

Rep. Atty. Gen. 1909-1910, p. 257.

Bonds of a street or interurban railway company are probably not "railroad corporation" bonds.

Rep. Atty. Gen. 1909-1910, pp. 261, 256.

"Corporate stock certificates" issued by the city of New York are "bonds."

Rep. Atty. Gen. 1909-1910, p. 258.

Mortgage notes of individuals are not authorized by this section.

Rep. Atty. Gen. 1909-1910, p. 325.

Nor are certificates of deposit issued by banks, although state depositories. Rep. Atty. Gen. 1909-1910, p. 257; Opins. Atty. Gen. 1917, p. 539.

Nor bonds of a light, heat and power company.

Rep. Atty. Gen. 1909-1910, p. 254.

Nor road improvement bonds of a district of a county of another state, where the credit of the entire county is not pledged. Rep. Atty. Gen. 1914, p. 701.

Nor bonds of a magisterial district of West Virginia. Opins. Atty. Gen. 1916, p. 1489.

A trust company organized prior to the enactment of the Thomas law, with a paid in capital of less than \$100,000 but which has transacted no trust business, cannot accept trusts until it increases its capital stock to at least \$100,000 and makes the deposit required. Rep. Atty. Gen. 1914, p. 1650; 12 O. L. R. 493.

Withdrawal of deposit. By foreign trust company retiring from the state. § 710-155.

Where a trust company transfers its assets to another trust company, which assumes its liabilities, the deposit of the transferee company stands as security for the liabilities of the transferrer company, and the deposit of the transferrer company may be returned by the state treasurer.

Rep. Atty. Gen. 1904-1905, p. 107.

Where a trust company goes into liquidation, the deposit can not be returned to it until the treasurer is satisfied by definite proof that the liabilities have been paid.

Rep. Atty. Gen. 1904-1905, p. 107.

The state treasurer may, before permitting a withdrawal of deposits after the trust company has wound up its business, take a bond providing for the payment of any outstanding liabilities of the company.

Rep. Atty. Gen. 1906-1907, p. 121.

Opinions on requests to withdraw or transfer deposit. See Opins. Atty. Gen. 1917, p. 792; Opins. Atty. Gen. 1918, p. 1360; Opins. Atty. Gen. 1919, p. 50.

Taxation of deposit. The securities deposited are subject to taxation, if of a taxable kind. Rep. Atty. Gen. 1914, p. 1197.

Section 710-151. (Foreign trust company may do business in this state, when; deposit; license fee.) Every foreign trust company shall, upon being admitted to do business within this state as otherwise provided by law, filed a certified copy of its certificate of admission with the superintendent of banks, together with a certified copy of the last published statement made by it and filed with the proper department of the state in which it is organized and doing business, and upon approval thereof and of the funds and securities to be deposited as in the preceding section provided, he shall certify that fact to the treasurer of state, and upon deposit of such funds and securities with the treasurer of state the superintendent of banks shall thereupon, and upon the payment of a license fee of one hundred dollars therefor, license said trust company to transact business within this state for the period of one year thereafter. (108 (Pt. 1) v. 118.)

A foreign trust company must comply with G. C. §§ 178 and 183, unless it had been admitted to do business in Ohio prior to July 11, 1919, or unless it comes within the exception of § 710-154. Opins. Atty. Gen. 1919, p. 895.

Under former statutes a foreign trust company was not required to comply with G. C. §§ 178 and 183. Opins. Atty. Gen. 1917, p. 1296;

Rep. Atty. Gen. 1914, p. 1636; 12 O. L. R. 449; Rep. Atty. Gen. 1913, p. 73.

A foreign trust company, acting as trustee under a mortgage executed and recorded prior to July 11, 1919, having complied with the laws then in effect, need not comply with §§ 710-151, 710-152, 710-17(c) or this section. Opins. Atty. Gen. 1921, p. 65.

Section 710-152. (Certificate of tax commission filed annually with superintendent.) Every foreign trust company doing a trust business in this state shall annually within thirty days after complying with all the provisions of law in relation to foreign corporations transacting business within this state, file with the superintendent of banks a certificate of the tax commission of Ohio as to such compliance together with a copy of the last published statement of said corporation, and if such trust company is not in default as to any trust matter or estate within this state, the superintendent of banks shall thereupon, and upon payment of a fee of one hundred dollars therefor, license said corporation to transact business within this state for a further period of one year. (108 (Pt. 1) v. 119.)

Annual franchise report. § 5499 et seq.

Section 710-153. (Examination of trust company; expense.) The superintendent of banks shall have the right to examine, by any deputy, examiner or person especially appointed for that purpose, the books or affairs of any foreign trust company, or any corporation doing a trust business, as to any and all matters relating to any trust, estate or property within this state and concerning which such trust company is acting in a trust or representative capacity, the expense of which shall be charged to and paid by such trust company. (108 (Pt. 1) v. 119.)

Section 710-154. (Compliance with law required before acceptance or execution of any trust; qualifying as executor or administrator.) No such trust company, foreign or domestic, authorized to accept and execute trusts, either directly or indirectly through any officer, agent or employee thereof, shall certify to any bond, note or other obligation to evidence debt, secured by any trust deed or mortgage upon or accept any trust concerning property located wholly or in part in this state, without complying with the provision of sections 150, 151 and 152 of this act (G. C. §§ 710-150, 710-151, 710-152). But nothing herein contained shall prevent a foreign corporation from qualifying as executor or administrator of property in this state, after appointment as

executor or administrator by the courts of any other state as provided by law, when the decedent was a resident of such state at the time of his death, or from acquiring, holding or transferring title to lands or other property within this state as trustee to secure any bond, note or other obligation aforesaid, or from certifying thereto, but provided always, that by the laws of such other state a trust company organized and doing business under the laws of this state shall have equal privileges as to any similar estate, deed or trust of property in such other state. (108 (Pt. 1) v. 119; G. C. § 9780; 99 v. 284, § 69.)

Section 710-155. (Retirement from state; notice; application to court for authority.) Upon the retirement from this state of any foreign trust company, notice of such proposed retirement shall be published once each week for four consecutive weeks in a newspaper of general circulation in the city or village in which the principal place of business of such company is located within this state and proof of such publication shall be filed with the superintendent of banks. Such company shall within thirty days after the expiration of the period provided for in such notice, file its application in the court of common pleas of the county in which its principal place of business is located within the state, for authority to withdraw from the treasurer of state the securities or fund deposited with him under the provisions of section 150 of this act (G. C. § 710-150); and said court, if satisfied that such company has fulfilled and met all of its obligations may so find and may authorize the withdrawal of such securities by such trust company; and upon receipt of a certified copy of such order, the superintendent of banks shall so certify to the treasurer of state and thereupon such treasurer of state shall deliver and surrender to such trust company the securities or funds heretofore deposited with him for the faithful performance of the trusts assumed by such trust company. (108 (Pt. 1) v. 119.)

Section 710-156. (How and from whom moneys may be received and held.) A trust company may receive and hold moneys, or property in trust, or on deposit from executors, administrators, assignees, guardians, trustees, corporations or individuals upon such terms and conditions as may be agreed upon between the parties. (108 (Pt. 1) v. 120; G. C. § 9819; R. S. § 3821a; 79 v. 101, 102.)

A deposit is presumed to be general and not special, unless it

otherwise appear. *Bank v. Brewing Co.*, 50 O. S. 151, 159 (1893); *State v. Perrin*, 9 N. P. n. s. 97; 19 L. D. 416 (C. P. 1909).

But where a trustee, having no authority to make a general deposit, deposits trust money, taking a certificate of deposit certifying that he as trustee has deposited the fund payable to himself on return of the certificate properly endorsed, the same not being subject to check, and no stipulation for interest being made, the presumption, in the absence of proof to the contrary, is that the trustee intended to perform and not violate his duty and that the deposit was intended as a special, and not a general deposit. *Smith v. Fuller*, 86 O. S. 57 (1912). See *Towson v. Cole*, 6 N. P. n. s. 388; 17 L. D. 282 (1906).

Section 710-157. (Courts may order moneys deposited with trust companies.) Any court in this state, including probate courts, may by order, decree or otherwise, direct moneys or property under its control, or paid into court by parties to an action or legal proceedings, or which are brought into court by reason of an order, judgment or decree, in equity or otherwise, to be deposited with a trust company, by such court designated upon such terms and subject to such instructions as are expedient. (108 (Pt. 1) v. 120; G. C. § 9776; 99 v. 284, § 68; G. C. § 9818; R. S. § 3821a; 79 v. 101.)

A trustee appointed to wind up and settle the affairs of an insolvent bank has no right or power, in the absence of a proper order of court, to make a general deposit of funds in a bank. Such a deposit is in legal effect a loan to the bank, and, unless authorized by the court, is a violation of duty by the trustee.

Smith v. Fuller, 86 O. S. 57 (1912).

Section 710-158. (Empowered to act as agents relative to evidences of indebtedness.) A trust company may act as agent or trustee for the purpose of registering, countersigning or transferring the certificates of stock, bonds, or other evidences of indebtedness of a corporation, association, municipality, state or public authority, upon such terms as may be agreed upon, and act as trustee under any mortgage or deed of trust to secure bonds issued by any corporation, association, municipality or body politic, and may accept and execute any other corporate or municipal trusts not inconsistent with the laws of the state. (108 (Pt. 1) v. 120; G. C. § 9817; R. S. § 3821a; 79 v. 101.)

A bank without trust company powers is not authorized to act as trustee under a mortgage securing bonds, although issued by an individual. *Rep. Atty. Gen.* 1913, p. 797. See also *Opins. Atty. Gen.* 1915, p. 957.

A trust company has no power to act as a real estate or insurance agent.

Rep. Atty. Gen. 1909-1910, pp. 330, 326.

Rep. Atty. Gen. 1908-1909, p. 195.

Rep. Atty. Gen. 1913, p. 42.

A trust company may act as trustee of a corporate mortgage securing a bond issue.

Cincinnati Hotel Co. v. Deposit Co., 25 W. L. B. 375 (Super. Ct. Cin. 1891); judgment modified by Supreme Court, 25 W. L. B. 295.

A trust company may act as registrar of stock.

Rep. Atty. Gen. 1910-1911, p. 568.

Liability of trust company certifying bonds with knowledge that the corporation did not own the property included in the mortgage.

See Dreifus v. Trust Co., 13 C. C. n. s. 441; 23 C. D. 46 (1910); reversed, without report, 87 O. S. 525.

Davidge v. Trust Co., 203 N. Y. 331 (1911).

Section 710-159. (Management and disposition of property; may accept and execute all trusts.) A trust company may act as agent, and take, accept and execute any and all trusts, duties and powers in regard to the holding, management and disposition of any property or estate, real or personal, which may be committed or transferred to, or vested in said trust estate, and the rents and profits thereof or the sale thereof, as may be granted or confided to it by any person, association, corporation, municipal or other authority; and may act as trustee under any will or deed or other instrument creating a trust for the care and management of property under the same circumstances and in the same manner, and subject to the same control by the court having jurisdiction of the same as in the case of a legally qualified person. (108 (Pt. 1) v. 120; G. C. § 9828; R. S. § 3821b; 95 v. 98; 79 v. 101, 104.)

A trust company, holding the legal title to land, in trust, as testamentary trustee, may bring a proceeding under G. C. §§ 11084 and 11085 to recover compensation for such land when unlawfully taken by a railroad company.

Trust Co. v. Railroad Co., 7 N. P. n. s. 497; s. c., 6 N. P. n. s. 454 (Ct. of Insol. 1908).

The bringing of such a proceeding by a foreign trust company is not "doing business" in the state within the meaning of § 178 et seq.

Trust Co. v. Railroad Co., 7 N. P. n. s. 497 (1908).

Section 710-160. (Trusts of fiduciary character; may accept and execute on order of court.) A trust company may take, accept and execute all such trusts which may be committed to it by order of any court of record or probate court of this or any other state or of the United States, to act as executor, administrator, assignee, guardian, receiver, or trustee, or in any other trust capacity, and receive and take title to any real estate which may be the subject of any such trust; and such courts of record and probate courts may appoint such trust company to act as executor, administrator, assignee, guardian, receiver, trustee or in any other

trust capacity, provided that any such appointment as guardian shall apply to the estate only and not to the person. But no such trust company shall be required to assume or execute a trust without its consent thereto. (108 (Pt. 1) v. 120.)

Under former statutes a trust company was not authorized to act as executor, administrator, receiver, assignee or trustee for creditors. *Schumacher v. McCallip*, 69 O. S. 500 (1903); *Opins. Atty. Gen.* 1915, p. 957.

But its appointment could not be collaterally attacked. *Trust Co. v. Telegraph Co.*, 79 O. S. 89 (1908).

And where appointed before a former statute was held unconstitutional, it was entitled to compensation. *Trust Co. v. Smith*, 4 C. C. n. s. 237, 16 C. D. 317 (1904); *aff'd*, no rep. 74 O. S. 505.

Section 710-161. (Capital and deposits with state treasurer held as security.) The capital stock of such trust company, with the liabilities of the stockholders existing thereunder, and the fund deposited with the treasurer of state as provided by law shall be held as security for the faithful discharge of the duties undertaken by such trust company in respect to any trust, and no bond or other security, except as hereinafter provided, shall be required from any such trust company for or in respect to any trust, nor when appointed executor, administrator, guardian, trustee, receiver, assignee, or depositary; except that the court or officer making such appointment may, upon proper application, require any trust company which shall have been so appointed to give such security for the faithful performance of its duties as to the court or officer shall seem proper, and upon failure of such trust company to give security as required may remove such trust company and revoke such appointment. (108 (Pt. 1) v. 121; G. C. § 9777; 99 v. 284, § 69; G. C. § 9829; R. S. § 3821b; 95 v. 98; 79 v. 101, 104.)

The exemption from bond does not apply where a bond was given prior to the enactment of § 710-161. The trust company must maintain the bond until the trust is administered. *Opins. Atty. Gen.* 1920, p. 805.

Bond may be required of a trust company only on application by an interested party. The court may not, on its own motion, require security. *Opins. Atty. Gen.* 1920, p. 210.

Section 710-162. (Court may order investigation of company, when; expense.) Any judge of a court in which such trust company is acting in such trust capacity, if he deems it necessary, or upon the written application of any party interested in the estate which it holds in a trust capacity, at any time, may appoint a suitable person or persons,

who shall investigate the affairs and management of such trust company concerning such trust and make sworn report to the court of such investigation. The expense thereof shall be taxed as costs against the party asking for such examination, or the trust fund of such trust company as the court decrees. Such court at any time may examine any officers of such trust company, under oath or affirmation, as to its trust matters in the court, or as to its affairs and management while considering its appointment in such capacity; and for any cause, applicable to natural persons in the same capacity, order that such trust company forthwith settle its trust. (108 (Pt. 1) v. 121.)

Section 710-163. (Officer empowered to sign and swear to accounts, papers, etc.) In proceedings in the probate court or any court of record, connected with any authority exercised under this act, all accounts, returns and other papers may be signed and sworn to in behalf of such trust company by a duly authorized officer thereof. The examination and answers of such officer under oath shall be received as the examination and answers of the trust company. The court may order and compel any of its officers to attend such examinations and to answer such questions as may be put to him relating to any such proceedings, in all respects as otherwise provided by law. (108 (Pt. 1) v. 121; G. C. § 9830; R. S. § 3821b; 95 v. 98; 79 v. 101, 104.)

Section 710-164. (Investment of money and property held in trust.) In the management of money and property held by it as trustee, such trust company may invest such money and property in a general trust fund of the trust company. But it shall be competent for the authority making the appointment to direct whether such money and property shall be held separately or any part thereof invested in a general trust fund of the trust company. The trust company always shall follow and be entirely governed by the directions contained in any will or instrument under which it acts. (108 (Pt. 1) v. 122; G. C. § 9831; R. S. § 3821b; 95 v. 98; 79 v. 101, 104; G. C. § 9788; 99 v. 286, § 76.)

A "general trust fund" is a fund in which all the money and property held as trustee may be invested, each trust being credited with its proportionate share of the increment, and being charged with its share of the management cost. It may be invested in a ground rent (§§ 710-166, 710-140), the title being held in the name of the trust company, as trustee. Rep. Atty. Gen. 1912, p. 700.

Section 710-165. (Mingling of property or securities, pro-

hibited.) No property or securities received or held by any trust company in trust shall be mingled with the investments of the capital stock or other properties belonging to such trust company or be liable for its debts or obligations. Moneys pending distribution or investment may be treated as a deposit in the trust department, or may be deposited in any other department of the bank, subject in other respects to the provisions of law relating to deposit of trust funds by trustees and others. (108 (Pt. 1) v. 122; G. C. § 9832; R. S. § 3821b; 95 v. 98; 79 v. 101, 104; G. C. § 9789; 99 v. 286, § 76.)

Section 710-166. (Investment of trust funds; securities enumerated.) A trust company may invest in or loan its trust funds upon the securities, bonds and other interest-bearing obligations enumerated in section 111, 112 and 140 of this act (G. C. §§ 710-111, 710-112 and 710-140), but subject to all limitations as to the amount of the investment or loan therein or thereon as provided by law, and in stocks and bonds of corporations when authorized by the affirmative vote of the board of directors, or of the executive committee of such trust company. (108 (Pt. 1) v. 122; G. C. § 9781; 99 v. 285, § 70.)

Section 710-167. (Reserve fund required.) A trust company shall keep the same reserve as is required of savings banks, and shall be governed by the same provisions of law in all respects relating thereto, but shall not be required to keep a reserve on trust funds or property held in trust. (108 (Pt. 1) v. 122; G. C. § 9787; 99 v. 286, § 75.)

Section 710-168. (Title guaranty and trust company may establish bank, how.) A title guaranty and trust company heretofore organized and now existing may be granted the power to establish a commercial or a savings bank or a combination of both in the manner provided in this act for the organization, conduct and supervision of commercial and savings banks; provided, that such title guaranty and trust company shall, in addition to its present capital, establish and maintain the capital required for a commercial or a savings bank or a combination of both as prescribed in section 37 of this act (G. C. § 710-168); provided, such capital and all other assets of the commercial savings bank or both of such title guaranty and trust company, shall be held solely for the repayment of the depositors of said bank and shall not be liable for or be pledged or used to pay any other obligation or liability of such title guaranty and trust company

until provision has been made for payment in full of all of the depositors of said bank; provided, further, that said commercial or savings bank or both shall be governed by all of the provisions of law applicable to commercial and savings banks; but nothing in this act shall limit the powers now granted by law to title guaranty and trust companies. (108 (Pt. 1) v. 122.)

Powers of title guaranty companies. See § 9850 et seq.

Section 710-169. (Subject to supervision and inspection laws.) When a title guaranty and trust company has complied with the provisions of this act and acquired banking powers herein granted, such company as to business transacted under powers heretofore granted to such title guaranty and trust company, shall thereafter make its report to and be examined by the superintendent of banks, who shall inspect and supervise such company according to the provisions of sections 9850, 9851, 9852 and 9855 of the General Code; and as to the banking powers granted herein, it shall be subject to all requirements of this act as to commercial and savings banks. A title guaranty and trust company accepting the provisions of this act shall not be subject to the limitations prescribed by section 9853 of the General Code. (108 (Pt. 1) v. 123.)

Section 710-170. (May have trust company powers when qualified.) A title guaranty and trust company heretofore organized and now existing may accept the provisions of this act and be granted trust company powers provided that it shall qualify and comply with all the requirements herein provided for the organization, conduct and supervision of trust companies; provided also that upon the acceptance of the powers granted under this act, all trust powers heretofore granted to title guaranty and trust companies are thereby revoked. (108 (Pt. 1) v. 123.)

Section 710-171. (Reports to auditor of state and superintendent. Application of fees.) Title guaranty and trust companies shall make such reports to the auditor of state as are required to be made by trust companies to the superintendent of banks, and shall be subject to like examination, penalties and fees; such examination to be made by and such fees and penalties assessed by and paid to the auditor of state.

Fees so received by the auditor of state and by him paid into the state treasury to the credit of the general rev-

venue fund are hereby appropriated for the express purpose of paying the cost of such examinations. (108 (Pt. 1) v. 123; G. C. § 9856; R. S. § 3821ggg; 98 v. 153; 95 v. 222.)

Section 710-172. (Embezzlement, misapplication, etc., of funds, unlawful; penalty.) Whoever being an officer, employe, agent or director of a bank, embezzles, abstracts, or wilfully misapplies any of the money, funds, credit or property of such bank whether owned by it or held in trust, or wilfully and fraudulently issues or puts forth a certificate of deposit, draws an order or bill of exchange, makes an acceptance, assigns a note, bond, draft, bill of exchange, mortgage, judgment or decree, or makes a false entry in a book, report or statement of such bank, or makes a false statement or certificate as to a trust deposit, fund or contract, for or under which such bank is acting as trustee, or fictitiously borrows or solicits, obtains or receives money for the bank not in good faith intended to become and be the property of the bank, with intent to defraud or injure the bank or another person or corporation, or to deceive an officer of the bank or an agent appointed to examine the affairs of such bank, or publishes a false statement or report relating to the financial condition of the bank with intent to defraud or injure it or another person or corporation, shall be fined not more than ten thousand dollars, or imprisoned in the penitentiary not more than thirty years, or both. (108 (Pt. 1) v. 123; G. C. § 12473; G. C. § 13183; G. C. § 13184; 99 v. 278, § 44; G. C. § 744-11; 103 v. 383, § 11.)

In a report, the change of an overdraft on an individual account into the column of loans is a false entry under this section. If the report is made properly but such change occurs in the published report, the offense would be against § 710-33. Rep. Atty. Gen. 1913, p. 799.

Section 710-173. (Wrongful charge on account or certifying checks; penalty.) Whoever, being an officer, employe, agent or director of a bank, wilfully certifies a check drawn on such bank and fails forthwith to charge the amount thereof against the account of the drawer thereof, or wilfully certifies a check drawn upon the bank unless the drawer of such check has on deposit with the bank an amount of money subject to the payment of such check and equal to the amount specified therein, shall be fined not more than five thousand dollars or imprisoned not less than one year nor more than five years, or both. (108 (Pt. 1) v. 1124; G. C. §§ 13185, 13186; 99 v. 275, §§ 31-33; G. C. § 744-10; 103 v. 383, § 10.)

Section 710-174. (Receiving money, etc., when insolvent; penalty.) Whoever, being an officer or employe of a bank, receives or, being an officer thereof, permits an employe to receive money, checks, drafts or other property as a deposit therein when he has acknowledged that it is insolvent, shall be fined not more than five thousand dollars or imprisoned in the penitentiary not more than five years, or both. (108 (Pt. 1) v. 124; G. C. § 13182; 99 v. 293, § 116; G. C. § 744-11; 103 v. 383, § 11.)

Section 710-175. (Receiving fictitious obligation, etc.; penalty.) Whoever, being an officer or employe of a bank, resorts to a device, or receives a fictitious obligation in order to evade the provisions of this section and the next two preceding sections, or certifies a check unless there has been regularly entered to the credit of the drawer thereof upon the books of such bank, an amount at least equal to the amount of such check, shall be fined not more than five thousand dollars or imprisoned not less than one year nor more than five years, or both. (108 (Pt. 1) v. 124; G. C. § 13187; 99 v. 275, § 33; G. C. § 744-10; 103 v. 383, § 10.)

Section 710-176. (Drawing check, draft, etc., without credit; penalty.) Any person who, with intent to defraud, shall make or draw or utter or deliver any check, draft or order for the payment of money upon any bank or other depository, who, at the time thereof, has insufficient funds or credit with such bank or depository, shall be guilty of a felony, and upon conviction thereof shall be fined not less than fifty dollars and not more than two hundred dollars, or imprisoned in the Ohio state penitentiary for not less than one year nor more than three years or both.

(Prima facie evidence of intent to defraud.) As against the maker or drawer thereof, the making, drawing, uttering or delivery of a check, draft or order, payment of which is refused by the drawee, shall be prima facie evidence of intent to defraud, and knowledge of insufficient funds in, or credit with, such bank or other depository. The word "credit" as used herein shall be construed to mean any contract or agreement with the bank or depository for the payment of such check, draft, or order, when presented. (108 (Pt. 1) v. 124; G. C. § 13193-1; 106 v. 443.)

Section 710-177. (False advertising of capital; penalty.) It shall be unlawful for a bank to advertise by newspaper,

letter head, or in any other way, a larger capital than actually has been paid in.

A bank violating this provision shall forfeit and pay to the state of Ohio five hundred dollars for each and every such offense, to be recovered with costs of suit in an action, to be prosecuted by the superintendent of banks, before any court of competent jurisdiction in the county wherein it is located. Two or more violations of the provisions of this section may be joined in the same prosecution. (108 (Pt. 1) v. 124; G. C. §§ 9745, 9746; 99 v. 277, § 38.)

Section 710-178. (Use of word "State" prohibited to un-organized banks; penalty.) It shall be unlawful for any bank not organized or transacting business under the provisions of the laws of this state and for all persons, corporations, firms or partnerships doing the business of bankers, brokers or savings institutions, not organized or transacting business under the provisions of this act, to use the word "State" as a portion of the name or title of such bank, corporation, firm or partnership.

Any violation of the foregoing provisions shall subject the party chargeable therewith to a penalty of fifty dollars for each day during which it is committed or repeated, to be recovered with costs of suit in an action, to be prosecuted by the superintendent of banks, before any court having jurisdiction of such bank or of such person, corporation, firm or partnership. (108 (Pt. 1) v. 125; G. C. §§ 9752-1, 9752-2.)

Section 710-179. (Banks subject to this act.) Every bank now existing, or which may hereafter become incorporated, shall be subject to the provisions of this act. (G. C. § 710-1 to § 710-189). Nothing in this act shall affect the legality of corporations heretofore organized or investments or loans heretofore made, or of transactions heretofore had, but the superintendent of banks may require the change of investments or loans for those named herein, as it can be done by the sale or redemption of securities so invested in or loaned upon, in such manner as to prevent loss or injury to the bank. No renewal or extension of such a loan or investment shall be made by such a bank unless it be approved by the superintendent of banks. (108 (Pt. 1) v. 125; G. C. § 9744; 99 v. 276, § 37; G. C. § 9793; 99 v. 288, § 91.)

A company incorporated for the purpose of "contracting for and buying and selling securities and bonds, also borrowing and loaning on same and making loans on real estate security" is not authorized

to engage in the business of banking. The solicitation and receipt of government bonds on deposit at its Ohio place of business, upon an agreement to return the same or like bonds on demand, at stipulated interest, for use as collateral, may be enjoined. *Security Co. v. State*, 105 O. S. 113 (1922); 20 O. L. R. 113.

Section 710-180. (Special plan banks; reserve required.)

Any bank organized and doing business as a special plan bank, and which by the terms of its contract with its depositors provides for the receipt of deposits which are not payable unconditionally upon demand or at a fixed time, may in the case of any loan made upon the security of the character and earning capacity of the borrower and of the co-makers or endorsers on the borrower's note evidencing the loan, in addition to discounting interest at the rate allowed by law, require such borrowers as additional security for such loan to make equal periodical deposits in such bank during the period of the loan, with or without an allowance of interest on such deposits, and such transaction shall not be deemed usurious. A special plan bank shall keep only the same reserve as is required of savings banks against all deposits, which by the contract with the depositor are not to be paid upon demand or at a fixed time, and no reserve shall be required against deposits hypothecated to secure indebtedness of the depositor to the bank. (108 (Pt. 1) v. 125.)

Prior to the enactment of this section Morris Plan Banks were unauthorized. Opins. Atty. Gen. 1916, p. 1401.

FIRE MARSHAL TAX.

Section 841. (Tax on insurance companies; credit of money.) For the purpose of maintaining the department of state fire marshal and the payment of the expenses incident thereto, each fire insurance company doing business in this state shall pay to the state in the month of November each year, in addition to the taxes required to be paid by it, one-half of one per cent, on the gross premium receipts after deducting return premiums and considerations received for re-insurances as shown by the next preceding annual statement of such company made pursuant to section fifty-four hundred and thirty-two and section ninety-five hundred and ninety of the General Code. The money so received shall be placed to the credit of a special fund for the maintenance of the office of state fire marshal. If any portion of such special fund remain unexpended at the end of the year for which it was required to be paid, and the state fire marshal

so certifies, it shall be transferred to the general fund of the state. (106 v. 502; 106 v. 240; R. S. § 409-56; 97 v. 418; 95 v. 474; 94 v. 388.)

Sections 5432 et seq. have no application to the tax under § 841. Rep. Atty. Gen. 1914, p. 643.

Foreign corporations doing solely a reinsurance business are not liable for the fire marshal tax unless the contract of reinsurance is made in Ohio. Opins. Atty. Gen. 1915, p. 805.

The treasurer of state is not authorized to make any reductions or accept any amount less than the amount certified to him under §§ 841 and 5433. But as these sections impose different taxes, he may accept payment of the tax assessed under one section and refuse an insufficient amount tendered under the other section. Opins. Atty. Gen. 1915, p. 2354.

As to computation of tax for the year 1915, see Rep. Atty. Gen. 1916, p. 106.

ASSOCIATIONS FOR CARE OF CHILDREN

Section 1352-2. (Certificate required before filing articles of incorporation.) No association whose object may embrace the care of dependent, neglected or delinquent children or the placing of such children in private homes shall hereafter be incorporated unless the proposed articles of incorporation shall have been submitted first to the board of state charities. The secretary of state shall not issue a certificate of incorporation unless there shall first be filed in his office the certificate of the board of state charities that it has examined the articles of incorporation, and that in its judgment the incorporators are reputable and respectable persons, and that the proposed work is needed, and the incorporation of such association is desirable and for the public good. Amendments proposed to the articles of incorporation of any such association shall be submitted in like manner to the board of state charities, and the secretary of state shall not record such amendment or issue his certificate therefor unless there shall first be filed in his office the certificate of the board of state charities that it has examined such amendment, that the association in question is, in its judgment, performing in good faith, the work undertaken by it, and that such amendment is, in its judgment, a proper one, and for the public good. (103 v. 864.)

Articles of incorporation filed without the certificate of the board of state charities, required by this section, are a nullity. Persons attempting to act as a corporation thereunder may be proceeded against under § 12303. Opins. Atty. Gen. 1915, p. 2436.

PART IX.

EXCERPTS FROM THE TAX COMMISSION ACT.

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| § 1465-12. Inspection of books, records, etc. | § 1465-22. Proceedings for contempt, for refusal or disobedience. |
| § 1465-13. Power to require production of books, etc., by order or subpoena. | § 1465-25. Depositions. |
| § 1465-14. Agent. | § 1465-26. Stenographer's copy of testimony and proceedings shall be received in evidence. |
| § 1465-15. Powers of agent. | § 1465-27. Incriminating testimony. |
| § 1465-16. Penalty for disclosure of information. | § 1465-28. Blanks. Extension of time. |
| § 1465-17. Decision. | § 1465-29. Other information. |
| § 1465-18. Returns and answers by firm, company, corporation, etc. | § 1465-30. Service. |
| § 1465-19. Reason in writing for failure to answer. | § 1465-31. Injunction. |
| § 1465-20. Verification of answers. | § 1465-32. Mandamus. |
| § 1465-21. Who empowered to administer oaths. | § 1465-36. Definitions. |

Section 1465-12. (Inspection of books, records, etc.) To carry out the purposes of the laws which it is required to administer, the commission, or any commissioner, or any person or persons employed by the commission for that purpose, shall, upon demand, have the right to inspect books, accounts, records and memoranda of any company, firm, corporation, person, association, co-partnership or public utility, subject to the provisions of such laws, and to examine under oath any officer, agent or employe of any such company, firm, corporation, person, association, co-partnership or public utility. Any person, other than one of such commissioners, who shall make such demand, shall produce his authority to make such inspection. (June 2, 1911, 102 v. 225, § 14; 101 v. 401, § 14.)

Officers of banks may be required to testify concerning their depositors.

Rep. Atty. Gen. 1911-1912, p. 663.

Section 1465-13. (Power to require production of books, etc., by order or subpoena. Penalty.) The commission may require, by order or subpoena, to be served on any such company, firm, corporation, person, association, co-partnership or public utility, in the same manner that a summons is served in a civil action in the court of common pleas, the production, within this state, at such time and place as it may designate, of any books, accounts, papers or records kept by it in any office or place within or without the state of Ohio, or veri-

fied copies in lieu thereof, if the commission shall so order, in order that an examination thereof may be made by the commission or under its direction. Any such company, firm, corporation, person, association, co-partnership or public utility, failing or refusing to comply with any such order or subpoena, shall, for each day it so fails or refuses, forfeit and pay into the state treasury a sum of not less than fifty dollars nor more than five hundred dollars. (June 2, 1911, 102 v. 226, § 15; 101 v. 401, § 15.)

Section 1465-14. (Agent.) For the purpose of making any investigation with regard to any company, firm, corporation, person, association, co-partnership or public utility, subject to the provisions of the laws which the commission is required to administer, the commissioner shall have power to appoint, by an order in writing, an agent whose duties shall be prescribed in such order. (June 2, 1911, 102 v. 226, § 16; 101 v. 401, § 16.)

Section 1465-15. (Powers of agent.) In the discharge of his duties such agent shall have every power whatsoever of an inquisitorial nature granted by law to the commission and the same powers as a notary public, with regard to the taking of depositions; and all powers given by law to a notary public relative to depositions are hereby given to such agent. (June 2, 1911, 102 v. 226, § 17; 101 v. 401, § 17.)

Section 1465-16. (Penalty for disclosure of information.) Except in his report to the commission, or when called on to testify in any court or proceeding, any such agent who shall divulge any information acquired by him in respect to the transactions, property or business of any company, firm, corporation, person, association, co-partnership, or public utility, while acting or claiming to act under such order, shall be fined not less than fifty dollars nor more than one hundred dollars, and shall thereafter be disqualified from acting as agent or in any other capacity under the appointment or employment of the commission. (June 2, 1911, 102 v. 226, § 18; 101 v. 401, § 17.)

Section 1465-17. (Decision.) The commission may conduct any number of such investigations, contemporaneously, through different agents, and may delegate to any agent the taking of all testimony bearing upon any investigation or hearing. The decision of the commission shall be based upon its examination of all testimony and records. The recommendations made by an agent shall be advisory only, and

shall not preclude the taking of further testimony, if the commission so order, nor further investigation. (June 2, 1911, 102 v. 226, § 19; 101 v. 402, § 18.)

Section 1465-18. (Returns and answers by firm, company, corporation, etc.) Each company, firm, corporation, person, association, co-partnership or public utility, shall furnish the commission in the form of returns prescribed by it all information required by law and all other facts and information, in addition to the facts and information in this act specifically required to be given, which the commission may require to enable it to carry into effect the provisions of the laws which the commission is required to administer, and shall make specific answers to all questions submitted by the commission. (June 2, 1911, 102 v. 226, § 20; 101 v. 402, § 19.)

In 1914 the attorney general ruled that the tax commission could require foreign corporations, which report to it, to furnish, as a part of their returns, a list of their stockholders residing in Ohio. Rep. Atty. Gen. 1914, p. 1409.

Section 1465-19. (Reason in writing for failure to answer.) Any such company, firm, corporation, person, association, co-partnership or public utility, receiving from the commission any blanks with directions to fill them, shall cause them to be properly filled out so as to answer fully and correctly each question therein propounded, and in case it is unable to answer any question, it shall, in writing, give a good and sufficient reason for such failure. (June 2, 1911, 102 v. 227, § 21; 101 v. 402, § 20.)

Section 1465-20. (Verification of answers.) The answers to such questions shall be verified under oath by such person or by the president, secretary, superintendent, general manager, principal accounting officer, partner or agent, and returned to the commission at its office, within the period fixed by the commission. (June 2, 1911, 102 v. 227, § 22; 101 v. 402, § 20.)

Section 1465-21. (Who empowered to administer oath.) Each commissioner, the secretary and every agent provided for in this act, for the purposes therein mentioned, shall have power to administer oaths, certify to official acts, issue subpoenas, compel the attendance of witnesses and the production of books, accounts, papers, records, documents and testimony. (June 2, 1911, 102 v. 227, § 23; 101 v. 402, § 22.)

Section 1465-22. (Proceedings for contempt, for refusal or disobedience.) In case of disobedience on the part of any person or persons, to comply with an order of the commission or a commissioner, or subpoena, or on the refusal of a witness to testify to any matter regarding which he may be lawfully interrogated before the commission, or its agents, authorized as provided by law, the court of common pleas of the county in which the person resides, or a judge thereof, on application of a commissioner, shall compel obedience by attachment proceedings as for contempt as in the case of disobedience of the requirements of a subpoena issued from such court or a refusal to testify therein. (June 2, 1911, 102 v. 227, § 24; 101 v. 402, § 22.)

Section 1465-25. (Depositions.) In an investigation the commission, or any party, may cause depositions of witnesses, residing within or without the state, to be taken in the manner prescribed by law for like depositions in civil actions in courts of common pleas. (June 2, 1911, 102 v. 228, § 27; 101 v. 403, § 24.)

Section 1465-26. (Stenographer's copy of testimony and proceedings shall be received in evidence.) A transcribed copy of the evidence and proceedings, or any specific part thereof, on any investigation, taken by the stenographer appointed by the commission, being certified by such stenographer to be a true and correct transcript of all the testimony on the investigation, or of a particular witness, or of a specific part thereof, carefully compared by him with his original notes, and to be a correct statement of the evidence and proceedings had on such investigations so purporting to be taken and transcribed, shall be received in evidence with the same effect as if such reporter were present and testified to the facts so certified. A copy of such transcript shall be furnished on demand to any party upon the payment of the fee therefor, as provided for transcripts in courts of common pleas. (June 2, 1911, 102 v. 228, § 28; 101 v. 403, § 25.)

Only parties to hearings and investigations are entitled to demand transcripts of evidence. The fee therefor is eight cents per one hundred words.

Rep. Atty. Gen. 1910-1911, p. 619.

Section 1465-27. (Production of testimony.) No person shall be excused from testifying or from producing accounts, books and papers in any proceedings based upon or growing out of any violation of the provisions of the laws which the

commission is required to administer, on the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him, may tend to incriminate him or subject him to penalty or forfeiture, but no person having so testified shall be prosecuted or subjected to any penalty or forfeiture for, or on account of any transaction, matter or thing concerning which he may have testified or produced any documentary evidence; but no person so testifying shall be exempted from prosecution or punishment for perjury in so testifying. (June 2, 1911, 102 v. 228, § 29; 101 v. 403, § 26.)

Section 1465-28. (Blanks. Extension of time.) The commission shall cause to be prepared suitable blanks for carrying out the purposes of the laws which it is required to administer, and, on application, furnish such blanks to each company, firm, corporation, person, association, co-partnership or public utility, subject thereto.

The commission, when it deems the same necessary or advisable, may extend to any corporation or public utility a further specified time not to exceed ninety days within which to file any report required by law to be filed with the commission in which event the attaching or taking effect of any penalty for failure to file such report or pay any tax or fee shall be extended or postponed accordingly. (June 2, 1911, 102 v. 228, § 30; 101 v. 426, § 109.)

Section 1465-29. (Other information.) If any company, firm, corporation, person, association, co-partnership or public utility, subject to the provisions of this act, fails or refuses to make out and deliver to the commission any statement required by law, or furnish the commission with any information requested, the commission shall inform itself as best it may on the matters necessary to be known in order to discharge its duties. (June 2, 1911, 102 v. 229, § 31; 101 v. 428, § 114.)

Section 1465-30. (Service.) Every order or notice, service of which is required, shall be served upon the person or corporation to be affected thereby, either by personal delivery of a certified copy thereof, or by mailing a certified copy thereof, by registered mail, to the person to be affected thereby, or in case of a corporation, to any officer or agent thereof upon whom a summons may be served. Within the time specified in the order of the commission every person or corporation upon whom it is served, if so required by the order, shall notify the commission, in like manner,

whether the terms of the order are accepted and will be obeyed. (June 2, 1911, 102 v. 229, § 32; 101 v. 429, § 118.)

Section 1465-31. (Injunction.) No injunction shall issue suspending or staying any order, determination or direction of the commission, or any action of the auditor of state, treasurer of state, or attorney general, required by law to be taken in pursuance of any such order, determination or direction, but nothing herein shall affect any right or defense in any action to collect any tax or penalty. (June 2, 1911, 102 v. 229, § 33; 101 v. 429, § 119.)

Under this section injunction will not lie to restrain the tax commission from certifying the gross earnings of a railway company to the auditor of state to be used as a basis for an excise tax. Where a constitutional right is infringed, the company has other adequate remedies.

Ohio River, etc., v. Dittey, 12 N. P. n. s. 93 (C. P. 1911).

Before the amendment of 1911 (102 v. 229) it was held that improper taxation of corporations by the tax commission might be enjoined. *Railway v. Poland*, 10 N. P. n. s. 617 (1910); aff'd, no rep. 88 O. S. 596.

Under the amendment of 1911 it has been held that additions to corporate returns made arbitrarily and without evidence or information could be enjoined. *Standard Oil Co. v. Hopkins*, 1 Ohio App. 82; 18 C. C. n. s. 274; 24 C. D. 170 (1913); *Lumber Co. v. Robinson*, 18 C. C. n. s. 146 (1913).

Involuntary payment.

See *Ratterman v. Express Co.*, 49 O. S. 608 (1892).

Western Union Co. v. Mayer, 28 O. S. 521 (1876).

Section 1465-32. (Mandamus.) In addition to the other remedies provided for by law for the prevention and punishment of any violation of the laws which it is required to administer, and the orders of the commission, the provisions of such laws and such orders may upon the application of the commission be enforced by proceedings in mandamus, injunction or other appropriate proceedings. (June 2, 1911, 102 v. 229, § 34; 101 v. 429, § 120.)

Section 1465-36. (Definitions.) The term "commission" or the term "tax commission" when used in this act or in the laws which the commission is required to administer, means the tax commission of Ohio. The term "commissioner" means one of the members of such commission. (June 2, 1911, 102 v. 230, § 38; 101 v. 403, § 27.)

PART X.

CEMETERY ASSOCIATIONS.

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| § 3450. No levy on lots. | § 3466. May sell burial grounds at public sale. |
| § 3461. Buildings upon grounds of cemetery. | § 3467. Disinterment of body buried in cemetery. |
| § 3462. Application of tax. | § 3468. Form of application. |
| § 3463. Bonds in anticipation of tax. | § 3469. Writ of mandamus. |
| § 3465. Abandoned burial ground. Removal of bodies and stones. | |

Section 3450. (No levy on lots.) No lot held by any individual in a cemetery, in any case shall be levied on or sold on execution. (R. S. Sec. 1469; April 15, 1857, 54 v. 187, § 4; S. & C. 228.)

Section 3461. (Buildings upon grounds of cemetery.) Where the township owns a burial-place within the grounds of a cemetery association, the trustees of the township may levy a tax not exceeding five mills on the dollar of the tax duplicate of the township for the purpose of erecting permanent buildings upon and within such cemetery grounds. (R. S. Sec. 1465-1; April 20, 1893, 90 v. 218, § 1.)

Trustees of a cemetery association are not public officers, and their books are not subject to inspection by the state bureau. Rep. Atty. Gen. 1912, p. 224.

Section 3462. (Application of tax.) When such tax has been assessed and collected it shall be paid to the officers of such cemetery association, and by them applied to the erection of such permanent buildings as in their judgment may be requisite for the accommodation of the patrons of the cemetery. (R. S. Sec. 1465-2; April 20, 1893, 90 v. 218, § 2.)

Section 3463. (Bonds in anticipation of tax.) In anticipation of such tax, the officers of such cemetery association may issue and sell bonds to bear interest at a rate not to exceed six per cent per annum. (R. S. Sec. 1465-3; April 20, 1893, 90 v. 218, § 3.)

Section 3465. (Abandoned burial ground. Removal of bodies and stones.) When any burial ground, public or private, has been abandoned, or when the trustees of a township, or the trustees or directors of a cemetery asso-

ciation, are of the opinion that the further use for burial purposes of any cemetery or burial ground will be detrimental to the public welfare or health, and a cemetery or burial ground in the near vicinity thereof is open for public use, such township trustees in every such case, or, in case of a cemetery association, the trustees or directors thereof, may order such cemetery or burial ground to be discontinued, and provide for the removal of all bodies therein buried, and for the removal of all stones and monuments marking the graves thereof, and for the re-interment of such bodies and the re-erection of such stones and monuments in suitable and public ground in the near vicinity, and pay therefor from the township treasury. They shall before providing for any such removal, first cause notice to be given to the family, friends or kindred of the deceased, if known to them of such order and of the time within which, not less than thirty days, such removal must be made, and that it is desired that such removal be made by the friends or kindred of the dead. If at the expiration of such time such removals have not been made, the trustees or the board, as the case may be, may cause them to be made as hereinbefore provided. (May 13, 1910, 101 v. 201; R. S. Sec. 1470-1; March 15, 1876, 73 v. 33, § 1.)

Section 3466. (May sell burial grounds at public sale.)

After due notice thereof has been first given in two newspapers of the county, of general circulation, township trustees and trustees and boards of directors of cemetery associations may dispose of, at public sale, and make conveyance of any burial grounds under their control that they have determined to discontinue as burial grounds, but possession thereof shall not be given to a grantee until after the dead therein buried, together with stones and monuments, have been removed as hereinbefore provided. (R. S. Sec. 1470-2; March 15, 1876, 73 v. 33, § 2.)

Section 3467. (Disinterment of body buried in cemetery.)

The trustees or board of any cemetery association, or other officers having control and management of a cemetery, shall disinter or issue a permit for disinterment, and deliver any body buried in such cemetery, on application of the next of kin of the deceased, being of full age and sound mind, to such next of kin, on payment of the reasonable cost and expense of disinterment. No such disinterment shall be made during the months of April, May, June, July, August and September, and in no event if the deceased died of a contagious or infectious disease, until a permit has been

issued by the local health department. (R. S., Sec. 1470-3; May 14, 1874, 91 v. 231, § 1.)

Brothers and sisters are next of kin of minor children deceased; but where these brothers and sisters are minors, the parents are next of kin and competent to make the application.

State, ex rel., v. Shonhoft, 14 C. C. 354; 7 C. D. 716 (1897).

Section 3468. (Form of application.) Such application shall be in writing and shall state the relation of the applicants to the deceased, that the applicants are the next of kin of the deceased, of full age and sound mind, the disease of which the deceased died, where the body shall be re-interred, and shall be subscribed and verified by oath. (R. S. Sec. 1470-4; May 14, 1874, 91 v. 231, § 2.)

Section 3469. (Writ of mandamus.) If such trustees or board or other officers in charge of the cemetery refuse to issue a permit for disinterment, there shall be issued by the court of common pleas of the county wherein the cemetery is situated, a writ of mandamus requiring such trustees or board or other officers to issue such permit. (R. S. Sec. 1470-5; May 14, 1874, 91 v. 231, § 3.)

PART XI.

MISCELLANEOUS PROVISIONS OF THE MUNICIPAL CODE RELATING TO PRIVATE CORPORATIONS.

- § 3632. Vehicles and use of streets.
 - § 3637. Signs, electricity, plumbing.
 - § 3643. Street cars.
 - § 3644. Hot water and steam heating.
 - § 3645. Movable and rolling roads.
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 - § 3714. Council to have care, supervision and control.
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- § 3768. Terms and conditions of construction and operation to be fixed by council; renewal of grant.

Section 3632. (Vehicles, and use of streets.) To regulate the use of carts, drays, wagons, hackney coaches, omnibuses, automobiles, and every description of carriages kept for hire or livery stable purposes; to license and regulate the use of the streets by persons who use vehicles, or solicit or transact business thereon; to prevent and punish fast driving or riding of animals, or fast driving or propelling of vehicles through the public highways; to regulate the transportation of articles through such highways and to prevent injury to such highways from overloaded vehicles, and to regulate the speed of interurban, traction and street railway cars within the corporation. (January 24, 1908, 99 v. 6, § 7i; 97 v. 505, § 7-9; 96 v. 23, § 7-9; Bates § 1536-100.)

Speed ordinances. See § 3781.

In the absence of a speed ordinance the speed must be reasonable in view of all the facts and circumstances.

Cincinnati St. R. Co. v. Lewis, 3 C. C. n. s. 115; 13 C. D. 127 (1901; s. c., 8 N. P. 417; 10 L. D. 53).

A provision in an ordinance that the speed of cars shall not exceed fourteen miles per hour, including stops, requires that at the end of the run the average speed should not have exceeded that rate.

Columbus Ry. v. Connor, 6 C. C. n. s. 361; 17 C. D. 229 (1905).

This section does not authorize a municipality, by penal ordinance, to require interurban cars to stop and take on or discharge passengers.

Townsend v. Circleville, 78 O. S. 122 (1908).

An ordinance requiring the motorman to exercise all possible care on approaching a car that has stopped, or to have complete control of his car on approaching a curve, is valid. Leis v. Railway Co., 101 O. S. 162 (1920).

Section 3637. (Erection of fences, signs; construction and repair of wires, poles, plants; licensing, house movers, electrical contractors, plumbers, etc.) To regulate the erection of fences, billboards, signs and other structures, within the corporate limits, and to provide for the removal and repair of, insecure billboards, signs and other structures; to regulate the construction and repair of wires, poles, plants and all equipment to be used for the generation and application of electricity; to provide for the licensing of house movers, electrical contractors, plumbers and sewer tappers and vault cleaners. (March 14, 1913, 103 v. 93; January 24, 1908, 99 v. 6, § 7m; 97 v. 506, § 7-13; 96 v. 23, § 7-13; R. S. Sec. 1536-100.)

See Toledo v. Winters, 10 N. P. n. s. 661; 21 L. D. 171 (1910).

Section 3643. (Street cars.) To require the employment of conductors on all street cars within the corporate limits. (January 24, 1908, 99 v. 9, § 7bb; 97 v. 509, § 7-28; 96 v. 25, § 7-28; Bates § 1536-100.)

See Thornhill v. Cincinnati, 4 C. C. 354; 2 C. D. 592 (1890).

A municipality can not, by penal ordinance, prescribe the qualifications of motormen or conductors.

Columbus, etc., Co. v. Columbus, 10 N. P. n. s. 161; 20 L. D. 555; (1910).

Section 3644. (Hot water and steam heating.) To use, or by ordinance grant, for periods not exceeding twenty-five years, the use of, its streets, avenues, alleys, lanes and public places, to lay pipes, conduits, manholes, drains, and other necessary fixtures and appliances, under the surface thereof, to be used for supplying such municipality and its inhabitants with steam or hot water, or both, for heat or power purposes, or both, but in all such grants, such municipal

corporations shall reserve the right to regulate, at intervals of not less than five years, the prices which the grantee or grantees may charge for such heat or power. (January 24, 1908, 99 v. 7, § 7r; 97 v. 507, § 7-18; Bates § 1536-100.)

See §§ 614-44 to 614-46.

A similar statute was held constitutional.

Kumler v. Silsbee, 38 O. S. 445 (1882).

Validity of former act containing curative provisions.

Columbus v. Lighting Co., 16 L. D. 311 (1905).

Where a franchise has been granted by the council for steam pipes under sidewalks and such use is made under the direction of the board of public service, the court can not inquire as to the propriety or mode of the use.

Stone v. Cuyahoga Light Co., 9 N. P. n. s. 545; 20 L. D. 130 (1909).

This section does not place restrictions on a natural gas company which furnishes light.

Columbus v. Gas & Fuel Co., 10 N. P. n. s. 305; 21 L. D. 179 (1910).

Section 3645. (Movable and rolling roads.) To use or grant, for periods not exceeding twenty-five years, the use of its streets, avenues, alleys, lanes and public places for the construction of inclined movable or rolling roads, for the conveying or moving of freight, vehicles, animals and other property, and those in charge thereof, upon such terms as the council of the municipal corporation may deem proper, but in all such grants, the municipal corporations shall reserve the right to regulate, at intervals of not less than five years, the prices which the grantee or grantees may charge for the conveying or moving of such freight, vehicles, animals, and other property. No such grant shall be made until there is produced to such council the written consent of the private property owners of more than two-thirds of the feet front of the lots and lands abutting on the street, avenue, alley, lane or public place, or part thereof, upon or over which it is proposed to construct the inclined movable or rolling road. (January 24, 1908, 99 v. 7, § 7r.)

Section 3645-1. (U. S. mail subways.) To use, or by ordinance grant to any person, company or corporation, for periods not exceeding twenty-five years, the use of its streets, avenues, alleys, lanes and public places for the purpose of constructing, laying, maintaining and operating subways and underground conduits, together with manholes and all other necessary appliances for transmitting United States mail matter under or beneath such streets, avenues, alleys, lanes and public places. (April 14, 1910, 101 v. 101.)

Section 3677. (Appropriation of property. Street improvement, etc. Canal improvement. Water supply. Change

of venue. **Street, interurban, suburban railways or terminals, etc.)** Municipal corporations shall have special power to appropriate, enter upon and hold real estate within their corporate limits. Such power shall be exercised for the purposes, and in the manner provided in this chapter.

1. For opening, widening, straightening, changing the grade of, and extending streets, and all other public places, and for this purpose the corporation may appropriate the right of way across railway tracks and lands held by railway companies, when such appropriation will not unnecessarily interfere with the reasonable use of the property so crossed by such improvement, and for obtaining material for the improvement of streets and other public places;

2. For parks, park entrances, boulevards, market places, and children's playgrounds;

3. For public halls and offices, and for all buildings and structures required for the use of any department;

4. For prisons, workhouses, houses of refuge and correction, and farm schools;

5. For hospitals, pesthouses, reformatories, crematories and cemeteries;

6. For levees, wharves and landings;

7. For bridges, aqueducts, viaducts and approaches thereto;

8. For libraries, university sites and grounds therefor;

9. For constructing, opening, excavating, improving or extending any canal, or water course, located in whole or in part within the limits of the corporation or adjacent and contiguous thereto, and which is not owned in whole or in part by the state, or by a company or individual authorized by law to make such improvement;

10. For sewers, drains, ditches, public urinals, bath-houses, water closets and sewage and garbage disposal plants and farms;

11. For natural and artificial gas, electric lighting, heating and power plants, and for supplying the product thereof;

12. For establishing esplanades, boulevards, park ways, park grounds, and public reservations in, around and leading to public buildings, and for the purpose of reselling such land with reservations in the deeds of such resale as to the future use of such lands, so as to protect public buildings and their environs, and to preserve the view, appearance, light, air and usefulness of public grounds occupied by public buildings and esplanades and parkways leading thereto.

13. For providing for a supply of water for itself and its inhabitants by the construction of wells, pumps, cisterns,

aqueducts, water pipes, dams, reservoirs, reservoir sites and water works, and for the protection thereof; and to provide for a supply of water for itself and its inhabitants, any municipal corporation may appropriate property within or without the limits of the corporation; and for this purpose any such municipal corporation may appropriate in the manner provided in this chapter, any property or right or interest therein, theretofore acquired by any private corporation for any purpose by appropriation proceedings or otherwise. Either party to such appropriation proceedings shall have the same right to a change of venue as is now given by law in the trial of civil actions.

14. For the construction or operation of street, interurban, suburban or other railways or terminals and the necessary tracks, way stations, depots, terminals, workshops, conduits, elevated structures, subways, tunnels, offices, sidetracks, turnouts, machine shops, bridges and other appurtenances for the transportation of persons, packages, express matter, freight and other matter, in, from, into or through the municipal corporation; and for such purpose or purposes any municipal corporation may appropriate any property within or without its corporate limits; any municipal corporation may appropriate any property or right or interest therein theretofore acquired by any private or public utility corporation for any purpose by appropriate proceedings, as well as the right to cross on, over or under any street, avenue, alley, way or public place or part thereof of any other municipality, township or country. (May 3, 1913, 103 v. 496; March 10, 1910, 101 v. 15; April 27, 1908, 99 v. 207, § 10; April 25, 1904, 97 v. 333, § 10; October 22, 1902, 96 v. 26, § 10; Bates §§ 1536-102, 1536-103.)

Right of way across railway tracks. Where a municipal corporation is about to file an application in court for the assessment of compensation for the extension of a street over railway tracks, a suit for injunction may be maintained by the railway company, in which suit it may be determined whether such street extension will unnecessarily interfere with the reasonable use of the railway property.

Ry Co. v. Greenville, 69 O. S. 487 (1903).

See Cleveland, etc., R. Co. v. Akron, 1 C. C. n. s. 174 (1903); s. c.; 4 C. C. n. s. 632 (1904); affirmed, 74 O. S. 457; s. c., 6 N. P. n. s. 81; 18 L. D. 231 (1907).

That the street crossing will inconvenience the railroad company, and cause it additional expense in operation, is no defense, providing the use of the property by the railroad company is not "unnecessarily" interfered with and the municipality acts in good faith.

Railroad Co. v. Akron, 6 N. P. n. s. 81; 18 L. D. 231 (1907).

Railroad Co. v. Dayton, 23 O. S. 510 (1872).

Railroad Co. v. Bellaire, 4 W. L. B. 201 (1872).

Railroad Co. v. Hyde Park, 4 N. P. 296; 7 L. D. 156 (1897).

A municipality can not open a new street, or extend an existing

street, across a railroad track without acquiring the right to do so by agreement or appropriation proceedings.

In re Avon Beach, etc., Ry., 3 N. P. n. s. 561, 567; 16 L. D. 87 (C. P. 1905).

Railway Co. v. Troy, 68 O. S. 510 (1903).

Railroad Co. v. Commissioners, 63 O. S. 23 (1900).

The railroad company is entitled to compensation for the cost of a bridge or viaduct to carry its trains over the street.

Railway Co. v. Troy, 68 O. S. 510 (1903).

The grade crossing act (§ 8897 et seq.) did not repeal or modify § 3677, and appropriation proceedings therein authorized cannot proceed until it is judicially determined that the appropriation will not unnecessarily interfere with the reasonable use of the property to be crossed by the street. The court of common pleas may, in one proceeding, hear and determine all questions under §§ 3677 and 8899. Railroad v. Martins Ferry, 92 O. S. 158.

Where the court found that the benefit to the public from a proposed street extension would be small and the burden upon the railroad company serious, it refused to order the appropriation. Warren v. Railway, 23 N. P. n. s. 161 (1919).

Property of water power company. This section (paragraph 13), giving a municipality power to appropriate, for purposes of water supply, property theretofore appropriated by a private corporation, is constitutional. Under this section the property of a hydro-electric power company may be appropriated. Power Co. v. Akron, 210 Fed. 524 (D. C. Ohio 1913); reversed on other grounds, 240 U. S. 461.

Estoppel of railroad company. Where a railroad company obtains the right to cross certain streets on condition that when it becomes necessary to open or extend the same it shall grant a right of way, it is estopped from denying the right to make such opening or extension.

Chicago, etc., Co. v. Hamilton, 3 C. C. 455; 2 C. D. 259 (1888).

Pleading and procedure. See

Toledo, etc., Ry. Co. v. Fostoria, 7 C. C. 293; 4 C. D. 602 (1893); aff'd, no rep., 56 O. S. 726.

P. C. C. & St. L. Ry. Co. v. Greenville, 69 O. S. 487.

Railroad Co. v. Hyde Park, 4 N. P. 296; 7 L. D. 156 (1897).

Appropriation of railroad property for other purposes.

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Railroad Co. v. Belle Center, 48 O. S. 273 (1891).

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Toledo, etc., Co. v. Toledo, 7 N. P. 285; 5 L. D. 306 (1894).

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Railroad Co. v. Commissioners, 63 O. S. 23 (1900).

Lake Erie, etc., Co. v. Seneca Co., 57 Fed. 944 (1893).

Appropriation of private property for railroad use. A municipality can not appropriate private property for the use of a railroad company.

Morehouse v. Norwalk, 6 W. L. B. 267 (C. P. 1881).

See White v. Cleveland, 12 N. P. n. s. 225 (1911); aff'd, 14 C. C. n. s. 369.

Title to railway company extinguished when. The title to land not used or needed for railway purposes is wholly extinguished by the establishment of a street. But if the land is so used, such use is not superseded.

Railway Co. v. Railway Co., 5 C. C. n. s. 583; 16 C. D. 180 (1903);
aff'd, no rep., 73 O. S. 364.

Dedication of street by railroad. An intention by a railroad company to dedicate a street is not clearly shown by proof that a way over its tracks and unenclosed lands was used for forty years by the public, when during the entire time the way was maintained by the company and was used by its patrons, and the use by the public was merely permissive.

Railroad v. Roseville, 76 O. S. 108 (1907).

Section 3714. (Council to have care, supervision and control.) Municipal corporations shall have special power to regulate the use of the streets, to be exercised in the manner provided by law. The council shall have the care, supervision and control of public highways, streets, avenues, alleys, sidewalks, public grounds, bridges, aqueducts, and viaducts, within the corporation, and shall cause them to be kept open, in repair, and free from nuisance. (October 22, 1902, 96 v. 26, § 9; 96 v. 31, § 28; Bates §§ 1536-131, 1536-102.)

Additional burdens. Rights of abutting owners.

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I. MISCELLANEOUS.

A municipal corporation may, by ordinance, regulate the length of time a train may remain standing across street crossings. *Akron v. Temple*, 16 C. C. n. s. 327 (1909.)

This section does not authorize a municipality, by penal ordinance, to prescribe the qualifications of motormen and conductors.

Columbus, etc., Co. v. Columbus, 10 N. P. n. s. 161; 20 L. D. 555 (1910).

This section authorizes a municipality to establish regulations for the operation of a street railway, which promote public safety, and which do not unreasonably interfere with its franchise.

Millcreek, etc., Co. v. St. Bernard, 8 N. P. 288; 11 L. D. 454 (1901).

The control of streets is vested exclusively in the council. Directions by the mayor, regarding improvements, are unauthorized.

Cincinnati, etc., Ry. Co. v. Carthage, 36 O. S. 631 (1881).

Power of municipality to regulate street railways between two states. See *South Covington Co. v. Covington*, 235 U. S. 536 (1915).

II. FRANCHISES.

Electric light, gas and water companies.

§§ 3982 to 3994 and 9320 to 9338, 9192 to 9198.

For street and interurban railways, §§ 3768 to 3780 and 9100 to 9149.

Railroads, § 8763.

Telegraph and telephone companies, §§ 9170 to 9191.

Prior to the constitutional amendments of 1912, sections 3714 and 10129 authorized a municipality to make a contract with a gas company or other public utility to use its streets in consideration of the

payment of a lump sum or a percentage of its gross receipts. *Gas Co. v. Columbus*, 96 O. S. 530 (1917).

A. Must emanate from legislature. A franchise must emanate either directly or indirectly from the legislature.

State v. Cincinnati Gas, etc., Co., 18 O. S. 262, 291 (1868).

State v. Railway, 1 C. C. n. s. 145; 14 C. D. 609 (1903); aff'd no rep., 73 O. S. 363.

A municipality has no inherent power to grant a franchise to a street railway.

Woodland Ave., etc., Co. v. Cleveland, 7 N. P. n. s. 161; 17 L. D. 763.

Raynolds v. Cleveland, 2 C. C. n. s. 139; 14 C. D. 215; aff'd no rep. 76 O. S. 619.

Grant under statute subsequently declared unconstitutional. A franchise granted under a statute which had been upheld by the supreme court, but was subsequently held to be unconstitutional, is valid.

State v. Oakwood St. Ry. Co., 11 C. C. n. s. 263; 20 C. D. 632 (1908); aff'd, no rep., 81 O. S. 502.

B. Defective franchise. Validity of curative act.

The legislature may by a subsequent law validate acts or contracts made ultra vires by a municipality, if the act might have been authorized by prior law.

Mill Creek, etc., Ry. Co. v. Carthage, 18 C. C. 216; 9 C. D. 833 (1899); aff'd, no rep., 62 O. S. 636.

See *Cincinnati, etc., Co. v. Horstman*, 72 O. S. 93, 666 (1905).

Burgett v. Norris, 25 O. S. 308 (1874).

Kumler v. Silsbee, 38 O. S. 445 (1882).

State v. Hoffman, 35 O. S. 435 (1880).

C. Ordinance granting. Requisites of.

Generally, see G. C. §§ 4224 to 4235.

Street railways, § 3768 et seq.

1. Must contain but one subject. "No ordinance, resolution or by-law shall contain more than one subject which shall be clearly expressed in its title . . ."

G. C. § 4226.

Where a granting ordinance contains but one subject matter, which is clearly expressed in its title, other provisions contained in the ordinance which are merely incident to the main subject matter do not render the ordinance invalid.

Belle v. Glenville, 5 C. C. n. s. 461; 17 C. D. 181 (1904); affirmed, no rep., 73 O. S. 392, 397; 75 O. S. 574.

A provision in a franchise for a waterworks system, for a lease of the system to the municipality and for an option to purchase, does not render the ordinance invalid as containing more than one subject.

Moore v. Elmore, 13 N. P. n. s. 651; 23 L. D. 50 (C. P. 1910).

2. Reading on three different days.

G. C. § 4224.

Smith v. Columbus, etc., Co., 8 N. P. 1; 10 L. D. 441.

Contra under former law, *State v. Oakwood St. R. Co.*, 11 C. C. n. s. 263; 20 C. D. 632 (1908); aff'd, no rep., 81 O. S. 502.

3. Publication. The duty of publishing an ordinance rests upon the municipality. In an action to oust a street railway company from its

franchise, the burden of proof as to defective publication rests upon the municipality.

State v. Oakwood St. Ry. Co., 11 C. C. n. s. 263; 20 C. D. 632 (1908); aff'd, no rep., 81 O. S. 502.

It has been held that an ordinance granting a franchise is not required to be published. State v. Orgill, 17 C. C. n. s. 260 (1910). *Contra*. Rep. Atty. Gen. 1912, p. 1655.

Estoppel by recital in ordinance as to publication.

Raynolds v. Cleveland, 8 C. C. n. s. 278; 18 C. D. 463 (1906); aff'd, no rep., 77 O. S. 631.

4. Delegation of franchise granting power to administrative board. An ordinance authorizing an administrative board to grant to a corporation the right to operate a public utility owned by the municipality, upon the terms and conditions specified in the ordinance, and empowering the board to perform specified administrative duties which are necessary to the carrying out of the plan, is not an unconstitutional delegation of legislative power. State v. Railway, 97 O. S. 283 (1918).

D. By grant of franchise municipality not divested of control of part of street occupied by street railway. A municipality is not divested of its control of streets by the grant of a franchise to a street railway company, by the terms of which the company is required to keep in repair that part of the streets between the rails, and which further provides that failure to comply with the terms of the grant, or with any general ordinances of the municipality regulating the use of the streets, should render the company liable for damages.

Columbus v. Street Railroad Co., 45 O. S. 98 (1887).

Gas Co. v. Columbus, 50 O. S. 65.

See New Orleans, etc., Co. v. Drainage Commission, 197 U. S. 453 462.

Union, etc., Co. v. Railway Co., 14 N. P. n. s. 171 (1913).

A municipality may change the grade of its streets, without liability to the grantee of the franchise for damage occasioned by the necessity of relaying the pipes, etc. Gas Co. v. Columbus, 50 O. S. 65.

The municipality may require a street railway company to relocate its tracks. Railway v. Springfield, 15 N. P. n. s. 241; 24 L. D. 277.

E. Permission to occupy street, when acted upon, a vested property right in the nature of a franchise or easement. When accepted by the grantee, and acted upon, a grant of the right to occupy streets for a street railway is more than a license; "it is a vested property right, in the nature of a franchise or easement in or to the particular portion of the street designated in the grant itself." Hamilton, etc., Traction Co. v. Hamilton, etc., Transit Co., 69 O. S. 402, 410 (1903).

F. Franchise as a contract. The grant of a right to construct street railway tracks in the streets of a municipality, when accepted by the grantee, is a contract, which can not be rescinded by one party without consent of the other. Interurban Railway v. Commission, 98 O. S. 287 (1918); Interurban Ry. v. Cincinnati, 93 O. S. 108 (1915); Street Ry. Co. v. Smith, 29 O. S. 291 (1876); Wyoming v. Traction Co., 104 O. S. 325 (1922).

The same rule applies to a renewal grant.

Street Ry. v. Cleveland, 7 N. P. n. s. 161; 17 L. D. 763.

And to a grant by county commissioners.

State, ex rel., v. C. E. Ry. Co., 15 C. C. 200; 8 C. D. 474 (1897).
 Railway v. Springfield, 15 N. P. n. s. 241; 24 L. D. 277 (1913).

The public utilities commission is not authorized to change rates which have been fixed in a valid franchise contract. Interurban Railway v. Commission, 98 O. S. 287 (1918).

A franchise can not be abrogated by the vacation of the street.

Union, etc., Co. v. Railway Co., 14 N. P. n. s. 171 (1913).

That operation of a public utility is unprofitable and the franchise contract cannot be performed without serious loss, is no defense in an action brought to compel performance. Cincinnati v. Ry., 14 N. P. n. s. 420 (1913). See also 98 O. S. 287; Columbus Co. v. Columbus, 249 U. S. 399; 17 O. L. R. 49 (1919); affirming, 253 Fed. 499; 16 O. L. R. 377 (D. C. 1918); Columbus v. Commission, 103 O. S. 79 (1921).

Grants of franchises are subject to the tacit condition that they may be lost for non-user or mis-user. The condition thus implied is a condition subsequent. Where no steps to exercise a franchise are taken within a reasonable time, it may be revoked by the municipality. N. Y. Electric Lines v. Empire City Subway, 235 U. S. 179 (1914).

G. Council has no power to grant exclusive franchise, in the absence of power clearly conferred. The council of a municipality can not grant an exclusive franchise in its streets in the absence of power expressly conferred upon the municipality by the legislature, or so far necessary to the execution of express powers as to make its existence free from doubt.

Columbus v. Columbus Gas Co., 76 O. S. 309, 339 (1907).

State, ex rel., v. Cincinnati Gas, etc., Co., 18 O. S. 262 (1868); approved in 115 U. S. 659.

State ex rel., v. Hamilton, 47 O. S. 52, 70, 71 (1890).

Cincinnati St. R. R. Co. v. Smith, 29 O. S. 291 (1876).

But the grantee of a franchise for a street railway over a right of way already occupied by a street railway, under a prior franchise, can not, without appropriation proceedings, take possession of the right of way, where the new use will materially interfere with and abridge the use of the prior franchise.

Hamilton, etc., Co. v. Hamilton, etc., Co., 69 O. S. 402, 409 (1903).

Isom v. Low Fare Ry. Co., 10 C. C. n. s. 89, 101; 19 C. D. 583 (1907); aff'd, no rep., 77 O. S. 638.

H. Grant silent as to duration. Franchise continues merely by consent of parties. Where the grant is silent as to its duration, the franchise is not perpetual, but exists only so long as the parties mutually agree thereto. The grantee may wholly withdraw from the exercise of its franchise.

East Ohio Gas Co. v. Akron, 81 O. S. 33 (1909).

Gas Co. v. Cleveland, 106 O. S. 489 (1922).

Compare State, ex rel., v. Columbus Ry. Co., 1 C. C. n. s. 145; 14 C. D. 609 (1903); aff'd, no rep., 73 O. S. 363.

But where there is no provision in the state constitution and statutes, and no prior adjudication by its courts to the contrary, a franchise is perpetual. A franchise granted by county commissioners, prior to the decision of East Ohio Gas Co. v. Akron, 81 O. S. 33, not specifying the duration, was held by the United States Supreme Court to be perpetual and not subject to annulment by the county commissioners (at least until the expiration of twenty-five years under § 3771). Northern Ohio T. & L. Co. v. Ohio, 245 U. S. 574 (1918); reversing, 93 O. S. 466 and affirming, 2 Ohio App. 113; 15 C. C. n. s. 577; 24 C. D. 262.

Where the street franchise of an electric light company is silent as to its duration, but the municipality fixes the rate under § 3982 for a fixed period and the rate is accepted by the company under § 3983, the duration of the franchise is for the period of the contract so made. Rep. Atty. Gen. 1914, p. 468.

I. Grants of franchises; how construed.

1. Rule of strict construction. Every grant in derogation of the rights of the public in the streets will be construed strictly against the grantee and liberally in favor of the public, and never extended beyond its express terms when not indispensable to give effect to the grant.

Railroad Co. v. Defiance, 52 O. S. 262, 307 (1895).

East Ohio Gas Co. v. Akron, 81 O. S. 33, 52 (1909).

Cleveland Electric Railway Co. v. Cleveland, 204 U. S. 116 (1907).

Columbus v. Columbus Gas Co., 76 O. S. 339 (1907).

Central Trust Co. v. Municipal Traction Co., 7 O. L. R. 413 (1909).

2. Exception: Provisions for forfeiture.

Toledo v. Toledo Ry. & Light Co., 2 C. C. n. s. 97; 15 C. D. 441 (1903).

3. Conditions precedent or subsequent. Where the conditions of a franchise do not clearly appear to be conditions precedent, they will be regarded as conditions subsequent.

State, ex rel., v. Boyce, 43 O. S. 46 (1885).

Toledo v. Toledo Ry. & Light Co., 2 C. C. n. s. 97, 105; 15 C. D. 441 (1903).

4. Provisions as to time for beginning or completing construction work. A requirement that the road be completed within a specified time does not prevent the laying of additional switches, etc., thereafter.

Chambers v. C. & S. W. Tr. Co., 5 C. C. n. s. 298; 17 C. D. 193 (1904); aff'd, no rep., 73 O. S. 348.

A condition that the grantee street railway company begin the removal of its old tracks and the construction of new by July 1, 1920, is not such a condition precedent as will authorize a forfeiture of the grant, in the absence of a provision therefor. State v. Traction Co., 104 O. S. 245 (1922).

Where work is delayed by an injunction suit, involving the validity of the franchise, the time for commencing work, as required by the ordinance, should be computed from the date of judgment in the injunction suit.

State, ex rel., v. Boyce, 43 O. S. 46 (1885).

Where a street railway grant required the road to be in operation within six months after the city had completed certain grading, the completion of such grading dates, not from acceptance of work by city from contractor, but from time when the street so graded is in condition for railway to be safely built thereon.

Toledo v. Toledo Ry. & Light Co., 2 C. C. n. s. 97; 15 C. D. 441 (1903).

J. Invalid conditions in valid franchise. That grantee shall not exercise one of its corporate powers.

A condition in a franchise prohibiting the grantee corporation from exercising one of its corporate powers is invalid.

A provision, in an ordinance granting a franchise to a natural gas company, that natural gas shall not be furnished for illuminating pur-

poses, but for heat and power only, is void, and the company may be compelled to furnish natural gas for illuminating purposes.

Springfield v. Springfield Gas Co., 12 C. C. n. s. 392; 21 C. D. 446 (1907); affirmed, no rep., 81 O. S. 537.

See comment, 58 Bull. 125.

Condition in franchise for a street railway that it should not transport freight held invalid.

State v. Dayton Traction Co., 18 C. C. 490; 10 C. D. 212 (1899); affirmed, 64 O. S. 272.

K. Invalid franchises.

1. Injunction against exercise of.

See notes to §§ 9101 and 9105.

2. Limitation of action to enjoin.

See Defiance Water Co. v. Defiance, 68 O. S. 520 (1903).

Defiance v. McGonigale, 150 Fed. 689 (1907); affirming 140 Fed. 621.

3. What defects render franchise invalid. To render a grant invalid the defects or irregularities must be in some respect which is jurisdictional to the grant, or of such a nature that equity and justice require interference by the courts.

Sloane v. People's, etc., Ry. Co., 7 C. C. 84; 3 C. D. 674 (1891).

Defects in a street railway franchise can not be cured by an amendment to the granting ordinance which merely sets forth the facts as to the publication of notice before bids were received, and declares that the publication was sufficient to meet the requirements of the granting ordinance.

Raynolds v. Cleveland, 8 C. C. n. s. 278; 18 C. D. 463 (1906); aff'd on the ground of laches, 77 O. S. 631.

Invalid conditions, not constituting moving consideration for the grant, do not invalidate grant; when.

See Columbus v. Federal Gas & Fuel Co., 2 N. P. n. s. 277 (1903); aff'd, no rep., 72 O. S. 632.

Where the financial interests of the mayor of a municipality will be advanced by the franchise, whatever may be his motive, the franchise is void. Railway v. Cleveland, 19 N. P. n. s. 577, 25 L. D. 467 (1916).

4. Estoppel of municipality permitting expenditures in reliance on grant. Where the grantee of a franchise has expended a large amount of money in reliance thereon, a suit in equity to enjoin the enjoyment thereof, on the ground that the contract was *ultra vires*, can not be maintained. The municipality will be left to its remedy at law.

Pugh v. Edison, etc., Co., 19 C. C. 594; 10 C. D. 573 (1900).

Columbus v. Federal Gas & Fuel Co., 2 N. P. n. s. 277 (1903); aff'd, no rep., 72 O. S. 632.

Raynolds v. Cleveland, 8 C. C. n. s. 278; 18 C. D. 463 (1906); aff'd, no rep., 77 O. S. 631.

Darby v. Norwood, 4 O. L. R. 536; 17 L. D. 253 (1906).

Mill Creek, etc., Ry. Co. v. Carthage, 18 C. C. 216; 9 C. D. 833 (1899); aff'd, no rep., 62 O. S. 636.

See Bunning v. Cincinnati St. Ry. Co., 1 C. C. 323; 1 C. D. 178 (1886).

Mt. Vernon v. State, 71 O. S. 428 (1904).

Detwiler v. Toledo, etc., Co., 6 N. P. 485; 8 L. D. 166.

Estoppel by recital in ordinance as to publication of notice.

Raynolds v. Cleveland, 8 C. C. n. s. 278; 18 C. D. 463 (1906); aff'd, no rep., 77 O. S. 631.

5. **Estoppel of grantee.** A gas company which accepts franchise ordinances, and lays and maintains pipes in the streets pursuant thereto, is estopped from questioning the validity of the ordinances.

Columbus v. Federal Gas & Fuel Co., 13 N. P. n. s. 394 (C. P. 1910).

L. Forfeiture of franchises.

1. **In general.** Must be declared by council, before suit will lie. Toledo v. Toledo Ry. & Light Co., 2 C. C. n. s. 97; 15 C. D. 441 (1903).

The declaration of forfeiture must be unconditional. State v. Northern Ohio Co., 2 Ohio App. 113; 15 C. C. n. s. 577; 24 C. D. 262; reversed, 93 O. S. 466; judgment, 93 O. S. 466; reversed by U. S. Sup. Ct., 245 U. S. 574.

Judicial declaration of forfeiture not essential, when ordinance authorizes municipality to remove tracks.

Stewart v. Ashtabula, 36 W. L. B. 46 (1896).

Stewart v. Ashtabula, 98 Fed. 516, 520 (1899).

But when the right to remove tracks is not reserved in the grant, the right to remove tracks must be exercised by due process of law.

Mill Creek, etc., Co. v. Carthage, 18 C. C. 216; 9 C. D. 833 (1899); aff'd, no rep., 62 O. S. 636.

Cleveland, etc., Co. v. Cleveland, 4 N. P. 21; 6 L. D. 33.

Akron, etc., Co. v. Bedford, 6 N. P. 276; 8 L. D. 142 (1899).

Notice must be given as a condition precedent to forfeiture, where the franchise ordinance provides that failure to comply with its terms and conditions, after twenty days' notice from the council, shall operate as a forfeiture.

Akron v. Northern Ohio, etc., Co., 6 C. C. n. s. 445; 17 C. D. 536 (1905); aff'd, no rep., 75 O. S. 565.

A condition, in a franchise from county commissioners, that removal of old and construction of new tracks begin by a specified date, is not such a condition precedent as will authorize a forfeiture for non-compliance. State v. Traction Co., 104 O. S. 245 (1922).

A franchise, in a consideration of three instalment payments by the grantee, providing for a forfeiture for non-payment "after said third instalment is due" does not authorize a forfeiture for failure to pay the second instalment. State v. Traction Co., 104 O. S. 245 (1922).

Forfeiture for delay in construction.

State, ex rel., v. Boyce, 43 O. S. 46 (1886).

Toledo v. Toledo Ry. & Light Co., 2 C. C. n. s. 97; 15 C. D. 441 (1903).

A forfeiture may be waived by the municipality and neither a competing company nor an abutting owner may bring suit to enforce the forfeiture and thus prevent the municipality from exercising its right of waiver.

Hamilton, etc., Co. v. Hamilton, etc., Co., 5 C. C. 319; 3 C. D. 158 (1890).

Barney v. Mt. Adams, etc., Co., 30 W. L. B. 286.

See Moore v. Elmore, 13 N. P. n. s. 651; 23 L. D. 50 (1910).

2. **Defenses.** Compliance with terms of franchise delayed or prevented by injunction.

State, ex rel., v. Boyce, 43 O. S. 46 (1886).

State v. Cincinnati, etc., Co., 6 C. C. n. s. 167 (1905).

M. **Abandonment of franchise.** The failure for over twenty years

to operate a railway on certain streets raises a presumption of abandonment of the grant as to such streets.

Louisville Trust Co. v. Cincinnati, 76 Fed. 296 (1896).

Where an electric light company removed and dismantled a portion of its equipment from streets, voluntarily and without consent of the municipality, and disabled itself from furnishing electricity for public lighting, it can not resume occupancy of the streets without consent of the municipality. Lighting Co. v. Upper Sandusky, 93 O. S. 428 (1916); aff'd, 251 U. S. 173.

N. Expired franchise.

1. **Rights of corporation in streets.** After the expiration of its franchise, a gas company has no right to further use of the streets without a new grant. In making such new grant the municipality is not limited to regulating the price of gas but may impose other reasonable regulations.

Columbus v. Columbus Gas Co., 76 O. S. 331 (1907).

The municipality may require the company to remove its equipment from the streets within a reasonable time.

Detroit United Ry. v. Detroit, 229 U. S. 39 (1913); affirming 156 Mich. 106.

Right of telephone or telegraph company to renewal of franchise.

See State v. Telephone Co., 14 C. C. 273; 7 C. D. 536 (1897); § 9178.

2. **Title to property.** After the expiration of a franchise of a street railway company, the title to the rails, poles, etc., is in the company. The right to take possession of such property can not, by ordinance, be conferred upon another company.

C. E. Ry. Co. v. Cleveland, 204 U. S. 116 (1907).

3. **Duty to continue service.** After the expiration of its contracts with a municipality, a gas company may wholly withdraw therefrom. It is under no obligation to continue service.

East Ohio Gas Co. v. Akron, 81 O. S. 33, 56 (1909).

But a street railway company has no right to tear up the streets in order to remove its equipment, without restoring the streets to the condition in which it found them. Mt. Vernon v. Berman, 100 O. S. 1 (1919); reversing 11 Ohio App. 472; 30 O. C. A. 81.

Under some circumstances, the municipality may be enjoined from interference with the property of the utility. Toledo v. Ry. & Lt. Co., 259 Fed. 450 (1919).

4. **Renewal of franchise as surrender of rights and obligations under prior franchise.**

See Cleveland v. C. C. Ry. Co., 194 U. S. 517 (1904).

C. E. Ry. Co. v. Cleveland, 137 Fed. 111; 3 O. L. R. 75 (1905); aff'd, 204 U. S. 116 (1907).

O. Remedies.

1. **Injunction against street railway involving validity of franchise.**

See notes to §§ 9101 and 9105.

2. **Of municipality to compel performance of contract obligations.** The solicitor may, under G. C. § 4311 et seq., bring suit in the name of the municipality to enjoin a public utility company from violating

its obligations to the municipality and to compel it to perform its duty.

Gaslight Co. v. Zanesville, 47 O. S. 35 (1889).

Mt. Vernon v. Berman, 100 O. S. 1 (1919).

Springfield v. Springfield Gas Co., 12 C. C. n. s. 392; 21 C. D. 446 (1907); aff'd, no rep., 81 O. S. 537.

Milford v. C. M. & L. Tr. Co., 4 C. C. n. s. 191; 16 C. D. 271 (1904); aff'd, no rep., 71 O. S. 529.

Toledo v. N. W., etc., Gas Co., 5 C. C. 557; 3 C. D. 273 (1890); affirming 6 N. P. 531; 8 L. D. 277.

Specific performance is not a proper remedy.

Matthews v. So. Ohio Tr. Co., 5 C. C. n. s. 179; 15 C. D. 652 (1903); aff'd, no rep., 70 O. S. 436.

Nor is mandamus.

State, ex rel., v. Cleveland El. Ry. Co., 15 C. C. 200; 8 C. D. 474 (1897).

See State v. Union Gas & Electric Co., 14 N. P. n. s. 97 (1913).

Negligent operation of system causing injury to municipal water pipes may be enjoined.

Dayton v. City Ry. Co., 6 C. C. n. s. 41; 16 C. D. 736 (1904).

Quo warranto will lie to oust a railway company from the exercise of a franchise, the terms of which it has violated. State v. Electric Co., 104 O. S. 120 (1922).

State v. Toledo Ry. & L. Co., 3 C. C. n. s. 285; 13 C. D. 603 (1902); reversed, no rep., 73 O. S. 356.

State v. Traction Co., 18 C. C. 490 (1899); aff'd, 64 O. S. 272.

State v. Oakwood St. Ry., 11 C. C. n. s. 263, 265; 20 C. D. 632 (1908); aff'd, no rep., 81 O. S. 502.

State v. Cincinnati, etc., Co., 6 C. C. n. s. 167 (1905).

State v. Telephone Co., 11 C. C. 55; 5 C. D. 311 (1895).

Ohio v. Railway Co., 53 O. S. 189 (1895).

A municipality, having granted a franchise for a street railway including all necessary switches, etc., can not by force prevent the construction of a switch on the ground that it is unnecessary or that the railway has not complied with the terms of the franchise. It can not take the law into its own hands, but must seek its legal remedy.

Akron, etc., Ry. v. Bedford, 6 N. P. 276; 8 L. D. 142 (1899).

Cleveland City Ry. v. Cleveland, 4 N. P. 21; 6 L. D. 33.

Where the franchise of a gas company required it to pay all judgments for damages recovered against the municipality resulting from excavations in the streets, in a suit by the municipality to recover the amount of a judgment paid by it, the charge of the court in the former action as to the issue submitted to the jury therein is conclusive. Gas Co. v. Elyria, 18 C. C. n. s. 156 (1910); aff'd, no rep. 85 O. S. 472.

3. Of municipality, where streets used without franchise. A street railway company occupying streets without a franchise may be treated as a trespasser, or as committing a nuisance, and may be enjoined under G. C. § 4311.

Rogers v. Railway Co., 12 L. D. 136 (1901).

County commissioners may recover damages under G. C. § 2424 from a street railway occupying a county road without a franchise.

Railway v. Commissioners, 56 O. S. 1 (1897).

4. Forfeiture of deposit, made by grantee of franchise, as security for performance. A deposit made by the successful bidder for a street railway franchise, to secure performance, may, on total failure to con-

struct the railway within the specified time, and on abandonment of the enterprise, be forfeited as liquidated damages.

Hattersly v. Waterville, 4 C. C. n. s. 242; 16 C. D. 226 (1904);
aff'd, no rep., 74 O. S. 266.

In settlement of a controversy as to the right of the municipality to forfeit the franchise, the council may authorize a refund of the deposit. Cincinnati Union Depot & T. Co. v. Cincinnati, 105 O. S. 311 (1922).

5. Remedy of holder of franchise. The holder of a franchise may enjoin acts of the municipality, other public service companies, or individuals which materially and injuriously interfere with the exercise of the franchise, or which violate contract obligations.

Hamilton, etc., Traction Co. v. Hamilton, etc. Transit Co., 69 O. S. 402 (1903).

Cleveland v. Cleveland City Ry. Co., 194 U. S. 517 (1904).

Millcreek, etc., R. Co. v. Carthage, 18 C. C. 216; 9 C. D. 833 (1899);
affirmed, 62 O. S. 636.

Millcreek, etc., R. Co. v. St. Bernard, 8 N. P. 288; 11 L. D. 454 (1901).

Woodland Ave., etc., Co. v. Cleveland, 7 N. P. n. s. 161; 17 L. D. 763.

Suit may be brought in federal court where the acts of the municipality violate contract obligations.

Cleveland v. Cleveland City Ry. Co., 194 U. S. 517 (1904).

Where a gas company laid pipes in a street, under a franchise, and subsequently the street was vacated and the abutting owner, a railroad company, changed the grade of the former street in order to lay tracks, and in so doing exposed the gas pipes, and made it necessary that the same be relaid, the railroad company is liable to the gas company for the cost thereof.

Union, etc., Co. v. Cincinnati, etc., Ry. Co., 14 N. P. n. s. 171 (1913).

6. Remedy of third persons under contracts. A street railway company may be enjoined from increasing fares in violation of a contract with private parties.

Humphrey Co. v. Cleveland Ry. Co., 9 N. P. n. s. 609 (1910).

But contracts with a street railway company are made in contemplation of existing laws and ordinances.

Cemetery v. Cincinnati St. Ry. Co., 11 C. C. n. s. 429; 21 C. C. 429 (1908).

7. Remedy of citizen to obtain service. A citizen may, by mandamus, compel a public service corporation to furnish him service in compliance with the terms of its franchise.

State v. Union Gas & El. Co., 14 N. P. n. s. 97 (1913).

But citizens can not maintain an action at law for failure to furnish service.

Blunk v. Dennison, etc., Co., 71 O. S. 250 (1904).

STREET RAILROADS.

See § 9100 et seq.

Section 3748. (Tax levy therefor; railway companies to pay portion of cost.) To provide a fund to pay all or part of the cost of such sprinkling, the board or officer having

charge of the repair of streets in the corporation, each year may estimate the cost thereof, and cause to be levied a tax therefor upon the general tax duplicate of the corporation, in the same manner and subject to the same conditions as other levies for municipal purposes, except that the levy may be in addition to the amount authorized for municipal purposes. Upon such estimate, the levy shall be made by the council in the corporation. Street railroad companies operating within such corporation shall annually pay into the treasury of the municipal corporation one cent per lineal foot of track upon sprinkled streets as their part of the cost of such sprinkling. (95 v. 448, § 4; R. S. Bates § 1536-175.)

Section 3749. (Council may require street railway company to sprinkle its right of way.) The council of a municipality by resolution may require any interurban or street railway company to sprinkle with water its right of way on any street, alley or public highway, or any portion thereof lying within the limits of the municipality. (February 9, 1906, 98 v. 5, § 1; Bates § 1536-175a.)

Section 3750. (Municipality may contract, when. Costs and penalty; a lien.) Upon failure of any interurban or street railway company after sixty days' notice to the person having charge or management of such interurban or street railway company in such municipality, to comply with the provisions of such resolution, the municipality may do such sprinkling or contract therefor, through its proper officials in accordance with the laws relating to contracts, and the cost thereof shall be charged against such interurban or street railway company so directed to sprinkle, and shall be a lien upon all the real estate and leasehold interest of such interurban or street railway company within the county wherein such municipality is situate, and such charge and cost together with a penalty of twenty-five dollars for each and every day of failure on the part of such interurban or street railway company to sprinkle as required, may be collected in any court of competent jurisdiction or the lien enforced in the manner provided by law. All charges, costs and penalties collected under the provisions of this section shall be paid into the general fund of the municipality to be disposed of as the council thereof may direct. (February 9, 1906, 98 v. 5, § 2; April 11, 1911, 102 v. 48; R. S. Bates § 1536-175b.)

LIGHTING BRIDGES AND RAILROADS.

Section 3762. (Council may require bridge or railway to be lighted.) When deemed necessary by the council of a municipality to have a bridge or railway, located in whole or in part in such corporation, owned, possessed, or operated by an individual, company, association or corporation, or any portion thereof, lighted, the council shall pass an ordinance for that purpose, requiring such individual, company, association, or corporation, to light such bridge or railway within a specified time, but it shall not require such railway or portion thereof to be lighted with electric arc lights. (R. S. Sec. 2494; May 7, 1902, 95 v. 419; March 23, 1872, 69 v. 47, § 429; R. S. Bates § 1536-175.)

This act is constitutional, being a police regulation.

C. H. & D. R. R. Co. v. Sullivan, 32 O. S. 152 (1877).

C. C. C. & St. L. Ry. Co. v. St. Bernard, 15 C. C. 588; 8 C. D. 385 (1898).

This section applies only to steam railroads. A street or interurban railway can not be compelled to light its bridge or railroad.

Railway v. Ottawa, 85 O. S. 229 (1912); reversing, 13 C. C. n. s. 562; 22 C. D. 197.

A company operating a railroad, the track of which extends within the municipality, is subject to this act, although it is neither the owner nor lessee.

C. H. & D. R. R. Co. v. Bowling Green, 57 O. S. 336 (1897) affirming 9 C. C. 524; 6 C. D. 531.

No notice to the railway company of the intention of the council to pass an ordinance is required. The only notice provided is under § 3764.

C. C. C. & St. L. Ry. Co. v. St. Bernard, 19 C. C. 299; 10 C. D. 415 (1898).

See also Ravenna v. Penna. Co., 45 O. S. 118, 123 (1887).

Section 3763. (Specifications in ordinance. Removal of lights and fixtures obstructing view of fixed signal.) The ordinance shall specify the manner in which such bridge or railway shall be lighted, the number and style of lamp posts, gas posts, electric lights or other lights and fixtures, and the time such lights shall be kept burning in each twenty-four hours; but no such lights, poles or fixtures, nor any lights, poles or fixtures, located by any municipal corporation on its streets, alleys or public grounds shall be required to be so placed as to interfere with a clear view of any fixed signal used in the operation of such railroad from such points thereon as such view is required for safe operation. And all lights, poles or fixtures heretofore placed so as to interfere with such clear view shall, within a reasonable time, be re-located to conform to this act. Provided, however, that nothing herein contained shall be construed as excusing any

railway company from lighting its bridges and tracks, when required so to do or from paying any reasonable assessment or charge therefor. (May 3, 1913, 103 v. 470; April 13, 1894, 91 v. 147; May 7, 1869, 66 v. 220, § 430; R. S. § 2495.)

The municipality has authority to prescribe the kind of light that shall be employed, and where an electric light plant is in operation within such city or village lighting its streets and furnishing light to its inhabitants, an ordinance is not unreasonable because it requires a railroad company to use the particular kind of lamp and illuminating material in use for lighting the streets of such municipality.

Railway Co. v. Bowling Green, 57 O. S. 336 (1897); affirming 9 C. C. 524; 6 C. D. 531.

See also s. c., 10 C. C. 63; 4 C. D. 39.

An ordinance under this section should receive a reasonable construction. The instrument should be reasonably certain in its requirements, but no particular form of words is necessary. It will not be held defective as failing to fix a specified time for the performance of such requirement by the company, if its language, taking the ordinance altogether, is sufficiently definite to inform the company that such lighting is required to be done, how and when it is to be done.

St. Mary's v. Railroad Co., 60 O. S. 136 (1899); reversing 14 C. C. 202; 7 C. D. 661.

A requirement that the company proceed to do the lighting by electricity within twenty days after notice of the passage of the ordinance is not necessarily unreasonable.

St. Mary's v. Railroad Co., 60 O. S. 136 (1899); reversing 14 C. C. 202; 7 C. D. 661.

An ordinance prescribing that "the number of hours that said electric lights shall be required to be lighted during each period of twenty-four hours shall be the same as the said council does now or may hereafter require for electric lamps within the limits of said village for lighting streets, shall be lighted," is sufficiently definite.

Railroad Co. v. Bowling Green, 57 O. S. 336 (1897); affirming 9 C. C. 524; 6 C. D. 531.

It is a good defense that the ordinance is unreasonable in that the light required will obscure headlights and endanger the service of the company.

Railway Co. v. St. Bernard, 15 C. C. 588; 8 C. D. 385 (1898).

An electric light company in a municipality is bound to furnish light impartially to all applicants, including railroad companies, at a reasonable price.

Railway Co. v. Bowling Green, 57 O. S. 336 (1897); affirming 9 C. C. 524; 6 C. D. 531.

Section 3764. (Notice of requirement shall be given; time and manner.) Notice of such requirement shall be given at least twenty days before penalty or charge shall be imposed for default, and such notice may be given by delivering a written or printed copy of the ordinance to an owner or part owner, or any person having possession, charge or management of such bridge or railway. When such ordinance requires the lighting of a railway, service of such written or printed copy of the ordinance upon a ticket or freight agent of such railway company in such municipality, and if

there is no such ticket or freight agent therein, upon any ticket or freight agent of such railway company in the county wherein such municipality is located, shall be sufficient, and shall charge the person, company, corporation, or partnership, owning or operating such railway with notice of the passage of the ordinance and the requirements thereof. (R. S. Sec. 2496; May 6, 1902, 95 v. 369; May 7, 1869, 66 v. 220.)

For insufficient service of notice under former law, see Dayton v. C. C. C. & St. L. Ry. Co., 46 W. L. B. 287 (1901). C. C. C. & St. L. Ry. Co. v. De Graff, 20 C. C. 710; 10 C. D. 825 (1899).

No notice to the railway company of the intention of the council to pass an ordinance is required. The only notice required is under this section.

Railway Co. v. St. Bernard, 19 C. C. 299; 10 C. D. 45 (1900).

A requirement that the company proceed to do the lighting by electricity within twenty days after the passage of the ordinance is not necessarily unreasonable.

St. Mary's v. Railroad Co., 60 O. S. 136 (1899).

Section 3765. (Procedure on failure to light bridge or railway.) If the person, company, or corporation, owning, possessing or operating such railway or bridge, neglects or fails to do such lighting in conformity with the provisions of the ordinance, for twenty days after such notice, the council may immediately cause the lighting to be done at the expense of such person, company, or corporations. (R. S. Sec. 2497; March 23, 1872, 69 v. 47, § 432.)

Although the lamps were not placed by the municipality on the track, the municipality may recover where the lamps lighted the tracks, although the street was incidentally lighted as well.

Railway Co. v. St. Bernard, 19 C. C. 299; 10 C. D. 415 (1900).

Section 3766. (Assessment for expense of such lighting.) The council may direct the manner in which the expense of lighting such bridge or railway shall be assessed and collected. When so assessed, the amount shall be a debt due against and payable by such person, company, or corporation, and shall be a lien to be enforced as any other lien on such bridge and the land on which it is built, or upon the real estate of the railway company or leasehold interest within the county wherein such municipality is located. (R. S. Sec. 2498; March 23, 1872, 69 v. 47, § 433.)

When, on default of the railway company, such lighting is procured to be done by the council, the expense of such lighting may, by the council, be assessed or declared a lien upon any of the real estate of the railway company within the municipality.

C. H. & D. R. R. Co. v. Sullivan, 32 O. S. 152 (1877).

The liability of the railway company to pay such expenses can only be enforced by suit or action, or in the language of the constitution, "by due course of law." It is not a tax or an assessment in the nature of a tax for local improvements, and can not therefore be summarily placed upon the county duplicate and collected as a tax or assessment proper.

C. H. & D. R. R. v. Sullivan, 32 O. S. 152 (1877).

Where an assessing ordinance, fixing the expense of such lighting, has been enacted in conformity with this section, such ordinance of itself furnishes prima facie evidence of the expense of the lighting.

St. Mary's v. Railroad Co., 60 O. S. 136 (1899).

Section 3767. (How lien may be enforced.) The charge may be collected or the lien enforced in the manner provided for the assessment of damages and expenses for making public improvements. (R. S. Sec. 2499; May 7, 1869, 66 v. 221, § 434.)

The mode of collecting such charge or enforcing the lien thereof, prescribed by this section, is by suit in the name of the municipal corporation, in a court of competent jurisdiction.

Railroad v. Sullivan, 32 O. S. 152 (1877).

STREET RAILWAYS.

Section 3768. (Terms and conditions of construction and operation to be fixed by council; renewal of grant.) No corporation, individual or individuals shall perform any work in the construction of a street railroad, until application for leave is made to the council in writing, and the council by ordinance has granted permission, prescribed the terms and conditions upon, and the manner in which, the road shall be constructed and operated, and the streets and alleys to be used and occupied therefor, but the council may renew any such grant at its expiration upon such conditions as may be considered conducive to the public interest. (R. S. Sec. 2501; April 21, 1896, 92 v. 206; March 4, 1887, 84 v. 40; R. S. 1880; June 12, 1879, 76 v. 156, § 4; May 7, 1869, 66 v. 217, § 411.)

Sections 3768 to 3780 apply to street railway lines wholly within municipalities. Sections 9100 et seq. relate to street railways wherever located.

In case of conflict between the special provisions of § 3768 et seq. and the general provisions of § 9100 et seq., the more specific provisions of § 3768 et seq. will prevail.

Railway Co. v. Railway Co., 5 C. C. n. s. 583; 16 C. D. 180 (1903); aff'd, no rep., 73 O. S. 364.

See, *Raynolds v. Cleveland*, 2 C. C. n. s. 139, 150; 14 C. D. 215 (1902); aff'd, no rep., 76 O. S. 619.

Hamilton v. Railway, 5 N. P. 457; 8 L. D. 174.

As construed by both state and federal courts, sections 3768-3777 and 9101-9139 authorize municipalities to make contracts for the

maintenance and operation of street railway lines. *Columbus Co. v. Columbus*, 253 Fed. 499 (1918); affirmed, 249 U. S. 399; 17 O. L. R. 49.

Use of streets by street railways.

See also note to § 3714.

A street railway company occupying or using a street, without a grant of the right to do so, may be treated as a trespasser or as committing a nuisance.

Rogers v. Railway, 12 L. D. 136 (1901).

In re Avon Beach, etc., Ry., 3 N. P. n. s. 561, 564; 16 L. D. 87 (1905).

See *Horstman v. Railway*, 1 N. P. n. s. 25; 13 L. D. 670; 14 L. D. 545; reversed, 72 O. S. 93.

A street car is a vehicle.

Ry. Co. v. Ry. Co., 5 C. C. n. s. 583, 588 (1903); aff'd, no rep., 73 O. S. 364.

Cincinnati, etc., Co. v. Snell, 54 O. S. 197 (1896).

Difference between use of streets by street railways, and by other passenger vehicles.

See *Isom v. Low Fare Ry. Co.*, 10 C. C. n. s. 90; 19 C. D. 583 (1907); aff'd, no rep., 77 O. S. 638.

Street Railway v. Cumminsville, 14 O. S. 545 (1863).

Akron, etc., Co. v. Erie R. R. Co., 7 C. C. n. s. 199, 203; 18 C. D. 36 (1905).

Franchise.

Generally. See note to § 3714.

Outside of municipalities. § 9101 et seq.

Permission to occupy streets is a franchise and easement. When accepted by the grantee, and acted upon, permission to occupy streets for a street railway is more than a license; "it is a vested property right, in the nature of a franchise or easement in or to the particular portion of the street designated in the grant itself."

Hamilton, etc., Traction Co. v. Hamilton, etc., Transit Co., 69 O. S. 402, 410 (1903).

State v. Dayton Traction Co., 18 C. C. 490, 499; 10 C. D. 212 (1899).

Application.

Is a condition precedent to passage of final grant.

Raynolds v. Cleveland, 2 C. C. n. s. 139, 152; 14 C. D. 215 (1902); affirmed, without report, 76 O. S. 619.

The presentation to the council of an ordinance for a street railway grant is a sufficient written application.

Sanfleet v. Toledo, 10 C. C. 460; 8 C. D. 711 (1893); affirmed, no rep., 54 O. S. 620.

The application may be for two routes in the alternative, leaving it to the municipality to grant either one.

Simmons v. Toledo, 5 C. C. 124, 141; 3 C. D. 64 (1889).

See *Somers v. Cincinnati*, 8 Am. L. R. 612, 622.

A grant to a corporation is not invalid because the application was filed before the articles of incorporation had reached the secretary of state, where the corporation was fully organized before the grant was made.

Sloane v. People's, etc., Co., 7 C. C. 84; 3 C. D. 674 (1891).

Grant must be made by council. A street railway franchise within a municipality can only be granted by the council, by ordinance. G. C. § 9101.

The authority to grant a franchise can not be delegated by the council to a board or officer. *State v. Bell*, 34 O. S. 194 (1877); *Sommers v. Cincinnati*, 8 Am. L. R. 612, 622.

Hamlet trustees, under the former municipal code, were authorized to grant a street railway franchise. *Commissioners v. Railway Co.*, 21 C. C. 769; 11 C. D. 664 (1896). See in re Newburgh Twp., 15 C. C. 78; 8 C. D. 24 (1897).

Ordinance. Preliminary or establishing ordinance under former statute. See note to § 3769.

Granting ordinance, requisites, etc. See note to § 3714.

As a contract. When accepted by the grantee, a franchise ordinance constitutes a contract. *Interurban Ry. v. Commission*, 98 O. S. 287 (1918); *Hattersly v. Waterville*, 4 C. C. n. s. 242; 16 C. D. 226 (1904); affirmed, no rep., 74 O. S. 466; *Cincinnati St. Ry. Co. v. Smith*, 29 O. S. 291 (1876); *Cleveland v. Ry. Co.*, 194 U. S. 517, 534 (1904); *Hamilton, etc., Co. v. Hamilton, etc., Co.*, 69 O. S. 402, 410 (1903); *Columbus v. Street Railroad Co.*, 45 O. S. 98 (1887).

The repeal of a granting ordinance is of no effect after acceptance. *Cincinnati, etc., Co. v. Carthage*, 36 O. S. 631 (1881).

Terms and conditions of franchise. See also note to § 3770.

The council may, in the grant, reserve the right to thereafter impose terms and conditions other than those expressly stipulated. *Kinsman, etc., Co. v. Broadway, etc., Co.*, 36 O. S. 239 (1880).

Payments to municipality. Car license fees, etc. Car license fees can not be imposed, where the franchise requires the company to repair, clean and sprinkle streets between tracks. *Columbus v. Jeffrey*, 1 N. P. n. s. 265; 12 L. D. 756 (1903).

But when provided for in the grant, such fees are a valid obligation. *Cincinnati v. Mt. Auburn, etc., Co.*, 28 W. L. B. 276 (1892); *Cincinnati St. Ry. Co. v. Cincinnati*, 8 N. P. 80; 11 L. D. 15; *Cincinnati v. Cincinnati St. R. Co.*, 6 N. P. 140; 9 L. D. 235 (1899); *Cincinnati v. Cincinnati, etc., Co.*, 22 L. D. 723 (1911).

It has been held that liability for car license fees ceases on expiration of the franchise.

Cincinnati v. Cincinnati, etc., Co., 30 W. L. B. 321.

Such fees are the property of the municipality and not of the state.

Cincinnati St. Ry. Co. v. Smith, 29 O. S. 291, 296, 306 (1876).

Percentage of gross receipts. See § 14770. *Cincinnati v. Railway*, 12 N. P. n. s. 305, 22 L. D. 723 (1911); *Telephone Co. v. Columbus*, 88 O. S. 466 (1912); *Gas Co. v. Columbus*, 96 O. S. 530 (1917).

A contract, providing that whenever the municipality should desire to reinforce a viaduct so that it would be safe for heavy vehicular traffic or electric cars, the railway company would pay a stipulated sum toward the expense, was held to render the company liable whenever the viaduct was so reinforced, although the company had ceased to use the viaduct, with the consent of the municipality. *Railway Co. v. Cincinnati*, 96 O. S. 297 (1917); affirming, 24 C. C. n. s. 241; 9 O. L. R. 190; 24 L. D. 201.

Route. The council can not make a grant of two or more routes in the alternative, leaving the choice of routes to the company.

Somers v. Cincinnati, 8 Am. L. R. 612, 622.

See *Cincinnati, etc., Co. v. Smith*, 29 O. S. 291 (1876).

But the application may be for two routes in the alternative, leaving it to the municipality to grant either one.

Simmons v. Toledo, 5 C. C. 124, 141; 3 C. D. 64 (1889).

The grant must be of the route as published under § 3769. A grant can not be made of only a part of such route, nor can another street be included.

Raynolds v. Cleveland, 2 C. C. n. s. 139, 152, 154; 14 C. D. 215 (1902); aff'd, no rep., 76 O. S. 619.

But the grant may include only a part of the route described in the application.

Simmons v. Toledo, 5 C. C. 124; 3 C. D. 64 (1889); aff'd, no rep., 30 W. L. B. 392.

A line may fork and be but one route.

Aydelott v. Cincinnati, 11 C. C. 11, 17; 4 C. D. 86 (1893).

Belle v. Glenville, 5 C. C. n. s. 461; 17 C. D. 181; aff'd, no rep., 73 O. S. 392, 397; s. c., 75 O. S. 574.

A franchise over a street to the "corporation line" does not, by virtue of an extension of municipal limits over tracks which had been built under a franchise from the county commissioners, supersede and abrogate the latter franchise. *Railway v. Springfield*, 15 N. P. n. s. 241, 249; 24 L. D. 277 (1913).

Paving. See § 3776 and note.

Maintenance of bridge or viaduct. A franchise provided that "whenever the * * * city shall desire to reinforce the Liberty Street viaduct * * * so that it will be safe for the operation of heavy vehicular traffic or electric cars over the entire structure, the * * * Railway Company shall be required to pay \$7,000 towards defraying the expenses thereof". Subsequently by consent the route was abandoned, the tracks removed and use of the viaduct by the company ceased. Thereafter the city reconstructed the viaduct. Held, the railway company was liable for the \$7,000 being part of the consideration for the franchise and not conditional upon its continued use by the railway. *Railway Co. v. Cincinnati*, 96 O. S. 297 (1917); affirming, 24 C. C. n. s. 241; 9 O. L. R. 190; 24 L. D. 201.

A franchise granted by county commissioners, over a free turnpike, required the railway company to repair certain bridges. Subsequently the territory was annexed to a city which, after notice to the railway company, repaired a bridge. Held, that as the duty of repair rested on the county commissioners, the city, in making the same, was a mere volunteer and could not recover the cost from the railway company. *Interurban Co. v. Cincinnati*, 94 O. S. 269 (1916); affirming, 18 N. P. n. s. 553.

Limitation of time for beginning or completing construction work. See note to § 3714.

Rate of fare. See note to § 3770.

Transfers. A provision requiring transfers is valid; although a company operating intersecting lines is placed at a disadvantage in bidding.

Raynolds v. Cleveland, 8 C. C. n. s. 278; 18 C. D. 463 (1906); aff'd, no rep., on ground of laches, 77 O. S. 631.

Where by the negligence of a conductor a passenger is given a defective transfer and is wrongfully ejected from a car for refusing to pay an additional fare, he may recover damages for the tort.

Railway v. Conner, 74 O. S. 225 (1906).

Exclusive franchise. The council can not by express grant give exclusive right of way in streets to one company.

Hamilton, etc., Traction Co. v. Hamilton, etc., Transit Co., 69 O. S. 402, 409 (1903).

Cincinnati St. Ry. Co. v. Smith, 29 O. S. 291 (1876).

Kinsman, etc., Ry. Co. v. Broadway, etc., R. Co., 36 O. S. 239, 250 (1880).

Toledo, etc., Co. v. Toledo, etc., Co., 6 C. C. 362; 3 C. D. 493 (1892); aff'd, 50 O. S. 603.

See Columbus v. Columbus Gas Co., 76 O. S. 309, 339 (1907).

A provision that "only one set of wires and poles shall be erected upon any one street" was construed not to give grantee a monopoly of the street, but to limit the grantee to one set of poles and wires on a street.

Mulhenny v. Toledo Central St. Ry., 20 C. D. 686.

Grant over right of way of another company. Straddle tracks. The grantee of a street railway franchise in streets already occupied and used under a prior franchise can not, without appropriation proceedings, take possession of the streets, where the new use will materially interfere with the use under prior franchise.

Hamilton, etc., Traction Co. v. Hamilton, etc., Transit Co., 69 O. S. 402, 409 (1903).

Isom v. Low Fare Ry. Co., 10 C. C. n. s. 89, 101; 19 C. D. 583 (1907); aff'd, no rep., 77 O. S. 638.

Hamilton, etc., Co. v. Hamilton, etc., Co., 5 C. C. 319; 3 C. D. 158 (1890).

Toledo Consol. St. Ry. v. Toledo, Elec., etc., Co., 6 C. C. 362; 3 C. D. 493 (1892); aff'd, 50 O. S. 603.

See §§ 9103, 9108.

Duplication of grant over same right of way by consent. Consent of the stockholders of the corporation holding the prior grant is necessary to a grant over the same right of way to other persons.

Isom v. Low Fare Ry. Co., 10 C. C. n. s. 89, 101; 19 C. D. 583 (1907); aff'd, no rep., 77 O. S. 638.

Joint use of tracks by other street railways. Under a franchise stipulating that another company, then in existence, should have the right to jointly use the tracks of the grantee, upon a reasonable compensation, and stipulating that the franchise was subject to such other terms and conditions as the council might thereafter prescribe, it was held that a subsequent grant of franchise over the route of the grantee, to a company subsequently organized, subject to the payment of a reasonable compensation, was valid.

Kinsman, etc., Co. v. Broadway, etc., Co., 36 O. S. 239 (1880).

Broadway, etc., Co. v. Brooklyn, etc., Co., 10 W. L. B. 72.

See §§ 9103, 9108.

Construction of terms and conditions. See also note to § 3714.

The grant of a street railway franchise is strictly construed in favor of the public.

C. E. Ry. Co. v. Cleveland, 204 U. S. 116 (1907).

Railroad Co. v. Defiance, 52 O. S. 262, 307 (1895).

E. Ohio Gas Co. v. Akron, 81 O. S. 33, 52 (1909).

Central Trust Co. v. Municipal Traction Co., 7 O. L. R. 413 (1909).

A renewal or extension of the term of grants by implication is not favored.

C. E. Ry. Co. v. Cleveland, 137 Fed. 111; 3 O. L. R. 75 (1905); affirmed, 204 U. S. 116.

Central Trust Co. v. Municipal Traction Co., 7 O. L. R. 413 (1909).
Cleveland v. C. E. Ry. Co., 201 U. S. 529 (1906).

A franchise for an extension of tracks, to terminate with the franchise for the main line, should be construed with reference to the main line franchise at that time, and not as subsequently extended.

C. E. Ry. Co. v. Cleveland, 204 U. S. 116 (1907).

The words "other appliances" in a grant for "all necessary side tracks, curves, switches, and other appliances," do not include a shelter house in the middle of the street.

Hamilton, etc., Transit Co. v. Hamilton, 1 N. P. 366; 4 L. D. 10.

A provision prohibiting the carriage of freight has been held invalid.

State v. Dayton Traction Co., 18 C. C. 490; 10 C. D. 212 (1899); affirmed, 64 O. S. 272.

Where the provisions of the ordinance are plain and unambiguous, the practical construction of the contract by conduct of the parties is without effect.

Cincinnati v. Cincinnati St. Ry. Co., 6 N. P. 140; 9 L. D. 235 (1899).

Grantee of franchise. The grantee must be expressly named in the granting ordinance.

State v. Bell, 34 O. S. 194, 198 (1877).

A grant may be made to a person describing him as trustee.

Simmons v. Toledo, 5 C. C. 124; 3 C. D. 64 (1889); aff'd, no rep., 30 W. L. B. 392.

A franchise may be assigned by the grantee, although the word "assignee" or "assigns" is not used.

State v. Northern Ohio, etc., Co., 2 Ohio App. 113; 15 C. C. n. s. 577; 24 C. D. 262; reversed, 93 O. S. 466; judgment, 93 O. S. 466; reversed by U. S. Sup. Ct., 245 U. S. 574.

Misnomer of grantee. Use of the word *Railroad* instead of *Railway* in the name of grantee company does not invalidate a grant where there is no such *Railroad* company, and the grant was accepted by the grantee and expenditures made thereunder.

State v. Oakwood St. Ry. Co., 11 C. C. n. s. 263; 20 C. D. 632 (1908); aff'd, no rep., 81 O. S. 502.

See note to § 3770.

Renewal of grant by implication. A renewal or extension of the term of a grant by implication is not favored in law.

C. E. Ry. v. Cleveland, 137 Fed. 111; 3 O. L. R. 75 (1905); affirmed, 204 U. S. 116.

Cleveland v. C. E. Ry. Co., 201 U. S. 529 (1906).

Central Trust Co. v. Municipal Traction Co., 7 O. L. R. 413; 169 Fed. 308 (1909).

An ordinance consenting to the consolidation of several companies on condition that but one fare should be charged for a continuous ride does not extend the franchise of any line.

C. E. Ry. Co. v. Cleveland, 204 U. S. 116 (1907); affirming 137 Fed. 111; 3 O. L. R. 75.

Central Trust Co. v. Municipal Traction Co., 169 Fed. 308; 7 O. L. R. 413 (1909).

Permission by the municipality that the motive power be changed to electricity does not have the effect of renewing the franchise.

Cincinnati v. Railway Co., 30 W. L. B. 321; affirmed, no rep., 52 O. S. 609.

Renewal by extension of route.

See Belle v. Glenville, 5 C. C. n. s. 461; 17 C. D. 181 (1904); aff'd, no rep., 73 O. S. 392, 397; 75 O. S. 574.

- Isom v. Low Fare Ry. Co.*, 10 C. C. n. s. 89, 95; 19 C. D. 583 (1907); aff'd, no rep., 77 O. S. 638.
C. E. Ry. Co. v. Cleveland, 204 U. S. 116 (1907); affirming 137 Fed. 111; s. c., 3 O. L. R. 75.
Central Trust Co. v. Municipal Traction Co., 7 O. L. R. 413; 169 Fed. 308 (1909).

Renewal before or after expiration of original franchise.

A grant may be renewed before its expiration.

State, ex rel., v. East Cleveland Ry. Co., 6 C. C. 318, 323; 3 C. D. 471 (1891); aff'd, no rep., 27 W. L. B. 64.

Cleveland v. C. E. Ry. Co., 201 U. S. 529 (1906).

Cleveland v. C. C. Ry. Co., 194 U. S. 517 (1904).

Belle v. Glenville, 5 C. C. n. s. 461, 470; 17 C. D. 181, aff'd, no rep., 73 O. S. 392, 397; 75 O. S. 574.

Lima v. Cramer, 5 N. P. n. s. 113; 17 L. D. 245 (1906).

Cincinnati v. St. Ry. Co., 31 W. L. B. 308; 1 L. D. 591 (1894).

A renewal grant is not invalid because made after expiration of original franchise, where negotiations therefor were begun before expiration and not abandoned, but by agreement the grant was deferred until enabling legislation was enacted.

State v. Oakwood St. Ry. Co., 11 C. C. n. s. 263; 20 C. D. 632 (1908); aff'd, no rep., 81 O. S. 502.

To holder of original franchise only. The council may renew a grant only to the grantee of the original franchise, or its assigns.

Isom v. Low Fare Ry. Co., 10 C. C. n. s. 89, 95; 19 C. D. 583 (1907); aff'd, no rep., 77 O. S. 638.

Raynolds v. Cleveland, 21 C. C. n. s. 228 (1905).

Renewal of part of grant. The council may renew a grant as to one part of the route only. *Lima v. Cramer*, 5 N. P. n. s. 113, 121; 17 L. D. 245 (1906).

Terms and conditions of renewal grant. A municipality, in granting an extension of a franchise, may require the railroad company to widen a bridge occupied by it, or in lieu thereof, to pay a stipulated sum. *Elyria v. Traction Co.*, 8 N. P. n. s. 85; 19 L. D. 294 (1908).

A provision authorizing "express passenger service and other special cars", at a special fare, with stops at certain places only, is valid. *Stafford v. Railway*, 20 C. C. n. s. 129 (1912).

A requirement in a renewal grant that fares to certain points outside the municipality be increased, is inoperative as to points where a contract as to fares is in effect between the railway company and others.

Humphrey Co. v. Cleveland Ry. Co., 9 N. P. n. s. 609; 20 L. D. 510 (1910).

See *Cemetery v. Cincinnati, etc., Co.*, 11 C. C. n. s. 429; 21 C. D. 51 (1908).

Where a company accepted a renewal grant in which the municipality reserved the right to grant the use of its track to any other company, on such terms as the municipality should deem equitable, and the municipality exercised its right, the court will not interfere if the terms are reasonable. Nor can the company object because a part of its business will be taken away.

Broadway, etc., Co. v. Brooklyn, etc., Co., 10 W. L. B. 72.

See § 9103.

Ordinance, renewing all rights, covers unconstructed lines. An ordinance which provides that the rights, privileges and franchises granted under former ordinances "be and the same are hereby renewed and extended," continues and renews the right of the grantee to lay tracks on a portion of the territory covered by the original ordinance in which no tracks had been laid, although such territory is not specifically mentioned in the renewing ordinance.

Akron v. Northern Ohio, etc., Co., 6 C. C. n. s. 445; 17 C. D. 536 (1905); aff'd, no rep., 75 O. S. 565.

Renewal grant as a contract. A renewal grant, when accepted and acted upon, is a contract.

Street Ry. v. Cleveland, 7 N. P. n. s. 161; 17 L. D. 763.

See note to § 3714.

Renewal grant as a waiver of rights under prior grant. A renewal grant, when accepted, operates as a waiver of rights under the prior grant.

C. E. Ry. Co. v. Cleveland, 137 Fed. 111; 3 O. L. R. 75 (1905); affirmed, 204 U. S. 116.

Cleveland v. C. C. Ry. Co., 194 U. S. 517 (1904).

Where the grantee of a franchise failed to construct tracks on one street specified in the grant, the right of the municipality to forfeit the franchise as to such street is waived by a new grant renewing all the rights, privileges and franchises of the original grant.

Akron v. No. Ohio, etc., Co., 6 C. C. n. s. 445; 17 C. D. 536 (1905); aff'd, no rep., 75 O. S. 565.

G. C. §§ 3769 and 3770 not applicable to renewals. The provisions of §§ 3769 and 3770 do not apply to the renewal of a grant. A renewal is not invalid because made without the publication of notice, consents of property owners and competitive bidding.

State, ex rel., v. East Cleveland R. R. Co., 6 C. C. 318; 3 C. D. 471 (1891); aff'd, no rep., 27 W. L. B. 64.

Clement v. Cincinnati, 16 W. L. B. 355 (1886).

Haskins v. Cincinnati, etc. Co., 4 W. L. B. 1126 (1880).

Pelton v. East Cleveland R. R. Co., 22 W. L. B. 67.

Lima v. Cramer, 5 N. P. n. s. 113; 17 L. D. 245 (1906).

See §§ 3770 and 9106.

Remedies. Of municipality to compel performances of contract obligations. See note to § 3714.

Of municipality and abutting owners, involving validity of franchise. See note to §§ 9101 and 9105.

Of holder of franchise. See note to § 3714.

Municipal ownership of street railways. A municipality is not authorized to own or operate a street railway.

Cleveland v. C. C. Ry., 3 C. C. n. s. 563, 566; 13 C. D. 373 (1902).

Section 3769. (Proceedings to establish a street railway route.) Nothing mentioned in the preceding section shall be done, no ordinance or resolution to establish or define a street railroad route shall be passed, no action inviting proposals to construct and operate such railroad shall be taken by the council, and no ordinance for the purpose specified in such section shall be passed, until public notice of the appli-

cation therefor has been given by the clerk of the council once a week, for the period of at least three consecutive weeks in one or more of the daily papers, if there be such, and if not, then in one or more weekly papers published in the corporation. (April 15, 1908, 99 v. 103, § 30; October 22, 1902, 96 v. 32, § 30; Bates Stats. § 1536-185; see R. S. Sec. 2502.)

Publication of notice.

Is jurisdictional to grant. A written application and publication of notice are conditions precedent to passage of final grant. *Raynolds v. Cleveland*, 2 C. C. n. s. 139, 152; 14 C. D. 215 (1902); affirmed, no rep., 76 O. S. 619.

Not required for extension of tracks or renewal of franchise. Publication of notice is not required for an extension of tracks.

State v. Cincinnati, etc., Co., 19 C. C. 79; 10 C. D. 418 (1889).

Somers v. Cincinnati, 8 Am. L. Rec. 612.

See also, *Ry. Co. v. Ry. Co.*, 5 C. C. n. s. 583, 596; 16 C. D. 180 (1903); affirmed, without report, 73 O. S. 364.

Nor on renewal of grant.

State v. E. Cleveland R. R., 6 C. C. 318; 3 C. D. 471 (1891); affirmed, without report, 27 W. L. B. 64.

Lima v. Cramer, 5 N. P. n. s. 113; 17 L. D. 245.

In one newspaper. Effect of general ordinance regulating publication. Publication in one newspaper is sufficient where the council, acting under the notice, passes an ordinance granting a franchise, although a general ordinance requires publication in two newspapers.

Simmons v. Toledo, 5 C. C. 124; 3 C. D. 64 (1889); affirmed, 30 W. L. B. 392.

Aydelot v. Cincinnati, 11 C. C. 11; 4 C. D. 486 (1893).

See G. C. § 4229.

Defective publication, rendering franchise invalid, can not be cured by an amendment to the granting ordinance declaring the publication sufficient.

Raynolds v. Cleveland, 8 C. C. n. s. 278; 18 C. D. 463 (1906); affirmed, without report, 77 O. S. 631.

The duty of publishing an ordinance rests upon the municipality. In an action by a city solicitor to oust a street railway company from its franchise, it is incumbent on the municipality to establish the omission. In the absence of evidence, a presumption arises that publication was regularly made.

State v. Railway, 11 C. C. n. s. 263; 20 C. D. 632 (1908); affirmed, without report, 81 O. S. 502.

Estoppel of municipality. A recital in a granting ordinance that proper publication had been made, when relied upon by the grantee of the franchise and expenditures made on the faith thereof, estops the municipality from maintaining an action to invalidate the grant because of defective publication.

Raynolds v. Cleveland, 8 C. C. n. s. 278; 18 C. D. 463 (1906); aff'd, no rep., on ground of laches, 77 O. S. 631.

Mandamus to compel. An owner of land, abutting on the proposed line, can not by mandamus compel the clerk to publish notice.

State v. Henderson, 33 O. S. 644 (1883).

Grant must be of route as advertised. A grant can not be made of a part only of route as advertised; nor can a street not included in advertisement or bids be embraced in grant.

Raynolds v. Cleveland, 2 C. C. n. s. 139, 152, 154; 14 C. D. 215 (1902); aff'd, no rep., 76 O. S. 619.

Compare Simmons v. Toledo, 5 C. C. 124; 3 C. D. 64.

Action by council prior to publication. "Establishing ordinance."

Former law. Former statute construed as to necessity and propriety of action by the council prior to publication. ("Establishing" ordinance or resolution.)

Raynolds v. Cleveland, 2 C. C. n. s. 139, 151-153; 14 C. D. 215 (1902); affirmed, without report, 76 O. S. 619.

Aydelot v. Cincinnati, 11 C. C. 11; 4 C. D. 486.

Sloane v. People's, etc., Co., 7 C. C. 84, 93; 3 C. D. 674 (1891).

Hamilton v. C. & H., etc., Ry., 5 N. P. 457; 8 L. D. 174.

State v. Henderson, 38 O. S. 644 (1883).

Section 3770. (When consent of property owners necessary.) No such grant shall be made, except to the corporation, individual or individuals, that agree to carry passengers upon such proposed railroad at the lowest rates of fare, and shall have previously obtained the written consent of a majority of the property holders upon each street or part thereof, on the line of the proposed street railroad, represented by the feet front of the property abutting on the several streets along which such road is proposed to be constructed. When within the year preceding, a street railway has been operated upon such street or part thereof, under a grant or renewal of a grant which has expired or will expire within two years, it shall not be necessary to obtain the consent of the property holders abutting thereon, if the number of tracks on the street, public way or part thereof is not increased beyond the number for which consents were originally obtained. (April 15, 1908, 99 v. 103, § 30; October 22, 1902, 96 v. 32, § 30; Bates Stats. § 1536-185.)

Consents of property owners. See notes to §§ 9105 and 9106.

Lowest rates of fare. The council is not authorized to grant a franchise to the company which will bid "the lowest price of commutation tickets in packages." Such a bid is not in compliance with this section.

Cincinnati St. R. R. Co. v. Smith, 29 O. S. 291 (1876).

Rates of fare fixed in a granting ordinance, with no reservation of the right to change the fare, can not be reduced by the council during the life of the grant.

Cleveland v. C. C. Ry. Co., 194 U. S. 517 (1904); affirming 94 Fed. 385.

A provision in a franchise granted by the council of a suburban village, that, in the event of its annexation to a neighboring city, the rate of fare should not exceed five cents, is binding. Interurban Co. v. Cincinnati, 93 O. S. 109 (1915).

Where rates of fare are fixed in a franchise contract, the courts can not relieve the street railway from its obligations on the ground

that, because of changed conditions, the operation will result in losses. *Columbus Co. v. Columbus*, 249 U. S. 399; 17 O. L. R. 119 (1919); affirming, 253 Fed. 497; *Cincinnati v. Railway*, 14 N. P. n. s. 420 (1913).

The public utilities commission is not authorized to change rates of fare which are fixed in the franchise contract. *Interurban Co. v. Columbus*, 98 O. S. 287 (1918).

Ordinance or resolution inviting bids.

Takes effect when. Council may fix time for taking effect. *Sloane v. Peoples, etc., Co.*, 7 C. C. 84, 93; 3 C. D. 674 (1891). See *State v. Henderson*, 38 O. S. 644 (1883). G. C. § 4227.

Provisions in.

Held valid. Requirement that fare shall entitle passenger to transfer. *Raynolds v. Cleveland*, 8 C. C. n. s. 278; 18 C. D. 463 (1906); aff'd, no rep., on ground of laches, 77 O. S. 631.

Requiring each bidder to accompany his bid with a bond, or cash deposit, to secure performance of bid.

Compton v. Johnson, 9 C. C. 532; 6 C. D. 110 (1895).

Simmons v. Toledo, 5 C. C. 124; 3 C. D. 64 (1889).

See *Raynolds v. Cleveland*, 8 C. C. n. s. 278, 279; 18 C. D. 463 (1906); aff'd, no rep., 77 O. S. 631.

Sloane v. Peoples, etc., Co., 7 C. C. 84; 3 C. D. 674 (1891).

Limiting time for the filing of bids and bonds.

Simmons v. Toledo, 5 C. C. 124; 3 C. D. 64 (1889).

Providing for "express passenger service and other special cars" at a specified fare, with stops at certain places only. *Stafford v. Railway*, 20 C. C. n. s. 129 (1912).

Providing free transportation for mail carriers (franchise granted prior to the enactment of § 516). *Steubenville v. Traction Co.*, 13 Ohio App. 493; 31 O. C. A. 513 (1920); motion to certify record overruled, 19 O. L. R. 51.

Establishing route through private property of president of applicant corporation. Competitive bidding is not prevented where owner of the property is estopped.

Harrison v. Mt. Auburn Cable Co., 17 W. L. B. 265.

Held invalid. A requirement that controversies between the grantee of the franchise and its employes shall be settled by arbitration.

Raynolds v. Cleveland, 2 C. C. n. s. 154; 14 C. D. 215 (1902); aff'd no rep., 76 O. S. 619.

Inviting bids for the lowest price of commutation tickets in packages.

Cincinnati St. R. R. v. Smith, 29 O. S. 291, 308 (1876).

Waiver of conditions in. A requirement as to a bond may be waived by the council, if no favoritism is practiced and no injury results to city.

Sloane v. Peoples, etc., Co., 7 C. C. 84; 3 C. D. 64 (1891).

Simmons v. Toledo, 5 C. C. 124; 3 C. D. 110 (1889).

Bids and bidding.

By whom made. A bid by an individual "for himself and associates" not named is the bid of the individual. The reference to associates does not invalidate the bid.

Compton v. Johnson, 9 C. C. 532, 542; 6 C. D. 110 (1895).

Gallagher v. Johnson, 30 W. L. B. 139 (1893).

Right of council to reject bids.

May reject all bids. The council can not be compelled to grant a franchise, even to the lowest bidder.

State v. Bell, 34 O. S. 194, 199 (1877).

State v. Henderson, 38 O. S. 644, 650 (1883).

Sloane v. People's, etc., Co., 7 C. C. 84, 93; 3 C. D. 674 (1891).

Rejection of part of bids. The council may reject a sham or fraudulent bid.

Compton v. Johnson, 9 C. C. 532; 6 C. D. 110 (1895).

Or a bid not accompanied by a bond when required, or not filed within the time limited.

Simmons v. Toledo, 5 C. C. 124; 3 C. D. 64 (1889).

But it may not reject a bid which substantially complies with the establishing ordinance and is not shown to be collusive or fraudulent.

Compton v. Johnson, 9 C. C. 532; 6 C. D. 110 (1895).

Gallagher v. Johnson, 31 W. L. B. 24.

Gallagher v. Johnson, 30 W. L. B. 139 (1893).

Knorr v. Miller, 5 C. C. 609; 3 C. D. 297 (1891); aff'd 27 W. L. B. 64.

Irregularities in bids, bonds, and in the opening of bids. Informalities in a bid, or a bond filed by a bidder, which do not go to the substance, may be disregarded.

Compton v. Johnson, 9 C. C. 532; 6 C. D. 110 (1895).

Simmons v. Toledo, 5 C. C. 124; 3 C. D. 64 (1889); aff'd, no rep., 30 W. L. B. 392.

Irregularities on the part of the council in opening and considering bids do not, under all circumstances, invalidate the award.

Sloane v. Peoples, etc., Co., 7 C. C. 84; 3 C. D. 784 (1891).

Simmons v. Toledo, 5 C. C. 124; 3 C. D. 64 (1889); aff'd, no rep., 30 W. L. B. 392.

Grant must conform to advertisement and bid. A grant can not include a street not advertised or bid for.

Raynolds v. Cleveland, 2 C. C. n. s. 139, 154; 14 C. D. 215 (1902); aff'd, no rep., 76 O. S. 619.

Injunction against grant to person not lowest bidder. A grant to a person not the lowest bidder may be enjoined.

Knorr v. Miller, 5 C. C. 609; 3 C. D. 297 (1891); affirmed, 27 W. L. B. 64.

Compton v. Johnson, 9 C. C. 532; 6 C. D. 110 (1895).

State v. Bell, 34 O. S. 194, 199 (1877).

But only on clear proof that the council erred in determining which bid was the lowest.

Simmons v. Toledo, 5 C. C. 124; 3 C. D. 64 (1889).

Renewal grant.

Competitive bidding and consents not required. A renewal grant is not rendered invalid because made without competitive bidding or consents.

State, ex rel., v. East Cleveland R. R. Co., 6 C. C. 318; 3 C. D. 471 (1891); aff'd, no rep., 27 W. L. B. 64.

Clement v. Cincinnati, 16 W. L. B. 355 (1886).

Haskins v. Cincinnati, etc., Co., 4 W. L. B. 1126 (1880).

Pelton v. Railroad, 22 W. L. B. 67.

See Isom v. Low Fare Ry. 10 C. C. n. s. 89; 19 C. D. 583 (1907); aff'd, no rep., 77 O. S. 638.

Deposit or bond; liquidated damages or penalty. A certified check, to secure performance of a bid, deposited by a bidder to whom a franchise is awarded, is supported by a consideration. On abandonment of the enterprise, the deposit may be deemed liquidated damages and forfeited to the municipality.

Hattersly v. Waterville, 4 C. C. n. s. 242; 16 C. D. 226 (1904);
aff'd, no rep., 74 O. S. 466.

But under a bond given by the grantee of a franchise conditioned upon the construction of the railway within the time specified, and to save the city harmless from claims for damages, the penal sum was held to be a penalty and not liquidated damages. *Elyria v. Railway*, 23 C. C. n. s. 578 (1912).

A deposit was made by a depot company, pursuant to the terms of a franchise, to become the property of the municipality if the franchise should be forfeited. The council subsequently revoked the franchise, and authorized the return of the deposit. Held, the return of the deposit was authorized. *Depot Co. v. Cincinnati*, 105 O. S. 311 (1922).

Section 3771. (Grant not valid for more than twenty-five years.) No grant or renewal of a grant for the construction or operation of a street railroad, shall be valid for a greater period than twenty-five years from the date of such grant or renewal, and after such grant or renewal of a grant is made, whether by special or general ordinance, the municipality shall not, during the term of such grant or renewal, release the grantee from any obligation or liability imposed by the terms of such grant or renewal of a grant. (April 15, 1908, 99 v. 103, § 30; October 22, 1902, 96 v. 32, § 30; Bates Stats. § 1536-185.)

See § 9102.

Franchises generally, see notes to § 3714.

Twenty-five year limitation. A grant made for a period exceeding twenty-five years is valid to the extent of twenty-five years.

Sommers v. Cincinnati, 8 Am. L. R. 612.

An unlimited franchise granted prior to enactment of this section was held to be perpetual.

State v. Columbus Ry. Co., 1 C. C. n. s. 145; 14 C. D. 609 (1903);
aff'd, 73 O. S. 363.

Compare *East Ohio Gas Co. v. Akron*, 81 O. S. 33.

Where there are no provisions in the state constitution or statutes, and no prior adjudications by state courts, to the contrary, a franchise duly granted and accepted, in which no duration is specified, is perpetual. *Northern Ohio Co. v. Ohio*, 245 U. S. 574 (1918); reversing 93 O. S. 466, and affirming, 2 Ohio App. 113; 15 C. C. n. s. 577; 24 C. D. 262.

Duration of extensions of route.

See *Belle v. Glenville*, 5 C. C. n. s. 461; 17 C. D. 181 (1904);
aff'd, no rep., 73 O. S. 392, 397; 75 O. S. 574.

C. E. Ry. Co. v. Cleveland, 137 Fed. 111; 3 O. L. R. 75 (1905);
aff'd, 204 U. S. 116.

Rights of parties after expiration of franchise.

C. E. Ry. Co. v. Cleveland, 204 U. S. 116 (1907).

Mt. Vernon v. Berman, 100 O. S. 1 (1919).

East Ohio Gas Co. v. Akron, 81 O. S. 33, 56 (1909).

Columbus v. Columbus Gas Co., 76 O. S. 331 (1907).

The so-called Rogers law (92 O. L. 277) authorized a franchise for 50 years, and empowered the municipal corporation to fix the rate of fare at the end of 20 years and every 15 years thereafter. It was held that the municipality could fix the fare within a reasonable time after the expiration of 20 years. Rogers v. Cincinnati, 22 N. P. n. s. 401 (1919). See Wyoming v. Traction Co., 104 O. S. 325 (1922).

Release of obligation or liability. A modification of the contract, made in good faith for the better accommodation of the public, is not void under this section.

Clement v. Cincinnati, 16 W. L. B. 355 (1886); aff'd, 19 W. L. B. 74.

Cleveland v. Cleveland City Ry. Co., 194 U. S. 517 (1904).

Cleveland v. Cleveland Electric Ry. Co., 201 U. S. 529 (1906).

Cincinnati v. Cincinnati St. Ry. Co., 2 N. P. 298; 2 L. D. 468 (1893).

A sum due a municipality as car license fees can not be released except on payment of the full amount. The principles of account stated and accord and satisfaction, based on a less amount, do not apply.

Cincinnati St. Ry. Co. v. Cincinnati, 8 N. P. 80; 11 L. D. 15.

A purchaser of a street railway at judicial sale assumes the obligation of the original grantee of the franchise to operate the road. Gress v. Fort Loramie, 100 O. S. 35 (1919); reversing, 21 N. P. n. s. 81.

Section 3775. (Grade of streets when street railroad is constructed.) Before a street railroad shall be constructed on any street less than sixty feet in width, with a roadway of thirty-five feet or under, the council shall provide that the crown of the street shall be made a nearly flat uniform curve from curb to curb, without ditch gutters, and in such manner as to give wheeled vehicles the full use of the roadway up to the face of the curb. When the tracks of two street railroads, or of a street railroad and a steam railroad, cross each other at a convenient grade on a street, the crossings shall be made with crossing-frogs of the most approved pattern and materials, and kept up and in repair at the joint expense of the companies owning such tracks. (R. S. Sec. 2503; April 20, 1881, 78 v. 296; R. S. 1880; May 7, 1867, 66 v. 217 § 413.)

The grade may be established in the granting ordinance.

Cincinnati, etc., Ry. Co. v. Carthage, 36 O. S. 631 (1881).

Crossing-frogs. This requirement is constitutional. It applies to all companies, whether their lines were constructed before or after its passage. All companies are under the duty of renewing with crossing frogs which may be found of a more approved pattern.

Cincinnati St. R. Co. v. C. H. & D. R. R., 32 W. L. B. 4 (1894).

Grade crossing over steam railroad. A street railway company will not be enjoined from constructing a crossing over a steam railroad at grade, under a franchise from the municipality. It is for the council to determine the grade.

Railway Co. v. Railway Co., 5 C. C. n. s. 583; 16 C. D. 180 (1903); aff'd, no rep., 73 O. S. 364.

See note to § 9108.

This section, and not § 592 et seq., govern the crossing of railroads and street railways at grade.

Railway Co. v. Railroad Co., 21 C. C. 391; 12 C. D. 113 (1898); aff'd, no rep., 64 O. S. 550.

An agreement by a street railway to construct and maintain, at its own expense, a crossing over a steam railroad, in a highway, at grade, is *numdum pactum* where the only consideration is a grant, by the steam railroad, of the right to cross. Harmon v. Traction Co., 10 Ohio App. 372; 31 O. C. A. 575 (1918). Motion to certify record overruled; s. e., 21 N. P. n. s. 76.

Section 3776. (Pavement of streets where railroads are constructed.) The council may require any part or all of the track, between the rails of any street railroad constructed within the corporate limits, to be paved with stone, gravel, boulders, or wooden or asphaltic pavement, as may be deemed proper, but without the corporate limits, paving between the rails with stone, boulders, wooden or asphaltic pavement shall not be required. (R. S. Sec. 2504; April 21, 1890, 87 v. 246; May 7, 1867, 66 v. 217, § 414.)

Under this section the council may require a street railway to pave between the rails, although the franchise is silent in regard thereto.

Rep. Atty. Gen. 1911-1912, p. 1571.

Brick pavement is not authorized by this section. Railway v. Springfield, 15 N. P. n. s. 241, 249; 24 L. D. 277 (1913).

Where a street railway was built beyond the municipal limits, under a franchise from county commissioners which required certain macadam paving, and the municipal limits are extended, this section does not authorize the municipality to assess against the street railway, the cost of brick paving between the tracks thus brought within the municipal limits, although the municipal franchise provided that the cost of paving ordered by the municipality should be assessed against the street railway. Railway v. Springfield, 15 N. P. n. s. 241, 249; 24 L. D. 277 (1913).

In the absence of a statute or franchise obligation, a street railway company can not be required to pave. Railway v. Springfield, 15 N. P. n. s. 241, 249; 24 L. D. 277 (1913).

Franchise obligation to repair. When the granting ordinance provides that the company shall repair the street between rails, and that in case of default the city may do the work and recover the cost; the city is not divested of its right to control the street, and it may cause new improvements to be made and determine the kind of improvement. The company, in accepting the grant, incurs the obligation to repair.

Columbus v. Street R. R. Co., 45 O. S. 98 (1887).

Cincinnati, etc., Ry. Co. v. Carthage, 36 O. S. 631 (1881).

A franchise required a street railway to keep certain space "in constant repair", but provided that it "shall not be required to repave by virtue of this obligation to repair". The renewal of worn out paving blocks on a viaduct was held to be a "repair" and not a repaving. Railway v. Cleveland, 97 O. S. 122 (1918).

Where a company operating a single track street railway, when a street was paved, paid for seven feet of pavement, as required by its franchise, and nine years later laid another track in the street, replacing the pavement, it is not liable to pay for fourteen feet of

pavement, as if it had been operating a double track railway at the time the pavement was first laid. *Traction Co. v. Stewart*, 19 C. C. n. s. 27 (1908).

Under a franchise requiring the railway to pave between tracks "simultaneously" with the paving of the rest of the street, it was held to be the duty of the railway, upon reasonable notice from the authorities, to proceed. *State ex rel. v. C. D. & M. Electric Co.*, 103 O. S. 280 (1921); s. c., 104 O. S. 120.

Failure to keep a street in repair, as required by its franchise, may render the street railway company liable in damages to a person injured by reason of the defect in the street. *Cleveland Ry. Co. v. Heller*, 15 Ohio App. 346 (1921). Motion to certify record overruled, 19 O. L. R. 652.

Recovery by municipality for paving.

Cleveland v. Cleveland, etc., R. R., 1 Cleve. L. R. 304 (1878).

Cleveland v. C. E. Ry., 1 N. P. 413; 3 L. D. 92; reversed, 60 O. S. 586.

On failure of railway company to pave, as required by its franchise, within a reasonable time, a cause of action accrues to the municipality without notice or demand on the company.

Cincinnati, etc., Ry. Co. v. Carthage, 36 O. S. 631 (1881).

Unless the franchise ordinance provides for notice.

Columbus v. Street Ry. Co., 45 O. S. 98 (1887).

Measure of damages is the reasonable cost of the work. *Ib.*

A municipality can not assess the cost of paving against a street railway company under G. C. § 3812 but should collect directly from the company under its franchise. *Rep. Atty. Gen.* 1912, p. 1832.

But the municipality may agree with the street railway that the entire street shall be paved by the municipality and that the street railway's share of the cost be paid to the municipality upon the same terms as special assessments against abutting owners are payable. *Newark v. Fromholtz*, 102 O. S. 81 (1921).

Assessment for street improvements. An interurban railway operating upon a public highway under a franchise is not subject to assessment for improvement of such highway as an owner of property abutting thereon. *Railway Co. v. Scott*, 101 O. S. 13 (1920).

Miscellaneous. A requirement to pave "between the rails" does not include the "devil strip," nor require paving to the end of the ties. *Street Ry. v. Cleveland*, 7 N. P. n. s. 161; 17 L. D. 763.

Car license fees can not be imposed by a municipality where franchise requires company to repair, sprinkle, etc., streets between tracks.

Columbus v. Jeffrey, 1 N. P. n. s. 265; 13 L. D. 639 (1903).

A provision in a franchise requiring the company to pay paving assessments is valid.

Railway Co. v. Columbus, 3 N. P. n. s. 438; 16 L. D. 102 (1905).

Columbus v. Railroad, 45 O. S. 98 (1887).

Such a provision does not make the railway company liable to the municipality for any part of the damages awarded to property owners as caused by the improvement of the street.

Railway v. Dayton, 1 Dayton (Iddings), 165.

Acceptance of franchise requiring railway company to pay paving assessment precludes railway company from certain defenses otherwise available.

Ry. Co. v. Columbus, 3 N. P. n. s. 438; 16 L. D. 102 (1905).

Right to pay paving assessments in installments as an abutting owner.

See 35 W. L. B. 345.

Repayment by the company to property owners, of assessments, under terms of franchise. The owner at time of repayment is entitled thereto.

Harkness v. Schiely, 13 C. C. 177; 7 C. D. 108 (1896).

An action against a street railway company for a tortious injury to a pavement, requiring a paving contractor to repair the same under its contract with the city, is barred in four years under G. C. § 11224.

Barber, etc., Co. v. N. O. T. & L. Co., 202 Fed. 817 (C. C. A. 1913).

Section 3777. (Council may grant extension of street railroad.) The council of a municipality may grant permission, by ordinance, to any corporation, individual, or company, owning, or having the right to construct, a street railroad, to extend the track, subject to the provisions of law relating to the construction, operation and extension of street railways, within or without, or partly within or without any municipal corporation, on any street or streets where council deems such extension beneficial to the public. When such extension is made, the charge for carrying passengers on a street railroad so extended and its connections made with any other road or roads, by consolidation, shall not be increased by reason of such extension or consolidation. (R. S. Sec. 2505; Bates Stats. § 1536-188; March 9, 1880, 77 v. 43; R. S. 1880; May 7, 1869, 66 v. 140, § 1.)

Power of council to require extensions. See § 614-51.

The reference to passengers in this section does not prohibit the transportation of freight.

State v. Traction Co., 18 C. C. 490; 10 C. D. 212; aff'd, 64 O. S. 272.

What constitutes an extension.

See *Sommers v. Cincinnati*, 8 Am. L. R. 612, 623, 624.

An extension can only be predicated of an existing line, or a present right to construct a line.

Cleveland, etc., Co. v. Urbana, etc., Ry., 5 C. C. n. s. 583, 595; 16 C. D. 180 (1903); aff'd, no rep., 73 O. S. 364.

An extension is not a new route; it has no independent life; it depends upon, and is a part of, the line to which it is added.

C. E. Ry. Co. v. Cleveland, 137 Fed. 111, 130, 132; 3 O. L. R. 75, 102, 106 (1905); aff'd, 204 U. S. 116.

May be by branches from main line. The extension need not begin at terminus of line, or run in same general direction. It may be by branches from the main line.

Belle v. Glenville, 5 C. C. n. s. 461; 17 C. D. 181 (1904); affirmed, no rep., 73 O. S. 392, 397; 75 O. S. 574.

Cincinnati v. Cincinnati St. Ry., 31 W. L. B. 308 (1894).

Sommers v. Cincinnati, 8 Am. L. R. 612, 623.

Aydelott v. Cincinnati, 11 C. C. 11, 17; 4 C. D. 486 (1893).

Over existing tracks. The council may grant a franchise for an extension over existing tracks of another company, but the grantee must appropriate the right to use such tracks before taking possession.

Street Ry. Co. v. Street Ry. Co., 50 O. S. 603 (1893).

Kinsman, etc., Co. v. Broadway, etc., Co., 36 O. S. 239 (1880).

Broadway, etc., Co. v. Brooklyn, etc., Co., 10 W. L. B. 72.

Lima v. Cramer, 5 N. P. n. s. 113, 117 (1906).

See G. C. § 9103.

Additional switches. Old switches can not be enlarged or extended, nor additional switches laid, without new authority from the municipality.

Harner v. Columbus, etc., Ry., 29 W. L. B. 387 (1893).

Chestnut v. Railway, 15 L. D. 336 (1905); affirmed, 76 O. S. 567.

Chambers v. Cleveland, etc., Co., 5 C. C. n. s. 298; 17 C. D. 193 (1904); aff'd, no rep., 73 O. S. 348.

Consents. See notes to § 9105.

Where the extension is to be partly over an existing street and partly over the same street relocated, over private property not yet acquired by the municipality, the consent of the municipality as prospective owner can not be counted. Carpenter v. Traction Co., 18 N. P. n. s. 1 (1915).

Under article XVIII of the constitution, a home rule municipal charter may authorize the grant of a street franchise to a public utility without the consents of abutting owners. Billings v. Railway, 92 O. S. 478 (1915).

Consents of abutting owners, as required by G. C. § 9105, must be procured for each street to be occupied by the extension.

Mt. Auburn, etc., Co. v. Neare, 54 O. S. 153 (1896); affirming 29 W. L. B. 171.

Sommers v. Cincinnati, 8 Am. L. R. 612.

Harner v. Railway, 29 W. L. B. 387 (1893).

But when the extension is over existing tracks of another company, consents need not be procured.

State v. Cincinnati, etc., Co., 19 C. C. 79; 10 C. D. 418 (1899).

Broadway, etc., Co. v. Brooklyn, etc., Co., 10 W. L. B. 72.

Mt. Auburn Cable R. Co. v. Neare, 54 O. S. 153 (1896).

Lima v. Cramer, 5 N. P. n. s. 113; 17 L. D. 245 (1906).

Compare, Sanfleet v. Toledo, 10 C. C. 460; 8 C. D. 711 (1893).

Where existing tracks occupy the street without right, the franchise having expired, consents are requisite.

Isom v. Low Fare Ry. Co., 10 C. C. n. s. 89; 19 C. D. 583 (1907); aff'd, no rep., 77 O. S. 638.

See G. C. §§ 9106, 3770.

Consents for an extension inure to persons to whom given and assigns, only, and can not be used by others.

Isom v. Low Fare Ry. Co., 10 C. C. n. s. 89, 99; 19 C. D. 583 (1907); aff'd, no rep., 77 O. S. 638.

See Forest City Ry. Co. v. Day, 73 O. S. 83 (1905).

A consent given for one specified extension is not available as a consent for a different extension.

Neare v. Mt. Auburn, etc., Co., 29 W. L. B. 171; 4 L. D. 475; aff'd, 54 O. S. 153.

Publication of notice not required for an extension.

State, ex rel., v. Cincinnati, etc., Co., 19 C. C. 79; 10 C. D. 418 (1899).

Sommers v. Cincinnati, 8 Am. L. Rec. 612.

See also Railway Co. v. Railway Co., 5 C. C. n. s. 583, 596, 597; 16 C. D. 180 (1903); aff'd, no rep., 73 O. S. 364.

Period for which extensions may be made.

Belle v. Glenville, 5 C. C. n. s. 461; 17 C. D. 181 (1904); aff'd, no rep., 73 O. S. 392, 397; 75 O. S. 574.

C. E. Ry. Co. v. Cleveland, 137 Fed. 111, 132; 3 O. L. R. 75, 106 (1905); affirmed, 204 U. S. 116.

Isom v. Low Fare Ry. Co., 10 C. C. n. s. 89, 95; 19 C. D. 583 (1907); aff'd, no rep., 77 O. S. 638; § 3771.

Change of motive power. Where animal power was specified in the original grant, an extension is not rendered invalid by the specification of electricity, where the line had been operated for years by electricity.

Belle v. Glenville, 5 C. C. n. s. 461; 17 C. D. 181 (1904); aff'd, no rep., 73 O. S. 392, 397; 75 O. S. 574.

Discretion of council. The discretion of the council in authorizing an extension will not be interfered with by the courts except upon a showing of fraud or bad faith.

Sims v. Street R. Co., 37 O. S. 556 (1882).

Cincinnati v. Cincinnati, etc., Co., 31 W. L. B. 308 (1894).

The extension may be granted upon conditions.

Cincinnati v. Cincinnati, etc., Co., 31 W. L. B. 308 (1894).

The council may, in its discretion, grant a franchise for an extension over several routes, leaving the choice of route to the company.

Sommers v. Cincinnati, 8 Am. L. R. 612, 622.

Miscellaneous. An ordinance granting permission for an extension is not a grant of corporate power, but a permit to exercise powers already granted.

Sims v. Street R. Co., 37 O. S. 556 (1882).

A steam railroad can not be extended under this section.

Cincinnati Inc. Plane Ry. v. Cincinnati, 7 N. P. 541; 5 L. D. 562 (1897).

An extension may be granted beyond the termini specified in the articles of incorporation of the company.

Sims v. Street Railway, 37 O. S. 556 (1882).

INTERURBAN RAILROADS.

Section 3778. (Franchises to interurban railroads for the purpose of securing terminals.) The council of any municipality may grant a franchise upon such terms and conditions as it may prescribe for the building of any interurban railroad having, constructing, or building, ten miles or more of track outside of such municipality, to any company or companies using electric or other motive power, save steam, for the purpose of securing to such company or companies access to or terminals within such municipality. The council may authorize such company to build and construct tracks and to operate cars thereon, on any street or streets, or parts of streets, of such municipality, upon which tracks have not already been laid and where the consent of the owners of a majority foot frontage has already been obtained by such company. (April 2, 1906, 98 v. 253, § 1.)

Cited, *Railway v. Poland*, 10 N. P. n. s. 621.

A franchise requirement that city mail carriers be transported free within city limits was held not invalidated by the subsequent enactment of G. C. § 516. *Steubenville v. Traction Co.*, 13 Ohio App.

493, 31 O. C. A. 513 (1920). Motion to certify record overruled, 19 O. L. R. 51.

Section 3779. (Condemnation proceedings when they can not agree.) The council may permit such interurban railroad to make use of the tracks or such parts of the tracks of any existing street railroad company within the limits of the municipality by agreement with such existing company. If no such agreement can be arrived at, the interurban railroad company may be authorized by council to condemn the right to make use of the tracks of such existing company upon the payment of proper compensation. But the interurban railroad company shall be permitted to condemn and make use of not more than one-eighth of the trackage of such company within the municipality, or so much as may be necessary to give the interurban company access to terminals within the municipality, or to enable such company to secure a right of way over such tracks through such municipality. The interurban railway company seeking permission to enter or pass through a municipality shall not be required to submit to competitive bidding on such routes. (April 2, 1906, 98 v. 253, § 1.)

Contracts for use of city tracks.

See § 9130.

Appropriation of use of tracks.

See notes to § 9108.

Section 3780. (Competitive bidding shall not be required.) No grant or franchise shall be made to such interurban company for a period longer than twenty years, and no franchise so granted shall be used for the purpose of operating a municipal street car system, it being the only intent hereof to provide a method whereby bona fide interurban railroads may gain access to, and a terminal within, and an exit from, a municipality. (April 2, 1906, 98 v. 253, § 1.)

STEAM RAILROADS.

Section 3781. (Regulation of rate of speed.) When a railroad track is laid in a municipal corporation, the council by ordinance may regulate the speed of all locomotives and railroad cars within the corporate limits, but such ordinance shall not require a less rate of speed than four miles an hour, and in villages having a population of two thousand or less, it shall not require a less rate than eight miles an hour. The corporate authorities, by civil action, may re-

cover from an engineer, conductor, or company, violating such ordinance, not less than five dollars nor more than fifty dollars for each offense. (R. S. Sec. 2500; April 27, 1877, 74 v. 132, § 1.)

For regulation of speed of street cars see § 3632.

This section applies to places within municipal limits other than public crossings. *Blancke v. Railroad*, 103 O. S. 178 (1921).

An ordinance regulating the speed of trains is rendered invalid by a provision for its enforcement by criminal proceedings.

Caskey v. Belle Center, 8 N. P. n. s. 153; 19 L. D. 726 (1908). But designating the penalty a "fine" does not render an ordinance "invalid" so long as no imprisonment or criminal process is sought to be enforced thereunder. The "fine" may be collected by civil action as a penalty. *Toledo C. & O. R. R. Co. v. Miller*, 108 O. S. — (1923); *Railroad v. De Leone*, 289 Fed. 201 (1923).

An ordinance "regulating the speed of automobiles and railway trains" is not invalid as containing more than one subject. *Railroad v. De Leone*, 289 Fed. 201 (C. C. A. Ohio 1923).

An ordinance regulating the speed of trains is *prima facie* reasonable, but the presumption may be rebutted. *Railway v. Grambo*, 103 O. S. 471 (1921); *Blancke v. Railroad*, 103 O. S. 178 (1921); *Railroad v. De Leone*, 289 Fed. 201 (1923).

Ordinances limiting the speed of trains are properly within the police power of a municipality. *Atlantic Coast Line v. Goldsboro*, 232 U. S. 549 (1914); *Blancke v. Railroad*, 103 O. S. 178 (1921); *Railway v. Grambo*, 103 O. S. 471 (1921).

Violation of speed ordinance; effect of in negligence cases. In an action to recover for an injury alleged to have been caused by cars moving on a railroad track, proof that the company was moving its cars in violation of a city ordinance at the time the injury was inflicted, while not sufficient *per se* to create a liability, is yet competent to go to the jury as tending to show negligence and to excuse contributory negligence.

Meek v. Pennsylvania Co., 38 O. S. 632 (1883).

Hart v. Devereux, 41 O. S. 565 (1885).

Railway v. Buxton, 3 Ohio App. 298; 20 C. C. n. s. 22 (1914); *aff'd*, no rep. 91 O. S. 423.

Signals by bell and whistle at crossings.

G. C. § 8853.

Section 3809. (Council may provide for light, water and certain public necessities.) The council of a city may authorize, and the council of a village may make, a contract with any person, firm or company for lighting the streets, alleys, lands, lanes, squares and public places in the municipal corporation, or for furnishing water to such corporation, or for the collection and disposal of garbage in such corporation, or for the leasing of the electric light plant and equipment, or the waterworks plant, or both, of any person, firm, company or municipality or for the purchase of electric current for furnishing light, heat or power to such municipi-

pality or the inhabitants thereof for a period not exceeding ten years, and the requirement of a certificate that the necessary money is in the treasury, shall not apply to such contract, and such requirement shall not apply to street improvement contracts extending for one year or more, nor to contracts made by the board of health, nor to contracts made by a village for the employment of legal counsel, nor to contracts by a municipality for the leasing or acquisition of the electric light plant and equipment, or the waterworks plant, or both, of any person, firm or corporation therein situated. (May 6, 1913, 103 v. 526; October 22, 1902, 96 v. 37, § 45; Bates Stats. § 1536-205.)

See also notes to §§ 3983, 3994 and 9324.

Power to lease a waterworks plant is expressly granted to villages by this section.

Moore v. Elmore, 13 N. P. n. s. 651; 23 L. D. 50 (C. P. 1910).

A village prevented from constructing a waterworks system, by inability to vote sufficient bonds, may grant a franchise to an individual to construct the system, and at substantially the same time lease the same, as provided by this section.

Moore v. Elmore, 13 N. P. n. s. 651; 23 L. D. 50 (C. P. 1910).

Power of non-charter governed city to purchase water works plant and make payment in part with municipal bonds, and by remortgaging the plant, see Opins. Atty. Gen. 1919, p. 1480; 11 Dept. Rep. 227.

Section 3981. (Municipalities may contract for a water supply; contract to be submitted to a vote.) A municipal corporation may contract with any individual or individuals or an incorporated company for supplying water for fire purposes, or for cisterns, reservoirs, streets, squares and other public places within the corporate limits, or for the purpose of supplying the citizens of such municipal corporation with water for such time, and upon such terms as may be agreed upon. But such contract shall not be executed or binding upon the municipal corporation until it has been ratified by a vote of the electors thereof, at a special or general election, and the municipal corporation shall have the same power to protect such water supply and prevent the pollution thereof as though the water works were owned by such municipal corporation. (R. S. Sec. 2434; Bates Stats. § 1536-545; 71 v. 93, § 54; R. S. 1880; 78 v. 42; 80 v. 71; 82 v. 11.)

See notes to §§ 3983, 3994 and 9324.

A contract by a private corporation to furnish water to a municipal corporation, the latter to filter and distribute it to consumers, is not governed by this section and need not be submitted to a vote. The term of such a contract is limited, by § 3809, to ten years. Opins. Atty. Gen. 1915, p. 987.

MUNICIPAL CODE PROVISIONS AFFECTING GAS, WATER AND ELECTRIC LIGHT COMPANIES.

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| § 3982. Council may regulate price of electric light, gas and water. | § 3987. A temporary failure shall work no forfeiture. |
| § 3983. Minimum price not to be reduced during term agreed upon. | § 3988. Council may provide for electric current and gas inspection. |
| § 3984. When council may occupy streets for gas purposes. | § 3989. Exclusive monopoly shall not be allowed to gas companies. |
| § 3985. Gas companies may be permitted to occupy streets. | § 3990. Council may erect or purchase gas or electric works. |
| § 3986. Forfeiture of charter for neglect to furnish gas. | § 3994. Contracts to supply municipality with electric light or gas. |

Section 3982. (Council may regulate price of electric light, gas and water.) The council of a municipality in which electric lighting companies, natural or artificial gas companies, gas light or coke companies, or companies for supplying water for public or private consumption, are established, or into which their wires, mains or pipes are conducted, may regulate from time to time the price which such companies may charge for electric light, or for gas for lighting or fuel purposes, or for water for public or private consumption, furnished by such companies to the citizens, public grounds, and buildings, streets, lanes, alleys, avenues, wharves, and landing places, or for fire protection. Such companies shall in no event charge more for electric light, natural or artificial gas, or water, furnished to such corporation or individuals, than the price specified by ordinance of council. The council may regulate and fix the price which such companies shall charge for the rent of their meters, and such ordinance may provide that such price shall include the use of meters to be furnished by such companies, and in such case meters shall be furnished and kept in repair by such companies and no separate charge shall be made, either directly or indirectly, for the use or repair of them. (R. S. Sec. 2478; March 31, 1906, 98 v. 170; April 20, 1904, 97 v. 114; March 1, 1889, 86 v. 62; March 4, 1887, 84 v. 39; R. S. 1880; May 7, 1869, 66 v. 218, § 415.)

Appeal to public utilities commission from price fixed. §§ 614-44 to 614-46.

Gas and water companies, powers, etc., §§ 9320 to 9338.

The regulation of rates is an exercise of the police power. The regulation of rates by a municipality under Section 3 of Article XVIII of the Constitution as amended September 3, 1912, must not be in conflict with the general laws of the state. *Telephone Co. v. Cleveland*, 98 O. S. 358 (1918).

The public utilities commission is not authorized to summarily fix a rate for gas, subsequent to the expiration of a contract with a municipality, and during a period within which the operation of a

new ordinance fixing the rate is suspended by the filing of a referendum petition. *Cincinnati v. Commission*, 96 O. S. 270 (1917).

The price of electricity for power purposes may be regulated. *Washington v. Commission*, 99 O. S. 70 (1918); *Ohio River Power Co. v. Steubenville*, 99 O. S. 421 (1919).

A contract for street lighting, authorized by ordinance, does not regulate the price of electric light to private consumers. *Universal Machine Co. v. Ohio Northern Co.*, 13 Ohio App. 271 (1919). Motion to certify record overruled, 17 O. L. R. 475.

But the price may be regulated in the same ordinance which authorizes a contract for public lighting under § 3994. *Mutual Electric Co. v. Pomeroy*, 99 O. S. 75 (1919).

Limitations on power to regulate price. The intention of the legislature was to permit councils to limit gas companies to fair and reasonable prices. The power is discretionary, but must be exercised in good faith and for the purpose for which it was given.

An ordinance fraudulently passed, fixing the price at a rate for which council knew gas could not be manufactured and sold without loss, would be invalid.

State v. Cincinnati, etc., Co., 18 O. S. 262, 301 (1868).

Cleveland, etc. Co. v. Cleveland, 35 W. L. B. 155; 71 Fed. 610; 9 O. F. D. 258 (1891).

Peoria Gas & Electric Co. v. Peoria, 200 U. S. 48 (1906).

But to invalidate an ordinance, it must appear that the rates fixed are plainly unreasonable and will result in the taking of property without just compensation. It should be ascertained whether the net profits from operation will produce a reasonable return on the value of the plant of the company at the time of the inquiry. Where the value of the property rests largely upon opinion evidence, the fact that prior to the ordinance the company had voluntarily reduced its rate to that fixed by the ordinance and continued the same for several years may be controlling. When it is not clearly shown that a rate will be confiscatory, the company should be required to abide the test of experience under such rate. *Gas Co. v. Newark*, 92 O. S. 393 (1915); affirmed, 242 U. S. 405; s. c., 3 Ohio App. 383; 20 C. C. n. s. 254; 25 C. D. 94; 22 N. P. n. s. 187; 30 O. C. A. 362.

Free gas for municipal purposes may not be required. *United Fuel Gas Co. v. Commission*, 103 O. S. 168 (1921).

Effect of contract of a gas distributing company with a producing company for gas supply upon a basis of meter readings. *Gas Co. v. Newark*, 92 O. S. 393; affirmed, 242 U. S. 405.

The council has no power to compel a gas company to furnish gas in a manner and at a rate entirely at the option of the consumer.

Logan, etc., Co. v. Chillicothe, 65 O. S. 186 (1901); reversing 8 N. P. 88; 11 L. D. 24.

An ordinance attempting to fix rates on both a meter and flat basis, and to give consumers the privilege of changing from one to the other, at their option, is not enforceable.

Granville v. Crawford, etc., Co., 14 C. C. n. s. 421; 24 C. D. 256 (1911); reversing, 11 N. P. n. s. 641, 23 L. D. 694.

The council has no power to make a contract that for an indefinite period delegates to other parties the regulation of the price, quality and quantity of gas.

Cincinnati, etc., Co. v. Avondale, 43 O. S. 257 (1885).

Section § 3983 is a limitation on the general power of regulation conferred by this section.

Logan, etc., Co. v. Chillicothe, 65 O. S. 186, 209 (1901).

Provisions in an ordinance which fixed the price of gas according to the use to which the heat produced by the gas was applied, and which provided that consumers having a flat rate prior to the passage of the ordinance should not be compelled to receive gas by meter, were held unreasonable.

Toledo v. Gas Co., 5 C. C. 557; 3 C. D. 273 (1890); s. c., 6 N. P. 631; 8 L. D. 277.

Provision in franchise ordinance. Where a maximum price is fixed in the franchise ordinance, which is accepted by the grantee, it is a legislative regulation of the price of gas, and a limitation upon the franchise, and must stand as such until changed by subsequent legislation.

Manhattan Trust Co. v. Dayton, 59 Fed. 327; 9 O. F. D. 310 (1893).

Where an ordinance granted a franchise to a natural gas company for twenty-five years "subject, however, to the right of the city to regulate the price of natural gas from time to time, as provided by law", the acceptance, by the company, of the ordinance constitutes a contract which determines the rights of the parties. The fixing of a rate for the first ten years of the franchise does not exhaust the power of the city to regulate. The contract continues as one entire contract. Cincinnati v. Commission, 98 O. S. 320 (1918).

Where the street franchise of an electric light company is silent as to its duration, but the municipality fixes the rate under § 3982 for a fixed period and the rate is accepted by the company under § 3983, the duration of the franchise is for the period of the contract so made. Rep. Atty. Gen. 1914, p. 468. See Gas Co. v. Cleveland, 106 O. S. 489 (1922).

Ordinance regulating price presumed to be valid. The presumption is in favor of the good faith and validity of the action of the council in passing an ordinance regulating prices. Inadequacy of the price fixed by the council is not the subject of inquiry in the absence of facts showing fraud or bad faith on the part of the council.

State, ex rel., v. Ironton Gas Co., 37 O. S. 45 (1881).

Central Ohio, etc., v. Columbus, 16 L. D. 359, 365 (1905).

Rates for varying quantities used. Rent of meters. The council may fix maximum rates for varying quantities used.

Van Wert v. Van Wert Public Service Co., 11 N. P. n. s. 91 (1910).

Prior to the enactment of G. C. § 9329 it was held that the council was authorized to fix the charge for rent of meters.

State v. Columbus, etc., Co., 34 O. S. 572 (1878).

Power to regulate price after expiration of contract. After the expiration of a contract with a gas company, a municipal corporation may regulate the price of gas so long as the gas company continues to exercise its franchise within the municipal corporation. But where the franchise in the streets has expired, the gas company may wholly withdraw, and the municipality can not prevent it from removing its property.

East Ohio Gas Co. v. Akron, 81 O. S. 33 (1909).

Gas Co. v. Cleveland, 106 O. S. 489 (1922).

Gaslight Co. v. Zanesville, 47 O. S. 35 (1889).

Where no action taken by council, reasonable price only may be charged. Where no action has been taken by the council of a municipality towards fixing the price of electric light, and the electric light company and a consumer are unable to agree as to a price, the company may be compelled to furnish light at a reasonable price.

C. H. & D. R. R. Co. v. Bowling Green, 57 O. S. 336, 346 (1898).

Council may regulate prices of company chartered under former constitution. A gas company chartered by an act of the legislature, passed before the adoption of the present constitution, is subject to this section, unless the right to fix its own prices is expressly conferred in its charter.

Zanesville v. Gaslight Co., 47 O. S. 1, 35 (1889).

State, ex rel., v. Columbus, etc., Co., 34 O. S. 572 (1878).

State, ex rel., v. Cleveland etc., Co., 3 C. C. 251; 2 C. D. 142 (1888).

See Cleveland, etc., Co. v. Cleveland, 35 W. L. B. 155; 17 Fed. 610 (1891).

Price. Natural and artificial gas furnished by same company. A gas company authorized by ordinance to supply natural gas, and, under certain conditions, artificial gas at a higher price, the existence of such conditions to be determined by the board of public service of the municipality, can not be compelled, at the suit of a property owner, to furnish artificial gas for the price of natural gas, where the board has found that the conditions exist under which artificial gas may be furnished.

Feckler v. Union Gas, etc., Co., 6 O. L. R. 658; 19 L. D. 658 (1909).

A charge for "readiness to serve" in addition to charge for electricity used, at rates fixed by ordinance, can not be imposed.

Lima v. Commission, 100 O. S. 416 (1920).

Van Wert v. Van Wert Public Service Co., 11 N. P. n. s. 91 (1910).

Power to require information from gas companies. As an incident to its power to regulate the price of gas, a municipal corporation may require gas companies to furnish information relative to the cost of gas.

Cline v. Springfield, 7 N. P. 626; 10 L. D. 389.

Remedies. Appeal to public utilities commission. §§ 614-44 to 614-46.

Where it is the duty of a gas company to furnish gas at rates fixed by the council, it may be compelled by a mandatory injunction to perform its duty.

A suit for such purpose may be brought by the city solicitor under G. C. § 4312.

Gaslight Co. v. Zanesville, 47 O. S. 35 (1889).

Toledo v. N. W., etc., Co., 5 C. C. 557; 3 C. D. 273 (1890).

Springfield v. Springfield Gas Co., 12 C. C. n. s. 392; 21 C. D. 446 (1907); aff'd, 81 O. S. 537.

A citizen may, by mandamus, compel a gas company to supply him gas in accordance with its franchise. Such remedy is not provided by § 3982 but exists without express statutory provision.

State v. Union Gas & El. Co., 14 N. P. n. s. 97 (1913).

The laws giving the commission power over rates do not deprive the courts of equitable jurisdiction. Where a municipality brought suit to enforce an unaccepted ordinance fixing the rate of gas, an answer of the gas company alleging facts showing the rate to be confiscatory states a case of which a court of equity has jurisdiction.

State v. Ct. of App., 104 O. S. 96 (1922).

Where the price has been fixed by the municipality, accepted by the public utility, no appeal taken under § 614-44, service furnished to the municipality, and a warrant drawn for its payment, but the treasurer of the municipality refuses to pay, the utility may compel its payment by mandamus. State v. Burris, 91 O. S. 70 (1914).

Courts have jurisdiction over a controversy between a municipality and a public utility, as to rates which have been fixed by contract, although the commission may also have jurisdiction. New Lexington v. Ohio Co., 24 C. C. n. s. 537 (1913).

The only mode of judicial relief in federal courts against unreasonable rates is by suit against the governmental authority which established them or is charged with the duty of enforcing them. It is not competent for each individual having dealings with the regulated company to raise a contest in the courts over the questions which ought to be settled in this general and conclusive way. In re Engelhard, 231 U. S. 646 (1914).

Rates for electric lighting. Findings by public utilities commission on appeal. 16 O. L. R. 350, 422.

Section 3983. (Minimum price not to be reduced during term agreed upon.) If council fixes the price at which it shall require a company to furnish electricity or either natural or artificial gas to the citizens, or public buildings or for the purpose of lighting the streets, alleys, avenues, wharves, landing places, public grounds or other places or for other purposes, for a period not exceeding ten years, and the company or persons so to furnish such electricity or gas assents thereto, by written acceptance, filed in the office of the auditor or clerk of the corporation, the council shall not require such company to furnish electricity or either natural or artificial gas, as the case may be, at a less price during the period of time agreed on, not exceeding such ten years. (R. S. Sec. 2479; April 23, 1904, 97 v. 263; May 7, 1869, 66 v. 218, § 416.)

Term for which municipalities may contract for public lighting under § 3994 is limited to ten years by this section.

Lima Gas Co. v. Lima, 4 C. C. 22; 2 C. D. 396 (1889).

This section a limitation on § 3982. This section is a limitation on the power of regulation conferred by § 3982.

Logan, etc., Co. v. Chillicothe, 65 O. S. 186, 209 (1901).

Acceptance of ordinance constitutes a contract. Where an ordinance, granting a franchise in streets of a municipality upon certain terms and conditions, has been accepted in writing by a gas company, such action constitutes a contract which determines the rights of the parties.

Cincinnati v. Commission, 98 O. S. 320 (1918).

Columbus v. Columbus Gas Co., 76 O. S. 309 (1907); reversing 2 N. P. n. s. 37.

Logan, etc., Co. v. Chillicothe, 65 O. S. 186 (1901).

East Ohio Gas Co. v. Akron, 81 O. S. 33 (1909).

State, ex rel., v. Cincinnati, etc., Co., 18 O. S. 262 (1868).

Such contracts are expressly authorized by Section 4, Article XVIII of the Constitution and are binding on both parties unless disapproved by the electors. Ohio River Co. v. Steubenville, 99 O. S. 421 (1919).

And are not subject to review by the commission. Link v. Commission, 102 O. S. 336 (1921); Universal Machine Co. v. Ohio, etc., Co., 13 Ohio App. 271 (1919). Motion to certify record overruled, 17 O. L. R. 475.

G. C. § 4221 (which requires advertisement for bids on expenditures by villages exceeding \$500) does not apply to contracts under §§ 3982-3983. Mutual Electric Co. v. Pomeroy, 99 O. S. 75 (1918).

Filing schedules with the public utilities commission is not an acceptance of a price-fixing ordinance, although the schedules contain the same rates as those fixed in the ordinance. *Newcomerstown v. Gas Co.*, 100 O. S. 494 (1919); affirming, 30 O. C. A. 283 (1919).

Provision as to price in franchise ordinance. Where a maximum price is fixed in the franchise ordinance, which is accepted by the grantee, it is a legislative regulation of the price of gas, and a limitation upon the franchise, and must stand as such until changed by subsequent legislation.

Manhattan Trust Co. v. Dayton, 59 Fed. 327; 9 O. F. D. 310.

Under a contract to furnish gas at a stipulated rate, with no meter rental charge, the company has no right to exact a "readiness to serve" charge. *Lima v. Commission*, 100 O. S. 416 (1919). See *Gas Co. v. Commission*, 102 O. S. 628 (1920).

If ordinance not accepted, power of council to regulate continues. A provision in an ordinance fixing the price of gas for a specified period operates as a proposition to the gas company. If not accepted the power of the council to regulate during such period remains as if the ordinance contained no such provision.

State, ex rel., v. Ironton Gas Co., 37 O. S. 45.

Cincinnati v. Commission, 98 O. S. 320 (1918).

Contract for more than ten years, or for indefinite time, void. An ordinance, accepted by the company, fixing the price of gas for an indefinite time, or for a period exceeding ten years, is void as an agreement.

United Fuel Gas Co. v. Commission, 103 O. S. 168 (1921).

Manhattan Trust Co. v. Dayton, 59 Fed. 327, 335 (C. C. A. 1893); affirming 55 Fed. 181.

Wellston v. Morgan, 59 O. S. 147, 156, 157 (1898).

Cincinnati, etc., Co. v. Avondale, 43 O. S. 257 (1885).

State, ex rel., v. Ironton Gas Co., 37 O. S. 45 (1881).

See *Toledo v. Gas Co.*, 5 C. C. 557; 3 C. D. 273 (1890).

Contract may be modified by mutual agreement. It is competent for the municipality and utility to make a new agreement as to price, and abrogate a prior agreement. A taxpayer has no vested interest in the earlier agreement. *Phelps v. Gas Co.*, 101 O. S. 144 (1920).

Council can not change the standard during term of the contract. Where an ordinance fixing the price has been accepted by a gas company, it can not be altered without the consent of the company by fixing another standard which may affect the price previously fixed.

Logan, etc., Co. v. Chillicothe, 65 O. S. 186 (1901).

Contract with one company not impaired by ordinance fixing price for new company at lower rate.

Central Ohio, etc., Co. v. Columbus, 16 L. D. 359 (1905).

Opins. Atty. Gen. 1917, p. 325.

See *Home Telephone, etc., Co. v. Los Angeles*, 211 U. S. 264; 6 O. L. R. 610.

Construction. Contract to furnish electric "light" includes lamps. A contract by an electric light company to "furnish light" at certain prices, includes the supplying of lamps or globes as well as electric current.

Newark v. Licking, etc., Co., 4 O. L. R. 351; 3 O. L. R. 644 (1906); 16 L. D. 669.

Invalid contract. Limitation of action to enjoin payments under. An action to enjoin payments by a municipality under an invalid contract is barred in ten years from the time the parties attempted to enter into the contract and to act under it.

Water Co. v. Defiance, 68 O. S. 520 (1903).

Expired contract. Rights of parties.

See East Ohio Gas Co. v. Akron, 81 O. S. 33 (1909).

An artificial gas company, whose contract has expired, can not enjoin a natural gas company from furnishing gas for illuminating purposes, although the franchise of the natural gas company was for fuel purposes only.

Circleville, etc., Co. v. Buckeye Gas Co., 69 O. S. 259 (1903); affirming 1 C. C. n. s. 526.

Section 3984. (When council may occupy streets for gas purposes.) If at any time any such company required by the council to lay pipes and light a street, alley, avenue, wharf, landing place, public ground or building, refuses or neglects for six months after being notified by authority of the council to comply with such requirement, the council may lay pipes and erect gas works for lighting such streets, alleys, or public grounds, and all other streets, alleys, and public grounds not already lighted, and such company shall thereafter be precluded from using or occupying any of the streets, alleys, public grounds or buildings not already furnished with gas pipes of such company, and council may open any street for the purpose of so conveying gas. (R. S. Sec. 2480; May 7, 1869, 66 v. 218, § 417.)

This section does not authorize a municipality to engage in the business of selling natural gas.

Central, etc., Co. v. Columbus, 16 L. D. 359 (1905).

See note to § 3990.

Section 3985. (Gas companies may be permitted to occupy streets.) At any time after the default mentioned in the preceding section, the council may permit such companies to use and occupy the streets, alleys, and public grounds of such corporation for the purpose of lighting them and furnishing gas to the citizens and public buildings. (R. S. Sec. 2481; May 7, 1869, 66 v. 218, § 418.)

Section 3986. (Forfeiture of charter for neglect to furnish gas.) A neglect to furnish gas to the citizens and other consumers of gas or to the corporation by any company in accordance with the prices fixed and established by the council from time to time shall forfeit all rights of such company under the charter by which it has been established, and the council may proceed to erect, or, by ordinance, empower any

person to erect gas works, for the supply of gas to such corporation and its citizens. (R. S. Sec. 2482; May 7, 1869, 66 v. 218, § 419.)

A person who installed electric light in his premises and thereafter used gas only occasionally or in cases of emergency is not a "consumer" of gas under this section, and the company is not bound to continue gas connections with his premises.

Adams Exp. Co. v. Cincinnati, etc., Co., 21 W. L. B. 18 (1888).

A municipality may erect a gas plant, although the gas company has not been negligent in furnishing gas.

State v. Hamilton, 47 O. S. 52 (1890).

A natural gas company may be compelled to furnish natural gas for illuminating purposes although its franchise prohibited such use.

Springfield v. Gas Co., 12 C. C. n. s. 392; 21 C. D. 446 (1907); aff'd, no rep., 81 O. S. 537.

Section 3987. (A temporary failure shall work no forfeiture.) A temporary failure to furnish gas shall not operate as a forfeiture, unless such failure is through the neglect or misconduct of such gas-light or gas-light and coke company. (R. S. 2483; May 7, 1869, 66 v. 219, § 420.)

Section 3988. (Council may provide for electric current and gas inspection.) In a municipality in which gas works are constructed, council may provide, by ordinance, for the appointment of an officer, to be known as inspector of gas, whose duty it shall be to inspect all gas and gas meters, and certify the correctness of all bills against consumers of gas, make photometric tests, and perform such other duties as may be prescribed by ordinance, and the council shall fix his compensation. Council may also provide for the inspection and testing of meters used for measuring electric current for electric light, power or other purposes, furnished by any individual or company within the corporation, and may prescribe a suitable charge for such inspection and testing, and the manner of collecting it. (R. S. Sec. 2484; May 18, 1894, 91 v. 300; April 12, 1876, 73 v. 227, § 4; May 7, 1869, 66 v. 219, § 421.)

Constitutionality.

See Cincinnati, etc., Co. v. State, 18 O. S. 237 (1868).

A provision in a franchise requiring the grantee to pay a reasonable sum annually to compensate the municipality for supervision and inspection is valid. A clause in the franchise ordinance providing that the payments are "for the benefit of the gas and light fund of said city" does not render the ordinance invalid, as a means to raise revenue, the clause being subordinate to the principal obligation.

Columbus v. Columbus Gas Co., 76 O. S. 309 (1907).

Section 3989. (Exclusive monopoly shall not be allowed to gas companies.) Council shall not agree by ordinance,

contract, or otherwise, with any person or persons for the construction or extension of gas works for manufacturing or supplying the corporation or its inhabitants with gas, which gives or continues to such person or persons the exclusive privilege of using the streets, lanes, commons, or alleys, for the purpose of conveying gas to the corporation, or the citizens thereof, or which deprives council of the right to designate, inspect or regulate the kind of meter to be used for the correct measurement of the gas furnished under such agreement, or which does not specify the exact quality of the gas to be furnished, and reserve to the council the right to enforce an exact compliance with such specification, under such rules as the council may prescribe, nor shall the council make any such agreement which does not secure to the council the right to purchase such works, and all the appurtenances belonging thereto, at any time within the existence of such contract or agreement (R. S. Sec. 2485; May 7, 1869, 66 v. 219, § 422.)

This section does not apply to natural gas companies.

Logan, etc., Co. v. Chillicothe, 65 O. S. 186, 208, 209 (1901).

The words "persons or persons" include a gas company or other private corporation.

Cincinnati, etc., Co. v. Avondale, 43 O. S. 257 (1885).

The right to use the streets of a municipality for the laying of gas pipes is a franchise, and must emanate either directly or indirectly from the legislature.

State, ex rel., v. Cincinnati Gas, etc., Co., 18 O. S. 262, 291 (1868).

The council of a municipality has no power to grant an exclusive gas franchise in its streets. Such power must have been expressly conferred by the legislature, or be so far necessary to the execution of express powers as to make its existence free from doubt.

Columbus v. Columbus Gas Co., 76 O. S. 309, 339 (1907).

State, ex rel., v. Cincinnati Gas Co., 18 O. S. 262, 289 (1868); approved, 115 U. S. 659.

State, ex rel., v. Hamilton, 47 O. S. 52, 70, 71 (1890).

See, Circleville, etc., Co. v. Buckeye Gas Co., 69 O. S. 259, 271 (1903).

A contract by a gas company to furnish gas to a municipality for public lighting under § 3994 is valid, although it fails to secure to the municipality the right to purchase the plant.

Lima Gas Co. v. Lima, 4 C. C. 22; 2 C. D. 396 (1889).

This section was not repealed by the public utilities commission acts. A franchise ordinance, which fails to specify the quality of artificial gas, is invalid. Stiver v. Gas Co., 13 Ohio App. 276, 31 O. C. A. 554 (1920).

Section 3990. (Council may erect or purchase gas or electric works.) The council of a municipality may, when it is deemed expedient and for the public good, erect gas works or electric works at the expense of the corporation, or purchase any gas or electric works already erected therein, but in villages where gas works or electrical works have already been erected by any person, company of persons, or corpora-

tion, to whom a franchise to erect and operate gas works or electric works has been granted, and such franchise has not yet expired, the council shall, with the consent of the owner or owners, purchase such gas works or electric works already erected therein. If the council and owner or owners of such gas or electric works are unable to agree upon the compensation to be paid therefor, the council may file in the probate court of the county where such gas works or electric works are located, a petition to appropriate such gas works or electric works, and thereupon the same proceedings of appropriation shall be had as is provided for the appropriation of private property by a municipal corporation. A municipal contract existing between any village and such person, company of persons or corporation for the public or street lighting shall be considered as an element of value in fixing the compensation to be paid for such gas works or electric works. (R. S. Sec. 2486; 95 v. 599; 93 v. 59; 66 v. 219, § 423.)

A franchise granted to a gas company does not confer vested rights which are violated by the municipality erecting its own gas plant.

State, ex rel., v. Hamilton, 47 O. S. 52 (1890).

Hamilton, etc., Co. v. Hamilton, 146 U. S. 258 (1892).

This section is in violation of the home rule amendment of 1912 to the constitution (Sec. 4, Art. XVIII) in so far as it requires the purchase of existing gas or electric works. Franchise or contract rights acquired while this section was in force were not annulled by the subsequent adoption of Section 4, Article XVIII of the Constitution. But contracts made after its adoption are controlled thereby. *Dravo-Doyle Co. v. Orrville*, 93 O. S. 236 (1915).

This section is not in violation of the federal constitution.

Hamilton, etc., Co. v. Hamilton, 146 U. S. 258 (1892).

Application of section to natural gas plants.

See Central, etc., Co. v. Columbus, 16 L. D. 359 (1905).

Bellaire Goblet Co. v. Findlay, 5 C. C. 419; 3 C. D. 205 (1891).

Fellows v. Walker, 39 Fed. 651; 6 O. F. D. 362 (1889).

Findlay Gas Light Co. v. Findlay, 2 C. C. 237; 1 C. D. 463 (1887).

A municipality can not enjoin a gas company from laying new pipes in its streets, on the ground that a gas plant owned by the municipality will be injured by the competition.

Hamilton v. Gas Light & Coke Co., 8 N. P. 319; 11 L. D. 513.

An option, in a franchise, giving the municipality the right to purchase the electric light plant upon the establishment of a municipal plant, is a mere offer, and the municipality may build its own plant, without offering to purchase the private plant under the option.

Rep. Atty. Gen. 1911-1912, p. 1642.

Section 3994. (Contracts to supply municipality with electric light or gas.) A municipal corporation may contract with any company for supplying, with electric light, natural or artificial gas, for the purpose of lighting or heating the streets, squares and other public places and buildings in the corporation limits. (R. S. Sec. 2491; March 31, 1906,

98 v. 150; March 1, 1889, 86 v. 62; March 4, 1887, 84 v. 39; Bates Stats. § 1536-581; R. S. 1880.)

See § 9324.

A contract for public lighting under this section need not contain a provision under G. C. § 3989 securing to the municipality the right to purchase the plant.

Lima Gas Co. v. Lima, 4 C. C. 22; 2 C. D. 396 (1889).

A contract under this section may be authorized in the same ordinance which regulates the price under § 3982. Mutual Electric Co. v. Pomeroy, 99 O. S. 75 (1919).

G. C. § 4221 does not apply to contracts for public lighting. A contract to go into effect after expiration of the terms of members of the council was said to be valid. Rep. Atty. Gen. 1914, p. 468.

Term of contract. The power of a municipality to contract under this section is by § 3983 limited to ten years.

Lima Gas Co. v. Lima, 4 C. C. 22; 2 C. D. 396 (1889).

A contract for public lighting for a period exceeding ten years is ultra vires and void. Neither party can enforce the same. There can be no recovery for light furnished to the municipality thereunder.

Wellston v. Morgan, 59 O. S. 147 (1898).

Nor is the municipality liable therefor on an account or on a quantum meruit.

Wellston v. Morgan, 65 O. S. 219 (1901).

In Defiance v. McGonigale, 150 Fed. 689; 15 O. F. D. 291 (1907); affirming 140 Fed. 621; 15 O. F. D. 100 (Petition for writ of certiorari denied, 207 U. S. 585), a water company was permitted to recover for water furnished to the municipality, under a contract for a period which exceeded the legal limit, where the contract was acquiesced in by the municipality, and no action taken to rescind or annul the contract until the statute of limitations had barred such action.

See also Defiance Water Co. v. Defiance, 68 O. S. 520 (1903).

Defiance Water Co. v. Defiance, 90 Fed. 753.

Duration of street franchise of electric light company as depending upon term of lighting contract. Rep. Atty. Gen. 1914, p. 468. See also note to § 3714.

Municipality not liable in absence of contract. One who has furnished gas to a municipality can not recover therefor in the absence of a contract.

There is no implied liability to pay, on the part of the municipality.

Wellston v. Morgan, 65 O. S. 219 (1901).

Union Co. v. Cincinnati, 18 N. P. n. s. 615 (1916).

Limitation of action to restrain performance of invalid contract. An action to enjoin payments by a municipal corporation under an invalid contract is barred in ten years from the time the parties attempted to enter into it and act upon it.

Defiance Water Co. v. Defiance, 68 O. S. 520 (1903).

See Defiance v. McGonigale, 150 Fed. 689 (1907).

Purchase by municipality to supply inhabitants. A municipality may, under § 3618, purchase electric current from a private corporation for the purpose of supplying its inhabitants, customers of its municipal plant, as well as for public lighting.

Rep. Atty. Gen., 1910-1911, p. 1026.

Construction of contract for "lowest averaged price" of gas furnished to private consumers in certain other cities. Cincinnati v. Gas Light & Coke Co., 53 O. S. 278.

MUNICIPAL CODE PROVISIONS. INDETERMINATE FRANCHISES OF STREET RAILWAYS.

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| § 4000-1. Indeterminate permit defined. | of question to electors; notice of election. |
| § 4000-2. Authority to surrender franchise and accept indeterminate permit. Purchase by municipality of public utility. | § 4000-8. Time of continuance of indeterminate permit; effect of acceptance. |
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| § 4000-6. Agreement by municipality with public utility as to compensation and time of purchase; proceedings. | § 4000-12. Procedure on appeals to public utilities commission. |
| § 4000-7. Ordinance shall not take effect until submission | § 4000-13. How duties shall be enforced. |
| | § 4000-14. Other methods unaffected. |
| | § 4000-15. Independent sections. |

Section 4000-1. ("Public utility" defined. "Indeterminate permit" defined.) Wherever in this act and for the purpose of this act, the term "public utility" shall be taken to mean and include any street railroad operated in whole or in part under the act passed April 22, 1896, commonly known as "The Rogers Law" and entitled "An act to amend and supplement sections 2505a and 2505b of the Revised Statutes of Ohio enacted May 1, 1891, and amended April 18, 1892" or any street railroad operated in connection with or upon the tracks of any such street railroad and any corporation which owns, operates or leases any such street railroads.

The term "indeterminate permit" as used in this act, shall mean and embrace any grant of a municipality to any person, association of persons, company or corporation, of power, right or privilege to own, operate, manage or control any plant or equipment or any part of a plant or equipment within this state of any public utility created under said acts as herein defined, which by the terms thereof is to continue in force until such time as the municipality shall exercise its right to purchase the property of such public utility, in accordance with the terms of this act or until it shall be otherwise terminated according to law. (May 6, 1913, 103 v. 726, § 1; in effect August 8, 1913.)

Section 4000-2. (Authority to surrender franchise and accept indeterminate permit. Purchase by municipality of public utility; how amount of payment determined.) Any such public utility is hereby authorized to surrender any existing license, permit, grant or franchise, and to accept in lieu thereof any indeterminate permit, and the munici-

pality in which all or the major part of the property of such public utility is situated may accept such surrender and grant an indeterminate permit, and at the time or times provided in the grant of such permit, or, if no time be provided in such grant, then at any time after such grant, the municipal corporation may purchase all the property of such public utility actually used and useful for the convenience of the public, upon paying therefor just compensation as determined or agreed upon in accordance with the terms of this act. Any such municipality is authorized to purchase and operate such property, and every such public utility is hereby required to sell such property for the compensation determined or agreed upon in accordance with the terms of this act. The amount to be paid for the property may be determined, first, by condemnation proceedings, or second, by proceedings as hereinafter described before the public utilities commission of Ohio, or third, by agreement between the municipality and the public utility as hereinafter described. In the ascertainment of the compensation to be paid by any municipality for the property of any public utility, either by condemnation proceedings before the public utilities commission, the compensation shall be made and awarded only for such property of the public utility as is used and useful for the convenience of the public, excluding therefrom the value of any franchise or right to own, operate or enjoy the same, in excess of the amount actually paid to such municipal corporation as the consideration for the grant of such indeterminate permit. (May 6, 1913, 103 v. 727, § 2; in effect August 8, 1913.)

Section 4000-3. (Authority to grant indeterminate permit.) Any municipality may grant an indeterminate permit to any such public utility upon such terms and conditions as may be considered conducive to the public interests, and as provided in this act. (May 6, 1913, 103 v. 727, § 3; in effect August 8, 1913.)

Section 4000-4. (How compensation determined.) When the municipality determines to acquire the property by condemnation, the compensation therefor shall be determined in the manner provided by law for the appropriation of private property by a municipal corporation. (May 6, 1913, 103 v. 728, § 4; in effect August 8, 1913.)

Section 4000-5. (Procedure when municipality desires to acquire public utility.) When the municipality so desires, as expressed in the ordinance determining to acquire the

property of any such public utility, to have the compensation determined by the public utilities commission of Ohio, the municipality shall make a request in writing to such commission in accordance with the provisions of section 21 [G. C. § 499-8] of an act passed April 28, 1913, entitled "An act to create the public utilities commission of Ohio, to prescribe its organization, its powers and its duties, and to repeal sections 487 to 499 inclusive, sections 543 to 551 inclusive, sections 614-24, 614-25, 614-26, 614-69, 614-70, 614-80, 614-81, and 614-83 of the General Code". Thereupon the public utilities commission shall proceed to make an inventory and valuation of the property of such public utility in accordance with the provisions of said act. The proceedings for a review of such valuation shall be as prescribed in section 29 of said act [G. C. § 499-16.] Such valuation shall not become binding upon the municipality, however, unless the council thereafter passes an ordinance accepting the same, which ordinance shall be subject to a referendum in accordance with the provisions of law relating to referenda upon municipal ordinances. If not accepted, the municipality shall reimburse the public utility for its expenses reasonably incurred in the valuation proceedings, the amount to be ascertained and fixed by the commission. In the absence of agreement as to compensation as provided in section 6 hereof [G. C. § 4000-6] the acceptance of an indeterminate permit shall be construed as a consent on the part of the public utility to the procedure provided for in this section. (May 6, 1913, 103 v. 728, § 5; in effect August 8, 1913.)

Section 4000-6. (Agreement by municipality with public utility as to compensation and time of purchase; proceedings.) Any municipal corporation may contemporaneously with or at any time after the grant of an indeterminate permit, as provided in sections 2 and 3 of this act [G. C. §§ 4000-2, 4000-3], agree with the public utility upon the compensation to be paid for its property, and the time or times for the exercise of the privilege of purchase; provided, however, that no period between the times fixed for such purchase shall exceed five years. Upon the determination of the municipality to acquire the property of such public utility, the amount to be paid by the municipality and the terms and conditions of the acquisition shall be as thus agreed upon. The agreement of the municipality shall be by ordinance. In the same or other ordinances, the municipality and public utility may agree upon the amount of or basis of calculating the amount of annual payment, if any,

to be made to the city to be treated as operating expenses of the utility or otherwise; also upon the basis of a division of earnings between the utility and the city; also the purposes for which and the amounts or the basis for calculating the amounts in which new stock, bonds or other securities may be issued; also the minimum net earnings or basis of or device for calculating the minimum net earnings which the utility may earn as a condition precedent to a reduction of fares or rates, and as a test of the reasonableness of extensions; also the initial rates, fares and charges, and the dates of revision of rates, fares or charges, but no period between dates fixed for revision shall exceed five years; also the obligations of the utility with reference to minimum maintenance, renewal and depreciation reserve funds; also for arbitration of differences, also any other terms and conditions relative to the construction, maintenance, financing, operation and control of service of the utility consistent with the terms and conditions of this act and an indeterminate permit. (May 6, 1913, 103 v. 728, § 6; in effect August 8, 1913.)

Section 4000-7. (Ordinance shall not take effect until submission of question to electors; notice of election.) No ordinance passed pursuant to the provisions of section 6 hereof [G. C. § 4000-6], shall take effect until submitted to the electors of the municipality, at a special or general election held in the municipality at such time as council may determine, and approved by a majority of the electors voting thereon. The ordinance shall be duly passed by an affirmative vote of not less than a majority of the members elected or appointed to the council, and shall be subject to the approval of the mayor as provided by law. The ordinance shall specify the form or phrasing of the question to be placed upon the ballot. Thirty days' notice of the election shall be given by publication once a week for four consecutive weeks in two daily or weekly newspapers published or circulated in the municipality, which notice shall contain the full form or phrasing of the question to be submitted. The clerk of the council shall certify the passage of such ordinance to the officers having control of elections in such municipality, who shall cause such question to be voted on at the general or special election as specified in the ordinance. (May 6, 1913, 103 v. 729, § 7; in effect August 8, 1913.)

Section 4000-8. (Time of continuance of indeterminate permit; effect of acceptance.) Any indeterminate permit

granted under the terms of this act shall continue in force until such time as the municipality shall acquire the property of the public utility as provided in this act, or until otherwise terminated according to the terms and conditions of the permit. The acceptance of an indeterminate permit shall be deemed to deprive the public utility of all rights under any license, permit, grant or franchise or granted in any municipal ordinance or resolution existing at the time of the granting of the permit. From the time of such grant, the rates, fares, charges, service, accounts, equipments, repairs, additions, extensions, improvements, transfers, joint use, depreciation, capitalization, bonded or other indebtedness and all other terms and conditions relating to the financing, construction, maintenance, and operation of such utility shall be subject to municipal regulation; provided, however, that such power of municipal regulation shall not be exercised in a manner inconsistent with the express terms of the ordinance granting the permit.

Provided, also, that the capitalization and bonded or other indebtedness for improvement and other purposes beyond the limits of the municipality granting the permit shall remain subject to regulation by the state public utilities commission as provided by law; but no such capitalization or indebtedness shall be given effect as a basis for purchase price to or rate regulation by the municipality contrary to the agreement of the municipality and public utility as expressed in the ordinance granting the permit.

Nothing in this act shall be construed as conferring upon any municipality, officer, department, or commission thereof any power to grant an indeterminate permit to any such public utility in any other manner than by ordinance, or to prescribe that such ordinance shall take effect in any other manner than by acceptance by the public utility to which it is granted by filing a written acceptance thereof with the clerk of the city council or other officers named in such permit. (May 6, 1913, 103 v. 729, § 8; in effect August 8, 1913.)

Section 4000-9. (Rates, tolls or charges.) In the absence of agreement as to rates, fares or charges, as provided in section 6 hereof [G. C. § 4000-6], all rates, fares, tolls and charges for services rendered and commodities furnished by any public utility shall be sufficient to yield a reasonable compensation to the public utility operating under an indeterminate permit, and in the ascertainment of what shall constitute such reasonable rates, fares, tolls, and charges, the municipal corporation shall have due regard, among other

things, to the value of all the property of the public utility actually used and useful for the convenience of the public, excluding therefrom the value of any franchise or right to own, operate or enjoy the same, in excess of the amount actually paid to such municipal corporation as the consideration for the grant of such indeterminate permit and exclusive of any value added thereto by reason of a monopoly or merger, and also with due regard to the necessity of making reservation out of the income for surplus, depreciation and contingencies. (May 6, 1913, 103 v. 730, § 9; in effect August 8, 1913.)

Section 4000-10. (Department may be created to exercise the powers conferred; procedure before department.) In the event that any municipality shall establish any department for the purpose of exercising any of the powers herein conferred, such department is hereby granted such powers of supervision and regulation of any public utility operating under an indeterminate grant, as are provided by law and in the ordinance granting the permit, and as may be from time to time prescribed by the terms of any ordinance not inconsistent with the express provisions of the ordinance granting the permit. It is hereby made the duty of every such public utility to comply with all orders and regulations of such department issued by virtue of the powers herein granted. The procedure of, by and before such department shall be as ordained by the council of the municipality in the permit and other ordinances. The council shall also have power to prescribe the penalties for non-compliance with and the methods of enforcement of the orders and regulations of such department, not inconsistent with the express provisions of the ordinance granting the permit. The provisions of the permit or of any ordinance or order of the municipality passed or issued under this act shall be binding upon all public officers and commissions. (May 6, 1913, 103 v. 730, § 10; in effect August 8, 1913.)

Section 4000-11. (Appeals, when ordinance contains no provisions.) When the ordinance granting the permit contains no provisions whatever relative to appeal from or arbitration concerning the orders of the municipality, the utility may appeal to the public utilities commission of Ohio from any order of the municipality which is in violation of law or of the permit, or from any unreasonable order concerning matters upon which the parties have not agreed in the permit itself. Such appeal shall be by petition filed within thirty days from the issuance of the order. The

filing of any such appeal shall not suspend the operation of the order appealed from unless the public utility shall give an undertaking payable to the municipality in such amount and containing such conditions as may be fixed by said commission. (May 6, 1913, 103 v. 731, § 11; in effect August 8, 1913.)

Section 4000-12. (Procedure on appeals to public utilities commission.) In the event that the ordinance granting the permit provides for an appeal to or arbitration by the state public utilities commission, then such commission shall determine such appeal or arbitration according to the procedure, methods, terms and conditions provided for in such ordinance. The provisions of law specially providing for judicial review of the orders of the public utilities commission shall not apply to actions of the commission upon such appeals or arbitration. Except as provided in this and the next preceding section, the provisions of law relating to appeals, complaints, or applications to the public utilities commission shall not apply to public utilities operating under indeterminate permits. (May 6, 1913, 103 v. 731, § 12; in effect August 8, 1913.)

Section 4000-13. (How duties shall be enforced.) In addition to the methods of enforcement herein provided, the duties herein imposed upon public utilities shall be enforceable by mandamus and all other judicial proceedings provided by law for the enforcement of the duties of public utilities. (May 6, 1913, 103 v. 731, § 13; in effect August 8, 1913.)

Section 4000-14. (Other methods unaffected.) Nothing in this act shall be construed to deprive any municipality of its rights to prescribe, by charter, any other methods, terms or conditions according to and upon which indeterminate permits may be granted in such municipality. (May 6, 1913, 103 v. 731, § 14; in effect August 8, 1913.)

Section 4000-15. (Independent sections.) The invalidity of any section or any part of this act shall not be deemed to affect the validity of any other section or part thereof. (May 6, 1913, 103 v. 731, § 15; in effect August 8, 1913.)

RAPID TRANSIT COMMISSION ACT.

§ 4000-16.	Appointment, qualification and term of members.		construction of boulevard or parkway; limitations.
§ 4000-17.	Organization of board; rules and regulations.	§ 4000-22.	Issue of bonds; procedure; election.
§ 4000-18.	Employment of clerks, engineers, superintendents, etc.; duties.	§ 4000-23.	Aggregate amount not limited by any law of Ohio.
§ 4000-19.	Control and management in construction, maintenance, etc. Construction of boulevard or parkway.	§ 4000-24.	Application of proceeds from sale of bonds.
§ 4000-20.	Control and expenditure of appropriations. How moneys shall be provided. Rejection of bids.	§ 4000-25.	Power in acquisition and appropriation of property.
		§ 4000-26.	Disposition of incomes.
		§ 4000-27.	Power to lease depots, terminals, etc.; submission of question.
§ 4000-21.	Assessment against property owners for	§ 4000-28.	Section or provision held invalid shall not affect any other part.

Section 4000-16. (Appointment, qualifications and term of members. Removal; cause for and procedure.) That whenever in any city the city council thereof, shall, by ordinance, declare it to be essential to the interest of such city that a rapid transit commission, with the powers and duties described in this act, be appointed, the mayor of such city shall appoint a board of commissioners to be known as the board of rapid transit commissioners. Said board shall consist of five members, and they shall be electors of the county within which such city is located, and a majority of such commissioners shall be electors of such municipal corporation. Said commissioners shall serve without compensation, until such time as any of the contracts necessary for the construction herein authorized shall have been awarded. After which time said commissioners shall receive such compensation as may be fixed by the council of the city and shall give bond in an amount to be fixed by council and approved as other bonds of municipal officers and the premium, if any, on said bonds shall be paid by the city. Such commissioners shall be appointed for the terms of one, two, three, four and five years respectively, and their successors shall be appointed for a term of five years, in cities having no charter, and in cities having charters in accordance with the provisions thereof, and in case of vacancy by death, resignation or removal of a member of such board, the mayor shall immediately appoint a successor to fill the vacancy for the unexpired term. The mayor, with the approval of the city council, may remove for malfeasance or nonfeasance in office any member of the commission upon charges and specifications thereof preferred by the mayor; copy of such charges and specifications shall be furnished

the commissioner accused and he shall be given a hearing by the mayor and have the opportunity to confront the witness against him, and to present his defense in person or by counsel; if the mayor's decision upon said charges is in favor of removal, he shall certify the proceedings and his findings to the council for approval or disapproval and the action of council thereon shall be final. (108 (Pt. 2) v. 1101; 107 v. 406; 106 v. 286.)

This act is constitutional. *State v. Railway*, 97 O. S. 283 (1918).

An ordinance authorizing an administrative board to grant to a corporation the right to operate a public utility owned by the municipality upon the terms and conditions specified in the ordinance, and empowering the board to perform specified administrative duties which are necessary to the carrying out of the plan, is not an unconstitutional delegation of legislative power. *State v. Railway*, 97 O. S. 283 (1918).

It is a violation of Section 6, Article VIII of the Constitution for an ordinance to grant to a street railway company the right to operate jointly a subway or street railway owned by the city with a system of railways owned by the company, and provide that the gross receipts from operation shall be used for the payment of existing and future securities of the company. *State v. Railway*, 97 O. S. 283 (1918).

Ordinance of the city of Cleveland providing for the appointment of a board of rapid transit commissioners, held not to be in violation of the Cleveland charter. *State v. Otis*, 98 O. S. 83 (1918).

Section 4000-17. (Organization of board; rules and regulations.) Said board of rapid transit commissioners shall elect one of its members president and another vice-president, who in the absence or disability of the president shall perform his duties. The board shall make its own rules, but its meetings shall be open to the public and all questions acted upon shall be decided by a yea and nay vote, with the name of each member voting recorded on the journal, and no question shall be decided unless approved by a majority of the members of the board. (106 v. 286, § 2.)

Section 4000-18. (Employment of clerks, engineers, superintendents, etc.; duties.) The board of rapid transit commissioners may employ clerks, engineers, superintendents, real estate experts, attorneys, and such other employes as may be necessary. The chief engineers of the subdepartment of engineering of the department of public service may be employed as the chief engineer of said board and receive compensation in addition to that paid him as chief engineer of the subdepartment of engineering of the department of public service. The duties performed by the chief engineer of the subdepartment of engineering of the department of

public service as engineer of the board of rapid transit commissioners and the compensation paid to said engineer shall be separate and distinct from the duties and compensation of said engineer as the chief engineer of the subdepartment of engineering of the department of public service and the duties of said engineer as engineer of the board of rapid transit commissioners, as provided by law, shall not be construed as being in conflict with his duties as chief engineer of the subdepartment of engineering of the department of public service under the provisions of this act. The subdepartment of engineering shall perform such engineering services as may be determined by said board. The board of rapid transit commissioners shall fix the compensation and term of service of all of its employes. The superintendents, clerks, engineers, real estate experts, and attorneys of the board shall be in the unclassified civil service and all other employes shall be in the classified civil service of the municipality. Sections 4000-16 and 4000-18 of the General Code authorizing the creation of a board of rapid transit commissioners in cities, defining its powers, passed May 17, 1915, as herein amended shall apply to and govern all pending proceedings. (107 v. 406; 106 v. 286, § 3.)

This section authorizes the board of rapid transit commissioners to employ an attorney and fix his compensation. *State v. Leimann*, 97 O. S. 334 (1918); *note to section 4000-18*.

The city solicitor may be appointed as such attorney. *Cincinnati v. Rogers*, 98 O. S. 246 (1918).

Section 4000-19. (Control and management in construction, maintenance, etc. Construction of boulevard or parkway.) The board of rapid transit commissioners shall have control and management of the construction of a rapid transit railway system, in, through, under, on, or upon any lands including also canal lands or parts thereof, together with the streets, alleys and public ways outside of such canal lands, whether within or without the limits of such corporation, and of depots and terminals for interurban, suburban, street and other electric railways, and the construction of interurban, suburban, street or rapid transit electric railways, and of any combination of two or more of such purposes, and shall have power of the acquisition, repair, control, operation, management and maintenance of the utilities so constructed and acquired.

In all cases where the construction of a rapid transit system is in, through or under any land, including also canal lands or parts thereof, such board may construct a boulevard or parkway on, upon or adjacent to such lands

or canal lands; plans therefor shall, however, be first approved by the board of park commissioners in cities having such a board. On completion of any such boulevard or parkway the same shall be committed to the control, charge and maintenance of the municipal board or officer in charge of the park system of such city. (106 v. 286, § 4.)

Section 4000-20. (Control and expenditure of appropriations. How moneys shall be provided. Rejection of bids.) The board of rapid transit commissioners shall have control of the expenditure of all moneys appropriated by the city council or received from sale of bonds provided for in this act or from any other source whatever, for the purchase, construction, improvement, maintenance, equipment or enjoyment of all such rapid transit property, but no liability shall be incurred or expenditure made unless the money required therefor is in the city treasury to the credit of the board of rapid transit commissioners' fund and not appropriated for any other purpose, and moneys to be derived from the sale of bonds, the issue of which has been lawfully authorized shall be deemed to be in the treasury to the credit of said fund. All moneys expended for the construction and acquisition of parkways or boulevards, as authorized by this act, shall be provided for by special appropriation or bond issue, or partly by such special appropriation or bond issue and also partly by assessments, as specified in section 6 of this act, shall be separately accounted for, and such expenditure shall not be considered a part of the rapid transit expenditure as herein authorized. Said board may let contracts for any and all part of the work to the lowest and best bidder after three weeks' advertisement in two newspapers of general circulation in the municipality.

Said board shall have the right to reject any and all bids, and the proceedings for said contracts and payment therefor shall be the same as are provided for the director of public service except the requirement of the approval of the board of control. (106 v. 286, § 5.)

Section 4000-21. (Assessment against property owners for construction of boulevard or parkway; limitations.) Such board of rapid transit commissioners may assess upon the abutting, adjacent, contiguous or other specially benefited lots or lands in the corporation fifty per cent. of the entire cost or expense connected with the construction of any boulevard or parkway as authorized by this act, and the proceed-

ings by said board for the levying and collecting of any special assessments, including the issuance and sale of bonds in anticipation of the collection of such special assessments shall be as provided by law for the levy and collection of special assessments and the issuance and sale of bonds in anticipation of the collection of such assessments for street improvements in municipalities; providing that resolutions of necessity, determinations to proceed with the improvements, the making of the assessments and letting of contracts, the appointment of estimating and equalizing boards in cases of assessments in proportion to benefits, the authorizing, the issuance, and sale of bonds in anticipation of the levy or collection of such assessments, and all other steps and proceedings preceding or relating to the levy of such assessments shall be adopted, passed, made, taken or performed by such board of rapid transit commissioners, and such board is hereby granted full power to adopt, pass, make, take and perform all such resolutions, steps and proceedings; and in such municipal corporations the plans, specifications and estimates shall at the time of the passage of the resolution of necessity be on file in the office of such board, and notice of such resolution shall be served by said board or any person or persons designated by it for the purpose, and objections to assessments and property owners claims for damages shall be filed with the clerk of said board, and said board shall determine whether claims for damages shall be judicially inquired into before commencement or after completion of the improvement, and in general all steps required by law to be taken by or with the clerk of council shall as regards said parkway construction authorized by this act be taken by or with the clerk of such board of rapid transit commissioners. Assessments for the above purpose shall be subject to the limitations provided by law for assessments for street and other improvements, and all collections made pursuant thereto shall be credited by the city auditor to the respective parkway improvement. (106 v. 286, § 6.)

Section 4000-22. (Issue of bonds; procedure; election.)

When the board of rapid transit commissioners deems it necessary to issue bonds secured by the general credit of the municipality or to levy a tax for the purpose of carrying into effect the powers herein conferred the board shall, by written resolution, so declare its judgment and state therein the amount of bonds to be issued or the tax to be levied for such purposes and transmit the resolution to the city council, which may authorize the issuance of such bonds

or levy a tax for the aforesaid purposes. Provided, however, that the total aggregate amount of bonds issued without being first submitted to a vote of the people shall not exceed one hundred and fifty thousand dollars. If the council fails to enact legislation for the issuance of bonds at its next regular or special meeting after the resolution has been received by the clerk of council, it shall then be the duty of council at its next regular or special meeting by ordinance to submit the question of the issuance of the bonds to a vote of the qualified electors of the municipality and the clerk of council shall file the ordinance with the board of deputy state supervisors of elections of the county; said board of deputy state supervisors shall then submit the question of the issuance of such bonds to the qualified electors of the city at either a special or a general election, as the ordinance may specify. Thirty days' notice of the election shall be given in one or more newspapers printed in the municipality once a week for four consecutive weeks prior thereto, stating the amount of bonds to be issued and the purpose for which they are to be issued, and the time of holding the election. If a majority of the voters voting at such election upon the question of issuing the bonds vote in favor thereof it shall then become the duty of the council of the city to enact within ninety days thereafter all legislation necessary to carry into effect the will of the majority of the voters voting at such election and bonds shall be issued from time to time as they may be needed. (106 v. 286, § 7.)

Section 4000-23. (Aggregate amount not limited by any law of Ohio.) The aggregate amount of such bonds authorized by vote of the people or total indebtedness created under the authority of this act shall not be limited by the provisions of any act or statute of Ohio or law, except by the limitation herein set forth, and such aggregate or total indebtedness shall not exceed two per cent. of the total value of all property in such municipal corporation as listed and assessed for taxation. (106 v. 286, § 8.)

Section 4000-24. (Application of proceeds from sale of bonds.) The proceeds from the sale of such bonds may be used by said board of rapid transit commissioners for the construction in, through, on, over, upon or under any canal lands or property leased by such municipal corporation from the state of Ohio, or any lands, rights of way, or property outside of such canal lands, whether within or without the

municipal corporation, of depots and terminals for street, interurban or suburban or rapid transit or street electric railways, or for the construction of interurban, suburban, street or rapid transit electric railways, or of any combination of two or more of such purposes, and the necessary tracks, way stations, depots, work shops, conduits, elevated structures, subways, tunnels, offices, sidetracks, turnouts, machine shops, bridges and other appurtenances, and for the purchase, acquisition or condemnation of the necessary lands, easements and rights of way, and for the purchase of the equipment necessary for the operation thereof; and the proceeds of bonds specially issued therefor shall be used to pay the cost for the construction of boulevards or parkways on, upon or adjacent to such lands or canal lands, subject to the provisions relative to the construction of and assessments for boulevards or parkways, as specified in sections 4, 5 and 6 of this act. (106 v. 286, § 9.)

Section 4000-25. (Power in acquisition and appropriation of property.) The board of rapid transit commissioners is hereby given power to acquire by purchase or to appropriate, enter upon and hold any real estate or easement, partial or otherwise, therein, thereon, thereunder, or thereover, or any interests therein, both within and without the limits of the municipality, which it deems necessary for the purposes above specified; such power to be exercised in the manner provided by law for the acquisition and appropriation of property by municipal corporations. The board of rapid transit commissioners shall have the same powers and rights to cross and occupy streets and highways as are provided by law for street, suburban or interurban electric railways, and to receive from city, township, or county officers grants of the right to use or occupy streets and other public highway which officers are empowered to donate said grants to said board. The board shall have the power to order the removal of pipes, sewers, conduits, poles and other structures that are in the way of construction authorized by this act, and to temporarily suspend street car traffic. The cost of changing sewers and water pipes shall be included as part of the cost of construction, and the said board shall have the right to enter upon lands or buildings for examination and surveys prior to appropriation proceedings, if any, therefor. (106 v. 286, § 10.)

Section 4000-26. (Disposition of incomes.) All rentals, payments and fees of every description and all other income,

earnings or revenues, received from all persons, firms and corporations for the use of said depot terminals and railways, shall be kept in a separate and distinct fund, and after paying the expenses of the municipal corporation for the maintenance, conducting and managing said depots, terminals and railways, including the setting aside of a reasonable sum annually for depreciation to be applied to the repair or replacement of any portion of said work, from the remainder of said receipts there shall annually be paid into the sinking fund of the city such sum or sums as are necessary for the payment of accruing interest on the bonds, if any, issued and outstanding for the construction of such rapid transit system, and for providing a sinking fund for the redemption thereof at maturity; and to the extent that said remainder shall not be sufficient for the said payment of the interest on said bonds and for the bonds issued during construction and for the said accumulation of a sinking fund sufficient for payment thereof at maturity, the municipal corporation shall annually levy a tax sufficient for such purposes, and said taxes for bonds issued by vote of the people shall not be subject to any of the limitations provided by law for maximum tax rates on property in the municipal corporation, except the combined maximum rate fixed in section 5649-5b of the General Code and in addition thereto, one-half mill may be levied.

The surplus in any year above said expenses, depreciation charges, interest and sinking fund charges, shall up to the amount necessary to equal said deficiencies of previous years, be paid into the sinking fund of said city until the amounts paid into the sinking fund from the said revenues shall equal the total accrued interest and sinking fund charges on said bonds, and any amounts thus paid in on account of such past deficiencies, may be applied to interest or sinking fund charges on any indebtedness of said city. Any surplus above said expenses, depreciation charges, current interest and sinking fund charges and reimbursement of past deficiencies of interest and sinking fund charges, may be used for the reconstruction of, improvement of, additions to, or extensions of such depots, terminal and railway equipment. (106 v. 286, § 11.)

Section 4000-27. (Power to lease depots, terminals, etc.; submission of question.) Said board of rapid transit commissioners may grant to any corporation organized for street railway or interurban railroad purposes the right to operate by lease or otherwise such depots, terminals and railways

upon such terms and conditions as said board shall be authorized by ordinance to agree upon with such corporation, subject to the approval of a majority of the electors of the municipal corporation voting thereon. Said board shall certify said lease or agreement to the board of deputy state supervisors of election of the county, and said board of deputy state supervisors shall then submit the question of the approval of said lease or agreement to the qualified electors of the city at either a special or general election as the ordinance may specify. Thirty days' notice of the election shall be given in one or more of the newspapers printed in the municipality once a week for four consecutive weeks prior to the time of holding said election as heretofore specified, setting forth the terms of said lease or agreement and the time of holding the election. On the approval by a majority of the voters voting at such election said corporation is invested with the power to operate such depots, terminals and railways as provided in said lease or agreement, and corporations organized under the laws of Ohio for street railway or interurban railroad purposes are hereby invested with power to lease and operate such depots, terminals and railways. (106 v. 286, § 12.)

Section 4000-28. (Section or provision held invalid shall not affect any other part.) Should any section or provision of this act be decided by the courts to be invalid, the same shall not affect the validity of the act as a whole or any part thereof, other than the part so decided to be invalid, and all acts of said board of rapid transit commissioners shall be authorized or approved by ordinance as may be required by the constitution of Ohio. (106 v. 286, § 13.)

MISCELLANEOUS.

§ 4020. Art galleries. Compensation to private company for maintaining free art gallery.

§ 4199. Municipality or township may transfer cemetery property to cemetery association.

§ 4200. Rights and titles inviolate.

Cemetery Associations.

Railroad on Boundary Line.

§ 4198. Purchase of land improvements.

§ 4560. Jurisdiction over railroad forming part of boundary line.

ART GALLERIES.

Section 4020. (Compensation to private company for maintaining free art gallery.) The council of each city may

levy and collect a tax not to exceed one-quarter of one mill on each dollar of the taxable property of the municipality each year, and pay it to a private corporation or association maintaining and furnishing a free museum or gallery for the exhibition of paintings, sculpture and other works of art, and, in connection therewith, an academy for advancing, improving and promoting painting, sculpture, drawing, architecture and other fine arts, and furnishing instruction therein by lectures and otherwise, for the benefit of the inhabitants of the municipality, as and for compensation for the use and maintenance thereof. Without change or interference in the organization of such corporation or association, the council shall require the treasurer of such corporation or association to make an annual financial report, setting forth all the money and property which has come into its hands during the preceding year, and its disposition thereof, together with recommendation as to future necessities. (March 29, 1906, 98 v. 146, § 218a.)

Section 4198. (Purchase of lands; improvements.) The council of a municipality, and the trustees of a township, may purchase of an incorporated cemetery association the lands, lots, and improvements of such cemetery association remaining unsold, for cemetery purposes, and take a conveyance thereof, but the purchase money in such cases shall be applied to the payment of the legal debts of the association, and to the embellishment and preservation of the land purchased, and such other purposes as the trustees of the cemetery may direct. (R. S. Sec. 2545; 66 v. 213, § 388; R. S. of 1880.)

Section 4199. (Municipality or township may transfer cemetery property to cemetery association.) The council of a municipality, and the trustees of a township, may transfer to an incorporated cemetery association, the lands, lots and improvements of a cemetery, owned and controlled by the municipality or township for cemetery purposes. The cemetery association shall assume all legal debts on the cemeteries so transferred. (R. S. Sec. 2545a; April 22, 1904, 97 v. 165.)

Section 4200. (Rights and titles inviolate.) The rights and titles of lot owners, purchased prior to such sale and conveyance, shall not be questioned, and such lot owners shall continue to hold and occupy their lots, under such rules and regulations as shall be adopted for the government and regulation of the cemetery by the authorities making the purchase. (R. S. Sec. 2546; 66 v. 214, § 389; R. S. 1880.)

Section 4560. (Jurisdiction over railroad forming part of boundary line.) When the line of a railroad adjoins or forms a part of the boundary line of a municipal corporation, such municipal corporation shall have jurisdiction over the entire width of the right of way of the line of railroad, so adjoining or forming a part of the boundary line of such municipal corporation, for the punishment of the violation of the ordinances of such municipal corporation. (92 v. 428, § 1; Bates Stats. § 1536-884.)

PART XII.

TAXATION OF CORPORATIONS AND STOCK.

§ 5324. Investments in stocks.	§ 5404-1. Property of companies, stocks of merchandise and materials shall be valued as of January 1st and filed before March 1st.
§ 5325. Personal property.	§ 5405. Returns. Valuation by county auditor.
§ 5327. Credits.	§ 5406. Duty of county auditor.
§ 5328. Property subject to taxation.	§ 5407. "Banks" and "bankers" defined.
§ 5348-2. Transfer or delivery of shares, stocks, deposits, etc., of decedent not allowed without consent of tax commission.	§ 5408. Shares or capital of banks, incorporated or unincorporated.
§ 5348-2a. Transfer in good faith sufficient defense.	§ 5409. Tax on real estate of bank.
§ 5370. Who shall list personal property.	§ 5410. Names of stockholders and shares of each.
§ 5371. Where personal property shall be listed.	§ 5411. Return made by cashier to auditor.
§ 5372. When and in whose name property listed; exemption of stocks in companies taxed, etc.	§ 5412. Auditor to fix value of bank shares or property.
§ 5387-1. When new corporation business listed.	§ 5413. When bank fails to make return.
§ 5404. Corporation returns.	§ 5414. Penalty for making false return.

Section 5324. ("Investment in stocks.") The term "investment in stocks" as so used, includes all moneys invested in the capital or stock of a bank whether incorporated under the laws of this state or the United States, or an association, corporation, joint stock company, or other company, the capital or stock of which is or may be divided into shares, which are transferable by each owner without the consent of the other partners or stockholders, for the taxation of which no special provision is made by law, held by persons residing within this state, either for themselves or others. (R. S., Sec. 2730; 95 v. 533; R. S. 1880; S. & C. 1439; 76 v. 28, § 1; 75 v. 436, § 1; 71 v. 96, § 78; 56 v. 175, § 1.)

Taxation of bank stock, § 5408.

Exemption of stock in Ohio corporations, §§ 192, 5372 and notes.

Stock in foreign corporations, when exempt, §§ 192, 5372.

Stock in a national bank is an "investment in stocks" under this section and not a "credit" under § 5327. Its owner can not deduct his debts from the value of the stock.

Chapman v. Bank, 56 O. S. 310 (1887); aff'd, 173 U. S. 205.

Niles v. Shaw, 50 O. S. 370 (1893).

See notes to §§ 5372 and 5412.

Section 5325. ("Personal property.") The term "personal property" as so used, includes first, every tangible

thing being the subject of ownership, whether animate or inanimate, other than money, and not forming part of a parcel of real property, as hereinbefore defined; second, the capital stock, undivided profits, and all other means not forming part of the capital stock of every company, whether incorporated or unincorporated, and every share, portion, or interest in such stocks, profits, or means, by whatsoever name designated, inclusive of every share or portion, right, or interest either legal or equitable, in and to every ship, vessel, or boat, of whatsoever name or description, used or designed to be used either exclusively or partially in navigating any of the waters within or bordering on this state, whether such ship, vessel, or boat is within the jurisdiction of this state or elsewhere, and whether it has been enrolled, registered, or licensed at a collector's office, or within a collection district in this state, or not; third, money loaned on pledge or mortgage of real estate, although a deed or other instrument may have been given for it, if between the parties thereto it is considered as security merely. (R. S. Sec. 2730; 95 v. 533; R. S. 1880; S. & C. 1439; 76 v. 28, § 1; 75 v. 436, § 1; 71 v. 96, § 78; 56 v. 175, § 1.)

See note to § 5328.

Section 5327. ("Credits" defined. Taxation purposes.)

The term "credits" as so used, means the excess of the sum of all legal claims and demands, whether for money or other valuable thing, or for labor or service due or to become due to the person to pay taxes thereon, including deposits in banks or with persons in or out of the state, other than such as are held to be money, as hereinbefore defined, when added together estimating every such claim or demand at its true value in money, over and above the sum of legal bona fide debts owing by such person. In making up the sum of such debts owing, there shall not be taken into account an obligation to a mutual insurance company, nor an unpaid subscription to the capital stock of a joint stock company, nor a subscription for a religious, scientific, literary, or charitable purpose; nor an acknowledgement of indebtedness, unless founded on some consideration actually received, and believed at the time of making such acknowledgment to be a full consideration therefor; nor an acknowledgment made for the purpose of diminishing the amount of credits to be listed for taxation; nor a greater amount or portion of a liability as surety, than the person required to make the statement of such credits believes that such surety is in equity bound, and will be com-

pelled to pay, or to contribute, in case there are no securities, nor any tax, fee or assessment due or to become due to the Government of the United States or to the state of Ohio, or to any political subdivision thereof. Pensions receivable from the United States shall not be held to be credits; and no person shall be required to take into account in making up the amount of credits, a greater portion of any credits than he believes will be received or can be collected, or a greater portion of an obligation given to secure the payment of rent than the amount that has accrued on any lease and remains unpaid. (110 v. 23; R. S. Sec. 2730; 56 v. 175, § 1 § 2); 71 v. 96, § 78; 75 v. 436, § 1; 76 v. 28, § 1; S. & C. 1439; 95 v. 533.)

A foreign corporation may deduct from the claims due to it, arising out of its Ohio business, such of its debts as arise out of the same source.

Hubbard v. Brush, 61 O. S. 252 (1899).

Debts incurred by a foreign corporation at its home office in the purchase of goods, a part of which are sent to its Ohio branch, can not be deducted from its Ohio credits, although debts for goods purchased solely for sale in Ohio, may be deducted. Rep. Atty. Gen. 1912, p. 608. See Rep. Atty. Gen. 1914, p. 1578; Heinz Co. v. Benham, 95 O. S. 410 (1916).

Unpaid stock subscriptions and debts due a corporation for purchases of its stock as "credits" prior to amendment of 110 v. 23. Opins. Atty. Gen. 1920, p. 403; Opins. Atty. Gen. 1918, p. 714; Opins. Atty. Gen. 1919, p. 1153; Insurance Co. v. La Rue, 22 O. S. 630 (1872).

The surplus dividend fund of an insurance company is not a "debt" under this section.

French v. Insurance Co., 12 L. D. 183 (1901).

A life insurance company can not deduct its accumulated deferred dividend and reserve fund.

Insurance Co. v. Hynicka, 5 N. P. n. s. 255; 18 L. D. 1 (1907).

Reinsurance is not a debt of an insurance company under this section.

Insurance Co. v. Cappelar, 38 O. S. 560 (1883).

See also as to deductions, note to G. C. § 5412.

Where government bonds, delivered by the owner to a national bank to be deposited as security for its circulating notes, under an agreement whereby the bonds were to be returned on demand, or to be paid for as the owner might elect, and whereby the bank agreed to pay the interest received thereon, together with a stipulated annual sum, it was held to be a bailment of bonds to the bank, and not a taxable credit.

Clark v. Gault, 77 O. S. 497 (1908).

An owner of bonds is not entitled to deduct his debts therefrom.

Payne v. Watterson, 37 O. S. 121 (1881).

Credits, arising out of machines rented or leased to persons outside of Ohio, are taxable in this state.

Rep. Atty. Gen. 1911-1912, p. 676.

Where an Ohio corporation has ordered machinery to be constructed for it in another state, such machinery is not taxable in Ohio until it reaches this state, but the right to such machinery may be a taxable "credit."

Rep. Atty. Gen. 1911-1912, p. 676.

Prior to the amendment of 110 v. 23 it was held that taxes due and owing to the federal government were "credits". *White Motor Co. v. Zangerle*, 23 N. P. n. s. 353 (1921).

Insurance agent's balances. See Opins. Atty. Gen. 1916, pp. 1307, 1889.

Federal farm loan bonds are not subject to state and local taxation. Opins. Atty. Gen. 1918, p. 747.

Section 5328. (Property subject to taxation.) All real or personal property in this state, belonging to individuals or corporations, and all moneys, credits, investments in bonds, stocks, or otherwise, of persons residing in this state, shall be subject to taxation, except only such property as may be expressly exempted therefrom. Such property, moneys, credits, and investments shall be entered on the list of taxable property as prescribed in this title. (R. S. Sec. 2731; 56 v. 175, § 1; 71 v. 96, § 78; S. & C. 1438; S. & S. 757.)

Bank stock, § 5408.

Stock in Ohio corporations, §§ 192, 5372.

Stock in foreign corporations, §§ 192, 5372.

Money deposited by an Ohio corporation in a bank outside of the state is, by this section, taxable in Ohio. *Coal Co. v. O'Brien*, 98 O. S. 14 (1918).

A membership in the New York Stock Exchange is personal property and taxable. *Anderson v. Durr*, 100 O. S. 251 (1919); aff'd, 257 U. S. 100.

Deposits in Ohio savings banks and in all banks having a capital stock should be returned as "money", if payable on demand. Rep. Atty. Gen. 1912, pp. 575, 605.

Life insurance policies do not come within any of the taxable classes of property enumerated in this section, excepting matured policies which are due but unpaid. Rep. Atty. Gen. 1912, p. 590.

Provisions in special charter limiting rate of taxation. A provision in a special charter, granted under a former constitution, providing for a tax rate in lieu of the rate which might be imposed by general taxation, was held to constitute a contract, which could not be impaired by subsequent legislation.

Bank v. Knoop, 16 How. (U. S.) 369.

Dodge v. Woolsey, 18 How. 331.

Bank v. Debolt, 18 How. 380.

State v. Auditor, 5 O. S. 444.

Bank v. Lewis, 5 O. S. 447.

Sebastian v. Bridge Co., 21 O. S. 451.

State v. Bank, 5 Ohio (pt. 1) 125.

See *Debolt v. Trust Co.*, 1 O. S. 563.

Bank v. Debolt, 1 O. S. 591.

Bank v. Toledo, 1 O. S. 622.

Plank Road Co. v. Husted, 3 O. S. 578.

Bank v. Wilbor, 7 O. S. 481.

Skelly v. Bank, 9 O. S. 606.

Insurance Co. v. Debolt, 16 How. (U. S.) 416.

Section 5348-2. (Transfer or delivery of shares, stocks, deposits, etc., not allowed without consent of tax commission; liability for tax.) No corporation organized or existing under the laws of this state, shall transfer on its books or issue a new certificate for any share or shares of its capital stock belonging to or standing in the name of a decedent or in trust for a decedent, or belonging to or standing in the joint names of a decedent and one or more persons, without the written consent of the tax commission of Ohio. No safe deposit company, trust company, corporation, bank or other institution, person or persons, having in possession or in control or custody, in whole or in part, securities, deposits, assets or property belonging to or standing in the name of a decedent, or belonging to or standing in the joint names of a decedent and one or more persons, including the shares of the capital stock of, or other interest in, such safe deposit company, trust company, corporation, bank or other institution, shall deliver or transfer the same to any person whatsoever whether in a representative capacity or not, or to the survivor or survivors when held in the joint names of a decedent and one or more persons, without retaining a sufficient portion or amount thereof to pay any taxes or interest which would thereafter be assessed thereon under this subdivision of this chapter, and unless notice of the time and place of such delivery or transfer be served upon the tax commission of Ohio and the county auditor at least ten days prior to such delivery or transfer; but the tax commission of Ohio may consent in writing to such delivery or transfer, and such consent shall relieve said safe deposit company, trust company, corporation, bank or other institution, person or persons, from the obligation to give such notice or to retain such portion. The tax commission or the county auditor, personally or by representatives, may examine such securities, deposits or other assets at the time of such delivery or otherwise. Failure to comply with the provisions of this section shall render such safe deposit company, trust company, corporation, bank or other institution, person or persons, liable for the amount of the taxes and interest due under this subdivision of this chapter on the succession to such securities, deposits, assets or property. Such liability may be enforced by action brought by the county treasurer in the name of the state in any court of competent jurisdiction. (108 (Pt. 1) v. 572.)

This section does not affect the validity of payments to a survivor on joint deposit, but the bank or building and loan association

making such payment without consent of the tax commission remains liable for the tax. Opins. Atty. Gen. 1919, p. 1271; 11 Dept. Rep. 169.

A joint deposit in the name of a decedent and one or more other persons does not create a joint estate in the nominal depositors. Presumably, the interests of the depositors are equal, in the absence of agreement or declaration of trust on the subject. Opins. Atty. Gen. 1920, p. 473. See also § 710-120.

National banks located in Ohio are subject to the duties and liabilities of this section relating to the transfer of stock. Opins. Atty. Gen. 1921, p. 277.

Coupon bonds are "securities". A bank which permits a personal representative of a deceased renter of a safe deposit box to remove bonds without complying with this section is liable. Opins. Atty. Gen. 1919, p. 1278.

This section applies to foreign corporations registered to do business in Ohio and keeping their stock books in Ohio, but does not apply where the stock books are kept outside of the state. Opins. Atty. Gen. 1919, p. 1332.

Stock in a foreign corporation owned by a non-resident decedent is not taxable, although the corporation owns property and does business in Ohio. Opins. Atty. Gen. 1921, p. 863.

Stock in Ohio corporations and in foreign corporations belonging to a non-resident decedent, but kept in a safety deposit box in Ohio, are taxable. *In re Ellerhorst*, 23 N. P. n. s. 33 (1920).

Coupon bonds of Ohio corporations, belonging to the estates of non-resident decedents are not taxable. But registered bonds are taxable and this section applies to the transfer of registered bonds. Opins. Atty. Gen. 1919, p. 1332.

The redemption of a preferred stock, for cash, by a bank acting for a corporation, is not a transaction within the purview of this section. Opins. Atty. Gen. 1919, p. 1413.

Where, in a safe deposit box leased in the joint names of decedent and his wife, sealed envelopes were found marked with the names of the wife and a corporation in which decedent was interested, the attorney general advised an appraisalment under § 5341, or a proceeding in probate court, to ascertain ownership of the contents. Opins. Atty. Gen. 1920, p. 203.

Stock in a railroad company consolidated under the laws of Ohio and other states is taxable. The probate court of the county in which the general office of the county is located, or of any county in Ohio in which the company has property has jurisdiction to determine the tax. The stock should be appraised at such proportion of its market value as is determined by the proportion of the entire property of the company located in Ohio. Opins. Atty. Gen. 1920, p. 952; 12 Dept. Rep. 603.

Bonds of a foreign corporation, sent by a decedent resident of another state to a trust company in Ohio, to be held by the trust company as agent of a bondholders' committee in a reorganization of the corporation, are taxable. Opins. Atty. Gen. 1921, p. 56.

Shares in a national bank located in Ohio, belonging to a deceased non-resident of the state, are taxable although the certificate was in his possession at the time of death. Opins. Atty. Gen. 1921, p. 277.

Section 5348-2a. (Transfer in good faith sufficient defense.) In any action brought under the preceding section it shall be a sufficient defense that the transfer of shares of

capital stock, or delivery or transfer of securities, deposits, assets or property, was made in good faith, without knowledge of the death of the decedent and without knowledge of circumstances sufficient to place the defendant on inquiry. (108 (Pt. 2) v. 1197.)

A corporation which, without knowledge of the facts, transfers on its books, stock, the certificate for which, indorsed in blank by the record owner, is presented for transfer after the death of the record owner, is not liable for the tax, if it used due care, although in fact the certificate was transferred in contemplation of death. Opins. Atty. Gen. 1919, p. 1491.

Section 5370. (Who shall list personal property.) Each person of full age and sound mind shall list the personal property of which he is the owner, and all moneys in his possession, all moneys invested, loaned, or otherwise controlled by him, as agent or attorney, or on account of any other person or persons, company or corporation, and all moneys deposited subject to his order, check, or draft; all credits due or owing from any person or persons, body corporate or politic, whether in or out of such county; and all money loaned on pledge or mortgage of real estate, although a deed or other instrument may have been given for it, if between the parties, it is considered as security merely. The property of a ward shall be listed by his guardian, of a minor child, idiot, or lunatic having no guardian, by his father, if living, if not, by his mother, if living, and if neither father nor mother is living by the person having such property in charge; of a person for whose benefit property is held in trust, by the trustees; of an estate of a deceased person, by his executor or administrator; of corporations whose assets are in the hands of receivers, by such receivers; of a company, firm, or corporation, by the president or principal accounting officer, partner or agent thereof; and all surplus or undivided profits held by a society for savings or bank having no capital stock, by the president or principal accounting officer. (R. S. Sec. 2734; March 7, 1879, 76 v. 28, § 2; May 11, 1878, 75 v. 441, § 1; April 8, 1865, 62 v. 105, § 4.)

In listing bank deposits, outstanding checks which have not been certified can not be deducted.

Insurance Co. v. Hynicka, 5 N. P. n. s. 255; 18 L. D. 1 (Super. Ct., Cin., 1907); affirming 4 N. P. n. s. 297; 17 L. D. 80.

The receiver of a corporation appointed in a dissolution proceeding must return for taxation the property in his possession.

In re Patent Wood Keg Co., 13 N. P. n. s. 321; 23 L. D. 381 (C. P. 1912).

An officer of a foreign corporation making a return under § 5404 acts for the corporation and does not act as "guardian, trustee or

agent''. Iron Co. v. Madigan, 17 C. C. n. s. 340 (1911); aff'd, no rep. 88 O. S. 533.

Section 5371. (Where personal property shall be listed.)

A person required to list property, on behalf of others, shall list it in the township, city, or village in which he would be required to list it if such property were his own. He shall list it separately from his own, specifying in each case the name of the person, estate, company, or corporation, to whom it belongs. Merchants' and manufacturers' stock, and personal property upon farms shall be listed in the township, city or village in which it is situated. All other personal property, moneys, credits, and investments, except as otherwise specially provided, shall be listed in the township, city, or village in which the person to be charged with taxes thereon resides at the time of the listing thereof, if such person resides within the county where the property is listed, and if not, then in the township, city, or village where the property is when listed. (R. S. Sec. 2735; April 8, 1865, 62 v. 105, § 4.)

The location of a corporation designated in its articles of incorporation is the situs of the corporation for taxation purposes. The statement in the articles of incorporation is conclusive, although much of the business of the corporation is transacted elsewhere.

A corporation located in a township outside of the limits of a city may, when the city limits are extended to include the site of its office, remove its office and location to another part of the township and avoid municipal taxation.

Pelton v. Transportation Co., 37 O. S. 450 (1882).

Booth v. Wonderly, 36 N. J. L. 250.

Union Steamboat Co. v. Buffalo, 82 N. Y. 351.

Tangible personal property, actually located in another state, is not taxable in Ohio, although belonging to an Ohio corporation.

Rep. Atty. Gen. 1911-1912, p. 676.

Machines leased or rented by an Ohio manufacturer to persons outside of Ohio are not taxable in Ohio, but the credits arising therefrom are taxable.

Rep. Atty. Gen. 1911-1912, p. 676.

Corporate property situated in more than one county. See §§ 5406-1 to 5406-3.

The purpose of this section is to designate the taxing districts which are to have the benefit of the taxes. Resort Co. v. Nuhn, 15 N. P. n. s. 449, aff'd by court of appeals, 12 O. L. R. 33.

Foreign corporation. The residence of a foreign corporation, having its principal office in a county in Ohio where all of its business is transacted, is, for taxation purposes, in such county.

Sims v. Best, 1 C. C. n. s. 41; 15 C. D. 149 (1903).

Deduction of debts from credits. See § 5327.

Section 5372. (When and in whose name property listed; exemption of stocks in companies taxed and mortgages on real estate. Registration fee. Mortgages covering property

in two or more counties.) Personal property of every description, moneys and credits, investments in bonds, stocks, joint stock companies or otherwise, shall, except as otherwise provided, be listed in the name of the person who was or became the owner thereof on the day preceding the second Monday of April, in each year, and the transfer or sale of any taxable property subsequently thereto shall not authorize any person to omit the same from his list nor the assessor to fail to assess the same in the name of the person who would have been required to list it, although such listing be not made until after the sale or transfer of such property; but all such property shall be listed for taxation in the same manner as if no sale or transfer thereof had been made. No person shall be required to list for taxation any shares of the capital stock of a company, the capital stock of which is taxed in the name of such company, or any mortgage hereafter executed and recorded, or the debt secured thereby, on real estate located and taxed within the state; but such mortgage, except it be a mortgage given to correct an error in a mortgage previously recorded, or to indemnify the guarantee as surety upon an unliquidated liability, shall be duly recorded in the manner provided by law and a special registration fee of one-half of one per centum on the amount secured by such mortgage in addition to the fee fixed by law for recording such instruments, shall be paid to the county recorder upon presentation of such mortgage for record; and the county recorder shall pay on the first of each month to the county treasurer to the credit of the undivided tax fund the sum collected by him during the preceding month under the provisions hereof; and no mortgage of real property subject to the registration fee imposed by the provisions of this act shall be recorded unless and until the fee for the registration thereof has first been paid in accordance with the provisions of this act. Provided, however, that mortgages covering property situated in two or more counties shall be registered in any of such counties in which the same shall be first presented for record; and the recorder receiving the fee therefor shall apportion and pay the same to the respective treasurers of the counties in which the property is located in the proportion to the assessed value of the property located in each county; and provided, that upon mortgages covering property located within and partly without the state of Ohio the registration fee, which shall be payable to the recorder of the county within the state to which the mortgage is first presented for record, shall be such pro-

portion of one-half of one per cent. of the amount secured thereby as the assessed value of the property within this state bears to the total assessed value of all the mortgaged property ascertained from the certificate of the respective county auditors, or other officers having charge of the various tax duplicates upon which such property is entered. (107 v. 695; 106 v. 247; R. S. Sec. 2746; 56 v. 175, § 59.)

The amendment of 107 v. 695 was held unconstitutional in so far as it operates to exempt mortgages on Ohio real estate from taxation. *State v. Frillman*, 96 O. S. 545 (1917).

"Investment in stocks" defined, § 5324.

"Credits" defined, § 5327.

Capital stock. The "capital stock" of a company under this section means its capital or property. Where a corporation is required to list its property, the shares of its stock are exempt from taxation, whether or not the corporation has actually listed its property.

Lee v. Sturges, 46 O. S. 153, 160, 175 (1889).

Jones v. Davis, 35 O. S. 474, 476, 477 (1880).

Pledged stock, if taxable, is taxed in the name of the pledgor, where it has not been transferred to the pledgee on the corporate books.

Ratterman v. Ingalls, 48 O. S. 468, 491 (1891).

Scrip certificates not taxable, when.

Adams v. Shields, 17 C. C. 129; 9 C. D. 558 (1898); *aff'd*, 61 O. S. 643.

State v. Franklin, 10 Ohio 91 (1840).

Void or illegal stock is not taxable.

McDonald v. Haggerty, 7 C. C. 508; 4 C. D. 702 (1893).

"False return of stock," what constitutes.

Ratterman v. Ingalls, 48 O. S. 468 (1891).

Ratterman v. Phipps, 7 C. C. 458; 4 C. D. 678 (1893).

Exemptions from taxation. An exemption from taxation must be expressed in clear and unmistakable terms.

Lee v. Sturges, 46 O. S. 160 (1889).

Scott v. Smith, 2 N. P. n. s. 617; 15 L. D. 590 (C. P. 1905).

Stock in Ohio corporations. Shares of stock in Ohio corporations are exempt from taxation.

G. C. § 192.

Prior to the amendment of § 192 in 1904 (97 v. 496), stock in an Ohio corporation was exempt only when the property of the corporation was taxed in its name in Ohio.

Lander v. Burke, 65 O. S. 532 (1901).

Section 192 exempts stock in Ohio corporations from taxation, although a part of its property is located in another state and is not taxed in Ohio. *Opins. Atty. Gen.* 1916, pp. 1739, 1743.

Stock in a railroad company formed by a consolidation of an Ohio company with a foreign company is not exempt under § 5372 but is exempt under § 192. *Opins. Atty. Gen.* 1917, p. 542.

No distinction is made in this section between preferred and common stock.

Miller v. Ratterman, 47 O. S. 141 (1890).

Stock in foreign corporations. As a general rule stock in foreign corporations owned by residents of Ohio is taxable in Ohio, although the corporate property is taxed in its home state.

Bradley v. Bauder, 36 O. S. 28 (1880).

Worthington v. Sebastian, 25 O. S. 1 (1874).

Lee v. Sturges, 46 O. S. 153 (1889).

Sturges v. Carter, 114 U. S. 511 (1885).

And although certificates representing the stock are in the possession of an agent in another state where taxes are paid thereon.

Rep. of Atty. Gen., 1906, p. 257.

But where all the property of the corporation is taxed in Ohio in the name of the corporation, the shares of its stock are exempt under §§ 192 and 5372.

Hubbard v. Brush, 61 O. S. 252 (1899).

Stock in a foreign corporation is also exempt where its holder furnishes satisfactory proof to the taxing authorities that at least two-thirds of its property is taxed in Ohio and the remainder in other states, providing the corporation also pays, as an annual franchise tax, the same percentage on its entire authorized capital stock that is required of an Ohio corporation on its subscribed or issued stock.

G. C. § 192.

Shares of stock in a foreign corporation are taxable, although its capital is wholly invested in patent rights, which are exempt under federal law.

Scott v. Smith, 2 N. P. n. s. 617; 15 L. D. 590 (C. P. 1905).

Stock in a foreign corporation held by a trustee residing in Ohio in trust for a non-resident beneficiary is taxable in Ohio. Rep. Atty. Gen. 1912, p. 596; Opins. Atty. Gen. 1914, p. 1277.

But stock in a foreign corporation held by a trustee residing in another state in trust for a resident of Ohio is not taxable in Ohio, although the trust is a revocable one established by the resident of Ohio. Opins. Atty. Gen. 1921, p. 969.

Stock in foreign corporation, owned by another foreign corporation. Stock in a foreign corporation, owned by another foreign corporation doing business in Ohio, is not taxable although the stock certificates are kept in its branch office in Ohio. Iron Co. v. Madigan, 17 C. C. n. s. 340 (1911); aff'd, no rep. 88 O. S. 533.

Federal reserve bank stock. Federal reserve bank stock is exempt from state and local taxation. Opins. Atty. Gen. 1915, p. 1018.

Other exemptions. The exemption from taxation of the first \$100 of personal property applies only to natural persons and not to corporations.

Rep. Atty. Gen., 1911-1912, p. 656.

Charitable institutions, lodges, etc., G. C. § 5364.

Churches, colleges, etc., G. C. §§ 5349, 7915-1.

O'Brien v. Hosp. Assn., 96 O. S. 1 (1917).

See Watterson v. Halliday, 77 O. S. 150 (1907).

Humphreys v. State, 70 O. S. 68 (1904).

Little v. Seminary, 72 O. S. 417.

Cleveland, etc., Ass'n. v. Pelton, 36 O. S. 253 (1880).

Humphries v. Little Sisters, 29 O. S. 201 (1876).

Morning Star Lodge v. Hayslip, 23 O. S. 144 (1872).

New Jerusalem Soc. v. Richardson, 10 N. P. n. s. 214 (C. P. 1910).

Y. W. C. A. v. Spencer, 9 C. C. n. s. 351; 19 C. D. 249 (1907).

Section 5387-1. (When new corporation business listed.)

When a company is incorporated after the first day of January and prior to the first day of July in any year, and the

personal property employed in such business has not been previously listed for taxation for the then current year, the president, secretary or principal accounting officer of such corporation shall list for taxation with the auditor of the county wherein located the probable average value of the personal property by him intended to be employed until January 1st thereafter. (110 v. 385.)

Section 5404. (Corporation returns.) The president, secretary, and principal accounting officer of every incorporated company, except banking or other corporations whose taxation is specifically provided for, for whatever purpose they may have been created, whether incorporated by a law of this state or not, shall list for taxation, verified by the oath of the person so listing, all the personal property thereof, and all real estate necessary to the daily operations of the company, moneys and credits of such company or corporation within the state, at the true value in money. (April 12, 1911, 102 v. 61; April 8, 1876, 73 v. 139, § 16; R. S. Sec. 2744.)

Stock in corporations. See §§ 192, 5372 and notes.

Banks, § 5407 et seq.

The sworn return of a corporation is not a bar to an application by the corporation to correct a mistake in its return, nor to an appeal to the tax commission. Opins. Atty. Gen. 1921, p. 733.

This section does not by implication repeal § 5328. Coal Co. v. O'Brien, 98 O. S. 14.

Sections 5404 et seq. are not exclusive so as to exclude corporations from the provisions of G. C. § 5385 and other provisions of chapter 3 of the title relating to taxation, which apply to the particular business carried on by the corporation. Rep. Atty. Gen. 1912, p. 612; Rep. Atty. Gen. 1911-1912, p. 676; Resort Co. v. Nunn, 15 N. P. n. s. 449.

An officer of a foreign corporation making a return under § 5404 acts for the corporation and does not act as "guardian, trustee or agent". Iron Co. v. Madigan, 17 C. C. n. s. 340 (1911); aff'd, no rep. 88 O. S. 533.

A sheriff holding money derived from sale in partition, pending adjudication of the right thereto, is not an "accounting officer" under § 5370. Pavey v. Pavey, 18 N. P. n. s. 377 (1914).

Excise or privilege tax does not exempt corporation. The imposition of a franchise or privilege tax does not bring a corporation within the exception of this section relating to corporations whose taxation is otherwise provided for.

Scottish, etc., Ins. Co. v. Bowland, 196 U. S. 610; 2 O. L. R. 515 (1904).

Western Assur. Co. v. Halliday, 127 Fed. 830 (C. C. 1903).

See Southern Gum Co. v. Laylin, 66 O. S. 578 (1902).

The excise tax on express companies does not relieve them from the property tax. Express Co. v. State, 55 O. S. 69 (1896).

Credits of foreign corporation. Choses in action, whether book accounts, notes, etc., of foreign corporations that are kept in Ohio and rise

out of the corporate business transacted here are taxable in Ohio under §§ 5404 to 5406.

Hubbard v. Brush, 61 O. S. 252 (1899).

Rep. Atty. Gen. 1911-1912, p. 676.

But if the books, notes, etc., are kept at its home office in another state, and all collections made from the home office, the credits are not taxable in Ohio.

Rep. Atty. Gen., 1911-1912, p. 630.

A foreign corporation having plants in several states, but maintaining its principal accounting office in Ohio, in which all its accounts and bills receivable are fully and completely managed and controlled, may be taxed on such credits in Ohio. Rep. Atty. Gen. 1912, p. 547.

A foreign manufacturing corporation, having a selling agency in Ohio where a stock of goods is kept, is taxable on the credits arising therefrom. It may deduct from the credits only such debts as are incurred by the selling agency or by the company for the agency. It can not deduct a proportionate share of the entire indebtedness of the company determined by the Ohio sales as compared with its total sales. Rep. Atty. Gen. 1914, p. 1578; *Heinz v. Benham*, 95 O. S. 410 (1916).

Where a foreign corporation loans money on mortgages in this state, through a resident agent, the agent holding the notes and mortgages in this state, such credits are taxable in Ohio.

Rep. Atty. Gen., 1911-1912, p. 630.

Conditional sale contracts or leases, owned by a foreign corporation, covering goods sold by sample and shipped into Ohio to fill orders, are not taxable in Ohio.

4 Opins. Atty. Gen., 826 (1898).

See note to § 194 "doing business" in Ohio.

Rep. Atty. Gen., 1911-1912, p. 676.

Bonds deposited with state officers pursuant to statutory requirements. See § 5437.

Sims v. Best, 1 C. C. n. s. 41; 15 C. D. 149 (1903).

Scottish, etc., Ins. Co. v. Bowland, 196 U. S. 611; 2 O. L. R. 515 (1904).

Western, etc., Co. v. Halliday, 126 Fed. 257 (1903).

Stock in foreign corporation, owned by another foreign corporation. Stock in a foreign corporation, owned by another foreign corporation doing business in Ohio, is not taxable although the stock certificates are kept in its branch office in Ohio. *Iron Co. v. Madigan*, 17 C. C. n. s. 340 (1911); aff'd, no rep. 88 O. S. 533.

Miscellaneous. Franchise to be a corporation.

Exchange Bank v. Hines, 3 O. S. 1, 7 (1853).

Southern Gum Co. v. Laylin, 66 O. S. 578 (1902).

Raw material of a non-resident foreign corporation, on which an Ohio corporation is performing work in the state, should be returned by the foreign corporation in its own name and not by the Ohio corporation. Opins. Atty. Gen. 1915, p. 769.

Building and loan associations are not required to return personal property under § 5404. Rep. Atty. Gen. 1913, p. 1375.

Unpaid stock subscriptions.

Farmers Ins. So. v. La Rue, 22 O. S. 630 (1872).

Opins. Atty. Gen. 1920, p. 403.

Interest in unincorporated company.

Pomeroy Salt Co. v. Davis, 21 O. S. 555 (1871).

How value of property ascertained.

State v. Jones, 51 O. S. 492, 511 (1894).

Insurance companies are required to make returns of taxable property under this section.

Scottish, etc., Ins. Co. v. Bowland, 196 U. S. 610; 2 O. L. R. 515 (1904).

A mutual insurance company, incorporated in Ohio, is required to return for taxation notes and cash, in the possession of its agents in other states, although it is required to pay an excise tax for the privilege of doing business in such states.

Insurance Co. v. Hard, 8 N. P. 36; 10 L. D. 469 (1900); s. c., 59 O. S. 248 (1898).

Section 5404-1. (Property of incorporated companies shall be listed as of January 1st and filed before March 1st.) All the listing and valuation of the personal property, moneys, credits, investments in stocks, bonds, joint stock companies, or otherwise, of incorporated companies, and all the averages of the stocks of merchandise and material used as a manufacturer, of such incorporated companies, shall be listed, valued and ascertained as of the first day of January, annually.

All such listing together with all supplementary forms and all information necessary in the proper fixing of such values for taxation, shall be filed with the county auditor on or before the first day of March, annually. (110 v. 385; 108 (Pt. 1) v. 132.)

A liquidating receiver of the assets of a corporation should make a return as of the day preceding the second Monday in April under G. C. § 5372-1, and not as of January 1 under this section. Opins. Atty. Gen. 1920, p. 227.

Property of a corporation, in possession of an agent (whether individual or corporate), should be returned as of January 1. The return should be made by the corporation owning the property, with possible exceptions of agents having control of investments and receivers. Opins. Atty. Gen. 1920, p. 1161.

Property of an individual, in possession of a corporation as his agent, should be returned as of the day preceding the second Monday in April. Opins. Atty. Gen. 1920, p. 1161.

Section 5405. (Returns. Valuation by county auditor. Apportionment.) Return shall be made to the several auditors of the respective counties where such property is situated, together with a statement of the amount thereof which is situated in each township, village, city, or taxing district therein. Upon receiving such returns, the auditor shall ascertain and determine the value of the property of such companies, and deduct from the aggregate sum so found of each, the value as assessed for taxation of any real estate included in the return. The value of the property of each of such companies, after so deducting the value of all the real estate included in the return, shall be apportioned by

the auditor to such cities, villages, townships, or taxing districts, pro rata, in proportion to the value of the real estate and fixed property included in the return, in each of such cities, villages, townships, or taxing districts. The auditor shall place such apportioned valuation on the tax duplicate and taxes shall be levied and collected thereon at the same rate and in the same manner that taxes are levied and collected on other personal property in such township, village, city or taxing district. (April 12, 1911, 102 v. 61; April 8, 1876, 73 v. 139, § 16; R. S. Sec. 2744.)

Corporation returns are made under § 5404 and bank returns under § 5411. In both cases real estate must be included in the return, and the deductions for real estate values are made by the auditor.

Rep.. Atty. Gen., 1911-1912, p. 1352.

Moneys, credits and investments of an Ohio corporation are "situated" in the taxing district wherein the corporation has its principal place of business. "Fixed property" probably includes all tangible personal property except that which is habitually moved about, such as the rolling stock of a railroad. Opins. Atty. Gen. 1918, p. 1139.

The personal property of a corporation should be valued at its true value in money without reference to the use made of it. Taking the market value of the shares of the stock of the company and deducting the value of the real estate is not a proper method of valuation. Nor is it proper to fix the value of the corporate property by capitalizing its net earnings. *Resort Co. v. Nuhn*, 15 N. P. n. s. 449 (1913); *aff'd* by court of appeals, 12 O. L. R. 33.

Section 5406. (Duty of county auditor.) The auditor of each county, on or before the first Monday of May, annually, shall furnish the president, secretary, principal accounting officer, or agent as provided in the next two preceding sections, the necessary blanks for the purpose of making such returns, but neglect or failure on the part of the county auditor to furnish such blanks shall not excuse such president, secretary, accountant, or agent, from making the returns within the time specified herein. If the county auditor to whom returns are made is of the opinion that false or incorrect valuations have been made, that the property of the corporation or association has not been listed at its full value, or that it has not been listed in the location where it properly belongs, or if no return has been made to the county auditor, he must have the property valued and assessed. This section and the next preceding section shall not tax any stock or interest held by the state in a joint stock company. (R. S. Sec. 2744; April 8, 1876, 73 v. 139, § 16.)

See *Ohio, etc., Co. v. Hard*, 59 O. S. 248 (1898).

State v. Halliday, 61 O. S. 352 (1899).

The auditor may include, in the blanks, value of shares of the corporate stock, amount of insurance carried, and amount of inventory. Rep. Atty. Gen. 1912, p. 545.

BANKS AND BANKERS.

Section 5407. ("Bank" and "bankers" defined.) A company, association, or person, not incorporated under a law of this state or of the United States, for banking purposes, who keeps an office or other place of business, and engages in the business of lending money, receiving money on deposit, buying and selling bullion, bills of exchange, notes, bonds, stocks, or other evidences of indebtedness, with a view to profit, is a bank, or banker, within the meaning of this chapter. (R. S. Sec. 2758; 64 v. 204, § 12; S. & S. 765.)

See *Robinson v. Ward*, 13 O. S. 293.

A society for savings incorporated under a special charter (see § 9812 et seq.), having no capital stock is not taxable under this chapter. Rep. Atty. Gen., 1911-1912, p. 645.

A firm or corporation engaged in a general merchandising business, not incorporated for banking purposes, which accepts deposits subject to check and pays interest thereon, but does not loan money or buy and sell evidences of indebtedness, is not a bank within the meaning of this section and is not required to make returns under this chapter.

Rep. Atty. Gen., 1911-1912, p. 662.

Section 5408. (Shares or capital of banks, incorporated or unincorporated.) All the shares of the stockholders in an incorporated bank or banking association, located in this state, incorporated or organized under the laws of the state or of the United States, and all the shares of the stockholders in an unincorporated bank, located in this state, the capital stock of which is divided into shares held by the owners of such bank, and the capital employed, or the property representing it, in an unincorporated bank the capital stock of which is not divided into shares, located in this state, shall be listed at the true value in money, and taxed only in the city, ward, or village where such bank is located. (R. S. Sec. 2762; April 23, 1904, 97 v. 279; April 16, 1900, 94 v. 348; April 16, 1867, 64 v. 204, § 1.)

Investment in stocks defined, § 5324.

Shares, not corporate property, taxed. Under §§ 5408 to 5414 the shares of the stockholders are taxed, and not the property of the bank except its real estate.

Cleveland Trust Co. v. Lander, 62 O. S. 266 (1900); *aff'd*, 184 U. S. 111.

Frazer v. Siebern, 16 O. S. 614 (1866).

The shares are taxed in the name of the stockholders and not the bank.

Miller v. First N. B., 46 O. S. 424 (1889).

Taxes on bank stock, owned by a non-resident parent, may be credited upon school tuition charges against the parent in the district in which the bank is located. Rep. Atty. Gen. 1914, p. 216.

National bank stock. The state has power to tax shares in national banks located in Ohio, subject to the limitations of U. S. Rev. Stats. § 5219, that such tax shall not exceed the rate imposed upon other moneyed capital of individuals, nor that imposed upon shares in state banks.

Frazer v. Siebern, 16 O. S. 614 (1866).

See Lander v. Mercantile N. B., 186 U. S. 458 (1902).

The restriction of § 5219 R. S. U. S. requires that both the tax rate and the assessed value of shares shall not be greater than on moneyed capital of individuals.

Cleveland Trust Co. v. Lander, 62 O. S. 266 (1900); aff'd, 184 U. S. 111.

Where a tax upon national bank shares exceeds the restrictions of § 5219 R. S. U. S. its collection will be enjoined only upon payment of a sum which is a fair equivalent for the tax on state banks.

Frazer v. Siebern, 16 O. S. 614 (1866).

Where other moneyed capital is systematically and intentionally valued for taxation far below its true value while national bank shares are assessed at their true value, the state taxing authorities may be enjoined, in federal court, upon tender of an amount equal to the tax on other property, from collecting the excess, although the state statutes require all property to be taxed at its true value.

Pelton v. Commercial N. B., 101 U. S. 144; 4 O. F. D. 573 (1880).

Cummings v. Merchants N. B., 101 U. S. 153; 4 O. F. D. 578 (1880).

Exchange N. B. v. Miller, 19 Fed. 372; 4 O. F. D. 578 (1884).

Stock in national banks belonging to nonresidents is taxable in Ohio.

Rep. Atty. Gen., 1911-1912, pp. 592, 610.

Where officers of a national bank misappropriated assets of the bank to such an extent that the shares of its stock were worthless, but the cashier made a fraudulent return under § 5411 showing that the shares were of value and paid the tax based thereon, the tax commission is authorized to remit such taxes. A finding of the comptroller of the currency showing the actual value of the shares is a quasi-judicial finding which can not be collaterally attacked. The action of the cashier in making the return and paying the tax was vitiated by fraud and illegal. Rep. Atty. Gen. 1913, p. 532.

Miscellaneous. Deductions. See § 5412 and note.

Value of shares.

Chapman v. First N. B., 56 O. S. 310 (1897); s. c., 173 U. S. 205; 12 O. F. D. 446.

Tax a lien on shares, § 5672.

Bank to collect tax from stockholders. See §§ 5672, 5673.

See Miller v. First N. B., 9 W. L. B. 353 (C. P. 1883); aff'd, 46 O. S. 424.

Miller v. Fourth N. B., 12 W. L. B. 66 (Dist. Ct. 1884).

A bank is not required to make return for taxation until actively engaged in doing business. Money paid on stock subscriptions before business is commenced should be listed by the subscribers.

Rep. Atty. Gen., 1909-1910, p. 158.

Corporation returns are made under § 5404 and bank returns under § 5411. In both cases real estate must be included in the return, and the deductions for real estate values are made by the auditor.

Rep. Atty. Gen., 1911-1912, p. 1352.

Shares in a corporation organized to deal in bonds, stocks and evidences of indebtedness, and actually engaged in such business, are taxable under § 5408 et seq. and its property is not taxable under the general property tax laws. Opins. Atty. Gen. 1922, p. 415; 16 Dept. Rep. 218.

Section 5409. (Tax on real estate of bank.) The real estate of a bank or banking association shall be taxed in the place where it is located, in like manner as the real estate of persons is taxed. (R. S. Sec. 2763; April 16, 1867, 64 v. 204, § 2.)

Section 5410. (Names of stockholders and shares of each.) There shall be kept in the office at all times where the business of such bank or banking association is transacted, a full and correct list of the names and residences of the stockholders therein, and the number of shares held by each, which at all times during business hours shall be open to the inspection of all officers who are or may be authorized to list or assess the value of such shares for taxation. (R. S. Sec. 2764; April 16, 1867, 64 v. 204, § 3.)

Cited, *Cleveland Trust Co. v. Lander*, 62 O. S. 266.

Section 5411. (Return made by cashier, etc., to auditor.) The cashier of each incorporated bank, and the cashier, manager or owner of each unincorporated bank, shall return to the auditor of the county in which such bank is located, between the first and second Mondays of May, annually, a report in duplicate under oath, exhibiting in detail, and under appropriate heads, the resources and liabilities of such bank at the close of business on the Wednesday next preceding the said second Monday, with a full statement of the names and residences of the stockholders therein, the number of shares held by each and the par value of each share, and of the amount of capital employed by unincorporated banks, not divided into shares, and the name, residence and proportional interest of each owner of such bank. (R. S. Sec. 2765; April 23, 1904, 97 v. 279; April 16, 1900, 94 v. 347; April 12, 1877, 74 v. 88, § 1.)

The shares must be listed in the names of the stockholders, not in the name of the bank.

Miller v. First N. B., 46 O. S. 424 (1889).

Correction of returns is provided for by § 5413 and not § 5401.

Miller v. First N. B., 46 O. S. 424.

Bank to pay tax, § 5673.

The return of bank stock should be made by the cashier, and not by the stockholders.

Lander v. Mercantile N. B., 118 Fed. 785; 14 O. F. D. 54; 55 C. C. A. 523 (1902).

The cashier, in making a return, is not agent of the stockholders. Rep. Atty. Gen. 1913, p. 532.

Former statute requiring return by savings societies.

See Collett v. Springfield Sgs. Soc., 13 C. C. 131; 7 C. D. 146 (1896).

Section 5412. (Auditor to fix value of bank shares or property.) Upon receiving such report the county auditor shall fix the total value of the shares of such banks, and the value of the property representing the capital employed by unincorporated banks, the capital stock of which is not divided into shares, each, according to their true value in money, and deduct from the aggregate sum so found, of each, the value of the real estate included in the statement of resources as it stands on the duplicate. Thereupon he shall make and transmit to the annual state board of equalization for banks a copy of the report so made by the cashier, manager or owner with the valuation of such shares or property representing capital employed as so fixed by the auditor. (R. S. Sec. 2766; April 23, 1904, 97 v. 279; March 9, 1883, 80 v. 54; April 13, 1880, 77 v. 191; April 12, 1877, 74 v. 88, § 2; April 16, 1867, 64 v. 204, § 5.)

Market value of the shares is not the proper rule of valuation. The corporate franchise and good will of a bank is not property for taxation. Doerfler v. Commission, 21 N. P. n. s. 361 (1918).

Where real estate is valued on the tax duplicate at a larger amount than on the books of the bank, the auditor or tax commission is justified in adding to the return the amount in which the tax value exceeds the book value. Bank v. Searles, 9 Ohio App. 76; 27 O. C. A. 407; 30 C. D. 179 (1917).

Deductions. Stockholders are not entitled to a deduction, from the value of their shares, of the amount of the capital stock of the bank which is invested in United States bonds.

Cleveland Trust Co. v. Lander, 62 O. S. 266 (1900); aff'd, 184 U. S. 111.

Frazer v. Siebern, 16 O. S. 614 (1866).

Nor investments in Federal Reserve Bank stock. Bank v. Beaman, 257 Fed. 729 (C. C. A. Ohio 1918); aff'g, 246 Fed. 163.

Nor other non-taxable securities. Opins. Atty. Gen. 1921, p. 499.

Nor is a stockholder entitled to a deduction of his debts from the value of his shares.

Chapman v. First N. B., 56 O. S. 310 (1897); aff'd, 173 U. S. 205.

Niles v. Shaw, 50 O. S. 370 (1893).

See Whitbeck v. Mercantile N. B., 127 U. S. 193 (1888).

Mercantile N. B. v. Shields, 59 Fed. 952 (1894).

Lander v. Mercantile N. B., 186 U. S. 458 (1901).

State v. Akins, 63 O. S. 182 (1900).

Nor can a deduction be made for the franchise.

Frazer v. Siebern, 16 O. S. 614 (1866).

Assessed value less than actual value. Discriminations. A stockholder, whose shares are valued at eighty percent of their true value in money, can not enjoin the collection of the tax thereon on the ground that other property in the county is valued at only forty percent of its value.

Wagoner v. Loomis, 37 O. S. 571 (1881).

But where national bank stock is assessed at its actual value, while other moneyed capital is intentionally and systematically valued far below its true value, under U. S. Rev. Stats. § 5219 the state taxing authorities may be enjoined from collecting the excess.

Pelton v. Commercial N. B., 101 U. S. 144; 4 O. F. D. 573 (1880).

Cummings v. Merchants N. B., 101 U. S. 153; 4 O. F. D. 578 (1880).

See *Exchange N. B. v. Miller*, 19 Fed. 372; 4 O. F. D. 578 (1884).

First N. B. v. Treasurer, 25 Fed. 749; 5 O. F. D. 467 (1885).

Section 5413. (When bank fails to make return.) If a bank fails to make and furnish to the county auditor the statement required, within the time herein fixed, the auditor shall examine the books of the bank; and also any officer or agent thereof under oath, with such other persons as he deems proper, and make such statement. The auditor shall have like powers, and the probate judge of the county shall exercise like powers, and perform like duties in aid of the auditor in the performance of his duties under this section, as are authorized by law in cases where the county auditor is informed, or has reason to believe, that any person has failed to make a return, or has made a false return for taxation. The statement so made out by the auditor shall stand as the statement required to be made by the cashier. (R. S. Sec. 2769; April 16, 1867, 64 v. 204, § 9.)

The correction of returns made by the cashier of a bank is provided for by this section, and not by § 5401.

Miller v. First Nat. Bank, 46 O. S. 424 (1889).

See *State v. Akins*, 63 O. S. 182 (1900).

An increase in the amount of a return, made as the result of a clerical error, may be enjoined. *Bank v. Hopkins*, 17 N. P. n. s. 55 (1915).

Section 5414. (Penalty for making false return.) A bank officer who fails to make out and furnish to the county auditor the return required by section fifty-four hundred and eleven, or wilfully makes a false statement in such return, shall forfeit not more than one hundred dollars together with the costs and other expenses incurred by the auditor or other proper officer in obtaining such statement. (R. S. Sec. 2769; April 16, 1867, 64 v. 204, § 9.)

TAX COMMISSION.

§ 5415. Public utility defined.	§ 5424. How assessment shall be made.
§ 5416. Definitions.	§ 5425. Property to be assessed.
§ 5417. Gross receipts defined.	§ 5426. Hearing.
§ 5418. Gross earnings defined.	§ 5427. Corrections.
§ 5419. Definitions.	§ 5428. Deductions.
§ 5420. Exceptions.	§ 5429. Valuation of railroad properties.
§ 5421. Statement under oath.	§ 5430. Apportionment.
§ 5422. Shall contain what, etc.	§ 5431. Apportionment.
§ 5423. Assessment when made.	

Section 5415. (Public utility defined.) The term "public utility" as used in this act means and embraces each corporation, company, firm, individual and association, their lessees, trustees, or receivers elected or appointed by any authority whatsoever, and herein referred to as express company, telephone company, telegraph company, sleeping car company, freight line company, equipment company, electric light company, gas company, natural gas company, pipe line company, waterworks company, messenger company, signal company, messenger or signal company, union depot company, water transportation company, heating company, cooling company, street railroad company, railroad company, suburban railroad company, and interurban railroad company, and such term "public utility" shall include any plant or property owned or operated, or both, by any such companies, corporations, firms, individuals or associations. (June 2, 1911, 102 v. 230, § 39; 101 v. 429, § 121.)

The tax commission act is constitutional. Ohio Tax Cases, 232 U. S. 576 (1914).

Section 5416. (Definitions.) That any person or persons, firm or firms, co-partnership or voluntary association, joint stock association, company or corporation, wherever organized or incorporated:

When engaged in the business of conveying to, from, or through the state, or part thereof, money, packages, gold, silver, plate or other article, by express, not including the ordinary lines of transportation of merchandise and property in this state, as an express company;

When engaged in the business of transmitting to, from, through, or in this state, telephonic messages, is a telephone company;

When engaged in the business of transmitting to, from, through, or in this state, telegraphic messages, is a telegraph company;

When engaged in the business of operating cars for the transportation, accommodation, comfort, convenience, or safety of passengers, on or over any railway line or lines, in whole or in part within this state, such line or lines not being owned, leased or operated by such company, whether such cars be termed sleeping, palace, parlor, chair, dining or buffet cars, or by another name, is a sleeping car company;

When engaged in the business of operating cars for the transportation of freight, whether such freight is owned by such company, or any other person or company, over any railway line or lines in whole or part within this state, such

line or lines not being owned, leased or operated, by such company, whether such cars be termed box, flat, coal, ore, tank, stock, gondola, furniture or refrigerator cars, or by another name, is a freight line company;

When engaged in the business of furnishing or leasing cars, of whatsoever kind or description, to be used in the operation of any railway line or lines, wholly or partly within this state, such line or lines not being owned, leased or operated, by such company, is an equipment company;

When engaged in the business of supplying electricity for light, heat or power purposes, to consumers within this state, is an electric light company;

When engaged in the business of supplying artificial gas for lighting or heating purposes, to consumers within this state, is a gas company;

When engaged in the business of supplying natural gas for lighting, heating or power purposes, to consumers within this state, is a natural gas company;

When engaged in the business of transporting natural gas or oil through pipes or tubing, either wholly or partially within this state, is a pipe line company;

When engaged in the business of supplying water through pipes or tubing, or in a similar manner to consumers within this state, is a waterworks company;

When engaged in the business of supplying messengers for any purpose in a messenger company;

When engaged in the business of signalling or calling by electrical apparatus, or in a similar manner, for any purpose is a signal company;

When engaged in the business of operating a union depot or station for railroad, suburban or interurban railroad purposes, is a union depot company;

When engaged in the transportation of passengers or property, by boat or other water craft, over any water way, whether natural or artificial, from one point within this state to another point within this state, or between points within this state and points without this state, is a water transportation company;

When engaged in the business of supplying water, steam or air through pipes or tubing, to consumers within this state, for heating purposes, is a heating company;

When engaged in the business of supplying water, steam or air through pipes or tubing, to consumers within this state, for cooling purposes, as a cooling company;

When engaged in the business of operating a street, suburban or interurban railroad company, wholly or partially within this state, whether cars used in such business

are propelled by animals, steam, cable, electricity, or other motive power, is a street, suburban or interurban railroad company;

When engaged in the business of operating a railroad, either wholly or partially within this state, on rights-of-way acquired and held exclusively by such company, or otherwise, is a railroad company. (June 2, 1911, 102 v. 230, § 40; May 10, 1910, 101 v. 404, 406, 409, §§ 28, 29, 30, 39, 46; April 24, 1904, 97 v. 324; R. S. Secs. 2777, 2780-7, 2780-12, 2780-17; April 15, 1902, 95 v. 136; March 19, 1896, 92 v. 79.)

Under this section an interurban railroad is classed as a street railroad.

Electric St. R. Co. v. Lohe, 68 O. S. 110 (1903).

Definitions in public utilities commission act. §§ 614-2, 501.

Railroad or interurban railroad company. Whether a railroad is a commercial or an interurban road is determined, not exclusively by its charter, but from its method of operation and the character of its business.

Railway v. Poland, 10 N. P. n. s. 617; 21 L. D. 630 (C. P. 1910); aff'd, no rep., 88 O. S. 596.

See note to § 9117.

"Interurban service" consists of cars or trains run more frequently than through passenger trains, and making frequent stops. **Railway v. Commission**, 92 O. S. 9 (1915).

A commercial railroad does not become an interurban railway under § 5416 by installing electric passenger cars and operating with frequent stops, when train service is no more frequent than it was prior to electrification. **Opins. Atty. Gen.** 1915, p. 865.

Electric light company. A corporation organized for the sole purpose of furnishing electric current, heat and water, to a group of manufacturing plants, which does not use streets, nor exercise the power of eminent domain, nor serve the general public, its stock being owned by the factories in proportion to the service supplied to each, is not a public utility. It is liable for a franchise tax based on its capital stock, but not for an excise tax. **State v. Factory Power Co.**, 16 N. P. n. s. 545 (1915). For opinion of the attorney general to the contrary, see **Rep. Atty. Gen.** 1913, p. 578.

A manufacturing company which, as an incident to its business, furnishes electric current to consumers for light, heat or power purposes, is a public utility and must make reports and pay excise taxes on its gross receipts. It is not required to make reports under the franchise tax law (§ 5495 et seq.). **Rep. Atty. Gen.** 1913, p. 545.

A building company which furnishes electricity to tenants for light, heat or power purposes, making a separate charge therefor, is a public utility. **Rep. Atty. Gen.** 1913, p. 575.

But a company having no plant, which purchases electric current for its stockholders, each of whom pays at cost for the current used by him, is not a public utility. **Rep. Atty. Gen.** 1913, p. 578.

Pipe line company. The power to own and operate pipe lines can not be joined in the articles of incorporation of a company formed to bore for oil, gas, etc.

Rep. of Atty. Gen., 1909-10, p. 147.

Rep. of Atty. Gen., 1908, p. 69-79.

A corporation engaged in drilling and operating gas wells, which sells part of its gas to a manufacturer, is not a pipe line company merely by reason of the fact that it owns and uses the pipe through which such gas passes.

Rep. Atty. Gen., 1911-1912, p. 630.

A corporation, engaged only in producing oil, is not a public utility by reason of the fact that it owns a pipe line through which its product is transmitted. Rep. Atty. Gen. 1913, p. 658.

A company which buys oil from producers and transports and sells it to refiners is a pipe line company. Rep. Atty. Gen. 1913, pp. 658, 670; Opins. Atty. Gen. 1915, p. 813.

But a refinery which produces and also buys oil from producers, and transports it in pipes to its refinery, making no charge for transportation and selling none from the line, is not a pipe line company. Rep. Atty. Gen. 1913, p. 673.

A foreign pipe line company is not liable for franchise taxes under § 5495 et seq. Rep. Atty. Gen. 1913, p. 670.

Natural gas company. A corporation engaged in drilling and operating gas wells which sells a part of its gas to a manufacturing company is a natural gas company under this section, as it sells to a "consumer" for "power purposes."

Rep. Atty. Gen., 1911-1912, p. 630.

A corporation which is mainly engaged in producing and transporting natural gas and selling it to distributing companies and also, to some extent, to consumers, is a natural gas company. Public Utilities Commission v. Landon, 249 U. S. 236; 17 O. L. R. 8 (1919); Opins. Atty. Gen. 1916, p. 901.

Telephone company. A mutual or assessment telephone system is said to be a public utility under the tax commission act. Rep. Atty. Gen. 1913, pp. 649, 1223.

Water transportation company. A company operating Ohio River steamers to an amusement park, having the exclusive privilege of landing and selling tickets good for transportation and admission to the park (the park being operated by another party) is a water transportation company. Rep. Atty. Gen. 1914, p. 916.

Freight line company. Although freight line companies are not expressly excepted by § 5420, no method of apportionment of value is provided for such companies in § 5422, and they are not required to report their gross receipts. They are subject to a tax on their rolling stock in Ohio by §§ 5462 and 5468. The tax commission assesses only the rolling stock of such companies. Other property is returned for taxation locally. Rep. Atty. Gen. 1913, p. 610.

Messenger company. An association of individuals engaged in the special delivery business, handling parcels and packages from stores and factories, furnishing guides to strangers, delivering letters and packages in connection with a taxicab and auto livery business is a messenger company under this section.

Rep. Atty. Gen., 1911-1912, p. 644.

Section 5417. ("Gross receipts" defined.) The term "gross receipts" shall be held to mean and include the entire receipts for business done by any person or persons, firm or firms, co-partnership or voluntary association, joint stock

association, company or corporation, wherever organized or incorporated, from the operation of any public utility, or incidental thereto or in connection therewith. The gross receipts for business done by an incorporated company, engaged in the operation of a public utility, shall be held to mean and include the entire receipts for business done by such company under the exercise of its corporate powers, whether from the operation of the public utility itself or from any other business done whatsoever. (June 2, 1911, 102 v. 232, § 41.)

Section 5418. ("Gross earnings" defined.) The term "gross earnings" shall be held to mean and include the entire earnings for business done by any person or persons, firm or firms, co-partnership or voluntary association, joint stock association, company or corporation, wherever organized or incorporated, from the operation of any public utility, or incidental thereto, or in connection therewith. The gross earnings for business done by an incorporated company, engaged in the operation of a public utility, shall be held to mean and include the entire earnings for business done by such company under the exercise of its corporate powers, whether from the operation of the public utility itself or from any other business done whatsoever. (June 2, 1911, 102 v. 232, § 42.)

Rentals paid by an interurban railway to a street railway can not be deducted by the interurban company from its gross receipts, whether the rentals are in the form of a lump sum, or are arrived at by computations based on passenger or freight traffic. *Traction Co. v. State*, 94 O. S. 24 (1916).

A manufacturing company which engages in electric lighting or other public utility business, although only as an incident to its principal business, should report its gross receipts from all intra-state business. *Rep. Atty. Gen. 1913, p. 546.*

A foreign railroad company, which does no intra-state transportation business, is not liable for excise taxes on rental receipts from property acquired and held with a view to use as a right of way, but not actually so used. *Opins. Atty. Gen. 1916, p. 498.*

Section 5419. (Definitions.) The property owned or operated by a public utility, required to make return to the commission of its property to be assessed for taxation by the commission, shall be deemed and held to include such utility's plant or plants and all real estate necessary to the daily operations of the public utility and all other property, moneys and credits owned or operated, or both, by it wholly or in part within this state, used in connection with or as incidental to the operation of the public utility, whether the same be held in common or by the individuals operating such

public utility. In the case of incorporated companies, all the real estate, personal property, moneys and credits owned and held by such corporation within this state in the exercise of its corporate powers, or as incidental thereto, whether such property, or any portion thereof, is used in connection with such public utility business or not, shall be conclusively deemed and held to be the property of such public utility. (June 2, 1911, 102 v. 232, § 43.)

The scheme of taxation of the property of a public utility adopted by this act is termed "the unit rule or rule of entirety," and is similar to the plan previously in effect applying to express, telegraph and telephone companies (R. S. §§ 2777 to 2780), upheld in *State v. Jones*, 51 O. S. 492; *Express Co. v. Auditor*, 165 U. S. 194 and 166 U. S. 183.

Rep. Atty. Gen., 1911-1912, p. 603.

Section 5420. (Exceptions.) Each public utility, as defined in this act, except express, telegraph and telephone companies, shall annually, on or before the first day of March, make and deliver to the tax commission of Ohio, in such form as the commission may prescribe, a statement, with respect to such utility's plant or plants and all property owned or operated, or both, by it wholly or in part within this state. (June 2, 1911, 102 v. 233, § 44.)

A railroad company which runs trains into the state for interstate business only, and which does no intra-state business, is not liable for excise or franchise taxes. Its rolling stock, however, is taxable as property and, for the assessment thereof, the company should make a report as a public utility. Rep. Atty. Gen. 1914, p. 1358.

Section 5421. (Statement under oath.) Such statement shall be signed and sworn to under the oath of the person constituting such public utility, if a person or under the oath of the president, secretary, treasurer, superintendent or principal accounting officer or person of such firm, association or corporation, if a firm, association or corporation. (June 2, 1911, 102 v. 233, § 45.)

Section 5422. (Shall contain, what. Real estate, value and separate statement. Personal property inventory and statement. Property outside of state. Bonded indebtedness. Statement by street and other railroad companies. Pipe line, gas and other companies.) Such statement shall contain:

1. The name of the company.
2. The nature of the company, whether a person or persons, firm, association or corporation, and under the laws of what state or country organized.
3. The location of its principal office.

4. The name and postoffice address of the president, secretary, auditor or the principal accounting officer or person, treasurer, and superintendent or general manager.

5. The name and postoffice address of the chief officer or managing agent of the company in this state.

6. The number of shares of the capital stock.

7. The par value and market value, or if there is no market value, the actual value of its shares of stock on the first day of the month of January in which the statement is made; the amount of capital stock subscribed, and the amount thereof, actually paid in.

8. A detailed statement of the real estate owned by the company in this state, where situated, and the value thereof as assessed for taxation, making separate statements of that part used in connection with the daily operations of the company, and that part used otherwise, if any such there be.

9. An inventory of the personal property, including moneys, investments and credits, owned by the company, in this state, on the first day of the month of January in which the statement is made, where situated, and the value thereof, making separate statements of that part used in connection with the daily operations of the company, and that part used otherwise if any such there be.

10. The total value of the real estate owned by the company and situated outside of this state, making separate statements of that part used in connection with the daily operations of the company, and that part used otherwise if any such there be.

11. The total value of the personal property owned by the company and situated outside of this state, making separate statements of that part used in connection with the daily operations of the company, and that part used otherwise if any such there be.

12. The total amount of bonded indebtedness and of indebtedness not bonded; the gross receipts for the preceding calendar year from any and all sources, and the gross expenditures for the preceding calendar year.

13. In the case of street, suburban or interurban railroad companies, and railroad companies, such statements shall also give:

(a) The whole length of their lines and the length of so much of their line as is without and is within this state, including branches in and out of the state, which shall include lines and branches such companies control and use under lease or otherwise.

(b) The railway track in each county in the state, through which it runs; giving the whole number of miles of

road in the county, including the track and its branches and side and second tracks, switches, and turnouts therein and the true and actual value per mile of such railway in each county, stating the valuation of main track, second or other main tracks, branches, sidings, switches and turnouts, separately.

(c) Such statement as to character, classes, number, amounts, values, locations, ownership or control and use of rolling stock, as the commission may require.

(d) The depots, station houses, section houses, freight houses, machine and repair shops and machinery therein, and all other buildings, structures and appendages connected thereto or used therewith, including tool houses, and the tools usually kept therein, together with telegraph and telephone lines owned or used, and the true and actual value of all buildings and structures, and all such machinery, tools and appendages, including such telegraph and telephone lines; and the true and actual value thereof in each county in this state in which it is located.

(e) The gross earnings for the year, including earnings from telegraph lines, which shall be stated separately, on the whole length of the road, including the branches thereof, in and out of the state, and also such earnings within this state on way freight and passengers.

14. In case of pipe line, gas, natural gas, waterworks and heating or cooling companies, such statement shall also show:

(a) The number of miles of pipe line owned, leased or operated within this state, the size or sizes of the pipe composing such line, and the material of which such pipe is made;

(b) If such pipe line be partly within and partly without this state, the whole number of miles thereof within this state and the whole number of miles without this state, including all branches and connecting lines in and out of this state;

(c) The length, size and true and actual value of such pipe line in each county of this state, including in such valuation the main line, branches and connecting lines, and stating the different value of the pipe separately;

(d) Its pumping stations, machine and repair shops and machinery therein, tanks, storage tanks and all other buildings, structures and appendages connected or used therewith, including telegraph and telephone lines and wires, and the true and actual value of all such stations, shops, tanks, buildings, structures, machinery and appendages and of such telegraph and telephone lines, and the true and actual value

thereof in each county in this state in which it is located; and the number and value of all tank cars, tanks, barges, boats and barrels. (June 2, 1911, 102 v. 233, § 46; May 10, 1910, 101 v. 414, § 72.)

Section 5423. (Assessment; when made.) On the second Monday of June of each year, the commission shall ascertain and assess, at its true value in money, all the property in this state of each such public utility, subject to the provisions of this act, other than express, telegraph and telephone companies. (June 2, 1911, 102 v. 235, § 47; 101 v. 417, § 73.)

Section 5424. (How assessment shall be made.) In determining the value of the property of each such public utility to be assessed and taxed within the state, the commission shall be guided by the value of the property as determined by the information contained in the sworn statements made by the public utility to the commission and such other evidence and rules as will enable it to arrive at the true value in money of the entire property of such public utility within this state, in the proportion which the value of such property bears to the value of the entire property of such public utility. (June 2, 1911, 102 v. 235, § 48; 101 v. 417, § 73.)

Section 5425. (Property to be assessed.) The property of such public utilities to be so assessed by the commission shall be all the property thereof, as defined in section forty-three (G. C. § 5419) of this act. (June 2, 1911, 102 v. 235, § 49; 101 v. 417, § 73.)

Section 5426. (Hearing.) Before the assessment of such property each of such public utilities shall have the right, upon written application, to appear before the commission and to be heard in the matter of the valuation of its property for taxation. (102 v. 235, § 50; 101 v. 417, § 74.)

Section 5427. (Corrections.) Between the date herein fixed for the assessment of the property of any such public utility for taxation by the commission, and the date herein fixed for the certification by it of the apportioned value to the county, or to the several counties as herein provided, the commission may, on the application of such public utility or any person interested therein, or on its own motion, correct the assessment or valuation of its property in such manner as will in its judgment make the valuation thereof just and equal. (June 2, 1911, 102 v. 235, § 51; May 10, 1910, 101 v. 417, § 74.)

This act does not divest county auditors of the power to correct assessments made by them prior to the passage of the act, and before appointment of the tax commission.

Railway v. Edmondson, 13 N. P. n. s. 377; 57 Bull 434; 23 L. D. 33 (C. P. 1912).

Section 5428. (Deductions.) The commission shall deduct from the total value of the property of each of such public utilities in this state, as assessed by it, the value of the real property owned by such public utilities, if any there be, as otherwise assessed for taxation in this state, and shall justly and equitably equalize the relative values thereof. (June 2, 1911, 102 v. 236, § 52; 101 v. 417, § 74.)

For railroads and interurban railways, the deductions include only real estate not used in daily running operations. For other public utilities, the deductions include all real estate. Opins. Atty. Gen. 1917, p. 1054.

Section 5429. (Valuation of railroad properties.) The commission shall ascertain all of the personal property, roadbed, stations, power houses, poles, wires, water and wood stations and real estate necessary to the daily running operations of the road, moneys and credits of each railroad company and each suburban or interurban railroad company, having any line, or road, or part thereof in this state and the undivided profits, reserved or contingent fund of the company, whether in moneys, credits, or in any manner invested, and the actual value thereof in money, and also locomotives, motors and cars not belonging to the company, but hired for its use or run under its control on its road by a sleeping car company or other company. Such rolling stock not belonging to it, but under its control, may be returned by such public utility separate from its own property, and if so returned the commission shall fix the valuation of such property separately, but must include the amount in the aggregate valuation. (June 2, 1911, 102 v. 236, § 53; 101 v. 418, § 75; R. S. Sec. 2772; 64 v. 114, § 3.)

Personal property under this section includes the road bed, water stations, moneys, credits and undivided profits.

Lee v. Sturges, 46 O. S. 153, 166 (1889).

The "roadbed" and "real estate necessary to the daily running operations of the road" are by this section made personal property for taxation purposes.

Railway Co. v. Hynicka, 4 N. P. n. s. 345, 349; 17 L. D. 163 (Super. Ct. Cin. 1906); aff'd, no rep., 77 O. S. 628.

The bridge of the Cincinnati Southern Railway which spans the Ohio River, together with the viaduct or trestle leading up to it, constitutes with the underlying ground, a part of the roadbed, and is property necessary to the daily operation of the road, and there being no additional charge to shippers or passengers on account of the use thereof, it should be

taxed with the remainder of the road as a unit and "averaged" over the entire road.

Railway Co. v. Hynicka, 4 N. P. n. s. 345; 17 L. D. 163 (Super. Ct. Cin. 1906); aff'd, 77 O. S. 628.

Side tracks, in daily use for loading and unloading of freight, and land purchased for the purpose of establishing a connection track with another railroad do not constitute real estate, structures or stationary personal property to be "localized" for taxation but should likewise be "averaged" for taxation over the entire road. After such property has been valued under this section, it can not again be taxed as omitted property, nor as property which has escaped taxation.

Railway Co. v. Hynicka, 4 N. P. n. s. 345; 17 L. D. 163 (Super. Ct. Cin. 1906); aff'd, 77 O. S. 628.

Where a railroad of this state which terminated at low water mark on the Ohio River was leased to a company owning a railroad on the Kentucky side of the river, and connected by a bridge and an approach on the Ohio side owned by the lessee which extended back from low water mark, and an additional charge was made for freight and passengers crossing the bridge, it was held that the approach on the Ohio side was subject to taxation as a separate "structure" belonging to the lessee, although the roadbed, etc., to the low water mark had been averaged for taxation.

Cowan v. Aldridge, 114 Fed. 44; 14 O. F. D. 21 (C. C. A. 1902).

Taxation of terminals of railroad owned by a municipality.

See Railway v. Roth, 17 C. C. n. s. 562 (1913) reversing, 13 N. P. n. s. 633.

It is the duty of the tax commission, and not of county auditors, to value the real estate of railroads used in daily running operations. Opins. Atty. Gen. 1917, p. 1054.

Section 5430. (Apportionment.) The value of such property, moneys and credits of each such street, suburban and interurban railroad and railroad companies, as found and determined by the commission, shall be apportioned by the commission among the several counties through which the road, or any part thereof, runs, so that to each county and to each taxing district therein, shall be apportioned such part thereof as will equalize the relative value of the real estate, structures and stationary personal property of such company therein, in proportion to the whole value of the real estate, structures and stationary personal property of the company in this state; and so that the rolling stock, main track, roadbed, power houses, poles, wires, supplies, moneys and credits of the company shall be apportioned in like proportion that the length of the road in such county, bears to the entire length thereof in all the counties, and to each city, village and district or part thereof therein. (June 2, 1911, 102 v. 236, § 54; 101 v. 418, § 77; R. S. Sec. 2774; 82 v. 160; R. S. 1880; 64 v. 58; 59 v. 88, § 5.)

This section is valid. A railroad passing through a taxing district created under the "one mile assessment pike law," is subject to taxation in such district, in the proportion fixed under this section.

Railroad Co. v. Commissioners, 48 O. S. 249 (1891).

Railway Co. v. Hynicka, 4 N. P. n. s. 345; 17 L. D. 163 (1906);
aff'd, 77 O. S. 628.

See State v. Jones, 51 O. S. 492, 508 (1894).

Construction of former act.

Wabash, etc., Ry. Co. v. Kelsey, 11 W. L. B. 234 (1884).

In entering for taxation the property of a railroad which lies partly within and partly without the state, sections 5445, 5423 and 5429, should govern and not this section or sec. 5431.

Railway Co. v. Hynicka, 4 N. P. n. s. 345; 17 L. D. 163 (Super. Ct. Cin. 1906); aff'd, no rep., 77 O. S. 628.

Method of apportionment. See Opins. Atty. Gen. 1917, pp. 1047, 1448; Rep. Atty. Gen. 1914, p. 1358.

Section 5431. (Apportionment.) If the line of such company is divided into separate divisions or branches, so much of the rolling stock thereof as belongs to or is used solely upon such divisions or branches shall be apportioned in like manner to the county, or counties, and to each taxing district therein, through which such branch or division runs. The commission shall certify to each such county auditor such apportionment. (June 2, 1911, 102 v. 236, § 55; 101 v. 417, § 77; R. S. Sec. 2774; 82 v. 160; R. S. 1880; 64 v. 58; 59 v. 88, § 5.)

The phrase "belongs to . . . such division or branches" has reference to cases in which a division or branch is separately equipped.

State v. Aldridge, 66 O. S. 598 (1902).

FOREIGN INSURANCE COMPANIES.

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| § 5432. Annual statements of foreign insurance companies. | § 5438. Where policy on Ohio property to be placed. |
| § 5433. Payment of tax to treasurer of state. | § 5439. Reinsuring, etc., risk with unauthorized foreign company. |
| § 5433-1. Term "gross premiums" defined for taxation purposes. | § 5440. Annual report required of chief officer. |
| § 5434. Failure to pay tax or make true statement. | § 5441. When authority of insurance company revoked. |
| § 5435. Penalty for non-payment of taxes. | § 5442. When superintendent to inspect company. |
| § 5436. Retaliatory provision. | § 5443. When foreign insurance company not admitted in state. |
| § 5437. Deposits with superintendent of insurance not taxable. | § 5444. Expenses of inspection to be paid by company. |

Section 5432. (Annual statements of foreign insurance companies.) Every insurance company incorporated by the authority of another state or government, in its annual statement to the superintendent of insurance, shall set forth the gross amount of premiums received by it from policies covering risks within this state during the preceding calendar year, without deductions for commissions, return premiums, considerations paid for reinsurance or any deductions whatever. It shall also set forth therein in separate items, return

premiums paid for cancellations and considerations received from other companies for reinsurances in this state during such year. If the superintendent of insurance has reason to suspect the correctness of such statement he may make an examination, at the expense of the state, of the books of such company or its agents for the purpose of verifying them. (R. S. Sec. 2745; March 9, 1909, 100 v. 67; April 26, 1904, 97 v. 401; April 29, 1902, 95 v. 290; March 27, 1894, 91 v. 91; April 19, 1893, 90 v. 201; April 12, 1889, 86 v. 274; April 11, 1888, 85 v. 183; R. S. 1880; April 8, 1876, 73 v. 138.)

“Gross amount of premiums received * * * without * * * any deductions whatever” contemplate the gross amount of premiums stipulated on the face of the policies in force in Ohio for the period specified in this section. *State v. Tomlinson*, 99 O. S. 233 (1919).

Assessment receipts are not “premiums”. *Opins. Atty. Gen.* 1916, p. 643.

Construction of section before amendment (100 v. 67).

Insurance Co. v. State, 79 O. S. 305 (1909).

Same case upon amended petition, 13 C. C. n. s. 113; 22 C. D. 51 (1910) reversed, 83 O. S. 469.

Rep. Atty. Gen., 1909-1910, p. 346.

A casualty insurance company may not deduct estimated cost of inspection of boilers, etc., from premiums in making annual statement.

Rep. Atty. Gen., 1908, p. 166.

This section does not apply to foreign mutual protective associations admitted to do business in Ohio under § 9435 et seq.; nor to assessment companies doing business under § 9445 et seq.; nor to fraternal benefit societies.

5 *Opins. Attys. Gen.*, 343 (1900).

It does apply to mutual fire companies admitted under § 9559.

5 *Opins. Attys. Gen.* 343, 347 (1900).

Section 5433. (Payment of tax to treasurer of state.) If the superintendent of insurance finds such report to be correct, prior to the month of November in each year, he shall compute an amount of two and one-half per cent. of the balance of such gross amount after deducting such return premiums and considerations received for reinsurances as shown by the next preceding annual statement and charge them to such company as a tax upon the business done by it in this state for the period shown by such annual statement, which amount shall be paid by each such company to the treasurer of state in the month of November next succeeding. All taxes so collected shall be credited to the general revenue fund of the state. (106 v. 502; R. S. Sec. 2745; 100 v. 67; 97 v. 401; 95 v. 290; 91 v. 91; 90 v. 201; 86 v. 274; 85 v. 183; R. S. 1880; 73 v. 138.)

The treasurer of state is not authorized to make any reductions or accept any amount less than the amount certified to him under

§§ 841 and 5433. But as these sections impose different taxes, he may accept payment of the tax assessed under one section and refuse an insufficient amount tendered under the other section. *Opins. Atty. Gen.* 1915, p. 2354.

Taxes due under this section are subordinate to the claims of policy holders against the deposit of foreign companies, made in compliance with § 9510. *McGhee v. Casualty Co.*, 15 Ohio App. 457 (1921).

The tax imposed by this section is a privilege or excise tax. Such tax does not relieve a corporation from the taxation of its property.

Scottish, etc., Ins. Co. v. Bowland, 196 U. S. 610 (1904).

Western Assur. Co. v. Halliday, 127 Fed. 83; 1 O. L. R. 643 (1903). Amount under former law.

State v. Hahn, 50 O. S. 714 (1893).

Section 5433-1. (Term "gross premiums" defined for taxation purposes. What annual statement shall show.) For the purpose of computing franchise taxes, on gross premiums, to be paid under any law of this state, now or hereafter in force, by any mutual fire insurance company authorized to do business under the laws of this state, the amount of premium deposits received by such company upon any risk within this state in excess of the net cost of insurance to the insured, shall not be included where such excess deposit is returned ratably by such company to its policy holders; but the amount of gross or aggregate premiums received by any such company shall be deemed to be the balance remaining after deducting from the gross amount of premium deposits received or collected by it on risks in this state during the preceding calendar year ending on the thirty-first day of December, that portion of gross premium deposits returned by it to policy holders during said preceding calendar year, upon the cancellation or expiration of risks upon property situated within this state. In addition to the matters of return required to be made by insurance companies for the purpose of computing taxes, any such company shall also return for such purpose in its annual statement:

(a) The total gross amount of premium deposits received or collected by it on risks in this state during the preceding calendar year ending on the thirty-first day of December;

(b) The total amount of gross premium deposits returned to policy holders during such preceding calendar year upon cancellation and upon expiration of risks upon property situated within this state. (May 7, 1913, 103 v. 713; in effect August 8, 1913.)

Section 5434. (Failure to pay tax or make true statement.) If a company fails or refuses to pay such tax, after

a statement thereof has been made and mailed to it, or if the statement required to be made by it under section fifty-four hundred and thirty-two is false or incorrect, the superintendent of insurance may revoke the license of such company doing business in this state. Upon failure or refusal to pay the tax, the superintendent of insurance shall certify that fact to the attorney-general, who shall thereupon begin an action against the company in the court of common pleas of Franklin county, or of any other county, as he may elect, to recover the amount of the tax. If such company ceases to do business in this state, it shall thereupon make report to the superintendent of insurance of the gross amount of premiums, not theretofore reported as provided in section fifty-four hundred and thirty-two, received by it from policies covering risks within this state, prior to such discontinuance of business after deducting return premiums and considerations received for reinsurance, not theretofore so reported, and shall forthwith pay to the superintendent of insurance a like per cent of tax thereon. (R. S. Sec. 2745; March 9, 1909, 100 v. 67; April 26, 1904, 97 v. 401; 95 v. 290; 91 v. 91; 90 v. 201; 86 v. 274; 85 v. 183; 73 v. 138.)

The license of an insurance company may be revoked although an action to recover the tax is pending.

State v. Matthews, 58 O. S. 1 (1898).

Injunction is the proper remedy to test the amount of the tax and to prevent a revocation of the license. Mandamus is not a proper remedy.

State v. Hahn, 50 O. S. 714 (1893).

Section 5435. (Penalty for non-payment of taxes.) If such company refuses to pay such tax, upon demand being made therefor, it shall be liable to the state of Ohio at the suit of the attorney-general, to a penalty of not more than five hundred dollars per month for each month it has failed, after demand therefor, to pay the tax. Service of process in such action shall be made according to the requirements of law governing suits brought against such companies by a policy holder therein. (R. S. Sec. 2745; 100 v. 66; 97 v. 401; 95 v. 290; 91 v. 91; 90 v. 201; 86 v. 274; 85 v. 183; 73 v. 139.)

Section 5436. (Retaliatory provision.) If the laws of another state, territory or nation authorize charges for the privilege of doing business therein, or taxes against insurance companies organized in this state, exceeding the charges provided in this chapter, like amounts shall be charged against all insurance companies of such state, territory or nation, doing business in this state, instead of the charges herein

provided. (R. S. Sec. 2745; 100 v. 67; 97 v. 401; 95 v. 290; 91 v. 91; 90 v. 201; 86 v. 274; 85 v. 183; 73 v. 138.)

See § 658.

State v. Reinmund, 45 O. S. 214 (1887).

State v. Insurance Co., 49 O. S. 440 (1892).

Section 5437. (Deposits with superintendent of insurance not taxable.) Neither insurance companies and associations, incorporated by the authority of another state or government, nor the superintendent of insurance, shall be required to make returns for taxation of the deposits of such companies or associations, made as required by law, with the superintendent of insurance, for the benefit and security of policy holders; nor be governed with respect to such deposits, by the provisions of law relating to the listing of personal property or to the making of tax returns by corporations. (R. S. Sec. 2745; March 9, 1909, 100 v. 67; April 26, 1904, 97 v. 401; April 29, 1902, 95 v. 290; March 27, 1894, 91 v. 91; 90 v. 201; 86 v. 274; 85 v. 183; R. S. 1880; 73 v. 138.)

This section is unconstitutional. Valentine v. Canada L. A. Co., 106 O. S. 273 (1922).

The deposits are taxable in Ohio. Valentine v. Canada L. A. Co., 106 O. S. 273 (1922).

Sims v. Best, 1 C. C. n. s. 41; 15 C. D. 149 (1903).

Scottish, etc., Ins. Co. v. Bowland, 196 U. S. 611 (1904).

Western Ins. Co. v. Halliday, 126 Fed. 257 (C. C. A. 1903).

Where the principal office of the company was in Cincinnati it was held that the tax was payable to Hamilton County and not to Franklin County. Sims v. Best, 1 C. C. n. s. 41, 15 C. D. 149 (1903).

Section 5438. (Where policy on Ohio property shall be placed.) An insurance company or agent legally authorized to transact insurance business in this state shall not write, place or cause to be written or placed, a policy, renewal of policy or contract for insurance upon property, situated or located in this state, except through a legally authorized agent in this state, who shall countersign all policies so issued and enter the payment of the premium upon his record. The writing, renewal, placing or causing to be written or placed of a policy of insurance, in any other manner or form is a violation of the law providing for the payment of taxes by foreign insurance companies doing business in the state of Ohio, as set out and provided in this chapter. Provided, that any authorized agent of an insurance company duly authorized to transact business in this state may procure the insurance of risks or parts of in other like companies duly authorized to transact business in this state, and may pay a commission thereon to such agent. But such

insurance shall be consummated through a duly licensed resident agent only of the company taking the risk. Provided further, that any authorized agent of an insurance company duly authorized to transact business in this state may accept business from such insurance brokers only as duly authorized and licensed as provided in section 644-2, and such agent may pay a commission thereon to such broker. (107 v. 671; R. S. Sec. 2745a; 94 v. 299; 88 v. 487.)

Insurance against damage in transportation of goods transported from a place without the state to a place within the state need not be written or placed through an agent residing in Ohio.

5 Opins. Attys. Gen., 432 (1901).

Section 5439. (Reinsuring, etc., risk with unauthorized foreign company.) No fire insurance company or association, authorized to do business in this state, shall reinsure, dispose of, cede, pool, divide or in any manner or form, reduce a portion of its risk or liability, covering property wholly or partially located in this state, in or with a company, association, person or persons, incorporated or otherwise, not authorized by law to do the business of fire insurance in this state, or to reinsure, or assume as a reinsuring company or otherwise, in any manner or form, the whole or part of a risk or liability, covering property wholly or partially located in this state, of or for an insurance company, association, person or persons, incorporated or otherwise, not authorized by law to do business of fire insurance in this state. (R. S. Sec. 2745a; April 16, 1900, 94 v. 299; 88 v. 487.)

A contract of reinsurance of liability risks made in another state by a foreign company which has not made the deposit required by § 9510 is a violation of the Ohio laws for which its license to do other business in Ohio may be revoked. *State v. Tomlinson*, 101 O. S. 459 (1920).

Section 5440. (Annual report required of chief officer.) The superintendent of insurance of this state annually, and at such times as he may see fit, shall require the president or other chief officer of each company or association, to file a statement under oath, showing the names of each fire insurance company, or association, with whom or for whom liability for insurance on property located wholly or partially in this state has been reinsured, disposed of, ceded, pooled, divided, or in any manner or form reduced or increased. (R. S. Sec. 2745a; April 16, 1900, 94 v. 299; 88 v. 487.)

Section 5441. (When authority of insurance company revoked.) Any company violating any of the provisions of the next three preceding sections, upon notice and satisfactory proof thereof being made to the superintendent of insurance of this state, shall have its authority to transact business in this state revoked for a period of not less than ninety days. Any insurance company whose license to do business in this state is so revoked, shall not be again permitted to do business in this state, until all taxes and penalties due from it have been paid, together with any expense that may be due under the provisions of this chapter. Such company shall only be re-admitted to transact business in this state upon a complete re-compliance with the laws in regard to the admission of such company. (R. S. Sec. 2745b; May 1, 1891, 88 v. 488.)

Section 5442. (When superintendent to inspect company.) When notice of a violation of any provision of the next four preceding sections is received by the superintendent of insurance, he shall forthwith in person, or by deputy, visit the office of the company where such contract of insurance has been written or made, and demand an inspection of the books and records thereof. Any company refusing to exhibit its books and records for his inspection shall be guilty of violating such provisions, and the penalties provided by law shall forthwith be enforced against such company by the superintendent of insurance. (R. S. Sec. 2745c; April 2, 1906, 98 v. 242; May 1, 1891, 88 v. 488.)

Section 5443. (When foreign insurance company not admitted in state.) When application is made by a foreign insurance company to the superintendent of insurance of this state for admission to do business in this state, it shall not be admitted until it has paid all taxes and penalties assessed against it for the violation of the laws relating to insurance. If such foreign company has been reported to the superintendent of insurance as having violated any of the laws of this state relating to insurance, he shall make or cause to be made an examination of the books and records of the company seeking admission, and before granting license to do business in this state, he shall require it to pay into the office of the state treasurer a penalty equal to twenty per cent of all premiums written in this state, for the six years next preceding the date of request for admission, and upon which such taxes have not already been paid. (R. S. Sec. 2745c; April 2, 1906, 98 v. 242; May 1, 1891, 88 v. 488.)

Section 5444. (Expenses of inspection to be paid by company.) The superintendent of insurance shall receive, as compensation for services rendered under the provisions of this chapter, his necessary expenses. Such sum shall be charged against the company or companies so visited by him, and be collected by suit in any court of competent jurisdiction. (R. S. Sec. 2745d; May 1, 1891, 88 v. 488.)

PUBLIC UTILITIES.

Property Taxes.	Excise Taxes.	
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§ 5467. Corrections.	§ 5493. Effect when tax charged invalid	
§ 5468. Certified to auditor of state—Excise tax.	§ 5494. Municipal corporations.	
§ 5469. Collection by treasurer of state.		

Section 5445. (Tax Commission of Ohio. Appointment of commissioners; terms of office, etc. Vacancy.) A tax commission is hereby created, to be known as the tax commission of Ohio, to be composed of three commissioners, electors of the state, not more than two of whom at any time shall be of the same political party. On or before July first, 1910, the governor shall appoint such commissioners as follows: the term of one such appointee, who shall belong to the same political party as one of the other members appointed on such commission, if there be two appointees from the same political party, shall terminate on the second

Monday of February, 1911; the term of the second such appointee shall terminate on the second Monday of February, 1912; the term of the third such appointee shall terminate on the second Monday of February, 1913. In February, 1911, and annually thereafter, in the month of February, there shall be appointed in the same manner, one commissioner for the term of three years, from the second Monday of February of such year. Each commissioner so appointed shall hold his office until a successor is appointed and qualified. Any vacancy on the commission shall be filled by appointment of the governor for the unexpired term. No appointee shall be qualified to act until after his appointment has been confirmed by the senate, unless appointed during a recess or adjournment of the senate. (May 10, 1910, 101 v. 399.)

There are two sections numbered § 5445.

See G. C. § 1465-1.

Section 1465-1 amends § 5445 only as to the terms of members of the commission. Section 5445 controls as to their appointment and confirmation. Rep. Atty. Gen. 1913, p. 5. See also § 1465-1a.

Section 5445. (Valuation when part of road in another state.) When a street, suburban or interurban railroad or railroad company has part of its road in this state and part thereof in another state or states, the commission shall take the entire value of such property, moneys and credits of such public utility so found and determined, in accordance with the provisions of this act, and divide it in the proportion the length of the road in this state bears to the whole length thereof, and determine the principal sum for the value of the road in this state accordingly, equalizing the relative value thereof in this state. (June 2, 1911, 102 v. 237, § 56; 101 v. 419, § 78; G. C. § 5431 (original number); R. S. Sec. 2776; 59 v. 88, § 8.)

The words "such property" refer back to §§ 5423 and 5429.

Railway Co. v. Hynicka, 4 N. P. n. s. 345, 349; 17 L. D. 163 (Super. Ct. Cin. 1906); aff'd, no rep., 77 O. S. 628.

Where property of a railroad lies partly within and partly without the state this section—§ 5423 and § 5429 should govern, and not §§ 5430, 5431.

Railway Co. v. Hynicka, 4 N. P. n. s. 345; 17 L. D. 163 (Super. Ct. Cin. 1906); aff'd, no rep., 77 O. S. 628.

Section 5446. (Apportionment.) The commission shall apportion the value of the property of all other public utilities assessed according to the provisions of this act as follows:

(a) When all the property of such public utility is lo-

ated within the limits of a county, the assessed value thereof shall be apportioned by the commission between the several taxing districts therein, in the proportion which the property located within the taxing district in question, bears to the entire value of the property of such public utility, as ascertained and valued as herein provided, so that, to each taxing district there shall be apportioned such part of the entire valuation as will fairly equalize the relative value of the property therein located, to the whole value thereof.

(b) When the property of such public utility is located in more than one county in this state, the assessed value thereof shall be apportioned by the commission between the several counties and the taxing districts therein, in the proportion which the property located therein, bears to the entire value of the property of such public utility as ascertained and valued, as herein provided, so that to each county and each taxing district therein, there shall be apportioned such part of the entire valuation as will fairly equalize the relative value of the property therein located to the whole value thereof.

(c) When the property of such public utility, required to be assessed by the provisions of this act, is located in more than one state, the assessed value thereof shall be apportioned by the commission in such manner as will fairly and equitably determine the principal sum for the value thereof in this state, and after ascertaining such value it shall be apportioned by the commission, as herein provided. (102 v. 237, § 57; 101 v. 419, § 79.)

Section 5447. (Certified to county auditors.) On the second Monday of July, the commission shall certify such apportionment to the auditor of each county in which any of the property of the public utility is located. (102 v. 237, § 58.)

Section 5448. (Entry on tax duplicate.) The county auditor shall place the apportioned value on the tax list and duplicate and taxes shall be levied and collected thereon, in the same manner and at the same rate, as other personal property in the taxing district in question. (102 v. 237, § 59.)

Section 5449. (Annual statement to tax commission.) On or before the first day of March, annually, every express, telegraph and telephone company, doing business in this state, under the oath of the person constituting such company, if a person, or under the oath of the president, secre-

tary, treasurer, superintendent or chief officer in this state of such association or corporation, if an association or corporation, shall make and file with the commission a statement in such form as the commission may prescribe. (108 (Pt. 1) v. 141; 106 v. 571; 102 v. 238; § 60; 101 v. 404, § 31; R. S. Sec. 2778; 91 v. 220; 90 v. 330; 62 v. 174, § 1.)

Amendment of 106 v. 571. See Opins. Atty. Gen. 1915, p. 930.

Section 5450. (Contents of statement.) Such statement shall contain:

1. The name of the company.
2. The nature of the company, whether a person or persons, or association or corporation, and under the laws of what state or county organized.
3. The location of its principal office.
4. The name and postoffice address of the president, secretary, auditor, treasurer and superintendent or general manager.
5. The name and postoffice address of the chief officer or managing agent of the company in this state.
6. The number of shares of the capital stock.
7. The par value and market value, or if there is no market value, the actual value of its shares of stock on the thirty-first day of the month of December, next preceding and the amount of its capital stock subscribed and the amount thereof actually paid in.
8. A detailed statement of the real estate owned by the company in this state, where situated, and the value thereof as assessed for taxation.
9. A full and correct inventory of the personal property, including moneys and credits, owned by the company in this state on the thirty-first day of the month of December next preceding, where situated, and the value thereof.
10. The total value of the real estate owned by the company and situated outside of this state.
11. The total value of the personal property owned by the company and situated outside of this state.
12. The total amount of bonded indebtedness and of indebtedness not bonded; the gross receipts from whatever source derived for business wherever done, for the year ending on the thirty-first day of December next preceding; and the total gross expenditures for such year.
13. In the case of telegraph and telephone companies, such statement shall also set forth, the whole length of their lines, and the length of so much of their lines as is without and is within this state, which shall include the lines such

telegraph and telephone companies control and use under lease or otherwise and the miles of wire in each taxing district in this state.

16. In the case of express companies, the gross receipts for the year ending on the thirty-first day of December, from whatever source derived, of each office within this state, giving the name of each office in this state.

17. In the case of express companies, such statement shall also contain the whole length of the lines of rail and water routes, over which the company did business on the thirty-first day of December and the length of so much of such lines of land and water transportation as is without and within this state, naming the lines within this state. (108 (Pt. 1) v. 141; 106 v. 571; June 2, 1911, 102 v. 238, § 61; May 10, 1910, 101 v. 404, § 32; R. S. Sec. 2778; May 10, 1894, 91 v. 220; April 27, 1893, 90 v. 330; April 13, 1865, 62 v. 174, § 1.)

Constitutionality. The tax commission act of 1911 (102 v. 238), imposing an excise tax on the gross receipts of public utilities, held constitutional. Ohio Tax Cases, 232 U. S. 576 (1914); affirming, 203 Fed. 537.

The act of 90 v. 330 taxing the *property* of express, telephone and telegraph companies held constitutional.

State v. Jones, 51 O. S. 492 (1894); affirmed in Adams Express Co. v. Ohio State Auditor, 165 U. S. 194 (1896); s. c., 166 U. S. 185 (1897).

The act imposing an *excise tax* on the gross receipts of express and other companies, held constitutional.

Express Co. v. State, 55 O. S. 69 (1896).

Western Union Telegraph Co. v. Mayer, 28 O. S. 521 (1876).

See Southern Gum Co. v. Laylin, 66 O. S. 578 (1902).

An excise or franchise tax, for the privilege of doing business, is valid, but such taxation is limited to the reasonable value of the privilege or franchise. Southern Gum Co. v. Laylin, 66 O. S. 578 (1902).

The franchise of a railroad company is not valueless merely because its present earnings are insufficient to pay operating expenses. Ohio Tax Cases, 232 U. S. 576 (1914).

Miscellaneous. The tax on gross receipts of railroads and public utilities is an excise tax. Traction Co. v. State, 94 O. S. 24 (1916).

An express company, discontinuing business at midnight of June 30th is not liable for excise taxes on the basis of its gross receipts for the year ending on that date. Rep. Atty. Gen. 1914, p. 1697; 12 O. L. R. 497.

Section 5451. (When value of property shall be ascertained.) On the first Monday in July of each year, the commission shall ascertain and assess the value of the property of the express, telegraph and telephone companies in this state. (108 (Pt. 1) v. 142; 106 v. 572; 102 v. 239, § 62; 101 v. 405, § 34.)

Section 5452. (How determined.) In determining the value of the property of such companies in this state, to be taxed within the state and assessed as herein provided, the commission shall be guided by the value of the property as determined by the value of the entire capital stock of the companies, and such other evidence and rules as will enable such commission to arrive at the true value, in money, of the entire property of such companies within this state, in the proportion which such property bears to the entire property of the companies, as determined by the value of the capital stock thereof, and such other evidence and rules. (June 2, 1911, 102 v. 239, § 63; May 10, 1910, 101 v. 405, § 34; R. S. Sec. 2778a; May 10, 1894, 91 v. 220; April 27, 1893, 90 v. 330.)

Held constitutional.

Western Union Tel. Co. v. Poe, 64 Fed. 9 (C. C. 1894).

Adams Express Co. v. Auditor, 165 U. S. 194; 166 U. S. 185.

State v. Jones, 51 O. S. 492 (1894).

Section 5453. (Hearing.) Before the assessment of the property of any express, telegraph or telephone company is determined, any company or person interested shall have the right, on written application to appear before the commission and be heard in the matter of the valuation of the property of any company for taxation. (June 2, 1911, 102 v. 239, § 64; 101 v. 405, § 35; R. S. Sec. 2778a; 91 v. 220; 90 v. 330.)

Section 5454. (Corrections.) Between the date herein fixed for the assessment of the property of any such company for taxation by the commission, and the date herein fixed for the certification by the commission of the apportioned valuation to the several counties, the commission may, on the application of any interested person or company, or on its own motion, correct the assessment or valuation of the property of any such company, in such manner as will, in its judgment, make the valuation thereof just and equal. (102 v. 240, § 65; 101 v. 405, § 35; R. S. Sec. 2778a; 91 v. 220; 90 v. 330.)

Remedies provided by statute for the correction of errors must be exhausted before resort to the courts.

State v. Express Companies, 2 N. P. 98; 3 L. D. 326; affirmed, 55 O. S. 69.

Section 5455. (Deductions.) The commission shall deduct from the total value of the property of each express, telegraph and telephone company in this state, the value, as assessed for taxation of any real estate situated within this

state and owned by such company. (102 v. 240, § 66; 101 v. 406, § 36; R. S. Sec. 2780; 91 v. 223; 90 v. 332; 60 v. 11, § 1.)

Section 5456. (Apportionment.) The value of the property of telegraph and telephone companies of this state, after deducting the value of the real estate, shall be apportioned by the commission among the several counties through or into which the lines of such telegraph or telephone companies run, so that to each county shall be apportioned such part of the entire valuation as will equalize the relative value of the property of the company therein, in proportion to the whole value of the property of the company in the state, and in the proportion that the length of the lines of wire owned by the company in the county, bears to the whole length of the lines of wire in all the counties in the state, and to each city, village and taxing district, or part thereof, therein. (102 v. 240, § 67; 101 v. 406, § 36; R. S. Sec. 2780; 91 v. 223; 90 v. 332; 60 v. 11, § 1.)

Valuation of separately owned poles and lines connected with a central switchboard. See Rep. Atty. Gen. 1913, p. 649.

Section 5457. (Apportionment.) The value of the property of express companies shall be apportioned by the commission among the several counties in which the company does business, in the proportion that the gross receipts in each county, bear to the entire gross receipts in all the counties in the state, and to each city, village and taxing district, or part thereof, therein. (102 v. 240, § 68; 101 v. 406, § 37; R. S. Sec. 2780; 91 v. 223; 90 v. 332; 60 v. 11, § 1.)

Section 5458. (When apportionment certified to subdivisions.) On the second Monday in July, the commission shall certify to the county auditor the amount apportioned to his county and to each city, village, township or other taxing district therein. (108 (Pt. 1) v. 142; 106 v. 571; 102 v. 240, § 69; 101 v. 406, § 38; R. S. Sec. 2780; 91 v. 223; 90 v. 332; 60 v. 11, § 1.)

Section 5459. (How taxes levied.) The county auditor shall place the apportioned valuation on the tax list and duplicate, and taxes shall be levied and collected thereon, at the same rate and in the same manner, as taxes are levied and collected on other personal property in the taxing district in question. (102 v. 240, § 70; 101 v. 406, § 38; R. S. Sec. 2780; 91 v. 223; 90 v. 332; 60 v. 11, § 1.)

Section 5460. (Public utilities not required to make returns under certain sections.) Public utilities shall not be required to make returns under, nor be governed by the provisions of sections fifty-four hundred and four, fifty-four hundred and five and fifty-four hundred and six of the General Code. (June 2, 1911, 102 v. 240, § 71.)

Section 5461. (How valuations determined on failure of report or statement. Domestic corporations. Foreign corporations. Sleeping car or freight line. Power extends to preceding years.) When a public utility or corporation fails to make any report or furnish any statement, which it is required to make or furnish, to the commission, or makes a return or statement of a portion only of the gross receipts or gross earnings, which it is required by law to make or return, and fails to make return or statement of the remainder, or fails to report a part or all of its taxable property, or report the same, or part thereof, according to its true value in money, the commission shall ascertain, as nearly as practicable, the gross receipts or gross earnings, or omitted portion of the same, or taxable property, or omitted part of the same, or such as was not reported according to its true value in money, that should have been reported or returned by such public utility or corporation, and certify such gross receipts or gross earnings, or the value of such property, so ascertained, as required in this act, with respect to its gross receipts, gross earnings and property of public utilities and corporations. When a domestic corporation makes a report of a portion only of its subscribed or issued and outstanding capital stock, the commission shall ascertain, as nearly as practicable, the omitted portion thereof, that should have been reported by such corporation, and certify such additional amount, as required in this act, with respect to the certification of the subscribed or issued and outstanding capital stock of domestic corporations. When a foreign corporation makes a report to the commission of a portion only of the property owned and used or business done by it in this state, or makes a report of a fictitious or excessive amount of property owned and used or business done by it outside of this state, or makes a report of a portion only of its total authorized capital stock, which it is required by law to make, the commission shall ascertain, as nearly as practicable, the total amount of property owned and used and business done by such foreign corporation in this state, and the total amount of property owned and used and business done by such foreign corporation outside of this state, and the proportion of the total authorized capital stock of

such corporation, represented by property owned and used and business done in this state, and certify such corrected amount, or the difference between such corrected amount and the amount that may have previously been certified, as required in this act, with respect to the certification of the proportion of the authorized capital stock of foreign corporations, represented by property owned and used and business done by such corporations in this state. When a sleeping car, freight line or equipment company fails to make any report or statement, which it is required to make or furnish, to the commission, or makes a return or statement of a portion only of its total authorized capital stock, or of the value of its shares of stock, or of its real estate owned either within or without this state, or of the number and value of the cars owned or leased by it and the daily average number of cars operated in this state, or the length of the lines of railway over which the company runs its cars within this state, or makes a return or statement of a fictitious or excessive length of lines of railway over which the company runs its cars without this state, the commission shall ascertain, as nearly as practicable, the amount of the capital and property of any such company owned and used in this state, and the amount of capital and property of such company owned and used outside of this state, and the proportion of the capital stock of any such company representing capital and property thereof owned and used in this state, as provided in this act, and shall certify such amount so ascertained, as required in this act, with respect to the certification of the amount and value of the proportion of the capital stock of such companies representing capital and property owned and used by them in this state. The power and duty of the commission, above provided for, shall extend to preceding years in such manner as that the commission shall, for such year or years preceding the year in which the inquiries are made, and omissions ascertained, certify such omitted amounts, so ascertained, as required in this act, with respect to such companies, in which event such omitted amounts shall be taxed at the rate of taxation belonging to the year or years in which the failure or omission occurred, in the case of property, and in all other cases the amount of the tax or fee upon such omitted amounts shall be calculated upon the amount so ascertained by the commission, at the rate provided by law, for such year or years: provided, however, that the power and duty of the commission with respect to property shall extend only to the five years next preceding the year in which such inquiries and corrections are made, and not in any event prior to the year

1911, except where no property of a company has been returned or assessed in any such year or years. (June 2, 1911, 102 v. 240, § 72; 101 v. 399, § 114; R. S. Sec. 2778a; 91 v. 221; 90 v. 331.)

A charge for omitted taxes under this section can not be made against a bona fide purchaser, without notice, of the assets of the company in default. But a purchaser with notice of the default, who agreed to pay all the liabilities of the selling company, as a part of the purchase price, may be liable to the state for such omitted taxes. Opins. Atty. Gen. 1916, p. 901.

Assessment by the tax commission, verbally informed as to the facts by a representative of a public utility, as a bar to action under this section, see Opins. Atty. Gen. 1915, p. 1844.

Section 5462. (Verified statement.) Annually, between the first and thirty-first days of May, every sleeping car, freight line and equipment company, doing business or owning cars which are operated in this state, shall under the oath of the person constituting such company, if a person, or under the oath of the president, secretary, treasurer, superintendent or chief officer in this state of such association or corporation, if an association or corporation, make and file with the commission a statement in such form as the commission may prescribe. (June 2, 1911, 102 v. 242, § 73; May 10, 1910, 101 v. 407, § 40; R. S. Secs. 2780-8, 2780-13; March 30, 1896, 92 v. 89; May 24, 1894, 91 v. 408.)

A tax based on rolling stock is imposed by § 5462 et seq. The companies mentioned in this section are not required to report their gross receipts. Only their rolling stock is valued by the commission. Other property is returned for taxation locally. Ohio companies are liable for the franchise tax, but foreign companies are not liable. Rep. Atty. Gen. 1913, p. 610.

Section 5463. (Statement shall contain; what.) Such statement shall contain:

1. The name of the company.
2. The nature of the company, whether a person or persons or association or corporation, and under the laws of what state or country organized.
3. The location of its principal office.
4. The name and postoffice address of the president, secretary, auditor, treasurer and superintendent or general manager.
5. The name and postoffice address of the chief officer and managing agent of the company in this state.
6. The number of shares of capital stock.
7. The par and market value, or, if there is no market value, the actual value of the shares of stock on the first day of May.

8. A detailed statement of the real estate owned by the company in this state, where situated, and the value thereof as assessed for taxation.

9. The total value of the real estate owned by the company and situated outside of this state.

10. The whole length of the lines of railway over which the company runs its cars, and the length of so much of such lines as is without and is within this state.

11. The whole number and value of the cars owned or leased by the company classifying the cars according to kind, and the daily average number of cars operated in this state. (June 2, 1911, 102 v. 242, § 74; 101 v. 407, § 41; R. S. Secs. 2780-8, 2780-13; 92 v. 89; 91 v. 408.)

That which is to be apportioned in Ohio on the basis of track mileage is the value of the daily average number of cars operated in Ohio, and not the value of the whole number of cars owned and operated by the company. Opins. Atty. Gen. 1919, pp. 421, 545; citing Union Tank Line Co. v. Wright, 249 U. S. 275.

Section 5464. (Equipment company.) In the case of an equipment company, such statement shall also contain the whole number and value of the cars owned and leased by the company, classifying the cars according to kind; the whole length of the lines of railway, wherever located, operated by the companies, naming them, to which cars owned by such equipment company are leased, and the length of so much of such lines as is without and within this state, giving the name and location of the lines wholly or partially within this state. (June 2, 1911, 102 v. 243, § 75; 101 v. 408, § 42; R. S. Sec. 2780-8; 92 v. 89.)

Section 5465. (Valuation.) On the first Monday in July, the commission shall ascertain and determine the amount and value of the proportion of the capital stock of sleeping car, freight line and equipment companies, representing capital and property of such companies owned and used in this state, and in so determining shall be guided in each case by the proportion of the capital stock of the company representing rolling stock, which the miles of railroad over which such company runs cars, or its cars are run in this state, bear to the entire number of miles in this state and elsewhere over which such company runs cars, or its cars are run, and such other rules and evidence as will enable the commission to determine, fairly and equitably, the amount and value of the capital stock of such company representing capital and property owned and used in this state. (102 v. 243, § 76;

101 v. 408, § 44; R. S. Secs. 2780-9, 2780-14; 92 v. 89; 91 v. 408.)

Value of "capital stock" under this section is not authorized capital stock, or the actual value of the corporate property as such; but the actual aggregate value of the shares of the capital stock. Rep. Atty. Gen. 1913, pp. 610, 637.

Section 5466. (Hearing.) Before the amount and value of the capital stock of any company representing capital and property owned and used in this state is determined, any company or person interested shall have the right, on written application, to appear before the commission and be heard in the matter of such determination. (102 v. 243, § 77; 101 v. 408, § 44; R. S. Sec. 2780-9; 92 v. 89; R. S. Sec. 2780-14; 91 v. 408.)

Section 5466-1. (Witness fees, mileage, etc.) A person who shall appear before the tax commission, by its order, with respect to the appraisal of property in any taxing district, shall be allowed and paid out of the treasury of the proper county, if an officer of any such taxing district or a member of any board mentioned in section 5542-9a, his actual and necessary traveling expenses, such expenses to be itemized and sworn to by the person who incurred the expense, and if other than any such officer or member of any such board he shall receive for his attendance the fees and mileage now provided for witnesses in civil cases in the courts of common pleas. Such traveling expenses and witness fees shall be audited and paid out of the county treasury of the proper county in the same manner as other expenses are audited and paid, upon the presentation of a certificate from the tax commission certifying to the fact of such attendance. (102 v. 30.)

Section 5467. (Corrections.) Between the date herein fixed for fixing the amount and value of the capital stock of any company representing capital and property owned and used in this state, and the date herein fixed for the certification to the auditor of state of such amount, the commission may, on the application of any person or company interested, or on its own motion, review and correct its action in such manner as it deems just and proper. (102 v. 243, § 78; 101 v. 408, § 44; R. S. Sec. 2780-9; 92 v. 89, § 3; R. S. Sec. 2780-14; 91 v. 408, § 3.)

After the expiration of the time limited by statute, the commission has no power to revise or change its findings. State v. Buckeye, etc., Co., 14 N. P. n. s. 401 (1913).

Section 5468. (Certified to auditor of state. Excise tax.)

On the first Monday in August, of each year, the commission shall certify such amount to the auditor of state, who shall charge a sum in the nature of an excise tax, to be collected from each sleeping car, freight line and equipment company, doing business or owning cars which are operated in this state, to be computed by taking one and two-tenths per cent. of the amount fixed by the commission as the value of the portion of the capital stock representing the capital and property of each company owned and used in this state. (102 v. 243, § 79; 101 v. 408, § 45; R. S. Sec. 2780-11; 92 v. 89, § 5; R. S. Sec. 2780-16; 91 v. 408, § 5.)

Constitutionality of excise tax.

Express Co. v. State, 55 O. S. 69 (1896).

Western Union Tel. Co. v. Mayer, 28 O. S. 521 (1876).

See Southern Gum Co. v. Laylin, 66 O. S. 578 (1902).

Section 5469. (Collection by treasurer of state.) On or before the first day of September of each year, the auditor of state shall certify to the treasurer of state, as herein provided, for collection from each sleeping car, freight line and equipment company, doing business or owning cars which are operated in this state, the amount so charged. (102 v. 244, § 80; 101 v. 408, § 45; R. S. Sec. 2780-11; 92 v. 89, § 5; R. S. Sec. 2780-16; 91 v. 408, § 5.)

Section 5470. (Public utility shall file statement, when.)

Each public utility except street, suburban and interurban railroad and railroad companies, doing business in this state, shall, annually, on or before the first day of August, and each street, suburban and interurban railroad and railroad company, shall, annually, on or before the first day of September, under the oath of the person constituting such company, if a person, or under the oath of the president, secretary, treasurer, superintendent or chief officer in this state, of such association or corporation, if an association or corporation, make and file with the commission a statement in such form as the commission may prescribe. (108 (Pt. 1) v. 142; 106 v. 573; 102 v. 244, § 81; 101 v. 409, § 47; R. S. Sec. 2780-18; 97 v. 325; 95 v. 137; 92 v. 79.)

Reports and taxes after sale or discontinuance of business of public utility. See Opins. Atty. Gen. 1918, p. 707; Rep. Atty. Gen. 1914, p. 1697; Opins. Atty. Gen. 1916, p. 1915 (sale by receiver).

Section 5471. (Statement; what shall contain.) The statement, provided for in the preceding section, shall contain:

1. The name of the company.
2. The nature of the company, whether a person or persons or association or corporation, and under the laws of what state or country organized.
3. The location of its principal office.
4. The name and postoffice address of the president, secretary, auditor, treasurer and superintendent or general manager.
5. The name and postoffice address of the chief officer or managing agent of the company in this state. (102 v. 244, § 82; 101 v. 410, § 48; R. S. Sec. 2780-18; 97 v. 325; 95 v. 137; 92 v. 79.)

Section 5472. (Further statement by railroad company.)

In the case of each railroad company, such statement shall also contain the entire gross earnings, including all sums earned or charged, whether actually received or not, for the year ending on the thirtieth day of June next preceding, from whatever source derived, for business done within this state, excluding therefrom all earnings derived wholly from interstate business or business done for the federal government. Such statement shall also contain the total gross earnings of such company for such period in this state from business done within this state. (102 v. 244, § 83; 101 v. 410, § 51; R. S. Sec. 2780-18; 97 v. 325; 95 v. 137; 92 v. 79.)

Dividends on securities owned by a public utility and income received from subsidiary companies are not taxable receipts. Traction Co. v. State, 92 O. S. 529 (1915).

Demurrage charges on interstate freight are not taxable as income. Rep. Atty. Gen. 1913, p. 592.

Section 5473. (Further statement by street, suburban or interurban railroad company.) In the case of each street, suburban or interurban railroad company, such statements shall also contain the entire gross earnings, including all sums earned or charged, whether actually received or not, for the year ending on the thirtieth day of June next preceding, from whatever source derived, for business done within this state, excluding therefrom all earnings derived wholly from interstate business or business done for the federal government. Such statement shall also contain the total gross earnings of such company for such period in this state from business done within this state. (102 v. 244, § 84; 101 v. 411, § 52; R. S. Sec. 2780-18; 97 v. 325; 95 v. 137; 92 v. 79.)

Section 5473-1. (Statement of telephone and telegraph companies.) In the case of telegraph and telephone com-

panies, such statement shall also contain the entire gross receipts, including all sums earned or charged, whether actually received or not, for the year ending the thirtieth day of June, from whatever source derived, whether messages, telephone tolls, rentals, or otherwise, for business done within this state, including the company's proportion of gross receipts for business done by it within this state in connection with other companies, firms, corporations, persons or associations excluding therefrom all receipts derived wholly from interstate business or business done for the federal government. Such statement shall also contain the total gross receipts of such company, for such period, from business done within this state.

In the case of express companies, such statement shall also contain the entire receipts including all sums earned or charged, whether actually received or not, from whatever source derived, for business done within this state, for the year ending the thirtieth day of June, for and on account of such company, including the company's proportion of gross receipts for business done by it within this state in connection with other companies, firms, corporations, persons, or associations, excluding therefrom all receipts derived wholly from interstate business or business done for the federal government. Such statement shall also contain the total gross receipts of such company, for such period, from business done within this state. (108 (Pt. 1) v. 142; 106 v. 573.)

Where a foreign telephone company purchases and continues the business of a domestic telephone company during the year, the purchaser is taxable only on its own receipts during the year, and not on the receipts of the selling company. Opins. Atty. Gen. 1918, p. 707.

Section 5474. (Contents of statement.) In the case of all such public utilities except railroad, street, suburban and interurban railroad companies and express, telegraph and telephone companies, such statement shall also contain the entire gross receipts of the company, including all sums earned or charged, whether actually received or not, from whatever source derived, for business done within this state for the year next preceding the first day of May, including the company's proportion of gross receipts for business done by it within this state in connection with other companies, firms, corporations, persons or associations, but this shall not apply to receipts from interstate business, or business done for the federal government. Such statement shall also contain the total gross receipts of such company for such period in this state from business done within the state. (108 (Pt.

1) v. 143; 106 v. 573; 102 v. 245, § 85; 101 v. 411, § 53; R. S. Sec. 2780-18; 97 v. 325; 95 v. 137; 92 v. 79.)

The phrase "entire gross receipts" does not include receipts which pass through the hands of a company but do not belong to it. Where a local gas company obtains its supply from another company, under a contract by which the receipts are divided on a percentage bases, the local company may be assessed only on its proportion of the receipts.

State v. Coshocton Gas Co., 12 N. P. n. s. 570; 22 L. D. 412 (C. P. 1912); aff'd, no rep. 88 O. S. 608. See Opins. Atty. Gen. 1915, p. 766; Rep. Atty. Gen. 1910-1911, p. 603.

But where gas, purchased by a local distributing company from a producing company, is paid for according to the volume of gas, and not on a percentage basis, all the receipts from local business constitute gross receipts of the distributing company. Opins. Atty. Gen. 1915, p. 1621.

Contract between a distributing company and a producing company construed to be a contract of agency and not of sale. Opins. Atty. Gen. 1916, p. 1756.

A pipe line company which receives, at the state line, gas produced in and transported from another state, is engaged in interstate commerce, and the receipts from such business need not be reported. Rep. Atty. Gen. 1912, p. 600.

Where gas is produced by a gas company in another state and is transported through main line pipe to a point of common distribution to consumers, interstate commerce ceases at such point. If the gas is sold to another company at that point, the producing company is engaged in interstate commerce. But if the producing company distributes the same to consumers, its business is intrastate. A sale by the producing company to a single customer, without entering a common distribution point, is interstate commerce. Rep. Atty. Gen. 1912, p. 625; Public Utilities Commission v. Landon, 249 U. S. 236; 17 O. L. R. 8 (1919).

Section 5475. (Valuation determined.) On the first Monday of September the commission shall ascertain and determine the entire gross receipts of each electric light, gas, natural gas pipe line, waterworks, messenger or signal, union depot, heating, cooling and water transportation company for business done within this state for the year then next preceding the first day of May, and of each express, telegraph and telephone company for business done within this state for the year ending on the thirtieth day of June, excluding therefrom, as to each of the companies named in this section, all receipts derived wholly from interstate business or business done for the federal government. (102 v. 245, § 86; 101 v. 411, § 55; R. S. Sec. 2780-19; 97 v. 326; 95 v. 138; 92 v. 79.)

Section 5476. (Gross receipts of electric light, gas, etc., companies.) The amount so ascertained by the commission, in such instance, for the purposes of this act, shall be the gross receipts of such electric light, gas, natural gas, pipe

line, waterworks, express, telegraph, telephone, messenger or signal, union depot, heating, cooling or water transportation companies for business done within this state for such year. (102 v. 245, § 87; 101 v. 411, § 55; R. S. Sec. 2780-19; 97 v. 326; 95 v. 138; 92 v. 79.)

Section 5477. (Gross earnings.) On the first Monday of October, the commission shall ascertain and determine the gross earnings as herein provided, of each railroad company whose line is wholly or partially within this state, for the year ending on the thirtieth day of June next preceding, excluding therefrom all earnings derived wholly from interstate business or business done for the federal government. The amount so ascertained by the commission shall be the gross earnings of such railroad company for such year. (102 v. 245, § 88; 101 v. 412, § 56; R. S. Sec. 2780-19; 97 v. 326; 95 v. 138, 92 v. 79.)

Transportation of iron ore from lake ports to points within the state is interstate commerce, if it is a part of a continuous transit begun outside of the state. But if, when landed from a vessel, it is held by the owner for sale at the port, and the subsequent transportation is in pursuance of the sale, it is not interstate commerce. Opins. Atty. Gen. 1915, p. 2510.

Storage of ore at docks awaiting rail transportation does not make the transportation intra-state. Opins. Atty. Gen. 1920, p. 682.

Interest on bank deposits probably does not constitute earnings from business done, nor does rental from real estate not used in operation if the railroad retains no control over the real estate. Rentals from advertising privileges constitute earnings, as also do receipts from the rental of joint facilities and earnings from meals served on dining cars. Opins. Atty. Gen. 1920, p. 633.

Section 5478. (Gross earnings.) On the first Monday of October, the commission shall ascertain and determine the gross earnings, as herein provided, of each street, suburban and interurban railroad company whose line is wholly or partially within this state, for the year ending on the thirtieth day of June next preceding, excluding therefrom, as to each of the companies named in this section, all earnings derived wholly from interstate business or business done for the federal government. The amount so ascertained by the commission shall be the gross earnings of such street, suburban or interurban railroad company for such year. (102 v. 245, § 89; 101 v. 412, § 57; R. S. Sec. 2780-19; 97 v. 326; 95 v. 138; 92 v. 79.)

Section 5479. (Hearing.) Before the gross receipts or earnings of any such public utility are determined, any company, or person interested, shall have the right, on written

application, to appear before the commission and be heard in the matter of such determination. (102 v. 246, § 90; 101 v. 412, § 58; R. S. Sec. 2780-19; 97 v. 326; 95 v. 138; 92 v. 79.)

Section 5480. (Corrections.) Between the dates herein fixed for the determination of the amount of the gross receipts or earnings of any such public utility, and the dates herein fixed for the certification to the auditor of state of such amount, as provided in this act, the commission may, on the application of any person or company interested, or on its own motion, review and correct its findings. (102 v. 246, § 91; 101 v. 412, § 59; R. S. Sec. 2780-19; 97 v. 326; 95 v. 138; 92 v. 79.)

After the expiration of the time limited by statute, the commission has no power to revise or change its findings. *State v. Buckeye, etc., Co.*, 14 N. P. n. s. 401 (1913).

Section 5481. (Certified to auditor of state.) On the first Monday of October the commission shall certify to the auditor of state, the amount of the gross receipts so determined, of electric light, gas, natural gas, pipe line, waterworks, express, telegraph, telephone, messenger or signal, union depot, heating, cooling and water transportation companies, for the year covered by its annual report to the commission, as required in this act. (102 v. 246, § 92; 101 v. 412, § 60; R. S. Sec. 2780-21; 97 v. 329; 95 v. 138; 92 v. 79.)

Section 5482. (Gross earnings certified to auditor of state.) On the first Monday of November the commission shall certify to the auditor of state the amount of the gross earnings so determined of each street, suburban and inter-urban railroad and railroad company for the year ending on the thirtieth day of June next preceding. (102 v. 246, § 93; 101 v. 412, § 60; R. S. Sec. 2780-21; 97 v. 329; 95 v. 138; 92 v. 79.)

Section 5483. (Excise tax.) In the month of October, annually, the auditor of state shall charge, for collection from each electric light, gas, natural gas, waterworks, telephone, messenger or signal, union depot, heating, cooling and water transportation company, a sum in the nature of an excise tax, for the privilege of carrying on its intra-state business, to be computed on the amount so fixed and reported by the commission as the gross receipts of such company on its intra-state business for the year covered by its annual report to the commission, as required in this act, by taking one and two-tenths per cent. of all such gross receipts, which

tax shall not be less than ten dollars in any case. (102 v. 246, § 94; 101 v. 412, § 61; R. S. Sec. 2780-21; 97 v. 329; 95 v. 138; 92 v. 79.)

That different rates are imposed on various classes of public utilities does not render the tax unconstitutional.

Ohio Tax Cases, 232 U. S. 576 (1914).

Constitutionality of statutes imposing an excise tax on gross receipts.

Express Co. v. State, 55 O. S. 69 (1896).

Western Union Tel. Co. v. Mayer, 28 O. S. 521 (1876).

Southern Gum Co. v. Laylin, 66 O. S. 578 (1902).

See State v. Jones, 51 O. S. 492 (1894); affirmed, 165 U. S. 194; 166 U. S. 185.

Ohio Tax Cases, 232 U. S. 576 (1914).

A corporation organized for the sole purpose of furnishing electric current, heat and water to a group of manufacturing plants, which does not use streets, nor exercise the power of eminent domain, nor serve the general public, its stock being owned by the factories in proportion to the service supplied by each, is not a public utility. State v. Factory Power Co., 16 N. P. n. s. 545 (1915).

Section 5484. (Excise tax on street, etc., railway companies.) In the month of November, the auditor of state, shall charge, for collection from each street, suburban and interurban railroad company, a sum in the nature of an excise tax, for the privilege of carrying on its intra-state business, to be computed on the amount so fixed and reported to him by the commission as the gross earnings of such company on its intra-state business for the year covered by its annual report to the commission, as required in this act, by taking one and two-tenths per cent. of all gross earnings, which tax shall not be less than ten dollars in any case. (102 v. 246, § 95; 101 v. 413, § 62; R. S. Sec. 2780-21; 97 v. 329; 95 v. 138; 92 v. 79.)

See Railway v. Poland, 10 N. P. n. s. 617 (1910).

That different rates are imposed on various classes of public utilities does not render the tax unconstitutional.

Ohio Tax Cases, 232 U. S. 576 (1914).

Section 5485. (Excise tax on express and telegraph companies.) In the month of October, the auditor of state shall charge for collection, from each express and telegraph company, a sum in the nature of an excise tax, for the privilege of carrying on its intra-state business, to be computed on the amount so fixed and reported to him by the commission as the gross receipts of such company on its intra-state business for the year covered by its annual report to the commission, as required in this act, by taking two per cent. of all such gross receipts, which tax shall not be less than ten

dollars in any case. (102 v. 247, § 96; 101 v. 413, § 63; R. S. Sec. 2780-21; 97 v. 329; 95 v. 138; 92 v. 79; 91 v. 237.)

Act of 91 v. 237 held constitutional.

Express Co. v. State, 55 O. S. 69 (1896).

See Western Union Tel. Co. v. Mayer, 28 O. S. 521 (1876).

Taxation of receipts from interstate commerce.

Ratterman v. Express Co., 49 O. S. 608 (1892).

Western Union Tel. Co. v. Mayer, 28 O. S. 521 (1876).

Express Co. v. State, 55 O. S. 69 (1896).

Adams Express Co. v. Ohio State Auditor, 165 U. S. 194 (1896);

(s. c., rehearing denied 166 U. S. 185); affirming State v.

Jones, 51 O. S. 492 (1894).

Where an express company paid a tax illegally imposed on gross receipts from interstate business, under protest and with notice of an intention to bring action to recover back the amount paid, such payment is involuntary and an action may be maintained to recover back the same.

Ratterman v. Express Co., 49 O. S. 608 (1892).

That different rates are imposed on various classes of public utilities does not render the tax unconstitutional.

Ohio Tax Cases, 232 U. S. 576 (1914).

Section 5486. (Excise tax on railroads.) In the month of November, the auditor of state shall charge for collection, from each railroad company, a sum in the nature of an excise tax, for the privilege of carrying on its intra-state business, to be computed on the amount so fixed and reported to him by the commission, as the gross earnings of such company on its intra-state business for the year covered by its annual report to the commission, as required in this act, by taking four per cent. of all such gross earnings, which tax shall not be less than ten dollars in any case. (102 v. 247, § 97; 101 v. 413, § 64; R. S. Sec. 2780-21; 97 v. 329; 95 v. 138; 92 v. 79.)

The tax imposed by this section is an excise tax for the privilege of doing business. Being on intrastate business only it is not unconstitutional as imposing a burden on interstate commerce. That various public utilities are taxed at different rates does not render the tax unconstitutional as wanting in uniformity of operation.

Ohio Tax Cases, 232 U. S. 576 (1914).

A railroad company having no intrastate earnings is not liable for the minimum tax of \$10. Rep. Atty. Gen. 1912, p. 2025.

But is liable for a tax on its property. Rep. Atty. Gen. 1914, p. 1358.

Commercial or interurban road: how determined.

Railway v. Poland, 10 N. P. n. s. 617; 21 L. D. 630 (1910); aff'd, no rep., 88 O. S. 596.

A former statute which required every corporation operating a railroad within the state to pay a fee of \$1.00 per mile was held unconstitutional.

Railway v. State, 49 O. S. 189 (1892).

Section 5487. (Excise tax on pipe line companies.) In the month of October, the auditor of state shall charge for collection, from each pipe line company, a sum in the nature of an excise tax, for the privilege of carrying on its intra-state business, to be computed on the amount so fixed and reported to him by the commission, as the gross receipts of such company on its intra-state business for the year covered by its annual report to the commission, as required in this act, by taking four per cent. of all such gross receipts, which tax shall not be less than ten dollars in any case. (102 v. 247, § 98; 101 v. 413, § 65; R. S. Sec. 2780-21; 97 v. 329; 95 v. 138; 92 v. 79.)

An excise tax can not be imposed on receipts from interstate business. *State v. Pipe Line Co.*, 14 N. P. n. s. 401 (1913).

A pipe line company, incorporated in Ohio, which receives at the state line gas produced in and transported from another state, is engaged in interstate commerce. But if it has a small income from intrastate business, it is taxable on such income and not on its capital stock under the Willis law. *Rep. Atty. Gen.* 1912, p. 600; G. C. § 5518.

Section 5488. (Collection by treasurer of state. Notice of taxes.) After determining the amount of taxes or fees payable to the state, as provided in this act, the auditor of state shall thereupon prepare proper duplicates and reports, and certify them to the treasurer of state for collection.

Upon the receipt of such duplicate, the treasurer shall notify each company charged with taxes or fees thereon, of the amount due from it. (102 v. 247, § 99; 101 v. 413, § 66; R. S. Sec. 2780-21; 97 v. 329; 95 v. 138; 92 v. 79.)

Where no notice is given to a corporation, as required by this section, the tax commission is not authorized to remit the penalties, but the attorney general, with the advice and consent of the commission, is authorized by § 5524 to compromise the same. *Rep. Atty. Gen.* 1913, p. 526.

Section 5489. (Daily statement to auditor.) The treasurer of state shall proceed to collect such taxes and render a daily itemized statement to the auditor of state of the amount of taxes or fees collected and the name of the company from whom collected, under all provisions of this act. (102 v. 247, § 100; 101 v. 413, § 66; R. S. Sec. 2780-21; 97 v. 329; 95 v. 138; 92 v. 79.)

Section 5490. (Other companies not exempt.) Nothing contained in this act shall exempt or relieve electric light, gas, natural gas, pipe line, waterworks, street, suburban or interurban railroad, express, telegraph, telephone, messenger

or signal, union depot, railroad, heating, cooling, sleeping car, freight line, equipment and water transportation companies from the assessment and taxation of their property in the manner authorized and provided by law. (102 v. 247, § 101; 101 v. 413, § 67; R. S. Sec. 2780-21; 97 v. 329; 95 v. 138; 92 v. 79.)

See *Railway v. Poland*, 10 N. P. n. s. 617; 21 L. D. 630 (C. P. 1910)

That a corporation pays a property tax does not render an excise tax unconstitutional.

Railway Co. v. Dittney, 203 Fed. 537 (D. C. 1913); affirmed, 232 U. S. 576.

Section 5491. (Tax credited to general revenue fund. Penalty.) All taxes received by the treasurer of state, under the provisions of this act, shall be credited to the general revenue fund. If any public utility fails or refuses to pay, on or before the fifteenth day of December, the tax assessed against it, or if any corporation fails or refuses to pay, on or before the dates fixed, in this act, the fee charged against it, the treasurer of state shall certify the list of such utilities or corporations, so delinquent, to the auditor of state, who shall add to the tax or fee due, a penalty of fifteen per cent. thereon. The auditor of state shall thereupon forthwith prepare proper duplicates and reports of such taxes and fees and penalties thereon and certify them to the treasurer of state for collection. Thirty days after he receives such duplicates of delinquent taxes and fees and penalties thereon from the auditor of state, the treasurer of state shall certify to the commission a list of such public utilities and corporations as have failed to pay such taxes or fees and penalties thereon. (102 v. 248, § 102; 101 v. 414, § 68; R. S. Sec. 2780-21; 97 v. 329; 95 v. 138; 92 v. 79.)

It is said that the delinquent list, certified under this section, should include corporations which have not been notified of the amount of the tax, as required by § 5488.

Rep. Atty. Gen., 1910-1911, p. 485.

Procedure in certifying delinquent corporations to the attorney general. Opins. Atty. Gen. 1917, p. 1920.

Method of collecting penalties prior to Act of 1911. Rep. Atty. Gen. 1912, p. 538.

Section 5492. (Action for recovery may be brought, where.) Such taxes or fees and penalties thereon may be recovered by an action in the name of the state, which may be brought in the court of common pleas of Franklin county, or of any county, in which such corporation has an office or place of business, or in which such public utility is doing business, or the line of any street, suburban or interurban

railroad company or railroad company is located, and such court of common pleas shall have jurisdiction of such action regardless of the amount involved therein. The attorney general, on request of the commission, shall institute such action in the court of common pleas of Franklin county, or of any of such counties as the commission may direct. In any such action it shall be sufficient to allege that the tax, fee or penalty sought to be recovered, stands charged on the delinquent duplicate of the treasurer of state, and that the same has been unpaid for a period of thirty days after having been placed thereon. Sums recovered in any such action shall be paid into the state treasury, to the credit of the general revenue fund. (102 v. 248, § 103; 101 v. 414, § 68; R. S. Sec. 2780-21; 97 v. 329; 95 v. 138; 92 v. 79.)

Section 5493. (Effect when tax charged invalid.) In case the tax or fee herein authorized to be charged and collected against any class of corporations or public utilities, defined in this act, shall for any reason, be declared invalid, such invalidity shall in no wise affect the validity of the law, as applicable to any other class or classes of corporations or public utilities, defined in this act, nor shall the abrogation or repeal of any section or clause of this act be held to abrogate or repeal any other section or clause thereof. (102 v. 248, § 104; 101 v. 414, § 69; R. S. Sec. 2780-21; 97 v. 329; 95 v. 138; 92 v. 79.)

Section 5494. (Municipal corporation exempt.) This act shall not be so construed as to require any municipal corporation within this state to make any return or pay any taxes under any provisions of this act. (102 v. 248, § 105; 101 v. 414, § 71; R. S. Sec. 2780-22; 97 v. 331; 95 v. 143; 92 v. 79.)

FRANCHISE TAX ON CORPORATIONS (WILLIS LAW).

§ 5495. Report of corporations for profit.	§ 5506. Taxes and penalties, first lien.
§ 5496. Verification of report.	§ 5507. Penalty.
§ 5497. Report shall contain, what.	§ 5508. Liabilities of foreign corporations. Insurance companies not included in this act.
§ 5498. Amount of capital stock determined. Certified to auditor of state. Fee. Minimum.	§ 5509. Failure to report or pay tax, or fee, effect of. Cancellation of articles.
§ 5499. Report by foreign corporations.	§ 5510. Penalty.
§ 5500. Verified.	§ 5511. Reinstatement of corporation.
§ 5501. Contents.	§ 5512. Action by attorney general.
§ 5502. Valuation certified to auditor of state.	§ 5513. Quo warranto proceedings.
§ 5503. Collection. Fee, minimum.	
§ 5504. Hearing. Corrections.	
§ 5505. Receipt.	

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| <p>§ 5514. Certified list of new corporations each month by secretary of state to commission.</p> <p>§ 5515. Information by county auditors.</p> <p>§ 5516. Fees, power of commission as to.</p> <p>§ 5516-1. Extension of time.</p> <p>§ 5517. Hearing. Application for review. Corrections. Warrant for overpayment.</p> <p>§ 5518. Public utility, insurance, etc., companies excepted.</p> <p>§ 5519. Report not required until lapse of six months from date of incorporation.</p> | <p>§ 5520. Dissolution no exemption from payment or filing report.</p> <p>§ 5521. When certificate of dissolution may be filed.</p> <p>§ 5522. Affidavits as to use of money or property in aid of elections.</p> <p>§ 5523. Certificate of secretary of state as to foreign corporation doing business without compliance with laws. Prosecution.</p> <p>§ 5524. Compromise.</p> <p>§ 5525. Application of preceding sections. Independent sections. Pending actions not affected.</p> |
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Section 5495. (Report of corporation for profit.) Annually during the month of May each domestic corporation incorporated for profit shall make a report in writing to the commission in such form as the commission may prescribe. For purposes of this act, domestic corporations shall be considered incorporated upon the filing of articles of incorporation. (109 v. 94; June 2, 1911, 102 v. 249, § 106; May 10, 1910, 101 v. 421, § 82; April 11, 1902, 95 v. 124, § 1.)

§ 5495 and succeeding sections, popularly known as the Willis law, were originally G. C. §§ 5522 to 5542. The fee or tax imposed is a franchise or privilege tax and not a tax on property.

Southern Gum Co. v. Laylin, 66 O. S. 578 (1902).

The law is a general revenue measure, under Section 10, Article 12 of the Ohio Constitution. *Air-way Corporation v. Archer*, 279 Fed. 878 (D. C. Ohio 1922).

Constitutionality. The state may impose a tax on privileges or franchises, not to exceed the reasonable value of the privilege or franchise originally conferred, or its continued annual value thereafter. Act of 95 v. 124 held constitutional.

Southern Gum Co. v. Laylin, 66 O. S. 578 (1902).

State v. Covington, etc., Co., 6 N. P. n. s. 55; 18 L. D. 273 (C. P. 1907).

Held constitutional as to foreign corporations. *Air-way Corporation v. Archer*, 279 Fed. 878 (D. C. Ohio 1922).

Franchise tax does not affect property tax. The imposition of a franchise or privilege tax does not relieve corporations from the taxation of their property.

Scottish, etc., Ins. Co. v. Bowland, 196 U. S. 611 (1905).

Company incorporated in several states. A corporation, organized by concurrent legislation of two or more states, is a domestic corporation in each state. Such a corporation is subject to the franchise tax as a domestic corporation.

State v. Covington, etc., Bridge Co., 6 N. P. n. s. 55; 18 L. D. 273 (C. P. 1907).

Corporations in bankruptcy or under receivership. Whether reports must be made and taxes paid by a receiver, assignee for creditors or trustee in bankruptcy seems to depend upon whether he continues the corporate business. So long as an assignee, receiver or

trustee continues the business, it is his duty to make reports and pay taxes. *Gerke Co. v. Kuerze*, 7 Ohio App. 37; 26 C. C. n. s. 17 (1916); *Morley v. Cleveland*, 23 C. C. n. s. 295 (1914).

If, however, he does not continue the business, but merely liquidates the assets for creditors, he need not make reports and is not liable for franchise taxes. *State v. Harris*, 229 Fed. 892; 14 O. L. R. 95 (C. C. A. Ohio 1916); certiorari denied, 242 U. S. 634; s. e., 225 Fed. 625.

If a corporation has exercised its corporate franchise any part of the tax year, corporate assets in the hands of its trustee in bankruptcy are liable for the tax, although the amount is not ascertained and charged until after the adjudication. *Bates v. Archer*, 288 Fed. 182 (C. C. A. Ohio 1923).

The attorney general has ruled that an insolvent bank, whose assets are being liquidated by the superintendent of banks, continues to be liable for franchise reports and taxes until dissolution. Rep. Atty. Gen. 1914, p. 1065.

Corporations not for profit are not required to make reports or pay franchise taxes. Rep. Atty. Gen. 1912, p. 617; Rep. Atty. Gen. 1911-1912, p. 697.

Section 5496. (Verification of report.) If the corporation has organized, such report shall be signed and sworn to before an officer authorized to administer oaths by the president, vice president, secretary or general manager of the corporation. In the event the corporation has not organized, then such report shall be signed and sworn to by one of the incorporators of said corporation and forwarded to the commission. (109 v. 94; 102 v. 249, § 107; May 10, 1910, 101 v. 421, § 82; April 11, 1902, 95 v. 124, § 1.)

Before the amendment of 109 v. 94, a corporation was not liable for the tax until ten percent of its capital stock has been subscribed and its directors chosen. Opins. Atty. Gen. 1915, p. 1196, 14 O. L. R. 36; 5 Opins. Attys. Gen. 999 (1903). *Contra*. Rep. Atty. Gen. 1912, p. 530.

Section 5497. (Report shall contain, what.) Such report shall contain:

1. The name of the corporation.
2. The location of its principal office.
3. The names of the president, secretary, treasurer and members of the board of directors, with the postoffice address of each.
4. The date of the annual election of officers.
5. The amount of authorized capital stock and the par value of each share.
6. The amount of capital stock subscribed, the amount of capital stock issued and outstanding, and the amount of capital stock paid up.

7. The nature and kind of business in which the corporation is engaged and its place or places of business.

8. The change or changes, if any, in the above particulars, made since the last annual report. (June 2, 1911, 102 v. 249, § 108; May 10, 1910, 101 v. 421, § 83; April 11, 1902, 95 v. 124, § 1.)

Where preferred stock has been redeemed under § 8669 it is extinguished, and should not be included as a basis for the franchise tax. Opins. Atty. Gen. 1918, p. 907.

Stock subscribed for but not yet issued should be included. Opins. Atty. Gen. 1916, p. 288.

Stock which has been issued, but is subsequently acquired by the corporation, should be included as a basis for the franchise tax, unless the capital stock is reduced under § 8700. This applies to stock purchased by the corporation (Opins. Atty. Gen. 1916, pp. 1322, 288). And to stock surrendered by the stockholders, on a sale of a part of the corporate property and distribution of the proceeds to the stockholders. Opins. Atty. Gen. 1917, p. 1543; 15 O. L. R. 415.

Shares donated to the corporation to be given as a bonus to purchasers of preferred stock, and shares deposited with the commissioner of securities to be held until the corporation has earned certain dividends, are "issued and outstanding". Opins. Atty. Gen. 1921, p. 102.

Where changes in subscribed or issued and outstanding stock occur during May, the latest condition should be reported. If the report is made after the month of May, the condition at the end of the month should be reported. Opins. Atty. Gen. 1919, p. 1585.

Section 5498. (Amount of capital stock determined; certified to auditor of state. Fee. Minimum.) Upon the filing of the report, provided for in the last three preceding sections, the commission, after finding such report to be correct, shall, on the first Monday of July, determine the amount of the subscribed or issued and outstanding capital stock of each such corporation. On the first Monday in August, the commission shall certify the amount so determined by it to the auditor of state, who shall charge for collection, on or before August fifteenth, as herein provided, from such corporation, a fee of three-twentieths of one per cent. upon its subscribed or issued and outstanding capital stock, which fee shall not be less than ten dollars in any case. Such fee shall be payable to the treasurer of state on or before the first day of the following October. (June 2, 1911, 102 v. 249, § 109; May 10, 1910, 101 v. 422, § 84; April 11, 1902, 95 v. 124, § 1.)

Rate of tax on corporations having no-par-value common stock. § 8728-11.

The tax should be assessed on stock subscribed for but not yet issued, and also upon the issued and outstanding stock. Opins. Atty. Gen. 1916, p. 288; 5 O. L. R. 122 (Atty. Gen. 1907).

The fee is probably for the current calendar year. State v.

Harris, 229 Fed. 892; 14 O. L. R. 95 (C. C. A. Ohio 1916). See Bates v. Archer, 288 Fed. 182 (1922).

Although it was held by a referee in bankruptcy to be for the year next ensuing after the filing of the annual report and not for past enjoyment of the franchise. *Emmerman v. Ohio Co.*, 14 O. F. D. 289; aff'd, by District Court, 14 O. F. D. 298. See also Rep. Atty. Gen. 1906-1907, p. 59.

A corporation which was in existence during the entire month of May is liable for the tax. Rep. Atty. Gen. 1912, p. 586; Bates v. Archer, 288 Fed. 182 (1922).

The tax is for the entire year. The act does not provide for consideration of fractional parts of a year, nor does it provide for remitting part of the tax where a corporation discontinues business during a year.

Rep. Atty. Gen. 1904-1905, pp. 69, 70.

Bates v. Archer, 288 Fed. 182 (1922).

Section 5499. (Report by foreign corporations.) Annually during the month of July, each foreign corporation for profit, doing business in this state, and owning or using a part or all of its capital or plant in this state, or, having complied with the provisions of section 183 of the General Code and having been authorized by the secretary of state to transact business in this state, in addition to all other statements required by law, shall make a report in writing to the commission in such form as the commission may prescribe. (109 v. 94; June 2, 1911, 102 v. 249, § 110; May 10, 1910, 101 v. 422, § 85; April 11, 1902, 95 v. 124, § 2.)

Filing a report under this section was held not doing business in the state, so as to subject the foreign corporation to the service of process on its designated agent in a suit on a cause of action arising outside of the state, where the corporation had withdrawn from the state, prior to such service, and prior to the filing of the report. *Robert Mitchell Furniture Co. v. Selden Breck Construction Co.*, 257 U. S. 213 (1921).

Rulings prior to the amendment of 109 v. 94. A foreign corporation is not subject to the Willis law unless it is also subject to G. C. § 183 et seq. A foreign corporation may be subject to G. C. § 178 without being subject to G. C. § 183 or to the annual franchise tax. Rep. Atty. Gen. 1912, pp. 569, 59.

A foreign corporation which owns property but transacts no business in the state need not file a report or pay a franchise tax. Opins. Atty. Gen. 1916, p. 995.

A foreign corporation which transacts no business in the state except interstate business, is not required to make reports or pay an annual franchise tax. The fact that such a corporation voluntarily complied with G. C. §§ 178-183 does not render it liable for the tax. Rep. Atty. Gen. 1912, pp. 59, 569.

A foreign freight line company is not subject to the franchise tax. Rep. Atty. Gen. 1913, p. 610.

Section 5500. (Verified.) Such report shall be signed and sworn to before an officer, authorized to administer oaths,

by the president, vice-president, secretary, superintendent or managing agent in this state, and forwarded to the commission. (June 2, 1911, 102 v. 249, § 111; May 10, 1910, 101 v. 422, § 85; April 11, 1902, 95 v. 124, § 2.)

Section 5501. (Contents.) Such report shall contain:

1. The name of the corporation and under the laws of what state or country organized.

2. The location of its principal office.

3. The names of the president, secretary, treasurer and members of the board of directors, with the postoffice address of each.

4. The date of the annual election of officers.

5. The amount of authorized capital stock, and the par value of each share.

6. The amount of capital stock subscribed, the amount of capital stock issued, and the amount of capital stock paid up.

7. The nature and kind of business in which the company is engaged and its place or places of business, both within and without the state.

8. The name and location of its office or offices in this state, and the name and address of the officers or agents of the corporation in charge of its business in this state.

9. The value of the property owned and used by the company in this state, where situated, and the value of the property owned and used outside of this state, and where situated.

10. The change or changes, if any, in the above particulars, made since the last annual report. (June 2, 1911, 102 v. 249, § 112; May 10, 1910, 101 v. 422, § 86; April 11, 1902, 95 v. 124, § 2.)

Section 5502. (Valuation certified to auditor of state.)

Upon the filing of the report, provided for in the last three preceding sections, the commission, from the facts thus reported and any other facts coming to its knowledge bearing upon the question, shall, on the first Monday in September, determine the proportion of the authorized capital stock of the company represented by its property and business in this state. On the first Monday of October, the commission shall certify the amount of the proportion of the authorized capital stock of each such company represented by its property and business in this state, as determined by it, to the auditor of state. (June 2, 1911, 102 v. 250, § 113; May 10, 1910, 101 v. 422, § 87; April 11, 1902, 95 v. 124, § 2.)

A company organized by concurrent legislation of two states is a

domestic corporation in each state. A finding by the taxing officers that such a company is a foreign corporation, and the acceptance of annual reports, does not bar the state from collection of the proper tax.

State v. Covington, etc., Co., 6 N. P. n. s. 55; 18 L. D. 273 (C. P. 1907).

The tax commission is invested with a reasonable discretion in making the determination. Rep. Atty. Gen., 1910-1911, p. 600.

The commission is not required to certify its action by registered mail. Opins. Atty. Gen. 1918, p. 290.

Effect of erroneous compliance with G. C. §§ 178 to 192. Where a foreign corporation, which neither owned nor used property in the state, by error, in complying with G. C. §178 et seq., reported its entire capital stock as used in the state, the tax commission may permit an amended report to be filed, and, under the authority to consider "other facts coming to its knowledge bearing on the question," may accept the minimum annual fee, and release the corporation from liability for the balance. Rep. Atty. Gen. 1909-1910, p. 84.

A foreign corporation, which is not subject to the franchise tax, does not become liable therefor merely by reason of a voluntary compliance with G. C. §§ 178-183. Rep. Atty. Gen. 1912, pp. 59, 569.

Method of computing tax. This tax is not based upon the *property* owned and used and *business* transacted in Ohio, but is based upon the *proportion of the total authorized capital stock* represented by such property and business. The proportion which the property owned and used and business transacted in Ohio bears to the entire property and business of the corporation is the proportion of the capital stock on which the tax is based. If the property owned and used and business transacted in Ohio is \$10,000, the entire corporate property and business \$20,000, and the authorized capital stock \$50,000, the tax would be based upon one-half of its authorized capital stock (\$25,000), the Ohio property and business being one-half of the total property and business.

State v. Coal Co., 17 N. P. n. s. 60 (1914).

Opins. Atty. Gen. 1915, p. 2411.

Aetna, etc., Co. v. Taylor, 13 C. C. 602; 5 C. D. 242 (1896).

4 Opins. Atty. Gen., 621-624 (1894).

Rep. Atty. Gen., 1910-1911, p. 600.

If the entire corporate property and business is in Ohio the tax should be based on the entire authorized capital stock. State v. Fulton, 98 O. S. 350 (1918); 5 O. L. R. 163.

The property and the business of a corporation are both factors in the assessment. The commission can not disregard corporate property outside the state. State v. Coal Co., 17 N. P. n. s. 60 (1914).

Neither "good will" nor "patent rights", separately considered, constitute "property" within the meaning of §§ 5501 and 5502. Opins. Atty. Gen. 1919, p. 358.

"Business in the state." The word "business" as used in this section is synonymous with the same word as used in §§ 5499 and 183. Sales to Ohio customers made by mail or through travelling salesmen, necessitating interstate transportation of the articles sold, are not "business in the state" although the corporation does other Ohio business. But deliveries to Ohio customers from a stock in the state is Ohio business. The operation of a factory in Ohio is doing business in the state regardless of where the products are sold or transported. Opins. Atty. Gen. 1915, pp. 460, 2411.

Sales in original packages, in warehouse or stock, are Ohio business. Rep. Atty. Gen. 1913, p. 679.

Where a foreign corporation has its managerial office in Ohio, in which all orders for goods are received, contracts made, and its book accounts and bills receivable controlled and collected, such book accounts and bills receivable constitute property located in Ohio. Opins. Atty. Gen. 1919, p. 403.

A sale in Ohio of goods to be shipped in delivery from outside the state is interstate commerce and not business done in Ohio. But sales of goods stored in Ohio to Ohio customers constitute business done in Ohio. Opins. Atty. Gen. 1919, p. 403.

Authorized capital stock. Where the charter of a foreign corporation authorizes the issue of a certain amount of common and a limited amount of preferred stock, an amount of common being reserved for issue only in exchange for preferred, which, after exchange, is retired and not subject to reissue, the "authorized capital stock" is not the sum of the authorized common and preferred, but the sum of the unreserved common and the preferred, or, in other words, the whole of the common stock. Opins. Atty. Gen. 1917, p. 1906.

Section 5503. (Collection. Fee. Minimum.) On or before October fifteenth, the auditor of state shall charge for collection, as herein provided, annually, from such company, in addition to the initial fees otherwise provided for by law, for the privilege of exercising its franchises in this state, a fee of three-twentieths of one per cent. upon the proportion of the authorized capital stock of the corporation represented by property owned and used and business transacted in this state, which fee shall not be less than ten dollars in any case. Such fee shall be payable to the treasurer of state on or before the first day of the following December. (June 2, 1911, 102 v. 250, § 114; May 10, 1910, 101 v. 422, § 87; April 11, 1902, 95 v. 124, § 2.)

Rate of tax on foreign corporations having no par value stock. § 8728-11.

A foreign corporation which has ceased to do business, but owns property in the state, and has not filed the certificate required by § 11976, should pay the minimum tax under § 5503. Opins. Atty. Gen. 1916, p. 995.

Section 5504. (Domestic corporations. Hearing. Corrections.) Between the dates herein fixed for the determination of the amount of the subscribed or issued and outstanding capital stock of a domestic corporation and the proportion of the authorized capital stock of a foreign corporation, represented by property owned and used and business transacted by it in this state, and the dates herein fixed for the certification to the auditor of state of such amount or proportion, the commission may, on the application of any person or company interested, or on its own motion, review

and correct its findings. (June 2, 1911, 102 v. 250, § 115; May 10, 1910, 101 v. 425, § 100; April 25, 1904, 97 v. 382, § 6; April 11, 1902, 95 v. 124, § 6.)

Section 5505. (Receipt.) Upon the payment of the tax or fee, provided for in this act, to the treasurer of state, the treasurer of state shall make out and deliver to the public utility or corporation so paying a receipt for the payment by such public utility or corporation of the tax or fee herein provided for. (June 2, 1911, 102 v. 251, § 116; May 10, 1910, 101 v. 424, § 92; April 11, 1902, 95 v. 126, § 4.)

Section 5506. (Taxes and penalties, first lien.) Annually on the last day of the month fixed for the filing of its report with the tax commission of Ohio the fees, taxes and penalties, required to be paid by this act, shall become the first and best lien on all property of a public utility or corporation, whether such property is employed by the public utility or corporation in the prosecution of its business or is in the hands of an assignee, trustee or receiver for the benefit of the creditors and stockholders thereof. Such lien shall continue until such fees, taxes and penalties are paid. (109 v. 94; 102 v. 251, § 117; 101 v. 424, § 93; 97 v. 381, § 5; 95 v. 124, § 5.)

Franchise taxes accruing after the appointment of a receiver, as well as before, are a lien if the receiver continues the corporate business. *Gerke Co. v. Kuerze*, 7 Ohio App. 37; 26 C. C. n. s. 17 (1916); *Morley v. Cleveland Co.*, 23 C. C. n. s. 295 (1914).

But where the corporate business is not continued, assets in possession of a trustee in bankruptcy are not subject to a lien for franchise taxes accruing after the bankruptcy. *State v. Harris*, 229 Fed. 892; 14 O. L. R. 95 (C. C. A. Ohio 1916); *certiorari denied*, 242 U. S. 634.

A petition in involuntary bankruptcy was filed against a corporation May 31, and it was adjudged a bankrupt on June 21. Tax for the year was held to be a lien on the corporate assets, although the amount was not ascertained and charged until after the adjudication. *Bates v. Archer*, 288 Fed. 182 (C. C. A. Ohio 1923).

This section does not signify that the lien is a source of power to tax. The lien merely affords security for collecting a tax otherwise specifically authorized and assessed. *State v. Harris*, 229 Fed. 892; 14 O. L. R. 95 (1915); *certiorari denied*, 242 U. S. 634.

Priority of lien. A purchase money mortgage given by a corporation, and a mortgage given by a former owner of the property and assumed by the corporation, have priority over the statutory lien created by this section. *Opins. Atty. Gen.* 1916, p. 1822.

Section 5507. (Penalty.) If a public utility or corporation, required to file a report by any provision of this act, fails or neglects to make such report, as required herein, it

shall be subject to a penalty of ten dollars per day for each day's omission after the time limited in this act for making such report. (June 2, 1911, 102 v. 251, § 118; May 10, 1910, 101 v. 424, § 94; April 25, 1904, 97 v. 381, § 5; April 11, 1902, 95 v. 126, § 5.)

Compromise of penalty, G. C. § 5524.

Section 5508. (Liabilities of foreign corporations. Insurance companies not included in this act.) All foreign corporations, and the officers and agents thereof, doing business in this state, shall be subjected to all the liabilities and restrictions that are, or may be imposed upon corporations of like character, organized under the laws of this state, and shall have no other or greater powers. Every contract made by or on behalf of any such foreign corporation, affecting the liability thereof or relating to its property within this state, before it shall have complied with the provisions of section one hundred and seventy-eight of the General Code, shall be wholly void on its behalf and on behalf of its assigns, but shall be enforceable against it or them. Nothing contained in this section shall be held or construed to apply to insurance corporations, fraternal beneficiary associations, or building and loan associations required by law to report to the superintendent of insurance, nor to repeal, change or modify the provisions of section one hundred and eighty-eight of the General Code. (June 2, 1911, 102 v. 251, § 119.)

Acting as a stockholder in an Ohio corporation, or giving assent to changes in its regulations, is not "doing business" in Ohio within the meaning of G. C. §§ 178 or 5508.

Toledo T. L. & P. Co. v. Smith, 205 Fed. 647 (D. C. 1913).

Powers of foreign corporations prior to enactment of § 5508.

See *State v. Insurance Co.*, 69 O. S. 327 (1903).

Mannington v. Ry. Co., 8 O. L. R. 451, 484; 183 Fed. 133; 16 O. F. D. 552 (C. C. 1910).

This section gives to stockholders of a foreign corporation, which has qualified to do business in Ohio, the right of inspection of corporate books and records under § 8673. *American Co. v. Whitney*, 19 C. n. s. 584 (1912).

Non-compliance with §§ 178 and 183; effect on contracts. A Wisconsin statute, similar to § 5508, has been construed to exclude unilateral contracts like bills, notes, and contracts which have been fully executed outside the state upon which there remains only the obligation of payment. Such contracts are not void as they do not "affect the liability" of the foreign corporation. *Catlin v. Schippert*, 130 Wis. 642; cited in 20 N. P. n. s. 19, 24.

A contract of sale requiring delivery outside of the state (as, f. o. b. Kansas City, Mo.) is an interstate transaction and not void under § 5508. *Vaccine Co. v. Redman*, 20 N. P. n. s. 17; 28 L. D. 4 (1917).

The Wisconsin statute was held constitutional as to transactions subsequent to its enactment. *Munday v. Wisconsin Trust Co.*, 252 U. S. 499 (1920); affirming, 168 Wis. 31.

In other states in which contracts by unlicensed foreign corporations are declared void by statute, such contracts are unenforceable, even in federal court. *Hayes Wheel Co. v. American Co.*, 257 Fed. 881 (6th Cir. 1919).

Before the enactment of § 5508 it was held that a contract made by a foreign corporation which had not complied with §§ 178 to 192 was not void.

Fergus v. Columbus, 6 N. P. 82; 8 L. D. 290.

Ins. Co. v. Ellis, 32 O. S. 388 (1877).

Ins. Co. v. McMillen, 24 O. S. 67 (1873).

But the right of action thereon was suspended until a certificate was secured.

Simplex Dairy Co. v. Cole, 86 Fed. 739 (1898).

Crefeld Miller v. Goddard, 69 Fed. 141 (1895).

Section 5509. (Failure to report or pay tax or fee; effect of. Cancellation of articles.) If a corporation, wherever organized, required by the provisions of this act, to file any report or returns or to pay any tax or fee, either as a public utility or as a corporation, organized under the laws of this state, for profit or as a foreign corporation for profit doing business in this state and owning or using a part or all of its capital or plant in this state, or as a sleeping car, freight line or equipment company, fails or neglects to make any such report or return or to pay any such tax or fee for ninety days after the time prescribed in this act for making such report or return or for paying such tax or fee, the commission shall certify such fact to the secretary of state. The secretary of state shall thereupon cancel the articles of incorporation of any such corporation which is organized under the laws of this state, by appropriate entry upon the margin of the record thereof, or cancel the certificate of authority of any such foreign corporation to do business in this state by proper entry. Thereupon all the powers, privileges and franchises conferred upon such corporations, by such articles of incorporation or by such certificate of authority, shall cease and determine. The secretary of state shall immediately notify such domestic or foreign corporation of the action taken by him. (June 2, 1911, 102 v. 251, § 120; May 10, 1910, 101 v. 424, § 97; April 25, 1904, 97 v. 381, § 5.)

See § 5525.

Corporate existence is not wholly terminated by a cancellation of articles under this section, because of the right of reinstatement provided in § 5511. A new corporation cannot be organized with the same name as a corporation whose articles have been cancelled, until after the expiration of the two-year period for reinstatement provided in § 5511. Rep. Atty. Gen. 1912, p. 48.

Where the articles of a corporation were cancelled under § 5509

and the corporation is subsequently reinstated under § 5511, the corporation is a corporation *de facto* during the interval between cancellation and reinstatement. One who contracts with the corporation during such interval cannot question its corporate capacity. *Goldstein Co. v. Mitchell*, 14 Ohio App. 231 (1921). *Contra. Package Sales Co. v. Orchard Sales Co.*, 24 N. P. n. s. 313 (Municipal Court of Cincinnati) holding that officers and directors are personally liable for debts contracted after cancellation of the articles.

After cancellation of articles, no reports need be made and the corporation is not liable for subsequent taxes. Rep. Atty. Gen. 1914, p. 570.

A certificate of voluntary dissolution may not be filed after cancellation of articles under this section, and before reinstatement under § 5511. Opins. Atty. Gen. 1923, p. —; 1 Ohio Law Abstract, 586.

An erroneous cancellation of articles may be corrected by the tax commission under § 5517. Opins. Atty. Gen. 1916, p. 1512.

The forfeiture of the right of a foreign corporation to do business in a state, under a statute such as § 5509, should be construed as relating to intra-state business only, and not to affect its right to do interstate business. *St. Louis, etc., Ry. v. Arkansas*, 235 U. S. 350 (1914).

Section 5510. (Penalty.) Any person or persons who shall exercise, or attempt to exercise, any powers, privileges or franchises, under the articles of incorporation or certificate of authority, after the same are cancelled, as provided in section one hundred and twenty of this act [G. C. § 5509], shall be fined not less than one hundred dollars nor more than one thousand dollars. (June 2, 1911, 102 v. 252, § 121.)

See § 5525.

Section 5511. (Reinstatement of corporation.) Any corporation whose articles of incorporation or certificate of authority, to do business in this state, has been cancelled by the secretary of state, as provided in section one hundred and twenty (G. C. Section 5509) of this act, upon the filing, within two years after such cancellation, with the secretary of state, of a certificate from the commission that it has complied with all the requirements of this act and paid all taxes, fees or penalties due from it, and upon the payment to the secretary of state of an additional penalty of one-tenth of one per cent upon the amount of its authorized stock, such penalty not to exceed one hundred dollars nor be less than ten dollars in any case, shall be entitled again to exercise its rights, privileges and franchises in this state, and the secretary of state shall cancel the entry made by him under the provisions of section one hundred and twenty (G. C. Section 5509) of this act, and shall issue his certificate entitling such corporation to exercise its rights, privileges and franchises. (109 v. 94; 102 v. 252, § 122.)

Reinstatement is not authorized after two years from the date of cancellation. Opins. Atty. Gen. 1923, p. —; 1 Ohio Law Abstract, 586.

A corporation is not required to pay franchise taxes for the period between the cancellation of its articles and the application for reinstatement. Rep. Atty. Gen. 1914, p. 570.

The secretary of state has no authority to remit the penalty imposed by this section. Nor does § 5524 authorize the attorney general to compromise it. Rep. Atty. Gen. 1914, p. 1377.

Section 5512. (Action by attorney general.) In addition to all other remedies for the collection of any taxes or fees due, under the provisions of this act, the attorney general, shall, upon the request of the commission, whenever any taxes, fees or penalties due, under this act, from any public utility or corporation, shall have remained unpaid for a period of ninety days, or whenever any corporation or public utility has failed or neglected for ninety days to make or file any report or return, required by this act, or to pay any penalty for failure to make or file such report or return, apply to the common pleas court of Franklin county, or of any county in the state in which such public utility or corporation is located or has an office or place of business, for an injunction to restrain such public utility or corporation from the transaction of any business within this state, until the payment of such taxes or fees and penalties thereon, or the making and filing of such report or return and payment of penalties for failure to make or file such report or return, and the costs of such application, which shall be fixed by the court. Such petition shall be in the name of the state, and if it is made to appear to the court, upon hearing, that such public utility or corporation has failed and neglected, for ninety days, to pay such taxes, fees or penalties thereon, or to make or file such reports or returns, or to pay such penalties for failure to make or file such reports or returns, such court of common pleas shall grant and issue such injunction. All actions brought under this act shall have precedence over any civil cause of a different nature pending in such court, and the court of common pleas shall always be deemed open for the trial of any such action brought therein. (June 2, 1911, 102 v. 252, § 123.)

See § 5525.

Section 5513. (Quo warranto proceedings.) If any corporation fails or neglects to make and file the reports or returns, required by this act, or to pay the penalties provided in this act for failure to make and file such reports or returns, for a period of ninety days after the time prescribed

in this act, the attorney general, on the request of the commission, shall commence an action in quo warranto, in the circuit court of Franklin county, or of any county in this state in which such corporation is located or has an office or place of business, to forfeit and annul its privileges and franchises. If the court is satisfied that any such corporation is in default as aforesaid, it shall render judgment ousting such corporation from the exercise of its privileges and franchises within this state, and shall otherwise proceed as provided in Chapter One of Title VIII, Part 3 of the General Code. (June 2, 1911, 102 v. 253, § 124; May 10, 1910, 101 v. 424, § 97; April 25, 1904, 97 v. 382, § 5; April 11, 1902, 95 v. 126, § 5.)

See § 5525.

Section 5514. (Certified list of new corporations each month by secretary of state to commission.) The secretary of state shall prepare and keep a correct list of all corporations, subject to the provisions of this act, engaged in business within this state. Each month he shall file with the commission a certified report showing all the new corporations, the increase or decrease of the capital stock, or the dissolution of existing corporations, and such other information as the commission requires. For the purpose of obtaining the necessary information, the secretary of state or the commission, shall have access to the records of the offices of the county auditors of the state. (June 2, 1911, 102 v. 253, § 125; May 10, 1910, 101 v. 425, § 98; April 25, 1904, 97 v. 382, § 6.)

Section 5515. (Information by county auditors.) Upon request of the secretary of state or the commission, any county auditor shall furnish such information as is shown by the records of his office concerning corporations located within his county, and subject to the provisions of this act. (June 2, 1911, 102 v. 253, § 126; May 10, 1910, 101 v. 425, § 99; April 25, 1904, 97 v. 382, § 6; April 11, 1902, 95 v. 126, § 6.)

Section 5516. (Fees; power of commission as to.) For the purpose of determining the amount of fees due from any such corporation, the commission may investigate and determine the facts showing the proportion of the authorized capital stock of the company represented by its property and business in this state. (June 2, 1911, 102 v. 253, § 127.)

Section 5516-1. (Extension of time.) The tax commission of Ohio, when it deems the same necessary or advisable,

may extend to any corporation or public utility, a further specified time within which to file any report required by law to be filed with the tax commission, in which event the attaching or taking effect of any penalty for failure to file such report or pay its tax or fee into the state treasury shall be extended or postponed accordingly. (March 2, 1911, 102 v. 31.)

Section 5517. (Hearing. Application for review. Correction. Warrant for overpayment.) Any bank, public utility or corporation may be heard by the commission upon the question as to the correctness of any determination, finding or order of the commission after the same has been made. Application to the commission for a review of any determination, finding or order by it made, must be filed in writing within sixty days from the date of the certification thereof by the commission to the proper officer. The commission, upon such application, if it finds the same has been filed within the time limited in this section, may make such correction in its determination, finding or order, as it may deem proper, and its decision in the matter shall be final. Such correction shall be certified to the proper official, who shall correct his records and duplicates in accordance therewith. In case any such bank, public utility or corporation has paid the tax or fee assessed against it under mistake, and such mistake is corrected by the commission, upon application so filed, so that the amount due from such bank, public utility or corporation, under such corrected determination, finding or order, is less than the amount of the taxes or fees paid and if such payment has been made to the county treasurer of the proper county the county auditor shall upon certificate of such correction, as herein provided, draw his warrant on the treasurer, in favor of the bank, public utility or corporation, for the amount so erroneously paid by it. The county treasurer shall thereupon pay such warrant out of any moneys in the general fund of the county not otherwise appropriated. (110 v. 60; June 2, 1911, 102 v. 253, § 128; May 10, 1910, 101 v. 425, § 100.)

The "proper officer" to whom the tax commission should certify corrections is the auditor of state. The state treasurer should also be notified of corrections.

Rep. Atty. Gen. 1911-1912, pp. 164, 451.

That part of this section which provides for an appropriation for a refunder of taxes overpaid is said to be in conflict with Art. 2, Sec. 22 of the constitution in that it is not specific and not limited to two years. This does not affect the remainder of the section.

Rep. Atty. Gen. 1911-1912, p. 148.

It is said that the tax commission has no authority to entertain

an application by a public utility for a review of its determination of value, after the commission has certified its determination to the county auditor. Opins. Atty. Gen. 1921, p. 647.

An erroneous cancellation of articles by the secretary of state under § 5509 may be corrected by the tax commission under this section. Opins. Atty. Gen. 1916, p. 1512.

Section 5518. (Insurance companies excepted.) An incorporated company, whether foreign or domestic, owning or operating a public utility in this state, and as such required by law to file reports with the tax commission and to pay an excise tax upon its gross receipts or gross earnings as provided in this act, and insurance, fraternal beneficial, building and loan, bond investment and other corporations, required by law to file annual reports with the superintendent of insurance, shall not be subject to the provisions of sections one hundred and six to one hundred and fifteen, inclusive, of this act [G. C. §§ 5495 to 5504]. 102 v. 254, § 129; 101 v. 425, § 101; 97 v. 382, § 7; 95 v. 127, § 7.)

Public utility companies not engaged in active business should file reports under § 5495 et seq.

Rep. Atty. Gen., 1906-1907, pp. 45, 41.

A public utility company, incorporated under Ohio laws, engaged mainly in interstate commerce but having a small income from intrastate business, is taxable on such income and not on its capital stock. If it has no intrastate business, it is taxable on its capital stock. Rep. Atty. Gen. 1912, pp. 600, 2025.

Public utility company, after lease of line or plant to operating company. A railroad corporation, whose line of railroad is operated by another company under a long term lease, is not required to make reports or pay taxes under the Willis law, although it maintains its corporate organization, collects the rent and pays dividends. C. & P. Railroad Co. v. State, 2 Ohio App. 228; 20 C. C. n. s. 61; 26 C. D. 403; reversing, 13 N. P. n. s. 671; motion to certify record overruled, 11 O. L. R. 538; 59 Bull. 112; State v. Little Miami Railroad, 7 Ohio App. 309; 27 C. C. n. s. 154; 28 C. D. 297; affirming, 19 N. P. n. s. 234; motion to certify record overruled, 15 O. L. R. 431; 62 Bull. 444.

In the opinion of the attorney general, the scope of decision of the cases cited above should be limited to so-called "underlying companies". Corporations organized to construct and operate public utilities, but which have not commenced operations, or which have abandoned or sold their public utility business, are liable for the franchise (Willis) tax. Opins. Atty. Gen. 1917, p. 2015.

Public utility company prior to operation. A railroad company was organized more than six months prior to May, 1912, but did not begin to operate its railroad until June. In May it filed a report under the franchise (Willis) law. The attorney general ruled that the company was liable for the franchise tax but not for an excise tax on its gross receipts for 1912. Rep. Atty. Gen. 1913, p. 585.

Insurance company. An insurance company, organized for profit, which has not obtained subscriptions for all of its capital stock and

has not been licensed by the superintendent of insurance, is subject to the Willis tax. Rep. Atty. Gen. 1912, p. 633.

Although an insurance company has reinsured all its risks and is therefore not "required" to make reports to the superintendent of insurance, it is not subject to the franchise (Willis) tax. Opins. Atty. Gen. 1917, p. 625. *Contra.* Opins. Atty. Gen. 1916, p. 1945.

Manufacturing company. A manufacturing company which furnishes electric current to consumers, for light, heat or power purposes, is a public utility and should make reports as such and pay an excise tax based on its gross receipts. Its property should be valued by the unit rule. It is not required to make a report or to pay taxes under the Willis law. Rep. Atty. Gen. 1913, p. 545.

Mutual public utility not using streets. A corporation organized for the sole purpose of furnishing electric current, heat and water to a group of manufacturing establishments, which own all of its stock in proportion to the amount of service rendered to each, and which does not exercise the power of eminent domain or serve the general public, is not a public utility and is subject to the franchise (Willis) tax, but not to the excise tax. *State v. Factory Power Co.*, 16 N. P. R. 545 (1915).

Freight line, sleeping car and equipment companies. Ohio freight line, sleeping car and equipment companies are not taxed on their gross receipts and are liable for the franchise (Willis) tax. Foreign companies, however, are not liable for the franchise tax. Rep. Atty. Gen. 1913, p. 610.

Section 5519. (Report not required until lapse of six months from date of incorporation.) A corporation shall not be required to file its first annual report under sections 106 to 115 (G. C. 5459 to 5504), inclusive, of this act, until the proper month, hereinbefore provided, for the filing of such report, next following the expiration of six months from the date of filing articles of incorporation or admission to do business in this state. (109 v. 95; 102 v. 254, § 130; 101 v. 425, § 102; 97 v. 382, § 7; 95 v. 127, § 7.)

The exemption of this section does not apply to a corporation which reorganizes under the no-par-value stock law. Opins. Atty. Gen. 1920, p. 594.

Where capital stock is increased within six months prior to the time of filing the report, the increased stock which is subscribed or issued and outstanding is taxable. Opins. Atty. Gen. 1918, p. 227; Opins. Atty. Gen. 1916, p. 1606; 4 Dep. Rep. 985. *Contra.* 5 Opins. Atty. Gen. 865 (1903).

A consolidated corporation need not file a report until after the expiration of six months following the filing of its certificate of consolidation.

Rep. Atty. Gen., 1908, p. 83.

Section 5520. (Dissolution no exemption from payment or filing report.) The mere retirement from business or voluntary dissolution of a domestic or foreign corporation, without filing the certificate, provided for in sections eleven

thousand nine hundred and seventy-four, eleven thousand nine hundred and seventy-five and eleven thousand nine hundred and seventy-six of the General Code, shall not exempt it from the requirements to make reports and pay fees or taxes in accordance with the provisions of this act. (June 2, 1911, 102 v. 254, § 131; April 25, 1904, 97 v. 383, § 8; April 11, 1902, 95 v. 127, § 8.)

Reports by receivers, trustees in bankruptcy and assignees for creditors, see note to § 5495.

Section 5520 relates only to cases of voluntary dissolution. A judgment of dissolution or revocation of charter, in a judicial proceeding, terminates the corporate existence, and there is no further obligation to make reports and pay taxes, although no certificate is filed under § 11975. Rep. Atty. Gen. 1912, p. 67.

A foreign corporation which has ceased to do business, but owns property in the state, and has not filed the certificate required by § 11976, should pay the minimum tax under § 5503. Opins. Atty. Gen. 1916, p. 995.

"Retirement from business" under §§ 5520 and 11976 refers to retirement from the exercise of the privilege covered by § 183 et seq. When a corporation retires from business in the state it may have its registration under § 178 et seq. continued. Rep. Atty. Gen. 1914, p. 1172.

Section 5521. (When certificate of dissolution may be filed.) In case of dissolution or revocation of its charter on the part of a domestic corporation, or of the retirement from business in this state, on the part of a foreign corporation, the secretary of state shall not permit a certificate of such action to be filed with him unless the commission shall certify that all reports required to be made to it, have been filed in pursuance of law, and that all taxes or fees and penalties thereon due from such corporation have been paid, and unless such corporation shall produce a certificate from the treasurer of the county wherein the property of such corporation, both tangible and intangible is or was located, showing that all personal property taxes assessed against such corporation, for the then current and previous years, have been paid. (110 v. 250; June 2, 1911, 102 v. 254, § 132; April 25, 1904, 97 v. 383, § 8; April 11, 1902, 95 v. 127, § 8.)

A certificate of the winding up of the affairs of a corporation through bankruptcy proceedings, or a dissolution proceeding under § 11938 et seq., is not entitled to be filed, without a certificate from the tax commission. Rep. Atty. Gen. 1912, pp. 17, 67.

But a judgment of dissolution or revocation, in a judicial proceeding, terminates the corporate existence and ends liability for franchise reports and taxes thereafter, although no certificate is filed at the time under §§ 5520 and 11975. A certificate under § 5521 may thereafter be procured from the tax commission, if the corporation was not delinquent as to reports or taxes up to the date of the judgment. Rep. Atty. Gen. 1912, p. 67.

A banking corporation, in liquidation by the superintendent of banks, continues liable for franchise reports and taxes until dissolution. If hopelessly insolvent, the superintendent may procure an order of dissolution from the common pleas court of the county in which the bank was located, and file a certificate thereof under § 11976. If there is an equity of assets for stockholders above the debts, the order of dissolution may be procured after the stockholders' meeting provided for in G. C. § 742-11. Rep. Atty. Gen. 1914, p. 1065.

Corporations not for profit are not required to procure certificates from the tax commission, except corporations organized more than six months prior to November, 1910. Under the former law reports were required from corporations not for profit.

Rep. Atty. Gen., 1911-1912, p. 697.

This section does not apply to insurance, fraternal benefit and other corporations required to file reports with the superintendent of insurance. G. C. § 5518.

Rep. Atty. Gen., 1911-1912, p. 697.

Section 5522. (Affidavits as to use of money or property in aid of elections. Form prescribed by commission and made part of return.) Every corporation or public utility required, by the provisions of this act, to make returns, statements or reports to the commission, shall file therewith, in such form as the commission may prescribe, an affidavit subscribed and sworn to by a person or officer having knowledge of the facts therein set forth, setting forth that such corporation or public utility has not, during the preceding year, directly or indirectly paid, used or offered, consented or agreed to pay or use, any of its money or property for, or in aid of any political party, committee or organization, or for, or in aid of any candidate for political office or for nomination for any such office, or in any manner used any of its money or property for any political purpose whatever, or for the reimbursement or indemnification of any person or persons for moneys or property so used. Such forms of affidavit as the commission may prescribe shall be attached to or made a part of the return, statement or report required to be made by such corporation or public utility under any provision of this act. (June 2, 1911, 102 v. 255, § 133.)

See §§ 8729, 8730.

Section 5523. (Certificate of secretary of state as to foreign corporation doing business without compliance with laws. Prosecution.) When the secretary of state has knowledge that a foreign corporation, organized for profit, and owning or using a part or all of its capital and plant in this state, is doing business in this state without having complied with the laws thereof, he shall certify such fact to the commission. The commission, when it ascertains from such certificate of the secretary of state, or otherwise, that any such

foreign corporation is doing business in this state without having complied with the laws thereof, shall certify the same to the attorney general, with the request that he prosecute an action against such foreign corporation for the penalties provided by law, in the court of common pleas of Franklin county, or in any county in which the corporation has an office or place of business. It shall be the duty of the attorney general, upon receipt of such request, to commence and prosecute such an action. On good cause shown, the commission may remit the penalty, or part thereof, incurred by a foreign corporation under the provision of Chapter 2, of Division 1, Title III, Part First, General Code. (June 2, 1911, 102 v. 255, § 134.)

See §§ 182, 186, 191.

Section 5524. (Compromise.) With the advice and consent of the commission, the attorney general may, before or after any action for the recovery of fees, taxes or penalties certified to him, as delinquent, under the provisions of this act, compromise or settle any claim for delinquent taxes, fees or penalties so certified.

And all claims compromised or settled as herein provided shall be set forth in the annual report of the tax commission to the general assembly and governor, giving in detail the terms and conditions of such compromise or settlement. (June 2, 1911, 102 v. 255, § 135; April 25, 1904, 97 v. 381, § 5; April 11, 1902, 95 v. 126, § 5.)

The word "settle" in this section has been construed to authorize the attorney general, with the advice and consent of the tax commission, to reduce or remit penalties for any good and sufficient reason. Rep. Atty. Gen. 1913, p. 526.

Section 5525. (Application of preceding sections.) The provisions of sections one hundred and twenty, one hundred and twenty-one, one hundred and twenty-two, one hundred and twenty-three and one hundred and twenty-four of this act [G. C. §§ 5509, 5510, 5511, 5512 and 5513] shall apply to any public utility or corporation which for two years prior to, and for ninety days from and after, the passage of this act, shall fail to pay any taxes or fees or penalties thereon, due from it to the state of Ohio, or to make or file any report or return, required by law, or to pay any penalty provided by law for failure to make or file any report or return required by law. (June 2, 1911, 102 v. 259, § 159.)

MISCELLANEOUS.

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| <p>§ 5650. Levy to pay bonds given for railroad subscription.</p> <p>§ 5672. Tax a lien on bank shares. Collection of tax. Penalty.</p> <p>§ 5673. Banks may deduct taxes paid from shareholders, when. Lien.</p> | <p>§ 5675. Agent of express or telegraph company to pay taxes thereof.</p> <p>§ 5676. Unlawful to act as agent, etc., for certain companies when taxes are unpaid.</p> <p>§ 5677. Railroad shall not transport anything for such company.</p> |
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Section 5650. (Levy to pay bonds given for railroad subscription.) The lawful authorities of a county, city, or township which have subscribed to the capital stock of a railroad company and have issued its bonds or other securities for the payment of such subscription, may levy or cause to be levied, annually, on the taxable property thereof, within five years next before the principal of such bonds, or other securities are payable, if the market price of the stock of such railroad company is less than seventy-five per cent on its par value, such tax, not exceeding one mill on the dollar, as will be sufficient to balance the discount on the railroad stock held by such county, city or township, by the time such bonds may become due. The proceeds of such taxes shall form, with such stock, a sinking fund, and be invested in the purchase of the bonds issued by such county, city or township, or in other safe and productive securities, and be applied only to the payment of the bonds so issued. (R. S. Sec. 2831; 56 v. 175, § 80; S. & C. 1466.)

Section 5672. (Tax a lien upon bank shares. Collection of tax. Penalty.) Taxes assessed on shares of stock, or the value thereof, of a bank or banking association, shall be a lien on such shares from the first Monday of May in each year until they are paid. It shall be the duty of every bank or banking association to collect the taxes due upon its shares of stock from the several owners of such shares, and to pay the same to the treasurer of the county, in which such bank or banking association is located, as other taxes are paid, and any bank or banking association failing to pay the said taxes as herein provided, shall be liable by way of penalty for the gross amount of the taxes due from all the owners of the shares of stock, and for an additional amount of one hundred dollars for every day of delay in the payment of said taxes. (May 2, 1911, 102 v. 91; R. S. Sec. 2839; 64 v. 204, § 6.)

Stock in national banks belonging to nonresidents is taxable in Ohio.
Rep. Atty. Gen., 1911-1912, pp. 592, 610.

Section 5673. (Banks may deduct taxes paid from shareholders; when. Lien.) Such bank or banking association paying to the treasurer of the county in which it is located, the taxes assessed upon its shares, in the hands of its shareholders respectively, as provided in the next preceding section, may deduct the amount thereof from dividends that are due or thereafter become due on such shares, and shall have a lien upon the shares of stock and on all funds in its possession belonging to such shareholders, or which may at any time come into its possession, for reimbursement of the taxes so paid on account of the several shareholders, with legal interest; and such lien may be enforced in any appropriate manner. (May 2, 1911, 102 v. 91; R. S. Sec. 2840; 64 v. 204, § 7.)

Prior to the amendment of 102 v. 91 it was held that taxes on shares of stock in an insolvent bank could not be collected from the assignee for creditors. *Irish v. Fancher*, 19 C. C. n. s. 11 (1908).

Section 5675. (Agent of express or telegraph company to pay taxes thereof.) The agent of an express or telegraph company shall retain in his hands and pay to the county treasurer, the amount of all taxes assessed against such company. In default of such payment, the treasurer shall collect the tax as in other cases of delinquent personal property tax. When there is more than one such agent of the same company in one county, the agent thereof in the principal city, or village of such county, may assume the payment of such tax, and upon so doing, the other agents in the county shall not be required to retain funds to pay the tax. (R. S. Sec. 2842; 59 v. 91, § 6.)

Section 5676. (Unlawful to act as agent, etc., for certain companies when taxes are unpaid.) If the taxes assessed against an express, telegraph, telephone, or insurance company, in any county in this state, remains due and unpaid to the treasurer of the county, for twenty days after the time provided by law for the payment thereof, no person or corporation, shall act as agent, or transact any business for such company so in default, until the tax, interest, and penalty are paid. (R. S. Sec. 2843; 82 v. 92; R. S. 1880; 59 v. 91, § 7.)

Section 5677. (Railroad company shall not transport anything for such company.) After the default in payment of taxes named in the next preceding section, a railroad company which, directly or indirectly, conveys or carries for such defaulting express, telegraph, telephone, or insurance company, a package of money, merchandise, or other articles, or transmits a telegraphic message, after having notice of

such default, for each offense shall forfeit and pay a sum equal to the amount of such tax due and unpaid, with the interest and penalty thereon, to be recovered by an action in the name of the state, in the county where the tax is assessed, with costs of suit. (R. S. Sec. 2843; 82 v. 92; R. S. 1880; 59 v. 91, § 7.)

Section 5888. (Chautauqua assemblies may make rules for government of grounds.) A corporation, organized under the laws of this state, for holding Chautauqua assemblies, or encouraging religion, art, science, literature, the general dissemination of knowledge, or two or more of such purposes, occupying grounds and holding meetings or entertainments thereon for advancing the purpose of its incorporation, through its board of directors or trustees, may make such rules and regulations for the government of such grounds, not inconsistent with the laws of this state, as will promote the purposes for which it is incorporated. (April 10, 1908, 99 v. 90, § 1; R. S. Sec. 7017-10.)

NOTE.—Sections 5889 to 5893, which authorize Chautauqua assemblies, etc., to appoint special police and define their powers, are omitted.

When a corporation which has for its object the owning and holding of land, for the purpose of carrying on religious exercises and meetings on the same, leases a part of such land with restrictive covenants in the lease that lessees "during all meetings would be subject to the rules and regulations of said meeting," and "would use such premises for the purpose of a private dwelling or residence only, except on a special permit from the company," such covenants are valid and binding on the lessees.

Where such lessees make a business of renting rooms, in their buildings on such leased premises, to temporary occupants, and refuse to obtain a special permit from the lessor and refuse to comply with the reasonable requirements of the lessor, in regard to the privilege of so using the leasehold, such use is a breach of the covenant to "use such premises for the purpose of a private dwelling or residence only, except on a special permit from the company."

The refusal to pay a gate fee, during the meetings, for admission to the grounds of the plaintiff on which the buildings of the defendant are situated, the same as charged to all other persons, is a breach of the covenant that the lessees "during all meetings would be subject to the rules and regulations of said meetings."

Park Co. v. Van Dusen, 63 O. S. 183 (1900).

Assessments on members or lot owners must be made by the members, in the absence of a provision of the constitution authorizing the trustees to make the same. An assessment made by the trustees without authority cannot be recovered.

A camp meeting association, authorized by its charter to furnish tents, cottages, and other necessary accommodations and conveniences on the camp grounds, has implied power to provide for the raising of revenue with which to maintain the accommodations. *Bradley v. Camp Meeting Assn.*, 9 Ohio App. 321; reversing, 21 N. P. n. s. 21.

Taxation of grounds. See G. C. § 5349; *Davis v. Camp Meeting Assn.*, 57 O. S. 257.

PART XIII.

"BLUE SKY LAW."

- § 6373-1. Providing licenses for dealers in securities.
- § 6373-2. What the term "securities" shall not be deemed to include. What the term "dealer" shall include. Exceptions. Definitions.
- § 6373-3. Application for license, filing fee. Information required. Bond. Copy of incorporation articles to be filed. Consent for service.
- § 6373-4. Publication of notice of an application for registration.
- § 6373-5. When license shall be taken out; fee. Revocation and amendment of license; fee.
- § 6373-6. License may be revoked. Prosecution for criminality. Oath of witness. Attachment for contempt.
- § 6373-7. Notice of revocation or refusal of license.
- § 6373-8. Petition against commissioner in case of refusal or revocation; answer; judgment.
- § 6373-9. Information required to be filed before disposal of securities.
- § 6373-10. Information need not be filed, when.
- § 6373-11. Filing of prospectus, circular and advertisement relating to sale.
- § 6373-12. Contract of subscription or disposal; contents.
- § 6373-13. Liability of one who counsels or who advises the purchase without disclosing agency.
- § 6373-14. Additional information and fee required of insured or underwriter before certificate issued. Securities to which section does not apply.
- § 6373-14a. Contract by solicitor, dealer, agent, etc., before sale of securities.
- § 6373-15. Licensed dealers only shall deal in real estate not located in Ohio. Transactions to which section does not apply.
- § 6373-16. Examination of issuer of securities. Deposit for expense. Itemized statement by commissioner. When certificate shall be issued; fee; refusal to issue; revocation; review. Detailed financial statement to be filed by issuer; reports.
- § 6373-16a. Penalty.
- § 6373-17. Certificate must state commissioner in no wise recommends securities.
- § 6373-18. Liability of seller to purchaser.
- § 6373-19. Duties of superintendent of insurance.
- § 6373-20. Penalty for violations.
- § 6373-20a. Penalty for illegal sale or disposition of securities.
- § 6373-20b. Aiding in sale or disposal, unlawful; penalty.
- § 6373-20c. Sale when issuer known to be insolvent, unlawful; penalty.
- § 6373-21. When accused presumed to have knowledge.
- § 6373-22. Act does not limit other liability imposed.
- § 6373-23. Contract obligations unimpaired.

Section 6373-1. (Providing license for dealers in securities.) Except as otherwise provided in this act, no dealer shall, within this state, dispose or offer to dispose of any stock, stock certificates, bonds, debentures, collateral trust certificates or other similar instruments (all hereinafter termed "securities") evidencing title to or interest in property, issued or executed by any private or quasi-public cor-

poration, co-partnership or association (except corporations not for profit), or by any taxing subdivision of any other state, territory, province or foreign government, without first being licensed so to do as hereinafter provided. (104 v. 110; 103 v. 743, § 1.)

The Ohio Blue Sky law is not in violation of the federal constitution. *Hall v. Geiger-Jones Co.*, 242 U. S. 39; 15 O. L. R. 39 (1917).

This section and section 6343-14 apply to advertisements published in Ohio, offering to sell securities, although the person procuring the publication resides in another state. In the opinion of the attorney general, the law also applies to circulars and letters mailed from another state. Rep. Atty. Gen. 1914, p. 1151.

Sale of stock by "dealer" without complying with "Blue Sky" law is void. A sale or contract to sell stock by a "dealer", without complying with the Blue Sky law, is illegal and void, although not expressly declared void by the statute. *Edward v. Ioor*, 205 Mich. 617, 172 N. W. 620 (1919); *Goodyear v. Meux*, 143 Tenn. 287, 228 S. W. 57 (1921).

But where stock, subscribed for before a permit was granted, was issued to, and accepted by, the subscriber after the permit was granted, the subscriber was held liable on the subscription in a suit by the trustee in bankruptcy of the corporation. *Moore v. Moffatt*, 204 Pac. 220 (Cal. 1922).

Unincorporated association. Massachusetts trust. The attorney general has ruled that a dealer's license can not be issued to an unincorporated association which is organized to carry on business in such a manner as to lead the public to believe that it is a corporation and whose intended acts are such as appertain to, or are to be done after, the manner of corporations. The organization in question was modelled after one form of so-called Massachusetts Trusts. It had a fictitious name, transferable shares and annual elections of trustees by the shareholders. The property was held in the names of the trustees. Opins. Atty. Gen. 1919, pp. 1023, 1065; *Elliott's Blue Sky. Laws*, p. 706. See also § 12303; for contra opinion, see article by *Edward C. Daoust*, 18 O. L. R. 526.

Transferable shares of beneficial interest in a "Massachusetts trust" are "securities" under the Blue Sky laws of some other states. *Home Lumber Co. v. Hopkins*, 107 Kans. 153, 190 Pac. 601 (1920); *People v. Clum*, 213 Mich. 651; 182 N. W. 136 (1921).

Section 6373-2. (What the term "securities" shall not be deemed to include. What the term "dealer" shall include. Exceptions. Definition of terms.) The term "securities", as used in this act, shall not be deemed to include conveyances of real estate; or, where the same have not been judicially declared invalid, and where, at the time of such sale, there is no default in payment of any part of the interest or principal of the same:

1. Mortgage bonds and notes (other than corporate bonds where more than fifty per cent. of the entire issue is not included in a sale to one purchaser) secured by a bona fide mortgage on real estate;

2. Securities of quasi-public corporations, the issuance of which has been authorized by the public service commission of this state;

3. The stock or obligation of any national bank, or of any bank, trust company or building and loan association, organized under the laws of this state and subject to examination and supervision by the proper authorities thereof.

The term "dealer", as used in this act, shall be deemed to include any person or company, except national banks, disposing, or offering to dispose, of any such security, through agents or otherwise, and any company engaged in the marketing or flotation of its own securities either directly or through agents or underwriters or any stock promotion scheme whatsoever, except:

(a) An owner, not the issuer of the security, who disposes of his own property, for his own account; when such disposal is not made in the course of repeated and successive transactions of a similar character by such owner; or a natural person, other than the underwriter of the security, who is a bona fide owner of the security and disposes of his own property for his own account;

(b) One, who in a trust capacity created by any law of the United States or of this or any other state or by judicial authority, lawfully disposes of any property embraced within such trust;

(c) A bank or trust company, organized under the laws of this state and subject to examination and supervision by the proper authority thereof, selling a security for a licensee, other than the issuer or underwriter thereof, at a commission of not more than two per cent., where such bank or trust company is not a regular dealer in securities;

(d) One, not the issuer, who disposes of securities to a licensee under this act or to a company which, as a part of its regular business, deals in or holds such securities;

(e) A pledgee selling, in the ordinary course of business, a security pledged to him as security for debt in good faith and not for the purpose of avoiding the provisions of this act;

(f) The issuer, organized under the laws of this state where the disposal in good faith and not for the purpose of avoiding the provisions of this act, is made for the sole account of the issuer, without any commission and at a total expense of not more than two percentum of the proceeds realized therefrom plus five hundred dollars and where no part of the issue to be disposed of is issued, directly or indirectly, in payment for patents, services, good will, or

for property not located in this state; provided that the president and secretary, or the incorporators if done before organization, of the issuer shall, prior to such disposal, file with the "commissioner" a written statement setting forth the existence of all such facts and that such issuer is formed for the purpose of doing business within this state.

As used in this act, the term "company" shall include any corporation, co-partnership or association, incorporated or unincorporated, and whenever and wherever organized; "dispose of" shall be construed to mean "sell barter, pledge or assign for a valuable consideration or obtain subscriptions for"; "issuer", the original issuer of the security; and, where the context demands it, words in the present tense include the future tense; in the masculine gender include the feminine and neuter gender; in the singular number include the plural, and in the plural, the singular number; the word "whoever" includes all persons, natural and artificial, principals, agents and employees; "and" may be read "or", and "or" "and". (104 v. 110; 103 v. 743, § 2.)

Dealer. A bank, which purchases bonds for its own account some of which are resold to customers, making fifty or more sales per year, is a "dealer". Opins. Atty. Gen. 1915, p. 1167.

A foreign corporation, selling a limited amount of its stock in Ohio to its own stockholders, is a "dealer". Opins. Atty. Gen. 1915, p. 1529.

A corporation, exchanging its stock for property not located in Ohio, is a "dealer". Opins. Atty. Gen. 1915, p. 256.

An owner disposing of his own securities, under exception "a" of this section, is not a "dealer". Rep. Atty. Gen. 1914, p. 759.

An exchange, by a foreign corporation, of its stock for stock in other companies was held to be a "sale" under the Michigan Blue Sky law. *Edward v. Ioor*, 205 Mich. 617; 172 N. W. 620; 15 Am. L. R. 256 (1919).

Securities. Trading stamps or coupons are not "securities". Opins. Atty. Gen. 1915, p. 697.

Under rulings of the attorney general, the following are "securities": Trust certificates. Opins. Atty. Gen. 1915, p. 171.

Membership certificates in a corporation engaged in furnishing supplies to its members, the purchasers having no stock in the corporation and no voice in its management. Rep. Atty. Gen. 1914, p. 352.

The disposal of "interim certificates" evidencing subscriptions to stock of a foreign corporation may be approved by the commissioner. Opins. Atty. Gen. 1919, p. 1360.

Disposal by issuer under paragraph "f". The word "issue", in paragraph "f" of this section, relates only to the particular issue which a company may desire to dispose of, and not to the entire bond, stock or security issues of the applicant corporation. Rep. Atty. Gen. 1913, p. 827.

Disposal by owner not the issuer. It is not a violation of the

Blue Sky law for several owners of stock to sell their stock to the same purchaser. *Dows v. Schuh*, 206 Mich. 133, 172 N. W. 418 (1919).

Sale, by an owner of stock, some of which stood in the names of members of his family, was held not to violate the Michigan Blue Sky law where not made in the course of continued and successive transactions of the same nature. *Dursum v. Benedict*, 209 Mich. 115, 176 N. W. 459 (1920).

Section 6373-3. (Application for license; filing fee. Information required. Bond. Copy of incorporation articles to be filed. Consent for service.) Before such license shall be issued to any dealer, there shall be filed by him with the commissioner of securities designated in this and the preceding and following sections of this chapter as the "commissioner," together with a filing fee of five dollars, an application for such license, together with information in such form as shall be determined by such "commissioner," setting forth;

(a) The names and addresses of the directors and officers,, if such applicant be a corporation or association, and of all partners, if it be a partnership, and of the person if the applicant be an individual, together with the names and addresses of all agents of such applicant assisting in the disposal of such securities;

(b) Location of the applicant or applicants' principal office and of such principal office in the state, if any;

(c) The general plan, including a detailed statement of the character of the business of said applicant or applicants, together with references thereto, which the "commissioner of securities" shall verify by investigation such as may be deemed necessary in determining the repute in business of such applicant, directors, officers, partners and agents;

(d) Every such applicant shall execute and file a bond to the state of Ohio in such sum in no case to be less than ten thousand dollars and with such surety as the commissioner requires, and shall also execute and file a bond to the state of Ohio in such sum as the commissioner may require, but not to exceed twenty-five hundred dollars with such surety as the commissioner requires, for each agent named in such application or in any supplemental application made thereto. Such bonds shall be filed with the commissioner of securities and kept by him in his office. Such bonds shall be conditioned upon the faithful observance of all of the provisions of this act, and shall also indemnify any purchaser of securities from such dealer or agent who suffers a loss by reason of misrepresentations in the sale of such security by such dealer or agent. Any purchaser claiming to

have been damaged by misrepresentation in the sale of any security by such dealer or agent may maintain an action at law against the dealer or agent making such misrepresentations; or both the dealer and agent where the agent makes such misrepresentations; and may join as parties defendant the sureties on the bonds herein provided for.

If the applicant be a corporation organized under the laws of any other state, territory or government, or have its principal place of business therein, it shall also file a copy of its articles of incorporation, certified by the proper officer of such state, territory or government, and of its regulations and by-laws; and if it be an unincorporated association, a certified copy of its articles of association, or deed of settlement.

The applicant at the same time shall also file with said "commissioner" a duly executed written instrument, irrevocably consenting that any action brought against such applicant, arising out of and founded upon the fraudulent disposal of such securities by him or his agents, may be brought in Franklin county, and that, in the event that proper service of process can not be had upon such applicant in such county, service of process made therein by the sheriff of such county, by sending a copy thereof by registered mail, at least thirty days prior to taking judgment in such case, addressed to such applicant at the place of his principal office named in his application or such other place as the applicant may thereafter designate in writing filed with the "commissioner," shall have the same effect as if personally made upon the applicant according to the laws of this state. (110 v. 276; 107 v. 508; 104 v. 110; 103 v. 74, § 3.)

A person selling stock for a "dealer" is its agent and the "dealer" is estopped from defending against his claim for commissions on the ground that the agent has not complied with the Blue Sky law. It is the duty of the "dealer" to register its agent. *Lovring v. Duplex Co.*, 204 Mich. 658, 171 N. W. 374 (1919).

Section 6373-4. (Publication of notice of an application for registration.) Notice of all applications for registration as a licensed dealer in such securities shall be published in a daily newspaper of general circulation in the city where the applicant's principal place of business in the state is located, or in the city of Columbus, if the applicant has no such place of business in the state, and no such application shall be acted on by the "commissioner" until the expiration of one week from the date of such publication, but shall be acted upon within twenty days after proof of such application has been filed with him. If the "commissioner" be sat-

ified of the good repute in business of such applicant and named agents, he shall, upon the payment of an annual fee of fifty dollars, and an additional fee of five dollars for each agent named in the application, register the applicant as a licensed dealer in such securities, and issue to him a license, containing the name of the applicant and all such agents, renewable annually upon payment of such annual fee, unless revoked as herein provided. The expense of all publications provided for in this act shall be paid by the applicant for license. Pending a final disposition of such application the "commissioner" may grant temporary permission to such applicant to transact business as a dealer under this act. All such renewals shall be made as of the first day of January in each calendar year upon proper application therefor, filed not less than twenty nor more than sixty days next preceding such date. (104 v. 110; 103 v. 746, § 4.)

The fee for each agent is payable only when the license is issued, and not annually thereafter on renewals of the license. Opins. Atty. Gen. 1917, p. 1685.

Section 6373-5. (When license shall be taken out; fee. Revocation and amendment of license; fee.) Such license shall be taken out at the beginning of each calendar year, but it may be issued at any time for the remainder of such year, and in such case the annual fee shall be reduced four dollars for each expired month but in no case shall it be less than ten dollars. Upon the payment of a fee of five dollars for each specified agent not named in such license the same may at any time be amended or supplemented to include such agent. Upon the written request of such applicant, accompanied by a fee of two dollars, such license shall be revoked as to any agent or agents of such applicant, and an amended license shall thereupon be issued for such applicant and his remaining agents; and thereafter the applicant shall not be bound by the acts of the agent whose license has been revoked. Notice of such amendments shall also be published as aforesaid. (104 v. 110; 103 v. 746, § 5.)

Section 6373-6. (License may be revoked. Prosecution for criminality. Oath of witness.. Attachment for contempt.)

Such commission may at any time revoke any such license, or refuse to renew the same, upon ascertaining that the licensee:

- (a) Is of bad business repute;
- (b) Has violated any provisions of this act;
- (c) Has engaged, or is about to engage, under favor of

such license, in illegitimate business or in fraudulent transactions; or

(d) Is insolvent;

No dealer whose license has been revoked shall be relicensed within six months from the date of such revocation.

The commissioner of securities shall at once lay before the prosecuting attorney of the proper county any evidence which shall come to his knowledge of criminality under this act. In the event of the neglect or refusal of such prosecuting attorney to institute and prosecute such violations, the commissioner of securities shall submit such evidence to the attorney general who is hereby authorized to proceed therein with all the rights, privileges and powers conferred by law upon prosecuting attorneys including the power to appear before grand juries and to interrogate witnesses before such grand juries.

The commissioner of securities for the purposes mentioned in this act shall have power to administer oaths, issue subpoenas, compel attendance of witnesses and the production of papers, books, accounts, documents and testimony. In case of the failure of any person to comply with any order of the commission or any subpoena lawfully issued, or upon the refusal of any witness to testify to any matter regarding which he may be lawfully interrogated, it shall be the duty of the common pleas judge of any county in this state on the application of the commissioner, to compel obedience by attachment proceedings for contempt, as in the case of disobedience of the requirements of a subpoena issued from such court or a refusal to testify therein. (110 v. 278; 109 v. 269; 104 v. 110; 103 v. 746, § 6.)

It is said that where facts warranting revocation of a license have been established, it is the duty of the commissioner to revoke it, and that he is not authorized to make an agreement with an offending dealer. Opins. Atty. Gen. 1915, p. 2074.

Section 6373-7. (Notice of revocation or refusal of license.) At least five days before revoking or refusing to grant or renew a license, the "commissioner" shall send by registered mail to the licensee or applicant, at the address named in the application, written notice of his intention so to do, specifying therein the reasons for such revocation or refusal. (107 v. 508; 104 v. 110; 103 v. 747, § 7.)

Section 6373-8. (Petition against commissioner in case of refusal or revocation; answer, judgment.) Any one whose license shall be refused or revoked, or to whom a renewal of

license may be denied, may file, within thirty days thereafter, in the court of common pleas of Franklin county, a petition against the "commissioner", officially, as defendant, alleging therein, in brief detail, the plaintiff's qualifications to be licensed and praying for a reversal of the official action complained of. Upon service of summons upon said defendant, returnable within three days from its date, but otherwise made as in civil actions, he shall, within one week from such return day, file an answer, in which he shall allege by way of defense the ground previously assigned in his notice to such applicant or licensee, and such other grounds as shall, in the meantime, accrue or be discovered. All allegations of the answer shall be deemed to stand denied without further pleading and, upon application of either party, the cause shall be advanced and heard without delay. Merely technical irregularities in the procedure of such "commissioner" shall be disregarded and the burden shall rest upon the plaintiff to disprove the grounds assigned and specified in the official action complained of. The court's decision shall consult only the rights of the plaintiff and the protection of the public and the "commissioner" shall prosecute no proceedings to obtain a reversal, modification or vacation of a judgment rendered in favor of the plaintiff and in such event, shall forthwith issue the license applied for. A judgment sustaining the refusal of the "commissioner" to grant or renew a license shall not bar, after thirty days, a new application by plaintiff for a license, nor shall a judgment in favor of the plaintiff prevent such "commissioner" from thereafter revoking such license for any proper cause which may thereafter accrue or be discovered. (104 v. 110; 103 v. 746, § 8.)

Section 6373-9. (Information required to be filed before disposal of securities.) Before such licensee shall dispose of any of such securities, within this state, he shall file with such "commissioner," in such form as shall be determined by him, the following information concerning such securities: If issued by any company,

(a) The name, location of principal office of the issuer and the names of its officers and directors, or if a co-partnership, the partners;

(b) A statement of the issuer, showing, in general detail, the assets and liabilities, and capital stock of the issuer, as of a date as late as the close of its last fiscal year, and of its gross income, expenses and fixed charges, for one

year last prior thereto, or for such time as the issuer has been in business, if less than one year;

(c) A pertinent description of such securities, and the purpose of said issue, and

(d) Unless the foregoing information be executed under the provisions of the following section, the approximate price at which the licensee purposes to dispose of such securities.

If the securities be of a taxing subdivision of any other state, territory, province or foreign government, and are not an obligation of the entire taxing subdivision and payable out of the proceeds of a general tax, there shall be filed the information required by paragraphs (c) and (d) of this section and, in addition thereto, a statement of the licensee, setting forth the nature of the obligation of such securities, how payment of the name is secured and that, to the best of his knowledge, there is no default in the payment of any part of the interest or principal of such securities and are no adjudications adversely affecting, or pending suits questioning the validity of the same. (104 v. 110; 103 v. 746, § 9.)

Section 6373-10. (Information need not be filed, when.)

The information required in the preceding section need not be filed:

(a) Unless required by the commissioner, if the same has been filed by any other licensee; or

(b) If actual current sales of the securities, at prices quoted, shall have been, from time to time, for not less than six months next preceding such disposal, published in the regular market reports of the news columns of a daily newspaper of general circulation in this state; or

(c) Where the securities disposed of are those of manufacturing or transportation companies, or of common carriers or other public utilities, issued and outstanding in the hands of bona fide purchasers for value, prior to March 1st, 1914, where such companies, were, on said date, and shall be, at the time of sale, actual going concerns, either directly or through lessees, and where there shall be at the time of sale, no default in payment of any part of the interest or principal of such securities; or

(d) Where the information required, other than the approximate selling price is contained in any standard manual of information, approved by such commissioner; or

(e) Where the disposal is made for a commission of less than one per centum of the par value thereof, by a licensee who is a member of a regularly organized and recognized

stock exchange and who has an established and lawfully conducted place of business in this state, regularly open for public patronage as such. (109 v. 269; 104 v. 115; 103 v. 747, § 10.)

Section 6373-11. (Filing of prospectus, circular and advertisement relating to sale.) Every dealer, before or at the time of circulating the same, shall furnish to the "commissioner" one copy of each prospectus, circular or other document of like nature and of each advertisement, circulated by him in connection with the sale of any securities concerning which information is required to be filed under the provisions of sections 6373-9 and 6373-10 of the General Code. (104 v. 115; 103 v. 747, § 11.)

Section 6373-12. (Contract of subscription or disposal; contents. Deposit of funds and securities.) No person or company shall, for the purpose of organizing or promoting any insurance company, or of assisting in the flotation of its stock after organization, dispose or offer to dispose, within this state, of any such stock, unless the contract of subscription or disposal shall be in writing, and contain a provision substantially in the following language:

"No sum shall be used for recommitment, promotion and organization expenses on account of any share of stock in this company in excess of per cent. of the amount actually paid upon separate subscriptions, or, in lieu thereof there may be inserted, '\$..... per share from every fully paid subscription,' and the remainder of such payments shall be invested as authorized by the law governing such company and held by the organizers (or trustees as the case may be) and the directors and officers of such company after organization, as bailees for the subscriber, to be used only in the conduct of the business of such company after having been licensed and authorized therefor by proper authority."

The amount of such commission, promotion and organization expenses shall in no case exceed fifteen per cent. of the amount actually received upon the subscription.

Funds and securities held by such organizers, trustees, directors or officers, as bailees, shall be deposited with a bank or trust company of this state or invested as provided in sections ninety-five hundred and eighteen and ninety-five hundred and nineteen of the General Code until such company has been licensed as aforesaid. (104 v. 115; 103 v. 748, § 12.)

Incorporators of an insurance company other than life (see § 9513) may contract with agents to sell its stock on commission and, if the commissions and expenses do not exceed the statutory limit of 15 percent, the superintendent of insurance may issue a certificate. Rep. Atty. Gen. 1914, p. 147.

Section 6373-13. (Liability of one who counsels or advises the purchase without disclosing agency.) Whoever, with intent to secure financial gain to himself, advises and procures any person to purchase any security and receive for such advice or services any commission or reward from the owner or salesman thereof, without disclosing to the purchaser the fact of his agency or his interest in such sale shall be liable to such purchaser for the amount of his damage thereby, upon tender of such security to, and suit brought against, such adviser, within one year subsequent to such purchase. (104 v. 116; 103 v. 748, § 13.)

Section 6373-14. (Additional information and fee required of insured or underwriter before certificate issued. Securities to which section does not apply.) For the purpose of organizing or promoting any company, or assisting in the flotation of the securities of any company after organization, no issuer or underwriter of such securities and no person or company for or on behalf of such issuer or underwriter shall, within this state, dispose or attempt to dispose of any such security until such commissioner shall issue his certificate as provided in section 6373-16 of the General Code which shall not be done until, together with a filing fee of five dollars, there be filed with the commissioner the application of such issuer or underwriter for the certificate provided for in section 6373-16, General Code, and, in addition to the other information hereinbefore required by paragraphs (a), (b), (c) and (d) of section 6373-9 of the General Code, the following:

(a) A certified copy of the articles of incorporation or association of the issuer, its regulations and by-laws;

(b) Certified copies of all minutes of stockholders and directors relative to the issue of such securities;

(c) A sworn statement made by the president and secretary of the issuer, showing in detail the items of cash, property, services, patents, good will and any other consideration for which such securities have been or are to be issued in payment;

(d) Like certified copies of all contracts or agreements between the issuer and any underwriters of such securities, and, if disposed of by the issuer, all contracts and agree-

ments relative to the sale and disposition thereof, and any such contracts or agreements made subsequent thereto shall be filed immediately upon the execution thereof;

(e) All contracts made between such underwriter and any salesman, agent or broker.

This section shall not apply where the issuance of the securities has been approved by the public service commission or like body of any state of the United States or any province of the Dominion of Canada, or where the sale is made by or on behalf of an underwriter who, in good faith and not for the purpose of avoiding the provisions of this act, purchases the securities so afterward sold by him and pays therefor, in cash or its equivalent, before attempting to sell the same, not less than ninety percentum of the price at which such securities are thereafter sold by him; nor where the securities are those of a common carrier or of a company organized under the laws of this state and engaged principally in the business of manufacturing, transportation, coal-mining or quarrying, and the whole or a part of the property upon which such securities are predicated is located within this state provided such company is an actual going concern, having been engaged in its principal business for a period of one year or more, and having no obligations which are past due and unpaid; nor of a real estate or building company all of whose property, upon which such securities are pre-predicated is located in this state; nor in the case of an issuer excepted under paragraph (f) of section 6373-2, General Code, nor in cases where the filing of information is dispensed with under the provisions of paragraphs (b), (c), (d), or (e) of section 6373-10, General Code.

The information required by paragraph (d) and (e) of this section shall be for the information of the commissioner only, and shall not be disclosed by him except when lawfully required in a judicial proceeding. (109 v. 270; 104 v. 116; 103 v. 750, § 14.)

The securities of a corporation engaged principally in manufacturing, etc., need not be certified under § 6373-16, but may be disposed of only through a licensed dealer. Opins. Atty. Gen. 1915, p. 2019.

A real estate or building company is not exempted under this section unless its securities are predicated upon property located in Ohio. Opins. Atty. Gen. 1918, p. 1009.

A municipal corporation or taxing district of another state is not a "company" under this section. Opins. Atty. Gen. 1920, p. 1157.

Section 6373-14a. (Contract by solicitor, dealer, agent, etc., before sale of securities.) In addition to the statements

and information otherwise required to be filed with the commissioners prior to any sale of such securities by or through solicitors, dealers, agents or brokers, there shall be filed an irrevocable contract executed by each such solicitor, dealer, agent or broker authorized to offer or sell such securities by or in behalf of the issuer to the effect that the issuer will receive in cash not less than 85 percent of the proceeds of each sale of the securities without deduction for any additional commission, directly or indirectly, and without liability to pay any additional sum whatsoever as commission. (109 v. 271.)

Section 6373-15. (Licensed dealers only shall deal in real estate not located in Ohio. Transactions to which section does not apply.) No person or company, unless licensed in the manner and under the conditions applicable thereto hereinbefore provided for dealers, shall, within this state deal in real estate not located in Ohio of which he is not the actual and bona fide owner and unless the "commissioner" shall issue his certificate as provided in the following section, and prior to such issuance there shall, together with a filing fee of five dollars, be filed with the "commissioner" an application for such certificate, and a written statement of the applicant containing a pertinent description of the real estate the sale of all or a part of which is sought to be made, the nature and source of the title of the owner thereto, and the amount or value and the nature of the consideration paid or allowed by him therefor, it shall, within this state, be unlawful:

(a) For any corporation, association or co-partnership doing business under any name other than the name or names of such person or of all the members of such association or co-partnership to sell any real estate not located in Ohio;

(b) For any person or company engaged in the business of dealing in real estate to sell or offer for sale any such real estate, the title to which is or is represented to the purchaser to be in the name of a corporation or unincorporated company, or of a person doing business under a fictitious name.

This section shall apply where the title to such property is held in the name of a trustee for any corporation or for any such described person or company; but it shall not be deemed to prohibit the disposal by an owner of his own property, in good faith and not for the purpose of avoiding the provisions of this act, where the transaction is not one

of repeated transactions of a similar nature, performed as a part of the business of dealing in real estate; nor shall it be deemed to prohibit a railroad company having an immigration bureau or department from advertising either directly or through its accredited representatives, the fact that there are along its route lands for colonization or sale; provided that such advertising be not of specific tracts of real estate, and not for the purpose of avoiding the provisions of this act. (104 v. 117; 103 v. 751, § 15.)

The blue sky law does not apply to an organization engaged in advertising the advantages and opportunities of other states or communities, but which does not sell, or offer to sell, real estate. Opins. Atty. Gen. 1915, p. 48.

A company proposing to engage in making contracts in Ohio to procure and validate title to United States Government lands located outside of Ohio must be licensed. Opins. Atty. Gen. 1919, p. 1322.

Section 6373-16. (Examination of issuer of securities. Deposit for expenses. Itemized statement by commissioner. When certificate shall be issued; fee; refusal to issue; revocation; review. Detailed financial statement to be filed by issuer; reports.) Said commissioner shall have power to make such examination of the issuer of the securities, or of the property named in the two next preceding sections, at any time, both before and after the issuance of the certificate hereinafter provided for, as he may deem advisable. When in the discretion of the commissioner all or any part of the expense of such examination should be paid by the applicant for such certificate, such applicant shall deposit with the commissioner such sum of money as the commissioner may order, out of which said sum the commissioner shall pay that portion of the expense of such examination as the commissioner determines said applicant should pay. The commissioner shall render to the applicant an itemized statement of the expenditure and a proper record thereof shall be kept. And if it shall appear that the law has been complied with and that the business of the applicant is not fraudulently conducted, and that the proposed disposal of such securities or other property is not on grossly unfair terms, and that the issuer or vendor is solvent, upon the payment of a fee of ten dollars, the commissioner shall issue his certificate to that effect, authorizing such disposal. But if it shall not affirmatively so appear he shall notify the applicant, in writing, and of his refusal to issue such certificate. Such certificate shall be issued or refused within a reasonable time after the filing of the application therefor, which shall be within not more than thirty days from and after the

applicant or certificate holder whose certificate has been revoked has fully complied with all requirements of this act precedent thereto; provided, that the commissioner may at any time revoke any such certificate issued by him when he has reason to believe that the business of the holder thereof is being fraudulently conducted, or that such securities or other property are being disposed of upon grossly unfair terms, or, in the case of securities that the issuer thereof is insolvent. Such applicant shall have the same right of review of such finding as is given to a dealer by section 6373-8. The fee provided for in this section shall not be required of an applicant who is licensed as a dealer.

Each issuer to whom there has been issued a certificate of corporate compliance shall file with the commissioner of securities a detailed and complete financial statement in such form as the commissioner of securities may prescribe, dated as of June 30 of each year and such statement shall be filed with the commissioner not later than August 1 of each year. Each issuer shall further furnish to the commissioner of securities a complete and detailed report as he may from time to time demand. (110 v. 278; 106 v. 363; 104 v. 118; 103 v. 751, § 16.)

Before a certificate can be issued, it must affirmatively appear that the disposal is not on grossly unfair terms and that the issuer is solvent. Opins. Atty. Gen. 1915, p. 1942.

Section 6373-16a. (Penalty.) Whoever knowingly makes any false statement or submits information required by this act to be filed with the commissioner of securities or in any advertisement, prospectus, letters, circulars or other documents containing any offer to dispose of, or solicitation to purchase, or commendatory matter concerning said securities or real estate with any intent to aid in the disposal of the same, or for the purpose of aiding in the disposal of any securities or real estate knowingly makes any false statement or representation concerning any license or certificate issued under the provisions hereof, or whoever violates any conditions upon which any such securities as herein provided for in this act are authorized to be offered or sold as set forth in the order of the commissioner of securities when issuing his certificate, or whoever knowingly violates any of the provisions of this act, shall be fined not less than one hundred dollars nor more than five thousand dollars, or imprisoned in the penitentiary for not more than one year, or both. (110 v. 279, § 2.)

Section 6373-17. (Certificate must state that commissioner in no wise recommends securities.) Such certificate shall recite in bold type that the commissioner in no wise recommends such securities or other properties and no person or company shall advertise in connection with the sale of such securities the fact that such certificate has been issued. No issuer, dealer, broker, agent or other person shall, with intent to induce, aid or assist in the sale thereof, in any verbal, written, or printed form, make or publish any representation, statement or advertisement that any securities of any company are or have been in any manner approved or endorsed by the commissioner. (109 v. 271; 103 v. 752, § 17.)

Prior to the amendment of 109 v. 271 it was said that an advertisement that a company is "operating under Ohio's rigid blue sky law" or, that "the sale of this stock is regulated by * * * the blue sky law", did not violate this section, where it was not stated therein that a certificate had been issued. Opins. Atty. Gen. 1915, p. 1898.

Section 6373-18. (Liability of seller to purchaser. Limitation of action.) In addition to the liability now imposed by law, any person or company that, by written or printed circular, prospectus, statement or advertisement of any kind, shall offer for subscription or purchase any security, or receive the profits accruing from the disposal of securities so advertised, shall be liable to any person who, on the faith of such advertisement or document, acquires such security, for the loss or damage sustained by him by reason of any untrue statement contained therein, unless such person or company shall establish that he or it had no knowledge or notice of the publication of such advertisement prior to the transaction complained of, or had just and reasonable grounds to believe the statements thereof to be true. Wherever any corporation shall be so liable, the directors thereof shall also be, under like limitations, jointly and severally liable. Any such director, upon the payment of a judgment so obtained against him, shall be subrogated to the rights of the plaintiff against such corporation and shall have the right of contribution for the payment of such judgment, under like limitations, against any of his fellow directors. Lack of reasonable diligence to ascertain the fact of such publication the falsity of any statement therein contained, shall be deemed to be knowledge of such publication and of the falsity of any untrue statement thereof. Any action brought against such director, based upon the liability hereby imposed, shall be brought within two years

after the acquisition of the security by any person so damaged or after payment of the judgment for which contribution is sought. (May 6, 1913, 103 v. 752, § 18.)

Section 6373-19. (Duties of superintendent of insurance.)

If the issuer of such securities be a company incorporated, organized or formed to make any insurance named in subdivisions I and II, division III, title IX of the General Code, the "commissioner," for all the purposes named in sections 14 and 16 of this act [G. C. §§ 6373-14, 6373-16], shall be the superintendent of insurance of this state. In addition to the powers given to, and the duties prescribed to be performed by, such "commissioner," under said sections, the superintendent of insurance shall have, over any such company disposing or attempting to dispose of any of its securities within this state, the powers of regulation, supervision and examination conferred on him by law, with reference to companies licensed to transact the business of insurance within this state. (May 6, 1913, 103 v. 752, § 19.)

The superintendent of insurance is the "commissioner" to whom application should be made for authority to sell and distribute trust certificates to be issued by a trust formed to acquire control of, and consolidate, several insurance companies. Opins. Atty. Gen. 1915, p. 171.

Section 6373-20. (Penalty for violations.)

Whoever knowingly makes any false statement of fact in any statement or matter of information required by this act to be filed with the "commissioner," or in any advertisement, prospectus, letter, circular or other document, containing an offer to dispose or solicitation to purchase, or commendatory matter concerning, such securities or real estate, with intent to aid in the disposal of the same, or whoever knowingly violates any of the provisions of sections 12, 14 or 15 of this act [G. C. §§ 6373-12, 6373-14, 6373-15], or for the purpose or aiding in the disposal of any security or real estate, knowingly makes any false statement or representation concerning any license or certificate issued under the provisions hereof, shall be fined not less than one hundred dollars nor more than five thousand dollars, or imprisoned in the penitentiary not more than one year or both; and whoever violates any of the other provisions of this act shall be fined not less than fifty dollars nor more than one thousand dollars, or imprisoned in the county jail or workhouse not more than sixty days, or both. (May 6, 1913, 103 v. 753, § 20.)

The venue of the offense of making a false statement, under this section, is in Franklin county. Opins. Atty. Gen. 1918, p. 699.

Section 6373-20a. (Penalty for illegal sale or disposition of securities.) Whoever, with intent to sell, or in any wise dispose of stocks, bonds, or securities, directly or indirectly, to the public for sale or distribution, or with the intent to increase the sales thereof, or to induce the public in any manner to enter into any obligation relating thereto, or to acquire title thereto, or an interest therein, causes, directly or indirectly to be made, published, disseminated, circulated or placed before the public, in this state, in a newspaper or other publication, or in the form of a book, notice, handbill, poster, bill, circular, pamphlet, or letter, or in any other way, an advertisement of any sort, of any stocks, bonds or securities, the issuance of which has not been authorized by the commissioner of securities or the issuance of which is not exempt by law from such authorization, shall be fined not less than fifty dollars, nor more than five thousand dollars, or imprisoned in the county jail not less than ten days or in the penitentiary nor more than two years, or both. Nothing in this section however, shall apply to the owners or publishers of newspapers who publish said advertising in good faith. (109 v. 271.)

Section 6373-20b. (Aiding in sale or disposal, unlawful; penalty.) Whoever with intent to aid in the disposal of any stocks, bonds or securities knowingly makes any verbal, written or printed statement or representation not authorized by the issuer, or any verbal, written or printed statement or representation at variance with or not reasonably predicated upon the statements and documents filed by the issuer in the office of the commissioner shall be guilty of a misdemeanor and upon conviction thereof, shall be fined not to exceed one thousand dollars or imprisoned in the county jail or workhouse not more than one year, or both. (109 v. 272.)

Section 6373-20c. (Sale when issuer known to be insolvent, unlawful; penalty.) Whoever, being an officer, director, trustee, solicitor, agent, dealer or broker of or for any issuer, knowing such issuer to be insolvent, shall make any sale of any securities of and for any such issuer, without disclosing the fact of such insolvency to the purchaser, shall be deemed guilty of embezzlement and upon conviction thereof shall be fined in a sum of not less than one thousand dollars (\$1,000.00) nor more than ten thousand dollars (\$10,000.00) or may be imprisoned in the penitentiary for not less than one year nor more than five years, or both. For the purpose of this section, an issuer shall be

deemed insolvent whenever the aggregate of its property shall not, at a fair valuation, be sufficient in amount to pay its debts. (109 v. 272.)

Section 6373-21. (When accused presumed to have knowledge.) In any prosecution brought under this act, the accused shall be deemed to have had knowledge of any matter of fact where, in the exercise of reasonable diligence, he should, prior to the commission of the offense complained of, have secured such knowledge. Information and indictments under this act need not negative any of the exceptions enumerated in sections two, ten and fourteen hereof. [G. C. §§ 6373-2, 6373-10, 6373-14.] (May 6, 1913, 103 v. 753, § 21.)

Section 6373-22. (Act does not limit other liability imposed.) Nothing herein contained shall limit or diminish the liability of any person or company now imposed by law, or prevent the prosecution of any person or company violating any of the provisions of this act, for the violation of any other statute or of any other provision hereof. (May 6, 1913, 103 v. 753, § 22.)

Section 6373-23. (Contract obligations unimpaired.) Nothing herein contained shall be so construed as to impair the obligation of prior contracts. (May 6, 1913, 103 v. 753, § 23.)

See Rep. Atty. Gen. 1914, p. 759; Rep. Atty. Gen. 1913, p. 852.

PART XIV.

TRUSTS.

§ 6390.	Definition of terms.	§ 6399.	Evidence.
§ 6391.	Definition of trusts.	§ 6400.	Duty of attorney-general and prosecuting attorney.
§ 6392.	Owning trust certificate or entering into a combination prohibited.	§ 6400-1.	Parties defendant. Statute of limitations no bar to suits.
§ 6393.	Illegal contract.	§ 6401.	Witness not excused from testifying.
§ 6394.	Prohibition against foreign corporations.	§ 6402.	Cumulative provisions.
§ 6395.	Civil penalty.	§ 6402-1.	Penalty when violation relates to milk, cream or butter fat.
§ 6396.	Criminal penalty.		
§ 6397.	Liability for damages.		
§ 6398.	What indictment shall contain.		

Section 6390. (Definition of terms.) The word "person" or "persons" as used in this chapter includes corporations, partnerships and associations existing under or authorized by any state or territory of the United States, or a foreign country. (April 19, 1898, 93 v. 146, § 12; R. S. Sec. 4427-12.)

Section 6391. (Definition of trusts.) A trust is a combination of capital, skill or acts by two or more persons, firms, partnerships, corporations or associations of persons, for any or all of the following purposes:

1. To create or carry out restrictions in trade or commerce.
2. To limit or reduce the production or increase, or reduce the price of merchandise or a commodity.
3. To prevent competition in manufacturing, making, transportation, sale or purchase of merchandise, produce or a commodity.
4. To fix at a standard or figure, whereby its price to the public or consumer is in any manner controlled or established, an article or commodity of merchandise, produce or commerce intended for sale, barter, use or consumption in this state.
5. To make, enter into, execute or carry out contracts, obligations or agreements of any kind or description, by which they bind or have bound themselves not to sell, dispose of or transport an article or commodity, or an article of trade, use, merchandise, commerce or consumption below a common standard figure or fixed value, or by which they agree in any manner to keep the price of such article, com-

modity or transportation at a fixed or graduated figure, or by which they shall in any manner establish or settle the price of an article, commodity or transportation between them or themselves and others, so as directly or indirectly to preclude a free and unrestricted competition among themselves, purchasers or consumers in the sale or transportation of such article or commodity, or by which they agree to pool, combine or directly or indirectly unite any interests which they have connected with the sale or transportation of such article or commodity, that its price might in any manner be affected. Such trust as is defined herein is unlawful, against public policy and void. (April 19, 1898, 93 v. 143, § 1; R. S. Sec. 4427-1.)

The original act included in §§ 6390 to 6402, popularly known as the Valentine Anti-trust Act, was adopted from the Texas Anti-trust Law.

State v. Bovee, 6 N. P. n. s. 337, 343; 17 L. D. 663.

Constitutionality. Original act (93 v. 143) held constitutional.

State v. Buckeye, etc., Co., 61 O. S. 520 (1899).

State v. Gage, 72 O. S. 210 (1905); reversing 1 C. C. n. s. 221; 14 C. D. 724.

Lemmon v. State, 77 O. S. 427, 432 (1908).

State v. Jacobs, 7 N. P. 261; 17 L. D. 515.

Salt Co. v. Salt Co., 12 L. D. 386.

Quo warranto was held to be a proper method of testing the constitutionality of the act.

State v. Pipe Line Co., 61 O. S. 520 (1899).

The policies of the state of Ohio, as declared by the Valentine Act, are much the same as the policies of the United States as declared by the Sherman Act. Telephone Co. v. Telephone Co., 202 Fed. 66, 70 (C. C. A. 1913).

Corporation, its officers and stockholders as a combination. A corporation and its own officers, stockholders and agents, without the participation of others, may be guilty of forming a trust and conspiracy in violation of this act, and all, including the corporation, may be counted in making up the two or more necessary parties.

State v. National Cash Register Co., 13 C. C. n. s. 73; 21 C. D. 637 (1910).

The combination does not lose its identity by the dissolution of the corporation and the formation of a new corporation by the same parties to continue the unlawful purpose.

State v. National, etc., Co., 13 C. C. n. s. 73; 21 C. D. 637 (1910).

"Trade and commerce." Combinations of insurance agents. A combination of insurance agents is not a violation of the anti-trust act.

State v. Boyee, 6 N. P. n. s. 337; 17 L. D. 663 (C. P. 1907).

Runk v. Cloud, 8 N. P. 436; 11 L. D. 444 (Super. Ct. Cin. 1901).

Foster v. Ankenbauer, 14 N. P. n. s. 637; 24 L. D. 70 (1913).

Contra, State v. Ross, 4 N. P. n. s. 377; 16 L. D. 704 (C. P. 1906).

See G. C. § 9563.

Combinations fixing prices, pooling interests, etc. An indictment charging that defendants were members of a combination formed to carry out restraint in trade and commerce, increasing the price and preventing competition in the sale of lumber, and knowingly acted in pursuance of

such combination, binding themselves not to sell lumber for use in a certain locality below a common standard in prices, and agreeing to pool, combine and unite their interests in such lumber trade states a violation of this section and not of § 6392.

Arnsman v. State, 11 C. C. n. s. 113; 20 C. D. 445 (1908).

An organization of manufacturers which raises a fund with which it "leases down" competing factories, and allots the trade of such factories among its members, controls the output and prices of its members and binds them not to sell to specified customers except by consent of its members, is an unlawful combination.

Fisher v. Flickinger Wheel Co., 7 C. C. n. s. 533; 18 C. D. 501 (1906).

A contract between two mercantile houses engaged in the same line of business, by which each acquires an interest in the gross profits made by the other is not on its face illegal, as tending to create a monopoly and void as against public policy either under this act or at common law.

Fechteter v. Palm Bros. & Co., 133 Fed. 462; 14 O. F. D. 369 (C. C. A. 1904).

An association organized for the purpose of increasing the price and decreasing the production of a commodity in general use, such as candles, is contrary to public policy.

Emery v. Ohio Candle Co., 47 O. S. 320 (1890).

Labor union, the by-laws of which prohibited members from working at non-union shops, limiting amount of work to be performed in a certain time, etc., held an illegal association.

Kealey v. Faulkner, 7 N. P. n. s. 49; 18 L. D. 498 (C. P. 1907).

An agreement between two corporations publishing evening newspapers whereby, for a sum of money, one agrees to publish a morning newspaper only, is not in restraint of trade. *Age Pbg. Co. v. Times Co.*, 4 Ohio App. 13; 21 C. C. n. s. 24; 25 C. D. 421 (1914).

Combination of employers and labor unions, to prevent the public from dealing with an employer who is a non-member of an association, by circulating statement that the non-member employer is unfair to union labor, held a violation of the Valentine Act. *Gildehaus Co. v. Busse*, 19 N. P. n. s. 263; 27 L. D. 13, 111 (1916).

Association of milk producers, requiring dealer to accept all milk offered at any time by a member of the association, and to refuse to buy from non-members, is illegal. *Opins. Atty. Gen.* 1918, p. 1672.

Contract of sale fixing resale prices. A contract of sale wherein the seller attempts to fix the price to be charged by the purchaser on resales of the goods is a violation of the Ohio anti-trust act. This is true even in the case of patented articles. *McCall Co. v. O'Neil*, 17 N. P. n. s. 17 (1914). See also *Boston Store v. Graphophone Co.*, 246 U. S. 8 (1918); *Dr. Miles Co. v. Park*, 220 U. S. 373 (1911).

But under an agency contract, as where goods are consigned to a factor for sale, the principal may fix the sale price. *Orebaugh v. New*, 6 Ohio App. 404; 28 O. C. A. 161; 28 C. D. 32 (1917).

Agreements to maintain prices, etc.

See *Graf v. Masters, etc., Assn.*, 1 N. P. n. s. 423; 11 L. D. 18 (Super. Ct. Cin. 1904).

Needles v. Bishop, etc., Co., 2 N. P. n. s. 77; 14 L. D. 445 (C. P. 1904).

State v. Standard Oil Co., 51 Bull 563 (Probate Ct. 1906).

Agreement to furnish employment if competitor discontinues business. An agreement to furnish employment to a competitor, if such competitor will discontinue business is not a violation of this act.

Kevil v. Standard Oil Co., 8 N. P. 311; 11 L. D. 114 (Super. Ct. Cin. 1901).

Monopoly at common law. Stock control of competing line, by railway.

State v. Railway Co., 12 C. C. n. s. 49; 21 C. D. 175 (1909); s. c., 12 C. C. n. s. 145.

Gould v. Railway, 10 N. P. n. s. 313 (1910).

Manufacturer fixing prices of resale by wholesale and retail dealers.

Freeman v. Miller, 9 N. P. n. s. 26 (Super. Ct. Cin. 1909).

An agreement between two telephone companies providing that neither will operate in the territory of the other, or connect with competitors of the other, was held to be against public policy. Telephone Co. v. Telephone Co., 12 N. P. n. s. 289 (1911). See § 614-52.

Cold storage of foods. The cold-storage act and the Valentine anti-trust law are distinct in purpose, employ different remedies and provide different penalties. They should not be so construed in *pari materia* as to employ the remedies of one for the prosecution of the other. The storage of food products by a cold storage company for six months does not *ipso facto* violate the Valentine law, without other proof of some combination or acts or unlawful agreement entered into by two or more. Packing Co. v. State, 106 O. S. 469 (1922); overruling, Packing Co. v. State, 100 O. S. 285. See Ohio v. Swift & Co., 270 Fed. 141.

Section 6392. (Owning trust certificate or entering into a combination prohibited.) It shall not be lawful for a person, partnership, association or corporation, or an agent thereof, to issue or own trust certificates, or for a person, partnership, association or corporation, or an agent, officer or employe thereof, or a director or stockholder of a corporation, to enter into a combination, contract or agreement with any person or persons, corporation or corporations, or a stockholder or director thereof, the purpose and effect of which is to place the management or control of such combination or combinations, or the manufactured product thereof, in the hands of a trustee or trustees with the intent to limit or fix the price or lessen the production and sale of an article of commerce, use or consumption, or to prevent, restrict or diminish the manufacture or output of such article. (April 19, 1898, 93 v. 145, § 10; R. S. Sec. 4427-10.)

Section construed.

Arnsman v. State, 11 C. C. n. s. 113, 118; 20 C. D. 445 (1908).

Control of several corporations by trustees, issuing trust certificates to stockholders.

See State v. Standard Oil Co., 49 O. S. 137 (1892).

Section 6393. (Illegal contract.) A contract or agreement in violation of any provision of this chapter is void and not enforceable either in law or equity. (April 19, 1898, 93 v. 145, § 8; R. S. Sec. 4427-8.)

A covenant in a lease of saloon property by a brewing company,

lessor, prohibiting the sale on the premises of beer other than that of the manufacture of the lessor is not invalid under this section.

Diehl Brewing Co. v. Konst, 12 C. C. n. s. 577; 20 C. D. 782 (1905); aff'd, no rep., 79 O. S. 469.

Brewing Co. v. Demko, 9 C. C. n. s. 130; 19 C. D. 102 (1907).

Brewing Co. v. Kraval, 16 C. C. n. s. 292 (1908); aff'd, no rep., 82 O. S. 395.

Where a combination purchased all the machinery of one of its constituent members, stipulating that the vendor corporation should not compete with its members, and providing employment for the president of the vendor company; and it appeared that the machinery was purchased without a plan for its use and location and remained unused for eight months, the agreement was held to be void. Where possession was not taken of the machinery the contract was not an executed contract although the full purchase price was paid.

Fisher v. Flickinger Wheel Co., 7 C. C. n. s. 533; 18 C. D. 501 (1906).

See Standard Distilling Co. v. Block, 5 N. P. n. s. 386; 17 L. D. 601; reversed, without report, 78 O. S. 448.

A contract monopolistic in its character is illegal at common law.

Crawford v. Wick, 18 O. S. 190 (1868).

Central, etc., Co. v. Guthrie, 35 O. S. 666 (1880).

Emery v. Ohio Candle Co., 47 O. S. 320 (1890).

A contract between a long distance telephone company and a number of local telephone companies, binding the local companies not to permit a connection between their lines and the lines of any other long distance company was held illegal. Telephone Co. v. Telephone Co., 202 Fed. 66 (C. C. A. 1913). *Contra*. Telephone Co. v. Telephone Co., 13 C. C. n. s. 337, 22 C. D. 18; aff'd, no rep. by divided court, 86 O. S. 319; s. c., 7 N. P. n. s. 425.

Action by member of a combination to recover price of goods sold.

In an action to recover the purchase price of goods sold it is no defense that the plaintiff is a member of an unlawful trust or combination.

Corn, etc., Co. v. Roser, etc., Co., 10 N. P. n. s. 596; 22 L. D. 663 (1910).

Wilder Mfg. Co. v. Corn Products Co., 236 U. S. 165 (1915).

See Kinner v. Ry. Co., 69 O. S. 339, 344 (1903).

Agreement by vendor of business not to re-engage in business.

An agreement by which one sells his business, agreeing not to enter into a similar business, within certain time and territorial limits, is valid if the prohibited territory is not more extensive than necessary to enable the vendee to enjoy the fruits of the contract.

Kevil v. Standard Oil Co., 8 N. P. 311; 11 L. D. 114 (Super. Ct. Cin. 1901).

But an agreement by the seller that he will not directly or indirectly engage in the same business in the state or United States for a period of twenty-five years necessarily tends to create a monopoly and is void.

Luffkin Rule Co. v. Fringeli, 57 O. S. 596 (1898).

Such agreements are valid only when the restraint of trade is partial and reasonable and not oppressive.

Grasselli v. Lowden, 11 O. S. 349 (1860).

Lange v. Werk, 2 O. S. 528.

Carr v. Walker Brewing Co., 3 O. L. R. 618; 17 L. D. 222 (Super. Ct. Cin. 1906).

Pappas v. Zonars, 14 N. P. n. s. 199; 23 L. D. 173 (1912).

A seller who agreed "not to start in the express and moving business for a term of five years within two miles" was held not to

violate his agreement by driving a van as employe. *Schroeder v. Schultz*, 16 C. C. n. s. 303 (1908).

Rescission of contract to form combination. Non-consenting stockholders of a corporation, which has entered a prohibited combination, are not in *pari delicto*, and may, after demand upon the corporate officers and their refusal to take steps to rescind, bring suit for a rescission. *Nat'l. Salt Co. v. United Salt Co.*, 12 L. D. 386 (C. P. 1902).

Where the illegal acts are wholly unexecuted, a party to the contract may abandon the contract and recover back the money paid. *Nat'l Salt Co. v. United Salt Co.*, 12 L. D. 386 (C. P. 1902).

Section 6394. (Foreign corporations must comply with anti-trust acts. Revocation of certificate.) A foreign corporation or foreign association exercising any of the powers, franchises or functions of a corporation in this state, violating any provision of this chapter shall not have the right, of and shall be prohibited from, doing any business in this state. The attorney general shall enforce this provision by proceedings in quo warranto in the supreme court, or the court of appeals of the county in which the defendant resides or does business, or by injunction or otherwise. The secretary of state shall revoke the certificate of such corporation or association theretofore authorized by him to do business in this state. (May 6, 1913, 103 v. 424; May 18, 1910, 101 v. 274; R. S. Sec. 4427-3; April 19, 1898, 93 v. 144, § 3.)

Section 6395. (Violation, penalty.) A person, firm, partnership, corporation or association violating any provision of this chapter shall forfeit and pay to the state, for the use of the general revenue fund thereof, the sum of fifty dollars for each day that such violation is committed or continued after due notice given by the attorney-general or a prosecuting attorney. Such sum may be recovered in the name of the state in any county where the offense is committed or where any of the offenders reside; and the attorney-general, or the prosecuting attorney of any county upon the order of the attorney-general, shall prosecute for the recovery thereof. When such action is prosecuted by the attorney-general he may begin the same in the court of common pleas of Franklin county or of any county in which the defendant resides or does business. (May 18, 1910, 101 v. 275; R. S. Sec. 4427-7; April 19, 1898, 93 v. 145, § 7.)

The probate court has concurrent jurisdiction with the court of common pleas of offenses under this section, which are misdemeanors under G. C. § 12372.

State v. Standard Oil Co., 51 Bull 563 (Prob. Ct. 1906).

Prosecutions may be brought by information as well as by indictment.

State v. Standard Oil Co., 51 Bull 563 (Prob. Ct. 1906).

One party to an unlawful combination is liable for the acts of other parties done under the agreement.

State v. Standard Oil Co., 51 Bull 563 (Prob. Ct. 1906).

Two or more corporations charged with conspiracy are properly joined in one information.

State v. Standard Oil Co., 51 Bull 563.

Section 6396. (Criminal penalty. Penalty when violation relates to bread, meat, vegetables, etc.) A violation of any or all of the provisions of this chapter is a conspiracy against trade, and a person engaged in such conspiracy or taking part therein, or aiding or advising in its commission, or, as principal, manager, director, agent, servant or employer, or in any other capacity, knowingly carrying out any of the stipulations, purposes, prices or rates, or furnishing any information to assist in carrying out such purposes, or orders thereunder, or in pursuance thereof, or in any manner violating a provision of this chapter, shall be fined not less than fifty dollars nor more than five thousand dollars or imprisoned not less than six months nor more than one year, or both. Provided, however, that when the violation of the provisions of this chapter consists of a combination to control the price or supply, or to prevent competition in the sale of bread, butter, eggs, flour, meat or vegetables or any one of said articles, the person or persons thus engaged shall upon conviction thereof be fined in any sum not less than five hundred dollars and be imprisoned in the penitentiary not less than one nor more than five years. Each day's violation of any of the provisions of this chapter shall constitute a separate offense. (April 27, 1913, 103 v. 254; R. S. Secs. 4427-4, 4427-10; April 19, 1898, 93 v. 144, 145, §§ 4, 10.)

Venue of criminal prosecution. The illegal combination must have been entered into in the county where the prosecution is brought, or some act must have been committed in such county in furtherance of the unlawful purpose.

Hughes v. State, 9 C. C. n. s. 369; 19 C. D. 237 (1907); aff'd 77 O. S. 640.

Compare, State v. Ice Delivery Co., 5 N. P. n. s. 89; 17 L. D. 515 (C. P. 1907).

State v. King Bridge Co., 7 C. C. n. s. 557; 18 C. D. 147 (1906).

Indictment. An indictment charging the defendants with being an unlawful combination from March 10, 1900, and continuing until March 9, 1903, and further charging violations during such period, is valid, although each day's violation constitutes a separate offense.

Hughes v. State, 9 C. C. n. s. 369; 19 C. D. 237 (1907); aff'd, no rep., 77 O. S. 640.

Arnsman v. State, 11 C. C. n. s. 113; 20 C. D. 445 (1908).

The exact date on which the combination was formed need not be alleged.
State v. Crystal Ice, etc., Co., 5 N. P. n. s. 149; 17 L. D. 640 (1906).

Imprisonment. Proper place of. See *Lemmon v. State*, 77 O. S. 427 (1908).

State v. Wirick, 81 O. S. 343 (1910).

In re Schooler, 7 N. P. n. s. 276; 19 L. D. 465 (C. P. 1908).

Improper sentence; remanding case for resentence.

Arnsmann v. State, 11 C. C. n. s. 113; 20 C. D. 445 (1908).

Corporations are subject to criminal penalties of this act.

State v. Ice Delivery Co., 6 N. P. n. s. 89; 17 L. D. 515 (C. P. 1910).

Construction of original section 4; "knowingly."

State v. Ice Delivery Co., 5 N. P. n. s. 89; 17 L. D. 515 (C. P. 1907).

Constitutionality. The imprisonment or penalty clause of this section is not in contravention of the constitutional requirement that all laws of a general nature shall have a uniform operation throughout the state.

State v. Hygeia Ice Co., 4 N. P. n. s. 361; 16 L. D. 735 (C. P. 1906); affirmed, except as to prison sentence; 77 O. S. 427.

Section 6397. (Liability for damages.) In addition to the civil and criminal penalties provided in this chapter, the person injured in his business or property by another person, or by a corporation, association or partnership, by reason of anything forbidden or declared to be unlawful in this chapter, may sue therefor in any court having jurisdiction thereof in the county where the defendant or his agent resides or is found, or where service may be obtained, without respect to the amount in controversy, and recover twofold the damages sustained by him and his costs of suit. When it appears to the court, before which a proceeding under this chapter is pending, that the ends of justice require other parties to be brought before such court, the court may cause them to be made parties defendant and summoned whether they reside in the county where such action is pending, or not. (April 19, 1898, 93 v. 146, § 11; R. S. Sec. 4427-11.)

Counterclaim in action for the price of goods sold by member of unlawful combination. Where the price of goods has been advanced as the result of an unlawful combination, and a member of the combination brings suit to recover payment for goods sold, the purchaser may set up, by way of counterclaim or set off, the damages allowed by § 6397. *Guyton v. Eastern Co.*, 91 O. S. 106 (1914).

Pleading. A petition in a civil action may allege the wrongful acts in the language authorized by § 6398.

Goode v. Ohio, etc., Assn., 3 O. L. R. 600; 16 L. D. 586 (C. P. 1906).

Cross-examination of plaintiff by deposition. In an action to enjoin an illegal combination and for damages, the plaintiff, whose deposition is being taken before a notary, can not refuse to disclose the

names of dealers from whom he procured goods after the combination had refused to sell to him, on the ground that it is a trade secret; but he may refuse on the ground that the question is irrelevant in such an examination.

Jones v. Goode, 7 C. C. n. s. 589; 18 C. D. 475 (1906); affirming 3 O. L. R. 401; 16 L. D. 404; affirmed, no report, 78 O. S. 421.

Removal to federal court. The action under this section is a civil action and may be removed to federal court.

Mahon v. Somers, 112 Fed. 174; 12 O. F. D. 433 (1901).

Section 6398. (What indictment shall contain.) In an indictment for an offense provided for in this chapter, it is sufficient to state the purpose or effects of the trust or combination, and that the accused is a member thereof, or acted with or in pursuance of it or aided or assisted in carrying out its purposes, without giving its name or description, or how, when and where it was created. (April 19, 1898, 93 v. 144, § 5; R. S. Sec. 4427-5.)

See notes §§ 6395 and 6396.

Arnsman v. State, 11 C. C. n. s. 113; 20 C. D. 445 (1908).

Hughes v. State, 9 C. C. n. s. 369; 19 C. D. 237 (1907); aff'd, no rep., 77 O. S. 640.

No overt act need be alleged. Mere membership in an unlawful combination constitutes an offense.

State v. Ice Delivery Co., 5 N. P. n. s. 89; 17 L. D. 515 (1907).

State v. Crystal Ice, etc., Co., 5 N. P. n. s. 149; 17 L. D. 640 (1906).

Section 6399. (Evidence.) In prosecutions under this chapter, it shall be sufficient to prove that a trust or combination as defined herein, exists, and that the defendant belonged to it, or acted for or in connection with it, without proving all the members belonging to it, or proving or producing an article of agreement, or a written instrument on which it may have been based; or that it was evidenced by a written instrument. The character of the trust or combination alleged may be established by proof of its general reputation as such. (April 19, 1898, 93 v. 145, § 6; R. S. Sec. 4427-6.)

Proof by general reputation unconstitutional. The last clause of this section providing that the character of a trust may be proved by general reputation is unconstitutional.

Hammond v. State, 78 O. S. 15 (1908).

Hughes v. State, 9 C. C. n. s. 369; 19 C. D. 237 (1907); aff'd, 77 O. S. 640.

Other evidence. Conversations, statements and conduct of alleged conspirators, not a part of the transactions charged in the indictment, but offered to establish the existence of the unlawful combination, are not admissible against a defendant not present nor concurring therein.

Hughes v. State, 9 C. C. n. s. 369; 19 C. D. 237 (1907); aff'd, 77 O. S. 640.

Evidence of prior acts can be considered only when it tends to show that a defendant is a member of the unlawful combination.
State v. Standard Oil Co., 51 Bull. 563 (Prob. Ct. 1906).

Charge to the jury. See Hughes v. State, 9 C. C. n. s. 369; 19 C. D. 237 (1907); 77 O. S. 640.

Section 6400. (Jurisdiction of courts. Quo warranto; injunction. Domestic corporations. Dissolution by court.)
The several courts of common pleas in the state are hereby invested with jurisdiction to restrain and enjoin violators of this chapter. For a violation of any provision of this chapter by a corporation or association mentioned herein, the attorney general, or the prosecuting attorney of the proper county, shall institute proper proceedings in a court of competent jurisdiction in any county in the state where such corporation or association exists, does business or has a domicile. When such suit is instituted by the attorney general in quo warranto, he may begin the same in the supreme court of the state, or the court of appeals of Franklin county. When such suit is instituted by the attorney general to restrain and enjoin a violation of any provision of this chapter, he may begin the same in the court of common pleas of Franklin county. Such proceedings to restrain and enjoin such violation, or violations, shall be by way of petition setting forth the case, and praying that such violation shall be enjoined or otherwise prohibited.

Upon the filing of such petition, and before final decree, the court may at any time make such temporary restraining order or prohibition as shall be deemed just in the premises. In any action or proceeding in quo warranto by the attorney general or a prosecuting attorney against a corporation the court in which such action or proceeding is pending may, ancillary to such action or proceeding, restrain or enjoin the corporation and its officers and agents from continuing or committing during the pendency of the action the alleged act or acts by reason of which the action is brought. When, in a proceeding quo warranto by the attorney general or any prosecuting attorney, any corporation incorporated under the laws of this state is, on final hearing, found guilty of violating any of the provisions of this act, the court may declare a forfeiture of all its rights, privileges and franchises to the state and may order the incorporation dissolved and appoint a trustee or trustees to wind up its affairs, as is provided in other cases in quo warranto. (May 6, 1913, 103 v. 425; May 18, 1910, 101 v. 275; April 19, 1898, 93 v. 114, § 2: R. S. Sec. 4427-2.)

The prosecuting attorney of a county may bring suit on behalf

of the state for violations of the Valentine Act, and in such suit the state is the real party plaintiff. Such a suit asking for an injunction and receiver is a civil action. *Ohio v. Swift & Co.*, 270 Fed. 141 (C. C. A. 6th Cir. 1921); certiorari denied, 257 U. S. —.

Where majority stockholders in a corporation exchange their stock for stock in another corporation, no corporate action being taken, the fact that a violation of the anti-trust may result does not entitle a minority stockholder to an injunction against the exchange. *Smith v. Peoples Co.*, 22 C. C. n. s. 229 (1909).

Quo warranto. Proper allegations of petition.

See *State v. National, etc., Co.*, 13 C. C. n. s. 73; 21 C. D. 637 (1910).

The state may inquire as to all acts committed by any participant in the alleged unlawful combination from the time it is alleged to have been formed.

State v. National, etc., Co., 13 C. C. n. s. 74; 21 C. D. 637 (1910).

A quo warranto proceeding may be brought in the circuit court of any county where one or more of the defendant corporations is situated and process may issue to other counties.

It need not be brought in the county where the combination does business as a separate entity.

State v. King Bridge Co., 7 C. C. n. s. 557; 18 C. D. 147 (1906).

Where dissolution of an illegal association is decreed, the court may appoint a receiver to liquidate its affairs and distribute its funds.

Kealey v. Faulkner, 7 N. P. n. s. 49; 18 L. D. 498 (C. P. 1907).

Section 6400-1. (Parties defendant. Statute of limitation no bar to suit.) In any action or proceeding in quo warranto, injunction or otherwise brought by the attorney-general or a prosecuting attorney under this chapter, all persons parties to or participating in the trust or conspiracy against trade violative of the provisions of this chapter, may be made parties defendant and summoned, whether they reside in the county where such action is instituted or not. Proceedings in quo warranto and in injunction may be instituted simultaneously, or while one or another of them is pending, such suits being started in the proper court as provided in this chapter, and no suit in injunction shall be a bar to a suit in quo warranto, nor shall a suit in quo warranto be a bar to one instituted to restrain and enjoin. No statute of limitation shall prevent or be a bar to any suit, or proceeding, for any violation hereafter committed of any provision of this chapter. (May 18, 1910, 101 v. 275.)

Section 6401. (Witness not excused from testifying.) If a court of record or in vacation a judge thereof, in which is pending a civil, criminal or other action or proceeding brought or prosecuted by the attorney-general or a prosecuting attorney for the violation of any provision of this chapter, or an action or proceeding for a violation of a law, common or statute, against a conspiracy or combination in restraint of trade, so orders, no person shall be excused from

attending, testifying or producing books, papers, schedules, contracts, agreements or other documents in obedience to the subpoena or order of such court or a commissioner, referee or master appointed by such court to take testimony, or a notary public or other person authorized by the laws of this state to take depositions, when the order made by such court or judge includes a witness whose deposition is being taken before such notary public or other officer, for the reason that the testimony or evidence required of him may tend to criminate him or subject him to a penalty; but no person shall be prosecuted or subjected to a penalty for or on account of a transaction, matter or thing concerning which he may so testify or produce evidence, documentary or otherwise, before such court, person or officer. (April 19, 1898, 93 v. 313, § 6a.)

The plaintiff, in a civil action under this act, being examined before a notary public under G. C. § 11497, can not refuse, on the ground that it is a trade secret, to disclose the names of dealers from whom he procured a supply of the goods which the combination had refused to furnish him, but such question is irrelevant to an examination under § 11497.

Jones v. Goode, 7 C. C. n. s. 589; 18 C. D. 475 (1906); aff'd, no rep., 78 O. S. 421; s. c., 3 O. L. R. 401.

Section 6402. (Cumulative provisions.) The provisions of this chapter shall be cumulative of each other and of all other laws in any manner affecting them. (April 19, 1898, 93 v. 145, § 9; R. S. Sec. 4427-9.)

Section 6402-1. (Penalty when violation relates to milk, cream or butter fat.) Whoever, being engaged in the business of buying milk, cream or butter fat, shall, for the purpose of creating a monopoly, or to restrain trade, or to prevent or limit competition, or to destroy the business of a competitor, discriminate between different sections, localities, communities or cities of this state, by purchasing such commodity at a higher price or rate in one locality than in another, after making due allowance for the difference, if any, in the actual cost of transportation from the locality of purchase to the locality of manufacture, shall be deemed guilty of unfair discrimination and, upon conviction thereof, shall be punished by a fine not exceeding five hundred dollars, or by imprisonment not exceeding six months. (110 v. 39.)

PART XV.

MISCELLANEOUS STATUTORY PROVISIONS RELATING TO
RAILWAYS AND CARRIERS.

- Railways on Public Highways.**
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| § 6956-21. Cost and expense which shall be borne by company. Proceedings when company fails to improve or repair. | § 6956-31. Payment. |
| § 6956-22. Power to raise or lower road grade above or below railroad tracks. | § 6956-32. Height of crossing above grade. |
| § 6956-23. Change of location of main market roads. | § 6956-33. Appropriation of property. |
| § 6956-24. Hearing by director of highways. Notice. | § 6956-34. Repairs. |
| § 6956-25. County commissioners shall hold public hearing. Notice. Railroad shall submit plans, when. Publication. Common pleas court may determine method. | § 6956-35. Townships, villages. Bonds. Tax levy. |
| § 6956-26. Petition. | § 6956-36. Crossings of main market roads, etc. Time of payment. Definition of terms. |
| § 6956-27. Finding of court. Apportionment between railroads. Appeal. Refusal or neglect. | § 6956-37. Grade of main market roads. Powers of director of highways. Hearing, appeal, review. |
| § 6956-28. Apportionment of cost between county and railroad. Return against county. May agree as to apportionment. | § 6956-38. Notice. Copies of record. Obligations as payment. |
| § 6956-29. Notice of change of grade to abutting owners. | § 6956-39. Appeal from order of director or board of commissioners. |
| § 6956-30. Service of summons and publication. Damages. | § 7472. Obstructing roads by railroad agents. |
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| §§ 8343 to 8352. Railroad contracts and subcontracts. | §§ 8376 to 8380. On public works, including railroads, street railroads, etc. |
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RAILWAYS ON PUBLIC HIGHWAYS.

Section 6956. (Cost and expense which shall be borne by company. Proceedings when company fails to improve or repair.) Any person, firm or corporation operating a railway for the transportation of passengers, freight or express crossing any street or road, shall improve, maintain and repair that portion of the highway at such crossing and lying between the outside ends of the ties, and also that

portion lying between the tracks in the case of two or more tracks, and the cost and expense of this improvement, maintenance and repair shall be borne by said individual, firm or corporation. Such improvement, maintenance or repair shall be made whenever in the opinion of the authorities having charge of such road the public necessity requires, and shall be made in accordance with plans and specifications approved by the county surveyor.

In case the said person, firm or corporation operating said railway, fails to improve, maintain or repair the same as required by the proper authorities, as provided in this section, then such authorities shall proceed to improve, maintain and repair the same, and the cost thereof shall be charged against said property and collected in the manner hereinafter provided. Whenever a road or street is improved where a street or interurban or other railroad or railway lies within the improved portion of the roadway, such railroad or railway grade shall in all respects be changed to meet the approval of the county surveyor unless otherwise provided for in the grant or franchise, by virtue of which such railway operates on or occupies said highway, and costs of such change of grade be paid by such company under the law or by the terms of its franchise or grant, shall be a lien upon the property of such company and the proper authorities may provide for the payment of the amount chargeable against said company under the law or by the terms of its franchise or grant, in installments as in the case of other property owners, and such installments shall bear interest as in other cases, and the board of county commissioners or other authorities may issue bonds in anticipation of the collection of said installments. (106 v. 611, § 137.)

Section 6956-22. (Power to raise or lower road grade above or below railroad tracks.) Any county may raise or lower, or cause to be raised or lowered the grade of any main market road or inter-county highway above or below the tracks of railroads, or railroads and parallel and adjacent interurban railroads within such county, and may require any railroad company operating a railroad in such county, and any interurban railroad company operating an interurban railroad parallel and adjacent to said railroad, to raise or lower the grade of its tracks, above or below any main market road or inter-county highway, and may construct ways or crossings for such road or highway above the tracks of any railroad or railroads and parallel and adjacent interurban

railroad, or require the railroad company and any interurban railroad company operating an interurban railroad parallel and adjacent to said railroad to construct ways or crossings therefor that are to be passed under its tracks, may require such railroad company and any interurban railroad company operating an interurban railroad parallel and adjacent to said railroad to erect permanent piers, abutments or any other appropriate supports for any of the above works in main market roads and inter-county highways within the county, whenever in the opinion of the board of county commissioners, the raising or lowering of the grade of any such railroad or railroads and parallel and adjacent interurban railroad tracks or the raising or lowering or construction of such roads or highways or supports may be necessary; upon the terms and conditions hereinafter set forth in this act. (110 v. 231, § 1.)

Section 6956-23. (Change of location of main market roads.) When the board of county commissioners deems it necessary in the abolishment of such grade crossings, to change the location of any main market road or inter-county highway in such county, such board of commissioners may, with the approval of the director of highways and public works, relocate such road, or highway, or any part thereof, may vacate the whole or any portion of such road or highway, abandoned by such relocation, and cause the improvements above contemplated to be placed in such relocated road or highway. (110 v. 232, § 2.)

Section 6956-24. (Hearing by director of highways. Notice.) As a condition precedent to the exercise of jurisdiction under the terms of this act by a board of county commissioners, such commissioners shall transmit to the director of highways and public works a full written description of the grade crossing which it is proposed to abolish, showing its location, the reasons which tend to make necessary the elimination of the same, the names of the railroad or railroads or interurban railway or railways owning the tracks crossing said main market road or inter-county highway and the manner in which it is contemplated the improvement proposed should be accomplished. On receipt of such description the state highway director shall conduct a hearing as to the necessity and the expediency of the proposed improvement after thirty days' notice in writing of the time and place of the holding of such hearing has been given to the county commissioners and to the railroad or

interurban railway company or companies concerned in such proposed elimination, such notice to be served by the sheriff upon the railroad or interurban railroad company, or companies, in the manner provided for by law for the service of summons in civil actions, and if, after such hearing, the state highway director is of the opinion that such improvement is reasonably necessary and expedient, he shall so certify in writing to said county commissioners, sending a copy of such certificate to all railroad or interurban railway companies involved. But if said director is not of such opinion he shall so state in his certificate, and thereupon no further proceedings shall be taken upon said application to said director. (110 v. 232, § 3.)

Section 6956-25. (County commissioners shall hold public hearing. Notice. Railroad shall submit plans, when. Publication. Common pleas court may determine method.) The board of county commissioners desiring to proceed under the provisions of this act shall, after receipt of the certificate of necessity and expediency from the director of highways and public works herein provided for, hold a public hearing as to the expediency of constructing such improvement, notice of which shall be given by publication in two English newspapers, published and of general circulation in such county, if such there be, otherwise in two newspapers of general circulation in such county, for two weeks before the date set for such hearing, and served upon the railroad or interurban railway company or companies in the manner provided by law for the service of summons in civil actions, not less than twenty days prior to the date of such hearing.

The board of county commissioners of such county after such public hearing and for the purpose of making or causing such an improvement to be made, may by resolution adopted by unanimous vote, require the railroad company, in co-operation with the county surveyor or any engineer designated by the board of county commissioners, to prepare and submit to such board of county commissioners within six months, unless longer time is mutually agreed upon in writing, plans and specifications for such improvements, specifying the number, character and location of all piers and supports which are to be permanently placed in any road or highway, specifying the grades to be established for the roads and the height, character and estimated cost of any viaduct or way above or below any railroad track and the change of grade required to be made of such tracks, in-

cluding side tracks and switches. But in changing the grade of any railroad, no grade shall be required in excess of the grade adopted by the railroad company for its construction work on that division or part of the railroad on which the improvement is to be made, without the consent of the railroad company, nor shall the railroad company's tracks be required to be placed below high-water mark. Such resolution shall be published in the manner provided by law as to resolutions of a city council declaring the necessity of a contemplated public improvement, and shall be served by the sheriff upon the railroad or interurban railroad company or companies in the manner provided by law for the service of summons in civil actions; and if the proposed public improvement is to be made within a village or city, notice of the passage of the same shall be served upon the village or city by delivering to the clerk of the village or city council a true copy thereof.

If, at the expiration of six months from the passage of such resolution, the railroad company has refused or failed to co-operate in the preparation of such plans and specifications, or if the county surveyor or engineer designated by the county commissioners and the railroad company fail to agree upon the plans and specifications of such improvement, then either the railroad company or the county may submit the matter of determining the method by which the improvement shall be made to the court of common pleas of such county. Either the county or company after the expiration of six months from the passage of the resolution may apply to such court of common pleas by petition accompanied by the necessary plans prepared by the county or railroad company covering the grade crossing proposed to be abolished. Such plans must show the grades to be established for such roads or highways, the changes to be made in the location of roads or highways; the height, character and estimated cost of any viaduct or way above or below the railroad tracks, and the number, character and location of piers, abutments or supports to be permanently located in the roads or highways, and the change of grade to be made in any railroad tracks, including side tracks and switches. (110 v. 233, § 4.)

An attempt to reach an agreement with the railroad company as to location, plans and specifications, must be made by the commissioners before appealing to the court. *Arbaugh v. Railroad*, 104 O. S. 110 (1922).

Section 6956-26. (Petition.) Upon the filing of such pe-

tion, accompanied by plans, the railroad company or county opposed to the prayer thereof, or directly interested therein, shall have the right, within sixty days thereafter to file an answer to such petition and to present other plans for the abolition of such crossing or crossings. After the expiration of such period of sixty days the court shall proceed to a hearing upon the petition and any answers that have been filed, which hearing must be advanced upon the docket upon motion of either party. After examination of all plans presented to it and after hearing the evidence, the court shall make a finding as to whether such plans or any of them are reasonable and practicable. (110 v. 233, § 5.)

Section 6956-27. (Finding of court. Apportionment between railroads. Appeal. Refusal or neglect.) If the court finds that the plans presented by the petitioner or any of the parties answering thereto are reasonable and practicable, it shall order the changes to be made in accordance with the most reasonable and practicable plan presented to the court or as amended by its order entered by consent of the parties. The county shall be required to make such changes in the roads or highways as may be necessary, and the railroad company or companies be required to make the changes necessary in the tracks and roadbed, in order to comply with the rulings of the court. If more than one railroad company, or a railroad company and an interurban railway company, or railroad companies and interurban railway companies, own tracks on the crossing in question, the court shall apportion between or among them the fifty per cent. herein-after provided to be paid by the railroad companies, or the railroad and interurban railroad companies, and when making such apportionment the courts shall take into consideration the difference in costs of construction and benefits derived as between such railroad or railroads and interurban railroad company or companies. But if the court finds that none of the plans are reasonable or practicable, the improvement shall not be made upon such plans.

Either party feeling aggrieved by the decision and order of the court may appeal or prosecute error as in other cases, the hearing of which shall be advanced upon the docket upon motion of either party.

If the county or railroad company refuses or neglects to comply with the orders or findings made by the court under the provisions hereof, the court may enforce its orders or findings by either mandamus or mandatory injunction or for contempt of court, as the necessity of the case may re-

quire, upon the application of either party to such proceedings. (110 v. 234, § 6.)

Section 6956-28. (Apportionment of cost between county and railroad. Action against county. May agree as to apportionment.) The cost of constructing the improvement authorized, including the making of ways, crossings or viaducts, above or below the railroad tracks, and the raising or lowering of the grades of the railroad tracks and side tracks for such distance as may be required by such county and made necessary by such improvement, including the cost of moving or changing existing structures and other incidental expenses, together with the cost of land or property purchased or appropriated, and damages to owners of abutting property, or other property, shall be borne, unless otherwise agreed upon, fifty per cent by the county and fifty per cent by such railroad company or companies, including any interurban railroad company or companies, the crossing of whose tracks with said highway is invoked. The county shall have a right of action against any such railroad company for the recovery of the fifty per cent of such costs payable by it, with interest from the time they become due. Such county and railroad company may agree as to what part of the work shall be done by the railroad company, and also fix the amount to be allowed or credited to the company for doing the work. Such railroad company shall be entitled to deduct from its fifty per cent of the cost of the improvement the expense incurred by it in the change of its grade required by the county or made necessary by it under such specifications, but only in case the amount of the expense has been agreed upon in writing between the county and the railroad company. If the amount of work done by the company, or made necessary by reason of such change of grade on lowering or raising its tracks, exceeds fifty per cent of the cost of the improvement, then it shall have the right to recover the amount with interest in excess of fifty per cent of the expenses, in an action at law against the county.

In connection with any such improvement the board of county commissioners of any county, or the director of highways and public works, and the railroad company or companies, including any interurban railroad company or companies whose tracks are to be raised or lowered, or over or under whose tracks the proposed improvement is to pass, may agree as to the portions of such construction, the cost of which is to be shared, and upon the percentages of the

cost to be borne by the county or state, and by the railroad company or companies, or interurban railroad company or companies, but if no such agreement is made the provisions of this section shall apply. (110 v. 235, § 7.)

Section 6956-29. (Notice of change of grade to abutting owners.) Before any work shall be done which may be required in the making of such proposed improvement, the board of county commissioners of such county shall, by resolution require notice of its intention to make such improvement in accordance with the plans and specifications, agreed upon or ordered to be given to the owner of each piece of property abutting on any road, the grade of which will be changed by the proposed improvement. (110 v. 236, § 8.)

Section 6956-30. (Service of summons and publication. Damages.) Notice of the passage of such resolution shall be served by the sheriff of the county upon the owner of each piece of such property which will be affected by any change of grade, in the manner provided by law for the service of summons in civil actions. If any of such owners are non-residents of the county, or if it appears from the return that they can not be found, the notice shall be published for at least two weeks in an English language newspaper published in said county. And such notice shall be completed at least twenty days before any work is done on said improvement; and the sheriff's return shall be prima facie evidence of the facts recited therein.

The filing of claims for damages, and the effect of failure to file such claims, found in General Code, section 3823, shall apply to the notice herein provided, and to all claims for damages by reason of such proposed improvement. But such claims shall be filed with the county auditor within the time, and rights thereunder shall pass to vendees, as in said section provided. After the expiration of the time provided for the filing of such claims, the board of county commissioners of such county, when claims have been filed within the time limited, shall determine by resolution whether such claims are to be judicially inquired into, as hereinafter provided, before commencing or after the completion of the proposed improvement. Thereupon, the county prosecutor shall make application for a jury, in the manner provided by law, to the common pleas, or probate court of the county, either before commencing or after the completion of the improvement, as the board of county commissioners determine, and all proceedings upon such application shall be governed

by the laws relating to similar applications provided for in cases of city improvements so far as applicable. (110 v. 236, § 9.)

Section 6956-31. (Payment.) The board of county commissioners may, by resolution, prescribe the manner and time or times of payment by such railroad company or companies of the proportion of the cost of such improvement which the railroad company or companies shall be required to pay. (110 v. 236, § 10.)

Section 6956-32. (Height of crossing above grade.) Any way, crossing or viaduct so constructed over a railroad track or tracks be of such height as not to be of less than twenty-one feet in the clear from the top surface of the rails in the railroad track to the lowest point of projection of such overhead way, crossing or viaduct, unless such company consents to, or the court orders a less height. But in no event shall such court order a less height than sixteen feet and three inches. (110 v. 237, § 11.)

Section 6956-33. (Appropriation of property.) The land or property required to make alterations in the road, or other way or any right, title or interest in a road or other way, required for the erection of piers or supports necessitated by the proposed improvement, shall be purchased or appropriated by the county or company after the manner provided by law for the appropriation of private property for public use. The land or property required to make any alteration in the railroad or railroads necessitated by the proposed improvements, shall be purchased or appropriated by the railroad company or companies after the manner provided for the appropriation of private property by such corporation. But the county shall not appropriate land held or owned by a railroad company and necessary for the use of the company in maintaining and operating its road. (110 v. 237, § 12.)

Section 6956-34. (Repairs.) After the completion of the work, the crossings and approaches shall be kept in repair as follows: When the public way crosses a railroad, or railroads, or railroad or railroads and interurban railroad or interurban railroads, by an overhead bridge, the cost of maintenance must be borne by the county, or by the state, as may be provided by law. When the public way passes under a railroad or railroads, or railroad or railroads and interur-

ban railroad or interurban railroads, the bridge and its abutments shall be kept and maintained by the railroad company or companies or the railroad company or companies and interurban railroad company or companies, as the case may be, in such proportions as shall be fixed by agreement between the parties, or, in the absence of such agreement, in such proportions as may be fixed by the common pleas court of the county in which the improvement is located, and the public way and its approaches shall be maintained and kept in repair by the county in which they are situated, or by the state of Ohio as may be provided by law. (110 v. 237, § 13.)

Section 6956-35. (Townships, villages. Bonds. Tax levy.)

The trustees of any township and the council of any village or city in which such proposed improvement is to be made may assume and agree to pay to the county on behalf of the village or city such portion of the costs of such improvement assumed by the county as the trustees or council deem reasonable.

For the purpose of raising the money to pay the proportion of the cost of such improvement payable by the county, the bonds of the county may be issued to the necessary amount, and for the proportion determined by the council or trustees to be assumed by the municipality or township, the bonds of such municipality or township may be issued to the necessary amount. They shall be of such denomination and payable at such place and times as the commissioners, trustees or council respectively determine, and bear interest not exceeding six per cent per annum, but shall not be sold for less than their par value.

After completion of the improvement, a tax may be levied by the county to pay the costs of maintaining and keeping in repair that part of the work required to be maintained and kept in repair by the county.

The bond issues and tax levies herein authorized shall be subject to the limitation prescribed by law for bond issues and tax levies for the purpose of paying the county's, township's and municipality's share of the cost of a road improvement carried forward by the state. (110 v. 237, § 14.)

Section 6956-36. (Crossings of main market roads, etc. Time of payment. Definition of terms.) In case the track or tracks of any street railway company or companies, or interurban railroad company or companies cross, in a main market road or inter-county highway, the right of way of any rail-

road company or companies at a point where, under the plans and specifications above provided for, it has been determined to construct such improvements, the county commissioners by resolution may require such street railway or interurban railroad company or companies, to bear a reasonable portion of the cost assumed by the county, in making the improvement, not exceeding twenty-five per cent. of the portion payable by the county; and it shall have a right of action against such street railway or interurban railroad company or companies, for that part of the cost which the resolution requires it or them to bear. Such part of the cost also shall be a lien upon all the property, real and personal, of such company or companies situated in such county from and after the date of the passage of such resolution.

The county commissioners may by resolution provide the mode and time or times of payment for the proportion of the cost of such improvement to be borne by such street railway or interurban railroad company or companies.

Such street railway or interurban railroad company or companies shall keep in repair at its or their own expense all its tracks affected by such improvement and shall bear a reasonable proportion of the cost of maintaining, renewing and repairing all construction work of whatever character, necessary to support such tracks.

The word "company" wherever used in this act is intended to include also the words "company or companies" and the words "railroad" or "interurban railroad" whenever used in this act are intended to include also the words "railroads" or "interurban railroads." (110 v. 238, § 15.)

Section 6956-37. (Grade of main market roads. Powers of director of highways. Hearing; appeal; record.) The director of highways and public works of the state of Ohio shall have the same power and authority to raise or lower or cause to be raised or lowered, the grade of any main market road or inter-county highway above or below railroad tracks within any county in the state herein conferred upon the county commissioners and may in like manner require any railroad company operating a railroad in any county to raise or lower the grade of its tracks and may construct ways or crossings above the tracks of any railroad or require the railroad company to construct ways or crossings that are to be passed under its tracks, but only after proper hearing as provided for in section 3 and section 17 [G. C. § 6956-38] hereof has been held by said director, and, in event of an appeal from the finding of said director as

provided for in section 18 hereof [G. C. § 6956-39], after the question of the necessity and expediency of said proposed elimination of grade crossing has been fully decided by the public utilities commission of Ohio, or the supreme court of Ohio as therein provided.

He may after such initial hearing, provided for in section 3 or section 17 hereof [G. C. §§ 6956-24, 6956-38], or in case of appeal therefrom, after final decision by the public utilities commission, or the supreme court as provided for in section 18 of this act [G. C. § 6956-39], require such railroad company to erect permanent piers, abutments or any other appropriate support in main market roads and inter-county highways within any county whenever in the opinion of the state highway director the raising or lowering of the grade of any such railroad tracks or the raising, lowering or construction of such roads, crossings or supports may be necessary. The director of highways and public works shall have the same power and authority and obligation with respect to all of the above enumerated matters as hereinbefore conferred or enjoined upon counties and county commissioners and shall be authorized to proceed with respect to all of such improvements in the manner herein provided with respect to counties and county commissioners, so far as such provisions are applicable. (110 v. 238, § 16.)

Section 6956-38. (Notice. Copies of record. Obligations as payment.) When said director desires to proceed under this section he shall enter upon his appropriate public record an order to that effect, which shall describe the grade crossing to be eliminated, give its location, the reasons for such elimination, the manner in which it is proposed to be accomplished, and a description of the proposed improvement to be substituted therefor. In said order said director shall fix a time and place for a hearing to be conducted by him as to the necessity and expediency of said proposed improvement.

He shall thereupon cause at least thirty days' notice of such order and hearing to be served upon the board of county commissioners of the county wherein said crossing is located, and the railroad or interurban railway companies whose tracks occupy the same, by causing copies of said order to be served upon them either by some persons designated by him or by registered letter. And the return of such person or the registry receipt for such letter shall be prima facie evidence of the truth of the statements therein contained.

The director, shall, on the day so fixed or to which the hearing may be adjourned, proceed to hear and determine said matter and shall thereupon proceed as provided in section 3 hereof.

And in his further proceedings in and about such improvement said director shall evidence his conclusions and intentions by order duly entered upon his record, of which copies shall forthwith be furnished to the commissioners, railroad companies or others directly affected by said proposed improvement, and in the case of notice of intention to proceed with the work in accordance with the plans and specifications agreed upon or ordered, shall be served upon property owners as provided by section 9 hereof.

The director shall assume on behalf of the state all of the obligations both with respect to the payment of a portion of the cost of any such improvements and otherwise as is herein provided with respect to counties. Any proportion of the cost of any such improvements assumed by the director on behalf of the state shall be paid from the intercounty highway or main market road funds of the department of highways and public works. In the event the director proceeds under the provisions of this act he shall be authorized to enter into agreements with the county commissioners of the county or trustees of the township or both, within which such improvement is located and also with the council of any municipal corporation within which such improvement is located, providing for the payment to the state by such county or township or municipal corporation of such proportion of the total cost assumed by the state as may be agreed upon between the director and the county commissioners, township trustees or municipal council.

Such commissioner, trustee or council shall have the same power to issue bonds or levy taxes for the purpose of providing any share of the cost of any such improvement assumed by them as is herein given with respect to improvement initiated by counties. (110 v. 239, § 17.)

Section 6956-39. (Appeal from order of director or board of commissioners.) From the finding and order of the director of highways and public works that such improvement is reasonably necessary and expedient, the county commissioners or any railroad or interurban railway company may, upon the question of such necessity and expediency, take an appeal to the public utilities commission of Ohio. A party desiring to take such an appeal shall file with said director written notice of its intention so to do within thirty days

after service upon it of said finding and order. Said director shall thereupon certify to such commission all original papers on file with him, together with a copy of all orders, made by him in said proceeding. Said appeal shall be docketed by said commission, and after reasonable notice to all interested parties said commission shall hear the same upon the evidence adduced before it, and shall thereupon determine and decide whether the making of said proposed improvement is necessary and expedient. An appeal from the order of said director or a board of county commissioners fixing the contribution of a street railway or inter-urban railroad company, under section 15 of this act [G. C. § 6956-36], to said public utilities commission may be taken and shall be heard and decided in the same manner. And any party to such proceedings on appeal, and being aggrieved by the decision of the commission thereon, may prosecute error to the supreme court as in other cases. (110 v. 240, § 18.)

Section 7472. (Obstructing roads by railroad agents.)

A person or corporation, or a conductor of a train of railroad cars, or other agent or servant of a railroad company, who obstructs, unnecessarily, a public road or highway authorized by any law of this state, by permitting a railroad car or locomotive to remain upon or across it for longer than five minutes, or permits timber, lumber, wood, or other obstructions to remain upon or across it to the hindrance or inconvenience of travelers, or a person passing along or upon such road or highway, shall forfeit and pay for each offense, not less than two dollars, nor more than twenty dollars. (R. S. Sec. 4748; 65 v. 14, § 31; S. & S. 669; S. & C. 1311.)

Diversion of highway during construction of railroad; duty to restore to former condition of usefulness; liability and remedies for breach of duty. See § 8773 and note.

An action to recover the penalty under this section may be maintained not only by the township trustees, but by any other person. The penalties when collected are to be applied under § 7474.

Higgins v. Grove, 40 O. S. 521.

In an action for obstruction of a highway by a railroad car it must be alleged in the petition that the obstruction was continued unnecessarily for more than five minutes. If the obstruction was caused by other agencies it need not be alleged to have been unnecessary.

Burton Twp. v. Tuttle, 30 O. S. 62.

Railroad Co. v. Mackey, 53 O. S. 370.

Section 7473. (Damages.) The company or person shall also be liable for all damages arising to a person from such obstruction, or injury to such road or highway, to be re-

covered by an action at the suit of the trustees of the township in which the offense is committed, or of any person suing therefor before a justice of the peace within the county where the offense is committed, or by indictment in the court of common pleas in the proper county. Each twenty-four hours the person or corporation, after being notified, permits such obstruction to remain, shall be an additional offense against the provisions of the next preceding section. (R. S. Sec. 4748; 65 v. 14, § 31; S. & S. 669; S. & C. 1311.)

See also note to § 8773.

Action by supervisor.

Hill v. Supervisor, 10 O. S. 621.

Bisher v. Richards, 9 O. S. 495.

A railroad company is not liable in a civil action for injuries sustained by its obstruction of a street, unless such obstruction is the proximate cause of the injuries.

Railroad Co. v. Staley, 41 O. S. 118.

Section 7474. (Moneys collected.) All penalties collected under section seventy-four hundred and seventy-two, shall be paid to the treasurer of the township in which the offense was committed, and be applied by the trustees to the improvement of roads and highways therein. (R. S. Sec. 4748; 65 v. 14, § 31; S. & S. 669; S. & C. 1311.)

Section 7475. (Company liable for fines against employes.) A railroad company or other corporation, the servant, agent or employe of which, in any manner, obstructs a public road or highway, shall pay all penalties which may be assessed against such servant, agent, or employe for so obstructing it. Such penalties may be enforced by execution issued against such corporation on the judgment rendered against such servant, agent, or employe. (R. S. Sec. 4749; 65 v. 14, § 32; S. & S. 669; S. & C. 1311.)

Section 7479. (Grant of franchise to street or interurban railways; conditions.) No franchise or grant to any street railway, interurban railway or other railway shall hereafter be granted by the state highway commissioner, by the board of county commissioners or by the council of any municipality, unless such franchise or grant shall provide, that such company, shall thereafter, when required by the proper authorities in charge of such road or street, make such changes in its grade and method of construction, as shall be necessary to conform to any improvement thereafter made of such street or road. The type of construction used by such company shall be approved in the first instance, by the state highway commissioner, if such road is under

jurisdiction of the state; by the engineer of a municipality, if such improvement is within the bounds of such municipality; or, by the county highway superintendent in the case of other roads, and shall also be approved by the proper authorities having jurisdiction over such street or road. (106 v. 652, § 252.)

Section 7480. (Power to appropriate right of way, crossing or lands of railroad; proceedings.) The state highway commissioner, county commissioners or township trustees shall have power to appropriate a right of way or crossing over railroad tracks, and lands held by railway companies, whether operated by steam or electricity, and shall also have the right to appropriate the necessary property and right to construct said crossing above or below the grade of said railway. Such proceedings shall be had thereon as are provided for appropriation of property by municipal corporations. In case the grade of the road at such crossing shall be raised or lowered above or below the railroad tracks thereon, by agreement or order of the court, the cost of raising or lowering such grade shall be apportioned between the county commissioners or township trustees and the railroad company in the same proportion as in cases where a grade is raised or lowered on a crossing already established or existing. (106 v. 653, § 255.)

LIENS OF RAILROAD SUB-CONTRACTORS.

Section 8343. (Liens against a railroad company.) Any person, association of persons, or corporation contracting for the construction of a railroad, depot buildings, water-tanks, or any part thereof, shall be liable to and pay to each person performing labor or furnishing materials stipulated for in the contract with the owner of the road, under a contract express or implied with the original contractor, or with any sub-contractor, for the whole or any part of the work stipulated in the original contract with the owner of the railroad. (R. S. Sec. 3207; 80 v. 99; R. S. 1880; 71 v. 51, § 1.)

The provisions of §§ 8343 to 8352 inclusive, providing for liens of subcontractors, etc., were held unconstitutional by the U. S. Circuit Court of Appeals.

Shaw v. Railway Co., 8 O. L. R. 43; 173 Fed. 476 (1909).

See Stewart v. Gardner, 10 C. C. n. s. 408; 20 C. D. 218; aff'd, 78 O. S. 451.

Railway Co. v. Cronin, 1 W. L. B. 315 (1876); aff'd, 38 O. S. 122 (1882).

This section does not apply to street railroads.

Massillon Bridge Co. v. Cambria Iron Co., 59 O. S. 179 (1898).

It has been held that this section does not provide for an action at law or authorize the recovery of a money judgment.

Schneider v. Cincinnati, etc., R. Co., 20 W. L. B. 457 (C. P.)

See Railway Co. v. Cronin, 38 O. S. 122 (1882).

§ 8350.

Where materials were delivered in another state for use in the construction of a railroad in Ohio, the seller is entitled to a lien.

Carnegie Bros. v. Lancaster, etc., Ry. Co., 1 N. P. 300; 3 L. D. 343 (C. P. 1894).

See Mack v. DeGraff, etc., Co., 57 O. S. 463 (1898).

Priority between mortgages and liens.

See Toledo, etc., R. R. Co. v. Hamilton, 134 U. S. 296, 301.

Feike v. Railroad Co., 12 C. C. 362; 5 C. D. 640 (1892); 14 C. C. 186; 7 C. D. 652 (1897).

Act is prospective in operation.

Feike v. Railroad Co., 12 C. C. 362; 5 C. D. 640 (1892).

Liens on railroads and bridges under general mechanics' lien law.

See Rutherford v. Cincinnati, etc., R. R. Co., 35 O. S. 559 (1880).

Smith Bridge Co. v. Bowman, 41 O. S. 37 (1884).

Industrial, etc., Co. v. Supply Co., 1 O. F. D. 483 (1897).

Bowman v. Springfield, etc., R. R. Co., 1 C. C. 64 (1885); 1 C. D. 39.

Cleveland, etc., Ry. Co. v. Trust Co., 86 Fed. 73 (1898).

Industrial, etc., Co. v. Electrical, etc., Co., 58 Fed. 732 (1893).

In re Amherst Quarries Co., 56 O. L. B. 93 (1910).

Section 8344. (What contracts for railroad work shall stipulate, etc.) A railroad company shall provide, in its contract with any person, association of persons, or corporation for the construction of its road, or any part thereof, that payments thereunder shall be made in the following order of priority: First, to the persons performing labor, furnishing materials, or boarding, on the order of any contractor or sub-contractor to persons employed by them, or either of them, in furnishing materials or labor for or in the construction of such railroad, without preference. Second, to any sub-contractor, any balance due under his contract after payment of his or their liabilities to persons performing labor or furnishing materials or boarding, under his or their contract. Third, to any contractor, or construction company, intervening between a sub-contractor and the railroad company, in the order of such intervention from such sub-contractor upward to the owner of the railroad, any balance due after payment by the company, of amounts found due in the order of priority above provided. (R. S. Sec. 3207; 80 v. 99; R. S. 1880; 71 v. 51, § 1.)

Section 8345. (What lien shall have precedence.) A person who performs labor or furnishes materials for or in construction of any railroad, depot buildings, water-tanks,

or any part thereof, and a person who furnishes boarding on the order of any contractor or sub-contractor, to persons employed by them or either of them, in furnishing materials, or performing labor for or in construction of such railroad, depot buildings, water-tanks, or any part thereof, in addition to his rights under the next two preceding sections shall have a lien for its payment upon such railroad. Such lien shall have and maintain precedence over any lien taken, or to be taken, and subsist for one year from the date of filing the attested account hereafter provided for. If an action is brought to enforce the lien within that time, it shall continue in force until finally adjudicated. (R. S. Sec. 3208; 80 v. 99; R. S. 1880; 71 v. 51, § 1.)

"Materials" in this section comprehends and includes only such articles as are furnished for and to be used in construction of the railroad. Hay, grain, etc., furnished for the keep of teams of a contractor or subcontractor are not "materials." Section 8351 does not enlarge the meaning of the word "materials."

Penna. Co. v. Mehaffy, 75 O. S. 432 (1907).

Priority between mortgages on after acquired property and mechanics' lien. Reed v. Ginsburg, 64 O. S. 11 (1901).

Rousculp v. Railroad Co., 19 C. C. 436; 10 C. D. 621 (1899).

See note to § 8793.

Under this section the taking of a note does not waive or affect the right to a lien, nor is it necessary to refer to or describe the note in taking such lien.

Rousculp v. Ohio Southern R. R. Co., 19 C. C. 436; 10 C. D. 621 (1899).

Lien not lost by extension of time.

Carnegie v. Lancaster, etc., Ry. Co., 1 N. P. 300; 3 L. D. 343 (1894).

Lien for materials delivered out of state.

Carnegie v. Lancaster, etc., Ry. Co., 1 N. P. 300; 3 L. D. 343 (1894).

Mack v. DeGraff, 57 O. S. 463 (1898).

Electric light plant, when not part of railroad.

See Industrial, etc., Co. v. Electrical, etc., Co., 58 Fed. 732; 9 O. F. D. 483 (C. C. A. 1893).

Section 8346. (How lien perfected.) In order to perfect such a lien, a person performing labor, or furnishing materials, or boarding, as heretofore specified, within forty days from the date that he ceased performing labor, or furnishing materials, or boarding on or for the railroad, shall file with the recorder of the county where the labor was performed, or materials, or boarding furnished, an affidavit containing an itemized statement of the kind and amount of materials furnished, or labor performed, the time when the contractor or sub-contractor for whom, and the section and place where, on the line of the road the labor was performed, or materials furnished, and the amount due therefor, after crediting all payments and set-offs. In case of boarding furnished, such

affidavit must have attached thereto an itemized account thereof, showing the name of the contractor or sub-contractor on whose order it was furnished, the several persons to whom furnished, the weekly rate of boarding, and the several amounts unpaid by each respectively. On filing the affidavit it shall be recorded in a separate book to be provided therefor, and then operate as a lien on the railroad, in the manner and subject only to the limitations herein provided. (R. S. Sec. 3208.)

Section 8347. (Proceeding after filing affidavit.) Within ten days after filing his affidavit with the recorder the claimant shall serve a notice in writing upon the secretary, or other officer or authorized representative of the railroad company, by delivering or leaving a copy thereof at his usual place of residence, or place of doing business. Such notice shall contain a statement of the facts of his filing such affidavit, the county wherein filed, the amount of his claim, whether for labor, materials or boarding furnished, and the contractor or subcontractor for whom rendered. But when the notice can not be served in the county where the affidavit is filed, it shall be served by the recorder upon the representative of the railroad aforesaid by depositing in the post-office a letter containing the notice directed to his place of residence, or place of doing business, if known to the recorder. Any person failing to file his affidavit, and serve such notice within the time herein prescribed, shall be held to have waived all claim under this and the next two preceding sections, against the railroad company. (R. S. Sec. 3208.)

The service of a notice under this section on a director of the company to be affected by it is sufficient.

Railway Co. v. McCoy, 42 O. S. 251 (1884).

Under this section a substantial compliance with the conditions of the statute providing for the service of written notice upon the owner of the road is essential to create any obligation.

Railway Co. v. Cronin, 38 O. S. 122 (1882).

Section 8348. (How action may be brought.) A person obtaining and holding a lien as provided for in the three preceding sections, in addition to his remedies, under this subdivision, may proceed by petition as in other cases of lien, against the owner of and all other persons interested, as lienholders or otherwise, in such a railroad, and obtain such judgment as justice and equity require. For the purposes of such suit any number of such lien-holders may join as parties plaintiffs, by separately stating and numbering their respective claims, but if several liens be obtained by

several persons as aforesaid, on the same railroad, they shall have no priority among themselves; payment thereon shall be made pro rata. (R. S. Sec. 3209; 80 v. 99; R. S. 1880; 71 v. 51, § 1.)

See *Schneider v. Cincinnati, etc., Ry. Co.*, 20 W. L. B. 457 (1888).

Section 8349. (Contractor to be notified of time of payment.) Each contractor or subcontractor shall have at least five days' notice, in writing, of the time when the lien for labor, boarding or materials furnished under a contract with him will be paid, which may be served upon him personally or upon his authorized agent or foreman, by the owner of the railroad, or any officer or agent thereof, stating therein the time of their payment. On request of such contractor or subcontractor he shall be permitted to examine such lien claims before they are paid at any time after the notice has been given. But if such notice can not be served in the county where the lien is filed, it may be given by publication in some newspaper of general circulation therein, for the period of two weeks. If he disputes any of the claims, the company or owner of the road shall withhold payment of those in dispute until they are adjusted. (R. S. Sec. 3210; 80 v. 99; R. S. 1880; 71 v. 51, § 2.)

Section 8350. (How disputed claims adjusted.) When the matter can not be adjusted between the parties interested, it may be submitted to the arbitration of three disinterested persons, one to be chosen by each of the parties, and one by the two thus chosen. Their decision, or that of any two of them, in the absence of fraud or collusion, shall be final and conclusive on the parties. If any claim be disputed and is not settled or submitted to arbitration, the claimant, in such case, shall be required to commence an action on his claim before the proper tribunal, within forty days after notice that it has been disputed, and prosecute it to final judgment without delay. The amount thus ascertained or adjudicated shall then be paid by the railroad owner. But after notice given as above provided, if no objection is filed against such claim within ten days after the expiration of the term for service of notice, then the contractor or subcontractor shall be held to have waived all objection to such claim, and, as against such contractor or subcontractor, it shall be taken to be correct. (R. S. Sec. 3210.)

The limitation of time applies to controversies arising between the contractor or subcontractor and the person furnishing materials or

work, and not to right of action on the part of the latter against the owner of the road.

Railway Co. v. Cronin, 38 O. S. 122 (1882).

Section 8351. (To whom preceding sections apply.) The provisions of the next six preceding sections apply to and include any person who furnishes grain, hay, merchandise, tools or implements, or who repairs any tools or implements, on the order of any contractor or subcontractor, for their own use, or the use of persons employed by them or either of them while furnishing materials or labor for or in construction of such railroad. But the amount of such claim shall not exceed the wages of the person performing labor or furnishing materials, to whom furnished, or the amount found due such contractor, or subcontractor, under the provisions of this subdivision. In every such case the requirements, as to filing affidavits and giving notices must be strictly complied with; and the aggregate of all liens taken and perfected thereunder, shall not be in excess of the actual construction contract price of the railroad company. (R. S. Sec. 3211; 80 v. 99; R. S. 1880; 71 v. 51, § 3.)

While this section extends the provisions of § 8345 to persons furnishing hay, grain, etc., it does not enlarge the meaning of the word "materials" in § 8345.

Penna. Co. v. Mehaffy, 75 O. S. 432 (1907).

See Schneider v. Railway, 20 W. L. B. 457.

A contractor furnishing gravel and dirt is engaged in "construction" and one who furnished a steam shovel to a subcontractor of the contractor is entitled to a lien on funds due from the railroad to the contractor. Wise v. Connell, 10 Ohio App. 14.

Section 8352. (Interpretation of word "owner.") The word "owner" in the sections of this subdivision of this chapter, shall be held and considered as including any lessee, receiver, corporation, company, or persons owning, operating or managing any railroad with whom or in whose behalf such contracts are made. (R. S. Sec. 3211.)

LIENS OF CARRIERS.

Section 8365. (Notice to owner of receipt of freight.) All express companies, transportation companies, forwarding and commission merchants, common carriers, warehousemen, wharfingers, and railroad companies, doing business in this state, within thirty days after the receipt of any property in their warehouse, depot, station, store or other place of deposit or doing business, when such property is plainly marked with the owner's name and place of residence, or it

be otherwise known, shall notify the owner that such property is held by them subject to charges, either by leaving notice at the usual residence or place of business of the owner, or by depositing it, postage prepaid, in the proper postoffice, duly addressed to such owner. (R. S. Sec. 3221; 72 v. 17, § 1.)

Liability of warehouseman on agreement to insure stored goods.

Storage Co. v. Cox, 74 O. S. 284 (1906).

Refusal of consignee to accept goods. Special contract between shipper and carrier for return. Loss on line of connecting carrier. Liability of carrier.

Railroad Co. v. Cappel, 80 O. S. 128 (1909).

Section 8366. (Register of freight.) All such persons, associations, or companies, shall keep a register, in which must be entered a list or inventory of all goods, wares, merchandise, baggage, or other property, with a pertinent description thereof by marks thereon, the size, weight, and the depot, warehouse, or other place where deposited, the time when received, and the amount of charges claimed thereon, which may be left in the possession of such person, association or company, by reason of the owner being unknown, or when such owner's residence is not known, or when such property has been refused, or the owner has neglected to receive it. (R. S. Sec. 3222; 72 v. 18, § 2.)

Section 8367. (When property may be sold.) When any such property has been conveyed to any point in this state, and remains unclaimed for six months at the place to which it is consigned, and the owner within that time fails to claim it, and pay the proper charges, if there be any against it, such person, association, or company, may sell such freight or other property, at public auction, offering each parcel separately. (R. S. Sec. 3223; 74 v. 17, § 3.)

Section 8368. (Notice of sale of property to be given.) Such property may be offered for sale either in the place where the office, station, depot, or warehouse in which it has been deposited for safe-keeping, is located, or at any other place where such person, association, or company may deem best to insure a prompt sale thereof. At least thirty days' notice of the time and place of sale, containing a descriptive list of the several articles to be sold, with names, numbers, and marks thereon, shall be given, by posting such notice at the office, station or depot of such person, association, or company in the county where the place to which the property was consigned is situated, or, if

there be no such office, station, or depot, by posting such notice in three public places in such county. In addition to the posting at the place of consignment, such descriptive list must be posted at the place where the property is to be sold, and thirty days' notice of the time and place of the sale be published in a newspaper of general circulation in the county where the sale is to be. (R. S. Sec. 3224; 74 v. 18, § 4.)

Section 8369. (Disposition of proceeds of sale.) From the proceeds of such property, such person, association, or company, shall pay all the necessary costs and expenses of the sale, and all proper charges for freight and storage of the property sold, apportioning such expenses and charges, as near as may be, among the articles sold, to the amount received for each and hold any overplus, subject to the order of the owner thereof, at any time within one year after the sale, upon proof of ownership by affidavit of the claimant or his attorney. After the expiration of one year, all such sums unclaimed shall be paid into the state treasury, to be placed to the credit of the common schools. Any article remaining unsold may be again offered as above provided, until sold. (R. S. Sec. 3225; 74 v. 18, § 4.)

Section 8370. (Suit to subject freight to payment of costs.) Such person, association or company may bring suit in any court of competent jurisdiction for the amount of the freight, storage, and legal charges thereon, and subject such freight to the payment thereof, after ten days from the giving of the notice provided for in section eighty-three hundred and sixty-five, unless such cost and charges are paid, if the owner or consignee is known or can be found in the county. If such owner or consignee is unknown, a non-resident of the county, or his place of residence is unknown, then such notice shall be published for not less than ten days in a newspaper of general circulation in such county. In such case the suit may be brought after ten days from the first publication. The judgment obtained shall be a lien upon the freight, to satisfy which, with costs of suit, it shall be sold. (R. S. Sec. 3226; 74 v. 17, § 3.)

Section 8371. (Storage and the lien therefor.) Such person, association, or company, after the expiration of ten days from the receipt of goods at the place to which they are consigned, upon giving or depositing the notice provided in section eighty-three hundred and sixty-five, and the expiration of ten days, may charge a fair and reasonable cost

for storage, which shall be a lien upon the goods so stored. Such person, association, or company also, after the expiration of such ten days, may deliver the goods to any warehouseman or storage merchant at the point of destination thereof, or in case there be no responsible warehouseman or storage merchant at such point willing to receive the goods, then at the most convenient point where storage can be effected, and receive from such warehouseman the freight and charges due such railroad or other company thereon, notifying the owner or consignee of such storage, when known, in the manner above provided, and the advances made. All reasonable charges for storage shall be a lien upon the goods so stored. (R. S. Sec. 3227; 74 v. 17, § 3.)

Lien for freight charges paid to other carriers.

Bennet, etc., Co. v. Robinson, 6 O. L. R. 355 (C. C. A. 1908).

Section 8372. (Copy of notice, sale bill, etc., to be kept.)

Such person, association, or company shall keep a copy of the notice, a copy of the sale bill, and the expenses thereof, proportional to each article sold, and also the oath of the claimant of the residue of the proceeds, and must furnish an inspection of it, and, if required, copies thereof, to any one, on payment of the proper charges therefor. (R. S. Sec. 3228; 72 v. 19, § 5.)

Section 8373. (Sale of perishable articles.) If perishable property be so conveyed as freight, and remain unclaimed until in danger of great depreciation, or it be refused, or the owner thereof cannot be found, then such person, association or company may sell it at private sale, or auction, without giving notice, for the best price it will bring, and apply the proceeds as aforesaid. (R. S. Sec. 3229; 72 v. 19, § 6.)

Live stock is perishable property.

Trustees v. Brighton Stock Yards Co., 27 O. S. 435 (1875).

Section 8374. (Within what time property may be claimed.) If the owner of any such property, at any time within five years, reclaims it, and produces satisfactory evidence to the auditor of state of his ownership thereof, the auditor shall draw his warrant in favor of such person upon the treasurer of state for the amount paid into the state treasury. (R. S. Sec. 3230; 72 v. 20, § 9.)

Section 8375. (Penalty for neglect to comply with provisions.) Any such person, association or company who refuses or neglects to perform any of the duties required by

this chapter, with the intent to avoid its provisions, shall forfeit and pay a sum not less than one hundred dollars, nor more than five hundred dollars, at the discretion of the court, to be recovered for the use of common schools in the county in which the principal office of such person, association, or company is located, and also be liable to any person injured thereby in double the value of the property. (R. S. Sec. 3231; 72 v. 20, § 7.)

LIEN ON PUBLIC WORKS.

Section 8376. (Lien for labor or material furnished.)

Any person who has performed common or mechanical labor upon, or furnished supplies to any railroad, street railroad, or railroad operated wholly or in part by electric motor power, turnpike, plank road, canal or on any public structure being erected, or on any abutment, pier, culvert or foundation therefor, or for any side track, embankment, excavation, or any public work, protection, ballasting, delivering or placing ties, or track-laying, whether the labor is performed for, or the supplies or materials are furnished to any company, corporation, contractor, or subcontractor, construction company, or any individual, shall have a first and absolute lien on the whole of the property on which such work is done, or to which such supplies were contributed, and on any fund arising from a sale thereof or any part thereof under an order of any court. (95 v. 609, § 1; R. S. Sec. 3231-1; 86 v. 120.)

This section does not apply to highways owned or constructed by public authorities, but only to such as are owned or constructed by private corporations. *In re Schilling*, 251 Fed. 966 (D. C. Ohio 1918).

The provisions of this section relating to liens of subcontractors have been held unconstitutional.

Stewart v. Gardner, 10 C. C. n. s. 408; 20 C. D. 218 (1907); *aff'd*, 78 O. S. 451.

Shaw v. Railway, 8 O. L. R. 43; 173 Fed. 476 (C. C. A. 1909).

Section construed. *New England, etc., Co. v. Railway Co.*, 75 Fed. 162 (1896).

Massillon Bridge Co. v. Cambria Iron Co., 59 O. S. 179 (1898).

Section 8377. (Determination of lien.) Such person shall hold the railroad, street railroad or railroad operated wholly or in part by electric motor power, canal, turnpike, plank road, or structure, to the creation or construction of which such labor or supplies were contributed, or so much thereof as in whole or part have been created by such labor or supplies, to the exclusion of any such railroads, canal, turn-

pike, plank road, public work or structure, as to operation, occupation or use, until the claim for such labor or supplies is properly adjusted and paid in full. (95 v. 609, § 1; R. S. Sec. 3231-1; 86 v. 120.)

Section 8378. (How lien obtained.) When it is deemed necessary for any construction company, contractor, subcontractor, mechanic, laborer, or person contributing supplies or material to secure a claim against a railroad, canal, turnpike, plank road, public work or public structure, either for work done or material furnished, they shall file a sworn itemized statement, within thirty days after the work was performed or materials furnished, of the amount of work done or material furnished, showing the balance due and claimed for labor or material furnished, with the recorder of the county or counties within which the work was done or materials furnished. If several liens be obtained by several persons on the same job, in the manner prescribed by this subdivision of this chapter, they shall have no priority among themselves, but payments thereon must be made pro rata. (86 v. 120, § 2; R. S. Sec. 3231-2.)

Section 8379. (Bond; when injunction may issue.) Any construction company, contractor, mechanic, laborer or person contributing supplies or material to any work named in section eighty-three hundred and seventy-six, at the time of filing the sworn statement of account as provided in the next preceding section, must file a good and sufficient bond of indemnity for an amount equal to the amount claimed, which bond shall be approved by the probate judge, and be so conditioned as to save and protect the defendant in any case arising under this subdivision of this chapter, and thereupon shall be entitled to a decree of the common pleas court, enjoining and prohibiting the operation, use or occupancy of the property created in whole or in part by the party or parties asking for such injunction; and the injunction shall not be dissolved until the court is satisfied that the claim has been adjusted and paid in full. (86 v. 121, § 3; R. S. Sec. 3231-3).

This section is unconstitutional.

Creech v. Railroad Co., 29 W. L. B. 112 (C. P. 1893).

But does not render the entire act invalid.

New England, etc., Co. v. Oakwood St. Ry. Co., 75 Fed. 162; 8 O. F. D. 682 (C. C. 1896).

Section 8380. (Engineer to make measurements, estimates, etc.) Any civil engineer employed as chief or as-

sistant engineer in the surveying, platting, or cross-sectioning of any railroad, canal, turnpike, plank road or other public road, before the work is commenced, shall make an accurate measurement thereof, and prepare a profile of each section of one mile or less of work, showing quantities of each and every class of work to be done thereon. He also shall designate the nearest benchmark or point from which measurements are made, and drive stakes at top of slope, at foot of embankments, at sides and center of grade and around every burrow pit for each one hundred feet, showing in plain figures by feet and tenths of a foot the depths of cut or height of fill or embankment, together with a correct showing of the quantity of overhaul beyond a given number of feet, in cubic yards, for each section of a mile or less. Such chief or assistant engineer, on demand, when any work is finished, must furnish to any company, contractor, subcontractor or person a final statement of quantities in each class of work done or supplies or material furnished by parties interested. (86 v. 121, § 4; R. S. Sec. 3231-4.)

Where a construction contract requires written orders for all extra work, an engineer has no authority to bind the company by verbal orders therefor.

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PART XVI.

GENERAL CORPORATION LAW.

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FORMATION.

Section 8623. (Purpose for which corporation may be formed.) Except for carrying on professional business, a corporation may be formed for any purpose for which natural persons lawfully may associate themselves. (R. S. Sec. 3235 May 12, 1902, 95 v. 623; March 22, 1900, 94 v. 65; April 6, 1894, 91 v. 126; April 20, 1893, 90 v. 205; R. S. 1880.)

Section cited. Ehrman v. Insurance Co., 35 O. S. 342; Larwell v. Hanover, etc., Co., 0 40. S. 282; State v. Lemert, 10 N. P. n. s. 135; Bachtel v. Wilson, 204 U. S. 36.

Corporations classified: (1) For profit; (2) Not for profit. Corporations organized under Ohio laws are classed as (1) corporations for profit, which must have a capital stock, and (2) corporations not for profit, which may, but need not, have a capital stock. State v. Standard Life Assn., 38 O. S. 281, 288 (1882); Snyder v. Chamber of Commerce, 53 O. S. 1 (1895).

Corporations for profit are those formed for the prosecution of business enterprises with a view to realizing gains to be distributed as dividends among the shareholders in proportion to their contributions to the capital stock. Snyder v. Chamber of Commerce, 53 O. S. 1, 11 (1895).

A corporation which is necessarily for profit must be so organized, with a capital stock. *State v. Home Co-op. Union*, 63 O. S. 547 (1900).

The character of the corporate business and the method of conducting it determine whether a corporation is one for profit, and not whether it has a capital stock. *Celina Tel. Co. v. Mutual Tel. Co.*, 102 O. S. 487, 495 (1921).

It has been said that a determining test between a corporation for profit and a corporation not for profit is whether the profits are to be distributed among the stockholders or members. A corporation not for profit may make profits, without being a corporation for profit, if the profits are to be used for the corporate purposes only, and if the stockholders or members have no right of participation therein. Articles of incorporation which provide that no profits shall be distributed to members may be filed on payment of the fee required of a corporation not for profit (§ 176). Rep. Atty. Gen. 1912, pp. 30, 41, 617. See also *Taylor v. Hospital*, 85 O. S. 90 (1911).

Where the real purpose of a corporation is the promotion of the pecuniary benefit of its members, it can not be organized as a corporation not for profit. Rep. Atty. Gen. 1911-1912, p. 127; Rep. Atty. Gen. 1913, p. 93.

If the real corporate purpose is to save money for the members, it is no less a corporation for profit than if its purpose were to make money for them. Rep. Atty. Gen. 1913, p. 93.

A corporation formed to make loans to its members without interest is for their pecuniary benefit, and can not be organized as a corporation not for profit. Rep. Atty. Gen. 1912, p. 39.

A corporation for profit may be organized to conduct an agricultural fair. *State v. Long*, 48 O. S. 509 (1891).

A mutual protective association organized under G. C. § 9427 is a corporation not for profit. *State v. Standard Life Assn.*, 38 O. S. 281 (1882).

A corporation not for profit may be formed for the purpose of distributing electric current to its members. Opins. Atty. Gen. 1919, p. 233.

And for the purpose of furthering the political candidacy of an individual. Opins. Atty. Gen. 1918, p. 1480.

Corporate purpose as a privilege, or a charter obligation. The purpose for which a corporation is organized is a privilege which need not be exercised to the full extent. The statement in articles of incorporation that the corporation is formed for the purpose of producing and furnishing natural gas to certain named cities "and to other cities, villages and places in the counties aforesaid," does not make it a charter obligation of the corporation to furnish gas to all such cities. *East Ohio Gas Co. v. Akron*, 81 O. S. 33, 51 (1909).

But the charter purpose may determine the character of the corporation, although it does not avail itself of all its powers. A bank possessing the powers of a commercial bank, trust company, and savings bank is a commercial bank although it may not act as such. Rep. Atty. Gen. 1914, p. 85.

Professional business. A physician's defense company proposing to issue contracts whereby it agrees to defend physicians against civil actions for malpractice can not become incorporated or be authorized to do business in Ohio. *State v. Laylin*, 73 O. S. 90 (1905); Rep. Atty. Gen. 1906, p. 51; Rep. Atty. Gen. 1913, p. 68.

A corporation carrying on professional business in violation of

this section can not complain of unfair competition in such business. *Union Painless Dentists Co. v. Mullen*, 6 O. L. R. 475; 19 L. D. 136 (Cin. Super. Ct. 1908).

A contract by a street railway corporation to perform medical services is not only ultra vires, but void. Such corporation can not be directly liable for malpractice. *Youngstown, etc., Ry. Co. v. Kessler*, 84 O. S. 74 (1911).

A public account is not engaged in professional business. Rep. Atty. Gen. 1909-1910, p. 84; Rep. Atty. Gen. 1910-1911, p. 237.

Engineering is not professional business. Rep. Atty. Gen. 1910-1911, p. 213.

But it is said that where the main purpose of a corporation requires that its business be transacted by agents, who are required to be qualified and licensed by public authority, such business must be deemed professional and within the prohibition of § 8623. Rep. Atty. Gen. 1911-1912, p. 73.

The making of contracts to furnish the contract holders with the services of physicians employed by the corporation is professional business and is prohibited by § 8623. Rep. Atty. Gen. 1912, p. 32.

But furnishing messenger, employment agency, and information service to physicians and others is not professional business. Opins. Atty. Gen. 1917, p. 262.

It is an agency and not professional business for a corporation to arrange a contract between an individual and a professional, for a compensation to be paid by the individual, leaving the selection of the professional to the individual and leaving the amount of compensation to mutual agreement between the individual and professional. Rep. Atty. Gen. 1911-1912, p. 73.

The making of contracts whereby a corporation, in consideration of periodical payments, agrees to furnish medical attendance in case of sickness, and to bury the remains after death, is probably professional business. 5 Opins. Attys. Gen. 975.

Single purpose rule. The use of the word "purpose" and not "purposes" implies a limitation. Except where specially authorized by statute, a corporation can be organized for one main purpose only. Several different purposes can not be united in one organization. *State v. Taylor*, 55 O. S. 61, 67 (1896). See 3 O. L. R. 187, 205.

Several purposes incident to the main purpose may be joined. A corporation organized for the main purpose of operating a street railway by electricity may also furnish electric light and power. *State v. Taylor*, 55 O. S. 61, 65 (1896).

Several means may be joined to carry out the main purpose. A corporation formed to furnish light may provide, in its articles of incorporation, for both gas and electricity for such purpose. *Pickard v. Hughey*, 58 O. S. 577 (1898).

A light, heat and power company may, in its articles, provide authority to purchase, or otherwise acquire, as well as to produce or manufacture its light, heat or power. Opins. Atty. Gen. 1916, p. 563.

A corporation may be originally organized to conduct several classes of business which one corporation, formed by consolidation of several corporations, is authorized to conduct. Rep. Atty. Gen. 1908, pp. 62, 55, 89; Rep. Atty. Gen. 1904, p. 78.

A corporation may be authorized to carry on both a wholesale and retail business, without violating the single purpose rule. Rep. Atty. Gen. 1908, p. 74.

The main purpose of a corporation fixes its class. A railroad company is not a hotel company because it operates eating houses in

connection with its passenger traffic, nor is a railroad company a land company because it has acquired unnecessary land. A coal company is not a railroad company because it operates a railroad from its mines to a railroad.

State v. H. V. Ry. Co., 12 C. C. n. s. 49, 60-61; 21 C. D. 175 (1909).

Special statutory provisions enlarge the powers of certain classes of corporations, such as manufacturing and mining companies.

G. C. § 10136 et seq.

A manufacturing company may deal in articles manufactured by it, but not in manufactured articles generally.

Rep. Atty. Gen., 1910-1911, pp. 214, 266.

Opins. Atty. Gen. 1916, p. 1497.

A manufacturing company may, as an incident to its business, purchase and sell patent rights. But a corporation formed for the purpose of developing certain inventions may not include in its articles the purpose of manufacturing and selling the articles to which the patent processes are applicable.

Rep. Atty. Gen., 1911-1912, p. 72.

It is not a violation of the single purpose rule for a foreign corporation to be organized for the purpose of acquiring and holding the stock and bonds of an Ohio corporation, to assist in its reorganization. Toledo Co. v. Smith, 205 Fed. 643, 653 (D. C. 1913).

Foreign corporations are, by the express provisions of G. C. § 178, excepted from the single purpose rule. Rep. Atty. Gen. 1912, pp. 15, 44.

Illustrations of violation of single purpose rule. Articles of incorporation have been rejected by the secretary of state where it was attempted to join several unrelated purposes, as follows:

To transact (1) manufacturing, (2) merchandise, and (3) transportation business. Opins. Atty. Gen. 1916, p. 218.

To (1) audit accounts, (2) establish a collection agency, and (3) do a mercantile agency business.

Rep. Atty. Gen. 1909-1910, p. 84.

To (1) mine, manufacture, buy and sell metals, (2) as principal, agent, factor and broker and (3) to deal in foundry supplies.

Rep. Atty. Gen. 1909-1910, p. 121.

To conduct (1) grocery stores and (2) a general invention development business.

Rep. Atty. Gen., 1908, p. 82.

To sell all merchantable articles at wholesale or retail.

Rep. Atty. Gen., 1908, p. 64.

To (1) deal in minerals and timber, (2) mineral and timber lands, and (3) engage in general mining.

Rep. Atty. Gen., 1908, p. 77.

To (1) produce oil and gas, and (2) mine coal.

Rep. Atty. Gen., 1910-1911, pp. 227, 228.

To (1) negotiate and make loans on real estate, and (2) furnish abstracts of title.

Rep. Atty. Gen., 1910-1911, p. 230.

To do (1) a general engineering, and (2) analytical, consulting and manufacturing chemistry business.

Rep. Atty. Gen., 1910-1911, p. 213.

To (1) manufacture machinery, etc., and (2) develop and sell power.

Rep. Atty. Gen., 1908-1909, p. 73.

See Rep. Atty. Gen., 1910-1911, pp. 221, 268.

To (1) do a stock and bond business, and (2) act as a trustee of corporate mortgages.

Rep. Atty. Gen. 1910-1911, p. 251.

To do (1) a real estate, (2) insurance, and (3) securities business. Opins. Atty. Gen. 1917, p. 196.

To (1) deal in real property, (2) manage estates, and (3) act as agent and broker.

Rep. Atty. Gen., 1908-1909, p. 84; Rep. Atty. Gen. 1910-1911, p. 235.

The (1) production, smelting, etc., of minerals, (2) organizing companies to produce and smelt minerals and (3) dealing in bonds and securities of other corporations.

5 Opins. Attys. Gen., 839 (1903).

To (1) act as agent for insurance companies, (2) act as agent in employing attorneys at law, and (3) loan money to litigants.

5 Opins. Attys. Gen., 1903, p. 1022.

See Rep. Atty. Gen. 1910-1911, p. 265.

To produce and deal in lumber, building materials, and "other personal property and rights and interests of every kind and description," and "to carry on any other lawful business whatsoever which the corporation may deem proper or convenient to be carried on in connection with . . . any of the foregoing purposes, or calculated indirectly to promote the interest of the corporation or to enhance or preserve the value of its property."

Rep. Atty. Gen., 1909-1910, 146.

Purpose must be lawful. A corporation can not be formed for an unlawful purpose, nor can a foreign corporation be admitted to do an unlawful business in Ohio.

Paul v. Groene, 4 O. L. R. 632; 17 L. D. 738 (Cin. Super. Ct. 1907).

State v. Interstate Sgs. Investment Co., 64 O. S. 283, 318 (1901).

Private corporations cannot be legally organized to discharge governmental functions, but may be formed for the purpose of assisting officers of the law in a legitimate way. Rep. Atty. Gen. 1912, p. 78; G. C. §§ 10199, 10200.

The following purposes have been held or deemed to be unlawful:

Conducting a lottery.

Paul v. Groene, 4 O. L. R. 632; 17 L. D. 738 (1907).

State v. Interstate Sgs. Investment Co., 64 O. S. 283 (1901).

Receiving illegal rebates from railway companies.

Brundred v. Rice, 49 O. S. 640 (1892).

Purchasing franchises of corporations.

(Atty. Gen.); 24 W. L. B. 269 (1890); 4 Opins. Attys. Gen., 361.

Dealing generally in stocks of other corporations. (On the ground that under G. C. § 8683 a corporation may acquire stock in "kindred but not competing corporations" only.)

5 Opins. Attys. Gen., 924, 969 (1903); citing Bank v. Bank, 36 O. S. 354.

Rep. Atty. Gen., 1910-1911, p. 246.

Rep. Atty. Gen., 1911-1912, pp. 58, 61.

Association of unmarried persons, to establish a fund by assessment and pay stipulated sums to members upon marriage.

5 Opins. Attys. Gen., 118 (1900).

Marriage endowment association.

4 Opins. Attys. Gen., 43.

Manufacturing articles infringing patents.

See Clemshire v. Boone Co. Bank, 53 Ark. 512 (1890).

A combination in restraint of trade. Rep. Atty. Gen. 1912, p. 66.

Forming a military company of foreigners, presumably for an improper purpose.

Russian American Guards Charter, 3 Pa. Dist. 673 (1893); s. c., 13 Pa. Co. Ct. Rep. 148.

Assisting in war against the United States.

Chicora Co. v. Crews, 6 S. C. 243 (1874).

United States v. Insurance Co., 22 Wall. (U. S.); 99 (1874).

Importing Co. v. Locke, 50 Ala. 332 (1876).

Arranging marriages for compensation.

In re Mutual Aid Ass'n, 15 Phila. 625 (1881).

In re Helping Hand Ass'n., 15 Phila. 644 (1881).

Resisting temperance laws.

Detroit, etc., Bund v. Detroit, etc., Verein, 44 Mich. 313 (1880).

Manipulating stocks of other corporations and thereby creating a trust. People, ex rel., v. Gas Trust, 130 Ill. 268 (1889).

Resisting enactment of laws by lawful means has been regarded as a proper purpose. 4 Opins. Attys. Gen., 84 (1888). *Contra*. 2 Opins. Attys. Gen. 1070, 1086 (1882).

Banks, insurance companies, etc., can not organize under the general corporation law. Where the method of incorporation of a certain class of corporations is specially provided for by statute, such companies must organize under the special statute and not under the general corporation law. G. C. § 8737.

Insurance companies. State v. Pioneer Live Stock Co., 38 O. S. 347 (1882); Rep. Atty. Gen. 1912, p. 83.

Banks: G. C. § 710-41 et seq.; Rep. Atty. Gen. 1908-1909, p. 80; 4 Opins. Attys. Gen. 565.

In the articles of incorporation of an insurance agency company, the corporate purpose can not be expressed as a "business of general insurance underwriters." Rep. Atty. Gen. 1911-1912, p. 60.

Corporations formed to administer trusts. A corporation formed to carry out and perpetuate a trust is subordinate and subsidiary to the objects of the trust, as declared by the donor. State v. Toledo, 3 C. C. n. s. 468, 474; 13 C. D. 327 (1902); Toledo v. Saiders, 15 C. C. n. s. 468; 23 C. D. 613 (1910); aff'd, no rep., 83 O. S. 495; see § 10085 et seq.

Section 8624. (Sanatoriums.) Corporations for the erection, owning and conducting of sanatoriums for receiving and caring for patients, their medical, surgical and hygienic treatment, and the instruction of nurses in the treatment of diseases and of hygiene, are not forbidden by the next preceding section. (R. S. Sec. 3235; May 12, 1902, 95 v. 623; March 22, 1900, 94 v. 65; April 6, 1894, 91 v. 126; April 20, 1893, 90 v. 205; R. S. 1880.)

A sanatorium is a place where patients are received and cared for. An office is not a sanatorium. Rep. Atty. Gen. 1912, p. 20.

Articles of incorporation of a training school for nurses may include authority to issue certificates of completion of course. Rep. Atty. Gen. 1908, p. 64.

A corporation not for profit maintaining a charity hospital or other purely charitable institution is not liable for the negligence of its servants. Taylor v. Protestant, etc., Assn., 85 O. S. 90 (1911).

Except where it has failed to exercise proper care in the selection of such servants. Taylor v. Hospital, 104 O. S. 61 (1922).

That a hospital receives pay from a patient for lodging and care does not affect its character as a charitable institution. Taylor v.

Protestant, etc., Assn., 85 O. S. 90 (1911); O'Brien v. Hosp. Assn., 96 O. S. 1 (1917).

A public charitable hospital can not receive pay patients to such an extent as to exhaust its accommodations and render it unable to care for the usual number of charity patients. O'Brien v. Hosp. Assn., 96 O. S. 1 (1917).

Under the "single purpose" doctrine (see note to § 8623) a corporation can not be organized to conduct both a hotel and a sanatorium. Rep. Atty. Gen. 1910-1911, p. 260.

Evidence of charitable nature of corporation. A corporation not for profit may show by its charter, constitution and by-laws, or by oral evidence not inconsistent therewith, that it is organized solely for the purpose of administering a public charity, the foundation of which is derived from private donations. O'Brien v. Hosp. Assn., 96 O. S. 1 (1917).

Section 8625. (Who may incorporate. What articles of incorporation shall contain.) Any number of persons, not less than five, a majority of whom are citizens of this state, desiring to become incorporated, shall subscribe and acknowledge articles of incorporation, which must contain:

1. The name of the corporation, which, unless it is not for profit, may begin with the word "the" and shall end with the word "company", "corporation," "incorporated," or "inc.", except as otherwise provided by law.

2. The place where it is to be located, or its principal business transacted.

3. The purpose for which it is formed.

4. The amount of its capital stock, if it is to have capital stock, and the number of shares into which it is divided.

5. But, if the corporation is for a purpose which includes the construction of an improvement not to be located at a single place, the articles of incorporation must also set forth—

a. The kind of improvement intended to be constructed.

b. Its termini, and the counties in or through which it or its branches will pass. (110 v. 144; R. S. Secs. 3236, 3237; April 10, 1889, 86 v. 224; April 16, 1885, 82 v. 134; Rev. Stats. 1880.)

Charter, what constitutes. The charter of a corporation formed under general corporation laws consists of the articles of incorporation and the general laws of the state. Security Trust Co. v. Ford, 75 O. S. 322, 333 (1906); Wegener v. Wegener, 101 O. S. 22 (1920); Cronin v. Potter's Co-op. Co., 29 W. L. B. 52 (1892).

The charter of a corporation, for excise tax purposes, may be determined from the nature of its business, and not exclusively from its articles of incorporation. Railway Co. v. Poland, 10 N. P. n. s. 617 (C. P. 1910).

Unauthorized provisions in articles of incorporation. Articles of

incorporation should contain only those provisions which are specified in the statute. Other provisions are void. *Security Trust Co. v. Ford*, 75 O. S. 322 (1906); *People v. Chicago Gas Trust*, 130 Ill. 268; *Oregon, etc., Co. v. Oregonian Ry. Co.*, 130 U. S. 1, 25; *State v. Anderson*, 31 Ind. App. 34; *O'Brien v. Cummings*, 13 Mo. App. 197.

Such unauthorized provisions do not, however, invalidate the entire instrument. If it contains the provisions required by statute, it will be held valid, and the unauthorized provisions disregarded as surplusage. *Toledo, etc., Ry. Co. v. Toledo Elec., etc., Co.*, 6 C. C. 362, 391; 3 C. D. 493, 507 (1892); aff'd, no rep., 50 O. S. 603. See *Hanna v. International Petroleum Co.*, 23 O. S. 622 (1873).

Articles containing unauthorized provisions may be refused filing by the secretary of state. 3 Opins. Attys. Gen. 699.

The following are illustrations of unauthorized provisions:

Limitation of duration of corporation (not a real estate company).

3 Opins. Attys. Gen. 241.

Designation of first board of directors or trustees.

3 Opins. Attys. Gen. 241-699.

Reformation of articles because of mistake.

See *Cronin v. Potter's Co-op. Co.*, 29 W. L. B. 52 (C. P. 1892).

Correction of defective articles.

See § 12210 et seq.

Amendment of articles. See § 8719.

Incorporators. Only natural persons may act. Associations, firms and corporations are disqualified.

Rep. Atty. Gen., 1908, p. 72.

2 Opins. Attys. Gen., 109.

Rep. Atty. Gen. 1910-1911, p. 210.

Infants are not competent to act.

State v. Burial Assn., 8 C. C. n. s. 233, 253; 18 C. D. 397 (1906).

Articles executed by less than five incorporators are void.

State, ex rel., v. Critchett, 37 Minn. 13.

People v. Montecito Water Co., 97 Cal. 276.

Articles which failed to show that a majority of the incorporators were residents of Ohio were refused filing by the secretary of state.

3 Opins. Attys. Gen., 530.

Incorporators need not subscribe for stock in the corporation or have any financial interest in it. *Kardo Co. v. Adams*, 231 Fed. 950, 964; 14 O. L. R. 226 (C. C. A. Ohio 1916); reversing, 13 O. L. R. 137.

Where, after articles have been filed and recorded, it is discovered that one of the incorporators was an infant, it is said that the articles can not be withdrawn and others substituted; but that an amendment of the articles should be filed.

Rep. Atty. Gen., 1910-1911, p. 263.

A secret intention, of illegal user, on the part of the incorporators, not expressed in the articles, does not vitiate the articles.

State v. Taylor, 25 O. S. 279 (1874).

Cronin v. Potter's Co-op. Co., 29 W. L. B. 52, 55 (C. P. 1892).

3 Opins. Attys. Gen., 1059, 1096.

(1). NAME OF CORPORATION.

See also note to § 8628.

Where the words "The" and "Company" are omitted from the name, the public is likely to be misled into the belief that it is dealing with individuals or an association of individuals.

Union Painless Dentists v. Mullen, 6 O. L. R. 475; 19 L. D. 136 (1908).

(2). LOCATION.

The statement in the articles is conclusive as to the location of the corporation, although much of its business is transacted elsewhere. The place so designated is the situs of the corporation for taxation purposes.

Pelton v. Transportation Co., 37 O. S. 450 (1882).

Mercantile Trust Co. v. Aetna Iron Works, 4 C. C. 579, 585; 2 C. D. 718, 722 (1890).

Sims v. Best, 1 C. C. n. s. 41; 15 C. D. 149 (1903); (foreign corporation).

Pomeroy Salt Co. v. Davis, 21 O. S. 555 (1871).

Booth v. Wonderly, 36 N. J. L. 250.

Union Steamboat Co. v. Buffalo, 82 N. Y. 351, §§ 10135, 8744, 9043.

The statute does not require the office building or street address to be stated. It is sufficient to specify the municipality or place. Within such municipality the corporation may, at pleasure, remove its principal office from one building to another, although its purpose is to avoid taxation.

Pelton v. Transportation Co., 37 O. S. 450 (1882).

Mercantile Trust Co. v. Aetna Iron Works, 4 C. C. 579, 585; 2 C. D. 718, 722 (1890).

An amendment of the articles is required for a change to another municipality or place. See § 8719.

State v. Coal Co., 4 N. P. 115; 6 L. D. 180 (1897).

An order of attachment may be issued by a justice of the peace against a corporation in any county in which it is a nonresident, or has no place of business, or no officer upon whom a summons may be served. See § 10253.

Champion Machine Co. v. Huston, 24 O. S. 503 (1874).

Ruling organization—location of: See §§ 8651, 8652.

(3). PURPOSE FOR WHICH ORGANIZED.

See also note to § 8623.

The purpose should be stated in general terms. It is improper to enumerate the incidental powers which are conferred upon the corporation by general law.

Rep. Atty. Gen., 1908-1909, pp. 84, 81, 94.

Wendel v. State, 62 Wis. 300.

People v. Chicago Gas Trust, 130 Ill. 268.

Rep. Atty. Gen., 1910-1911, p. 252.

Rep. Atty. Gen. 1911-1912, p. 64.

The purpose should be clearly stated. The business to be transacted must be specified. It is not a compliance with the law to state that the company is formed to do any business it may find profitable.

In re Crown Bank L. R., 44 Ch. Div. 634.

See State, ex rel., v. Central, etc., Assn., 29 O. S. 399 (1876).

Nor "for the mutual benefit of its members." Rep. Atty. Gen. 1912, p. 76.

The purpose clause should be complete and should not require a reference to the articles of another corporation. Opins. Atty. Gen. 1915, p. 1923.

The articles of a corporation not for profit should clearly show the absence of any pecuniary benefit to the members or stockholders. Rep. Atty. Gen. 1912, pp. 36, 30, 66. See also note to § 8623.

The articles of a manufacturing company should specify definitely the articles to be manufactured.

Rep. Atty. Gen., 1910-1911, pp. 229, 266.

Articles of incorporation have been refused filing and record in the

office of the secretary of state because of indefinite statement of purpose. Illustrations:

Corporation formed to manufacture a certain article "and to engage in a general manufacturing and mercantile business."

Rep. Atty. Gen., 1908-1909, p. 54.

Corporation formed to manufacture brake shoes "and all other articles that may be manufactured from wood and sold at a profit."

Rep. Atty. Gen., 1908-1909, p. 54.

Contractors' association incorporated for the purpose of "promoting the business welfare of its stockholders and members."

Rep. Atty. Gen., 1911-1912, p. 70.

Articles of incorporation should be construed as an entirety, in determining the powers of a corporation, and the power should not be limited by reading single sentences or clauses and excluding all else. *Eaton v. Society*, 264 Ill. 88; 105 N. E. 746 (1914).

(4). CAPITAL STOCK.

No-par-value common stock. § 8728-1.

A corporation which is necessarily for profit can not be organized without a capital stock.

State v. Home Co-op. Union, 63 O. S. 547 (1900).

A clerical error in the statement of the number or amount of shares will not invalidate articles where the amount of the capital stock is correctly stated.

Hughes v. Antietam Mfg. Co., 34 Md. 316.

Articles which failed to specify the number of shares were rejected by the secretary of state.

3 Opins. Attys. Gen., 194.

Statements in articles as to preferred stock.

See §§ 8668, 8669 and notes.

The term "capital stock" is sometimes used to designate the common stock, exclusive of the preferred stock. *Miller v. Baker Co.*, 11 O. L. R. 557 (U. S. D. C. 1912).

Capital stock and corporate property distinguished. In taxation and certain other statutes the term "capital stock" has been used as meaning the *capital* or property of the corporation.

Lee v. Sturges, 46 O. S. 160 (1889).

Bradley v. Bauder, 36 O. S. 34 (1880).

Jones v. Davis, 35 O. S. 476, 477 (1880).

Railway Co. v. Furnace Co., 49 O. S. 112 (1892).

But there is a distinction between the *capital stock* and the *capital* of a corporation. The amount of the capital stock remains fixed while the property or capital fluctuates in value and continually increases or diminishes in amount.

State v. Jones, 51 O. S. 510, 511 (1894).

Cleveland Trust Co. v. Lander, 62 O. S. 273 (1900).

The capital stock is not owned by the corporation, but by its shareholders. A corporation owes and not owns its stock. The capital stock is a liability of the corporation and not an asset.

Southern Gum Co. v. Laylin, 66 O. S. 578, 596 (1902).

Natl. Bank v. L. S. & M. S. R. Co., 21 O. S. 221, 230 (1871).

State v. Franklin Bank, 10 Ohio 91 (1840).

A share of stock is a right which entitles its owner to participate in the profits of the corporation, in its assets upon liquidation, and to vote at elections for directors.

See *Jones v. Davis*, 35 O. S. 477 (1880).

(5). TERMINI AND ROUTE OF IMPROVEMENT.

Where the corporate purpose includes the construction of an improvement not located at a single place the termini must be designated with reasonable certainty. Opins. Atty. Gen. 1919, p. 233; 5 Opins. Atty. Gen. 950 (1903).

The articles of incorporation of a telephone company must set forth the termini of the improvement and the counties in or through which it or its branches shall pass.

Rep. Atty. Gen., 1904-1905, p. 74.

An interurban railroad, in amending its articles so as to change its route or a terminum, must comply with §§ 8747 and 8748. Opins. Atty. Gen. 1915, p. 1282.

Where a gas company extends into more than one locality, its articles must set forth the route and termini. Rep. Atty. Gen. 1912, p. 1497.

Definiteness of description required. The statute only requires reasonable certainty and the description of the termini and course may be somewhat indefinite in the articles of incorporation, if defined by location. The location must be made with reasonable compliance with the description in the articles of incorporation. To require a greater degree of certainty in the articles of incorporation to ensure validity would necessarily defeat the object of the statute in many, if not most, cases. Reasonable latitude must be allowed, for it is by force of such description that a company may send its engineers upon the lands of others to locate the route definitely.

Callender v. Painesville, etc., R. R. Co., 11 O. S. 516.

Cleveland, etc., R. R. Co. v. Prentice, 13 O. S. 373, 379 (1862).

A description of the termini and course of a road "from a point on the Ohio and Pennsylvania State line in the County of Trumbull, in said state of Ohio, to a point on the Ohio River in same state in the County of Brown or Adams," was held too uncertain to support condemnation proceedings.

Atlantic, etc., R. R. Co. v. Sullivant, 5 O. S. 276 (1855).

Indefiniteness of descriptions in articles of incorporation may be cured by legislative recognition or by actual location, construction and operation.

Cayuga R. R. Co. v. Kyle, 5 Thomp. & C. (N. Y.) 659 (1875).

Articles of association of a road corporation describe the termini of the projected road with sufficient certainty when the description can be rendered certain, as where the road is made to start at a point definitely described to run specified courses and distances to an end, the whole length of road being given.

Miller v. Wild Cat Gravel Road Co., 52 Ind. 51 (1875).

Where the articles of incorporation of a railroad company are defective in not specifying with sufficient certainty the terminus of the road, but are properly filed in the office of the secretary of state, such filing is notice to the state of such defect, and if the state neglects for five years (G. C. § 12340) to take advantage by quo warranto or otherwise, the right is lost.

State v. Bailey, 19 Ind. 452.

Route. This section does not require the townships to be specified. Where townships are specified, it is mere surplusage. The railroad may be extended into other townships within the counties named in the articles.

Hayes v. Toledo Ry. & Ter. Co., 6 C. C. n. s. 281; 16 C. D. 395 (1903); aff'd, no rep., 70 O. S. 425.

Contiguous counties may be named in the alternative and the terminus may be an undesignated point in a township.

Callender v. Painesville R. R. Co., 11 O. S. 516 (1860).

Termini. Both terminal points may be located in one city.

State v. Union Ter. R. Co., 72 O. S. 455 (1905).

The terminus may be an undesignated point in a township.

Callender v. Painesville, etc., R. R. Co., 11 O. S. 516 (1860).

Articles of incorporation are not invalid because the terminus of the proposed improvement is designated as "in or near the town of Lima, Allen County, state of Ohio, at a point on the Cleveland and St. Louis Railroad." The words "in or near" are sufficiently definite, meaning substantially "in."

Warner v. Callender, 20 O. S. 190 (1870).

Central R. R. Co. v. Penn. R. R. Co., 31 N. J. Eq. 475 (1879).

A description "from" a city or other point includes any point in such city. See § 8745.

Colorado, etc., Ry. Co. v. Union Pac. Ry. Co., 41 Fed. 293.

Comm. v. Erie, etc., R. R. Co., 27 Pa. St. 339, 352.

Chicago, etc., Ry. Co. v. Chicago, etc., Ry. Co., 112 Ill. 589.

St. Louis, etc., Ry. Co. v. Hannibal, etc., Co., 125 Mo. 82; 28 S. W. Rep. 483.

Contra, Northeastern R. R. Co. v. Payne, 8 Rich. L. (s. c.), 177.

A description "to" a certain place is inclusive.

Rio Grande R. R. Co. v. Brownsville, 45 Tex. 88.

St. Louis, etc., Co. v. Hannibal, etc., Co., 125 Mo. 82; 28 S. W. Rep. 483.

See Hatry v. Painesville, etc., Ry. Co., 1 C. C. 426, 433; 1 C. D. 238, 242 (1886).

A description "at" a certain town is inclusive.

Mohawk Bridge Co. v. Utica, etc., R. R. Co., 6 Paige Ch. (N. Y.) 554.

Mason v. Brooklyn, etc., Co., 35 Barb. (N. Y.) 373.

A description "between" certain points is inclusive.

Morris, etc. R. R. Co. v. Central, etc., R. R. Co., 31 N. J. L. 205.

Section 8625-1. (Soldiers or sailors may form corporation not for profit. Corporation with or without capital stock; fee.) Any five or more honorably discharged soldier or sailors who have served in any war in which the United States has participated, may organize a corporation not for profit, under the general corporation laws of the state of Ohio, for the purpose of perpetuating American ideals, of encouraging, promoting and unifying the interests of, and work among the veterans of the Army and Navy of the United States and its Allies, and providing means and facilities for such purpose or purposes, by acquiring by purchase, lease or otherwise, real estate for a club house, and educational and recreational grounds, buildings and equipment, and owning, improving, holding, operating and disposing of the same for the accommodation, convenience, pleasure and entertainment of said veterans, and providing funds for the acquisition and operation of said buildings, grounds and

equipment, and for the carrying on of said work, or for any one or more of the above purposes.

Such corporation may be organized with or without capital stock and the fee to be charged by the secretary of state upon the filing of such articles of incorporation shall be two dollars if such corporation shall have no capital stock and twenty-five dollars if such corporation shall have capital stock, irrespective of the amount thereof. (109 v. 139.)

Section 8626. (Acknowledgment of articles; where filed.)

Articles of incorporation shall be acknowledged before an officer authorized to take the acknowledgment of deeds, the form of which shall be prescribed by the secretary of state. The official character of the officer before whom articles of incorporation are acknowledged, shall be certified by the clerk of the common pleas court of the county wherein the acknowledgment is taken. Articles of incorporation shall be filed in the office of the secretary of state, who shall record them, and shall also record certificates relating to that corporation, thereafter filed in his office. (R. S. Secs. 3236, 3238; March 31, 1902, 95 v. 76; April 27, 1896, 92 v. 320; April 10, 1889, 86 v. 224; April 16, 1885, 82 v. 134; Rev. Stats. 1880.)

Execution and acknowledgment. Articles should be signed and acknowledged in this state, under the rule that the acceptance of a charter and organization of the corporation must occur in the state creating it.

3 Opins. Attys. Gen., 560.

See *Myers v. Manhattan Bank*, 20 Ohio 283 (1851).

Smith v. Silver, etc., Co., 64 Md. 85.

Freeman v. Machias, etc., Co., 38 Me. 343.

Heath v. Silverthorn, etc., Co., 39 Wis. 146.

A total absence of acknowledgment will render the articles void.

Doyle v. Mizner, 42 Mich. 332.

Articles signed in blank, and subject to future agreement, may be disaffirmed by the incorporators.

Dutchess R. R. Co. v. Mabbett, 58 N. Y. 397.

Richmond R. R. Co. v. Reed, 83 Ind. 9.

A material alteration, after acknowledgment, will invalidate the articles.

2 Opins. Attys. Gen., 243.

An acknowledgment made before a probate judge must be authenticated by the certificate of the clerk of the court of common pleas.

Rep. Atty. Gen., 1910-1911, p. 216.

The officer's certificate of acknowledgment should contain the names of the incorporators as subscribed to the articles. Opins. Atty. Gen. 1919, p. 18.

Officers authorized to take acknowledgments in Ohio. A notary public within the county of his residence and of each county for which he is appointed, §§ 126, 8510; a judge or clerk of a court of record, a county auditor, county surveyor, mayor, a justice of the peace, § 8510; a police judge, § 4585; a probate judge, § 1582.

Acknowledgments under former law. State, ex rel., v. Lee, 21 O. S. 662 (1871).

Spinning v. Home Ass'n., 26 O. S. 483 (1875).

Warner v. Callender, 20 O. S. 190 (1870).

Lucas v. Building Ass'n., 22 O. S. 339 (1872).

Griffin v. Clinton, etc., R. R. Co., 1 W. L. M. 31 (1859).

Clarke v. Thomas, 34 O. S. 46, 59 (1877).

Hagerman v. Building Ass'n., 25 O. S. 186, 200 (1874).

Filing.

Duty of secretary of state. If the instrument is in proper form and shows compliance with the law, it is the duty of the secretary of state to file and record the same. In case of wrongful refusal, mandamus will lie to compel its filing and recording.

State v. Taylor, 55 O. S. 61 (1896).

But it is also the duty of the secretary of state to refuse to file an instrument which is defective in form, or which contains a statement of an illegal or unauthorized corporate purpose.

State v. Laylin, 73 O. S. 90 (1905).

Or in which the corporate purpose is not clearly stated.

Rep. Atty. Gen., 1908-1909, p. 54.

4 Opins. Attys. Gen., 470.

Or in which the "single purpose" rule is violated.

State v. Taylor, 55 O. S. 61 (1896).

Or in which the law is not complied with in other respects.

Security Trust Co. v. Ford, 75 O. S. 335 (1906).

Or where the corporate name violates § 8628.

The secretary of state has discretion to determine whether a name is misleading.

Rep. Atty. Gen., 1911-1912, p. 127.

Time of filing. The act of filing and not the endorsement of the instrument by the secretary of state determines the time of filing. The endorsement is merely the evidence of filing.

State v. Foulkes, 94 Ind. 493.

See King v. Penn., 43 O. S. 57 (1885).

Haines v. Lindsey, 4 Ohio 88 (1829).

Withdrawal of articles. Where, after articles have been filed and recorded, it is discovered that one of the incorporators was a minor, it is said that the articles can not be withdrawn and other articles substituted; but that an amendment to the articles should be filed.

Rep. Atty. Gen. 1910-1911, p. 263.

"Other certificates relating to the corporation." Section 8626 authorizes the filing, not only of the certificates expressly provided for by statute, but also of miscellaneous certificates and affidavits for the purpose of record. The following have been approved by the attorney general:

A certificate by incorporators of abandonment of the purpose of forming a corporation. Opins. Atty. Gen. 1915, p. 137.

A certified transcript, from the record of a county recorder, of incorporation proceedings under former laws. Opins. Atty. Gen. 1915, p. 2073.

An affidavit showing the existence and amount of the capital stock of a corporation reorganized under statutes relating to railroad companies, where no certificate had been filed as required. Opins. Atty. Gen. 1916, p. 261.

The fee is 20 cents per 100 words; minimum \$5 under § 176, par. 12. Opins. Atty. Gen. 1916, p. 261.

Approval of board of state charities required before incorporation of certain charitable associations. Proposed articles of incorporation of associations for the care of dependent, neglected or delinquent children, or the placing of such children in private homes, must be submitted to the board of state charities and a certificate from such board obtained, before filing with the secretary of state. Opins. Atty. Gen. 1915, p. 2436; G. C. § 1352-2.

Section 8627. (General powers.) Upon filing articles of incorporation, the persons who subscribed them, their associates, successors, and assigns, by the name and style provided therein, shall be a body corporate, with succession, power to sue and be sued, contract and be contracted with; also, unless specially limited, to acquire and hold all property, real or personal, necessary to effect the object for which it is created, and at pleasure convey it in conformity with its regulations and the laws of this state. Such corporation also may make, use, and at will alter a common seal, and do all other acts needful to accomplish the purposes of its organization. (R. S. Sec. 3239; May 1, 1852, 50 v. 274, § 3; S. & C. 273.)

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- B. Corporate note payable to officer, p. 958.
- C. Form, p. 958.

XX. Miscellaneous powers.

- A. To act as trustee, p. 958.
- B. To enter into partnership, p. 958.
- C. To become surety or guarantor, p. 959.
- D. To carry on professional business, p. 959.
- E. To borrow money, issue bonds, etc., p. 959.

I. POWER TO CREATE CORPORATIONS.

See Constitution of Ohio, Article XIII.

A corporation can be created only by the state acting through the instrumentality of the legislature.

Myers v. Manhattan Bank, 20 Ohio 283 (1851).

Ashley v. Ryan, 49 O. S. 504 (1892); aff'd, 153 U. S. 436; 8 O. F. D. 215.

The power of creating a corporation can not be exercised outside of the territorial limits of the state.

Myers v. Manhattan Bank, 20 Ohio 283, 295 (1851).

Before the adoption of the constitution of 1851 when the legislature had

power to grant special charters, a statute which recognized the existence of a corporation in effect created the corporation.

Trustees v. Zanesville, etc., Co., 9 Ohio 203.

The state may impose such terms and conditions as it pleases upon the creation of a corporation. It may fix the filing fee of articles of incorporation and articles of consolidation.

Ashley v. Ryan, 49 O. S. 504 (1892); *aff'd*, 153 U. S. 436; 8 O. F. D. 215.

II. CORPORATE FRANCHISE.

"No persons can make themselves a body corporate and politic without legislature authority. Corporate capacity is a franchise." *California v. Pacific R. Co.*, 127 U. S. 1, 41 (1888).

"A domestic corporation is given life and continued existence by the state and this life and existence with their accompanying powers constitute the franchise." *Burket J. in Southern Gum Co. v. Laylin*, 66 O. S. 578, 595 (1902).

"There is a wide difference between a franchise which is incident to and inheres in the right of a corporation to exist as a corporation and the grant of a right to occupy a public street and construct therein a public utility. The creation of the former, an artificial person, must be done by the state itself. But this is not true of the latter." *Johnson J. in Billings v. Railway*, 92 O. S. 478, 490 (1915).

III. WHEN CORPORATE EXISTENCE BEGINS.

The filing of articles of incorporation does not create a corporation with authority to exercise all its corporate powers. Such articles merely authorize the incorporators to form the corporation. No corporation exists for the transaction of the business for which the corporation is organized until the requisite stock has been subscribed, the first instalment paid thereon and directors elected.

State v. Insurance Co., 49 O. S. 440 (1892).

Cemetery Assn. v. Traction Co., 93 O. S. 161 (1915).

Queen City Telephone Co. v. Cincinnati, 73 O. S. 64, 77 (1905).

But the existence of the corporate body begins upon the filing of the articles.

Ashtabula, etc., R. R. Co. v. Smith, 15 O. S. 328, 334 (1864).

State v. Robinson, 12 W. L. B. 269.

Milford, etc., Co. v. Brush, 10 Ohio 111, 113, 114 (1840).

See Hanna v. International Petroleum Co., 23 O. S. 622, 625 (1873).

Benninger v. Gall, 1 C. S. C. R. 331 (1871).

Its powers are divided into two classes (1) those exercisable before the election of directors, and (2) those exercisable thereafter. Before the election of directors the incorporators may receive subscriptions to the capital stock, and the stockholders may elect directors and adopt regulations; but the business for which the corporation is organized can not be transacted until after the directors are elected.

Ashtabula, etc., R. Co. v. Smith, 15 O. S. 328, 334 (1864).

Powers v. Railway Co., 33 O. S. 429, 432 (1878).

Milford, etc., Co. v. Brush, 10 Ohio 111, 113, 114 (1840).

Where articles have been filed and corporate business transacted, the corporation may have a *de facto* existence for the purpose of suing and being sued. *Kardo Co. v. Adams*, 231 Fed. 950; 14 O. L. R. 223 (C. C. A. Ohio 1916); reversing, 222 Fed. 967; 13 O. L. R. 137.

IV. CORPORATION AS A LEGAL ENTITY.

In contemplation of law a corporation is a legal entity, an ideal person, separate from the persons composing it. But this fiction is limited to the purposes for which it was adopted—convenience in transacting business, in suing and being sued in its corporate name, and the continuance of its rights and liabilities unaffected by change in its members.

Bank v. Trebein, 59 O. S. 316, 326 (1898).

Brown v. Hitchcock, 36 O. S. 667, 678 (1881).

Reed v. Loan Co., 68 O. S. 280 (1903).

A. Corporate entity as instrument for fraud or illegal purpose.

The fiction of corporate entity can not be abused. Fraud or illegal purposes can not be accomplished by means of the fiction of legal entity. In such cases the fiction is disregarded by the courts and the acts of the real parties dealt with.

Bank v. Trebein, 59 O. S. 316 (1898).

State v. Standard Oil Co., 49 O. S. 137 (1892).

Brundred v. Rice, 49 O. S. 640 (1892).

Sayler v. Simpson, 12 L. D. 148 (Cin. Super. Ct. 1888).

Sportsman Shot Co. v. American, etc., Co., 30 W. L. B. 87 (Cin. Super. Ct. 1893).

Cincinnati Volksblatt Co. v. Hoffmeister, 62 O. S. 189, 200 (1900).

In re Rieger, Kapner & Altmann, 8 O. L. R. 498 (D. C. Ohio 1907).

Where funds of a third person have been converted to the use of an insolvent corporation, by its treasurer, the separate entity of the corporation does not relieve the treasurer from criminal liability. Brown v. State, 3 Ohio App. 52; 21 C. C. n. s. 545 (1914); affirming, 15 N. P. n. s. 65; motion to certify record overruled.

Directors and officers can not shield themselves behind the separate entity where they are the actual and efficient actors in committing a fraud or an offense. Kelly v. United States, 258 Fed. 392 (C. C. A. 6th Cir. 1919); certiorari denied, 249 U. S. 616.

Under a contract by all stockholders, for a sale of a part of their stock, providing that the purchasers "are in no way to assume or pay the whole or any part of any unearned interest heretofore due", which had been paid by money contributed by such stockholders, future corporate earnings can not be used to repay such contributions to the stockholders. The corporate form can not be used as an instrument to defeat their agreement. H. V. Ry. Co. v. Toledo Co., 99 O. S. 35 (1918).

An injunction restraining a corporation from maintaining a nuisance, is binding upon a new corporation, of the same name and having the same officers, to which all the assets and business of the former corporation were transferred. Farmers Co. v. Ruh, 7 Ohio App. 430; 29 O. C. A. 165 (1917).

The plant and assets of the B. Company were controlled and operated by the A. Company, although separate corporate organizations were maintained. The A. Company, in assuming control, agreed to indemnify stockholders of the B. Company against all liability for debts of the B. Company. An employe of the B. Company was injured during such operation by the A. Company, and brought an action against the B. Company. Liability insurance effected by the A. Company was in force, and attorneys were employed by the insurance company to defend the suit. Held, the A. Company was bound by the judgment. Boxboard Co. v. Hinton, 100 O. S. 505 (1919).

B. Corporations formed or controlled by failing debtors. Where the members of a partnership form a corporation, to which the entire partnership assets are transferred in exchange for its capital stock, each partner receiving shares of stock in proportion to his interest in the partnership, the partnership assets being the only consideration for the stock, the corporation is liable for the debts of the partnership.

Andres v. Morgan, 62 O. S. 236 (1900).

Bruce Co. v. Eustis Co., 8 Ohio App. 341, 30 O. C. A. 177 (1917); motion to certify record overruled, 15 O. L. R. 485. See also note to § 8710.

See Paul v. Caldwell Co., 7 C. C. n. s. 272, 276; 17 C. D. 768 (1905).

For recourse on stockholders where partnership debts exceeded the assets exchanged for stock see

Sayler v. Simpson, 12 L. D. 148 (Cin. Super. Ct. 1888).

Ford v. Lamson, 17 C. C. 539; 9 C. D. 374 (1899).

Gates v. Tippecanoe Stone Co., 57 O. S. 60 (1897).

Where a failing debtor forms a corporation, to which he transfers his assets and business in exchange for its stock, and assigns such shares of stock as security for a part of his indebtedness, and continues as manager of the business, such conveyance is a fraud on other creditors and may be set aside and the assets administered as an assignment for creditors.

Bank v. Trebein, 59 O. S. 316 (1898).

A mercantile partnership acquired 99 percent of the issued stock of a manufacturing corporation, and the partners, as directors and officers, managed the corporate business, the partnership taking and selling all its output. On bankruptcy of the partnership, the corporation was held to be merely an agency of the partnership, and the corporate property to be assets of the bankrupt estate, the respective rights of the partnership and corporate creditors being determined in the bankruptcy proceedings.

In re Rieger, Kapner & Altmark, 8 O. L. R. 498 (U. S. D. C. 1907).

C. Separate entity as a protection to stockholders. The separate entity is a protection to stockholders, whose stock has been paid up, against personal liability for debts of the corporation. Robinson v. Willard, 16 C. C. n. s. 464 (1907); aff'd, no rep. 78 O. S. 441; Carr v. Inglehart, 3 O. S. 457, 458 (1854); Ireland v. Palestine Co., 19 O. S. 369, 372 (1869).

Ownership, by one corporation, of all the stock in another corporation, will not make it liable for the debts of the latter, in the absence of unusual circumstances. Pittsburg Co. v. Duncan, 232 Fed. 584 (C. C. A. Ohio 1916).

Where the same persons own a controlling interest in two corporations in which the other stockholders are not identical, and their business is separately conducted, one of such corporations is not liable for the debts of the other corporation. Pittsburg Co. v. Duncan, 232 Fed. 584 (C. C. A. Ohio 1916).

There is, however, a distinction between mere stock ownership, and actual control of the business and property. Where one corporation actively controls the property and business of another corporation, it may be liable for the debts of such other corporation. See Boxboard Co. v. Hinton, 100 O. S. 505; Westinghouse Co. v. Allis Chalmers Co., 176 Fed. 362.

In general, the acquisition, by one person, of all the stock of a corporation, does not change the powers or liabilities of the corporation as such. 6 O. L. R. 304.

But a corporation may be bound by a contract of sale made by a person who owns all of its stock although the contract is made in his own name. *Insurance Co. v. Brown*, 16 C. C. n. s. 518 (1905). See *Norris v. Dains*, 52 O. S. 215 (1894); *Camp v. Gress*, 250 U. S. 308 (1919).

D. Stockholders bound by judgment against corporation. In actions by or against a corporation its stockholders are represented by the corporation. A judgment against the corporation in favor of a creditor can not be impeached by a subscriber to stock in the corporation, where the judgment was not obtained by fraud or collusion.

Scofield v. Excelsior Oil Co., 6 C. C. n. s. 176; 17 C. D. 318 (1905).

Henry v. Railroad Co., 17 Ohio 187, 191.

Griffin v. Rowley, 3 Ohio App. 481, 23 C. C. n. s. 209.

Non resident stockholders are represented by the corporation in a proceeding to enforce the double liability of stockholders and are bound by the finding and decree, although not served with process.

Irvine v. Putnam, 167 Fed. 174 (1909).

Francis v. Hazlett, 192 Mass. 137, 142 (1906).

Childs v. Cleaves, 95 Me. 498; 50 Atl. 714 (1901).

A stockholder may appeal from a judgment against the corporation where there is reason to believe that the officers in neglecting to appeal are actuated by an adverse interest.

Henry v. Jeanes, 47 O. S. 116 (1890).

But a stockholder not a party can not prosecute error.

Dunbar v. Casket Co., 19 C. C. 585; 10 C. D. 684 (1900).

Where managing officers wilfully and fraudulently refuse to set up a valid defense to an action brought against the corporation, a stockholder may be permitted to intervene, upon proper allegations showing the defense and the failure of the managing officers to set it up. *Buckeye Co. v. Young*, 18 C. C. n. s. 429 (1910).

E. When corporation bound by action of all its stockholders. It has been held that a person who owns all the stock of a corporation may bind the corporation by a contract of sale, although made in his own name. *Insurance Co. v. Brown*, 16 C. C. n. s. 518 (1905). See *Norris v. Dains*, 52 O. S. 215; *Camp v. Gress*, 250 U. S. 308.

Unanimous consent of stockholders to an informal distribution of profits, other than prorata, acted on so as to materially change the position of the parties, was held to preclude the corporation from setting up the informality and inequality of the division. *Kramer v. Foundry Co.*, 23 N. P. n. s. 81 (1918).

Whether a corporation is estopped by the action of all its stockholders has been variously decided.

Held not estopped.

Columbus, etc., Ry. v. Burke, 19 W. L. B. 27 (C. P. 1887).

Contra.

Central Trust Co. v. Columbus, etc., Ry., 87 Fed. 815 (1893).

V. DE FACTO CORPORATIONS.

Where an attempt is made to organize under a law authorizing incorporation, and the body acts as a corporation, a corporation *de facto* exists, although there are defects or irregularities in the proceedings. Its capacity can be questioned only by the state.

Society Perun v. Cleveland, 43 O. S. 481 (1885).

Shawnee, etc., Bank v. Miller, 1 C. C. n. s. 569; 14 C. D. 199 (1902).

Gaff v. Flesher, 33 O. S. 107, 113 (1877).

See *Griffin v. Clinton, etc., R. Co.*, 3 O. F. D. 441.

State v. Toledo, etc., Assn., 8 C. C. n. s. 233; 18 C. D. 397 (1906).
In general there must be a law authorizing the formation of corporations to exercise such powers as the corporation *de facto* claims.

Gaff v. Fleisher, 33 O. S. 107, 113, 114, 453 (1877).

Raccoon River Nav. Co. v. Eagle, 29 O. S. 238 (1876).

Society Perun v. Cleveland, 43 O. S. 481, 498, 499 (1885).

Where incorporation was had under a statute subsequently declared unconstitutional:

State v. Extension, etc., Co., 21 C. C. 662, 665; 12 C. D. 319 (1901).

Beck v. Rocky River, etc. District, 14 L. D. 312 (1904).

or where a judgment of ouster was rendered in a quo warranto proceeding:

Society Perun v. Cleveland, 43 O. S. 481 (1885).

Rowland v. Meader Furn. Co., 38 O. S. 271 (1882).

the private transactions prior to such adjudication were those of a corporation *de facto*.

Where articles of incorporation have been filed, and corporate business transacted, the corporation may have a *de facto* existence, for the purpose of suing or being sued, although the statutory requirements as to the subscription for stock and election of directors have not been properly complied with. Kardo Co. v. Adams, 231 Fed. 950; 14 O. L. R. 223 (C. C. A. Ohio 1916); reversing, 222 Fed. 967; 13 O. L. R. 137.

A. De facto existence is not based upon the doctrine of estoppel. A *de facto* corporation is a reality. It has an actual and substantial existence.

Society Perun v. Cleveland, 43 O. S. 481 (1885).

De facto existence may be proved by evidence of attempted incorporation, followed by bona fide user.

Society Perun v. Cleveland, 43 O. S. 481 (1885).

A *de jure* corporation does not, by an ultra vires act, lose its *de jure* existence and become a corporation *de facto*.

Dayton, etc., Ry. v. P. C. C. & St. L. Ry., 6 C. C. n. s. 537; 15 C. D. 705 (1902); aff'd, no rep., 67 O. S. 523.

B. Contracts of *de facto* corporations made through authorized agents are binding.

Beck v. Rocky River, etc., District, 14 L. D. 312 (1904); s. c., 9 C. C. n. s. 551; 19 C. D. 717; 76 O. S. 587.

C. Power to appropriate property. A *de facto* corporation can not exercise the right of eminent domain.

Cemetery Assn. v. Traction Co., 93 O. S. 161 (1915).

Powers v. Hazleton, etc., Ry. Co., 33 O. S. 429 (1878).

Telephone Co. v. Cincinnati, 73 O. S. 64 (1905).

Atlantic, etc., Co. v. Sullivant, 5 O. S. 276 (1855).

D. Personal liability of stockholders. Stockholders in a corporation *de facto* are liable only as stockholders; not as partners.

Rowland v. Meader Furn. Co., 38 O. S. 271 (1882).

Irregular or defective incorporation does not render the stockholders personally liable, where the statute has been substantially complied with.

Second Nat'l. Bank v. Hall, 35 O. S. 158, 166 (1878).

Bartholomew v. Bentley, 1 O. S. 37 (1852).

Failure to file a certificate of subscription under § 8633 does not render the stockholders or directors personally liable, where the requisite percentage of stock was subscribed and the required payments made. Garwood v. Oil Co., 11 Ohio App. 96 (1919).

E. Estoppel to deny corporate existence. All parties to a transaction in which a de facto corporation has acted as a corporation, are estopped to deny its legal existence. No party to the transaction can escape responsibility by showing that the corporation was not duly incorporated. This rule applies to the corporation itself;

Callender v. Painesville, etc., R. Co., 11 O. S. 516 (1860).
 its stockholders and subscribers to its stock;
 Gaff v. Flesher, 33 O. S. 107, 113 (1877).
 Clark v. Thomas, 34 O. S. 46, 59 (1877).
 Callender v. Painesville, etc., R. Co., 11 O. S. 516 (1860).
 Trumbull Co., etc., Co. v. Horner, 17 Ohio 407 (1848).
 Vorhees v. Receivers, 19 Ohio 463 (1850).
 Benninger v. Gall, 1 C. S. C. R. 331 (1871).
 Ryan v. Miami Valley Ry., 10 Am. L. R. 263 (1881).
 Compare Raccoon River Nav. Co. v. Eagle, 29 O. S. 238, 240 (1876).

its officers:

Second Nat'l. Bank v. Lovell, 2 C. S. C. R. 397 (1873).
 and to debtors of the corporation.
 Peckham Iron Co. v. Harper, 41 O. S. 100, 106 (1884).
 Newburg Petroleum Co. v. Weare, 27 O. S. 343 (1875).
 Hagerman v. Ohio, etc., Assn., 25 O. S. 186, 200 (1874).
 Lucas v. Greenville, etc., Assn., 22 O. S. 339 (1872).
 Receivers v. Renick, 15 Ohio 322 (1846).
 Durrell v. Belding, 9 C. C. 74; 4 C. D. 263 (1894).
 Elektron Mfg. Co. v. Jones Bros. El. Co., 8 C. C. 311; 4 C. D. 555 (1894).

Creditors who have extended credit to a de facto corporation, as a corporate body, are estopped from denying its corporate existence so as to hold the stockholders liable as partners;

Second Nat'l. Bank v. Hall, 35 O. S. 158, 166 (1878).
 Beebe v. Thomas, 2 W. L. B. 107 (Cin. Super. Ct. 1877).
 Second Nat'l Bank v. Lovell, 2 C. S. C. R. 397 (1873).
 Benninger v. Gall, 1 C. S. C. R. 331 (1871).
 See Rowland v. Meader Furniture Co., 38 O. S. 269 (1882).
 or to invalidate a mortgage executed by the de facto corporation.
 Lattimer v. Mosaic Glass Co., 13 C. C. 163; 7 C. D. 430 (1896).
 Hatry v. P. & Y. Ry. Co., 1 C. C. 426; 1 C. D. 238 (1886).
 Continental Trust Co. v. Toledo, etc., R. Co., 82 Fed. 642 (1897).

But the proof, in bankruptcy, of a claim against the estate of a bankrupt corporation, and the receipt of a dividend thereon, does not estop the creditor from subsequently bringing an action to hold the stockholders as partners.

Ridenour v. Mayo, 29 O. S. 138, 143 (1876).

Pleading and proof of corporate existence.

See notes to § 8629. In appropriation proceedings, see note to § 11046.

VI. "ASSOCIATES" DEFINED.

Associates are such persons, other than those specifically mentioned, as might thereafter become members of the association.

State v. Sibley, 25 Minn. 387, 399.

See also Lechmere Bank v. Boynton, 65 Mass. (11 Cush.) 369, 382.

VII. CORPORATION AS A "PERSON."

A. In general. A corporation is a "person" under G. C. § 3989 which prohibits a municipality from granting an exclusive gas franchise to any person or persons.

Cincinnati Gas Co. v. Avondale, 43 O. S. 257 (1885).

And under G. C. § 12940 which prohibits persons conducting hotels, amusement places, etc., from excluding citizens because of color or race. *Johnson v. Humphrey Pop Corn Co.*, 4 C. C. n. s. 49; 14 C. D. 135 (1902); *aff'd*, no *rep.*, 70 O. S. 478.

And under the 14th amendment of the federal constitution forbidding the deprivation of property without due process of law.

Covington, etc., Co. v. Sandford, 164 U. S. 578 (1896).

Foreign corporation as a person or citizen, see note to § 194.

B. In criminal statutes. The word "person" in a criminal statute has been generally held not to apply to a corporation.

State v. Cincinnati Fertilizer Co., 24 O. S. 611 (1874).

Brewing Co. v. State, 2 C. C. n. s. 537; 15 C. D. 601 (1904); *aff'd* in part, 71 O. S. 476.

See *Burke v. State*, 34 O. S. 79 (1877).

except when expressly included, as in the anti-trust act.

State v. Hygeia Ice Co., 4 N. P. n. s. 361, 363; 16 L. D. 735 (1906); *affirmed*, except as to sentence only; 77 O. S. 427.

Since the adoption of the General Code in 1910 the word "whoever" includes "all persons, natural and artificial." G. C. § 12371.

VIII. PROMOTERS.

A. Fiduciary relation. Promoters occupy a fiduciary relation toward the corporation.

Shawnee, etc., Bank v. Miller, 1 C. C. n. s. 569; 14 C. D. 199 (1902).

Second N. B. v. Greenville, etc., Co., 3 C. C. n. s. 372; 13 C. D. 274 (1899); 11 O. L. R. 81 (Article by A. A. Thomas).

B. Sales to corporation. Promoters must truly disclose all facts relating to property which they sell to the corporation. A promoter who conceals his interest in such property, or who misrepresents its value, is liable to the corporation. He can not make a secret profit in such a transaction.

Second N. B. v. Greenville, etc., Co., 3 C. C. n. s. 372; 13 C. D. 274 (1899).

Shawnee, etc., Bank v. Miller, 1 C. C. n. s. 569; 14 C. D. 199 (1902).

Yeiser v. U. S. Board & Paper Co., 107 Fed. 340; 12 O. F. D. 678 (C. C. A. 1901).

Bank v. Raridon, 4 Ohio App. 468; 24 C. C. n. s. 161 (1915); *affirming*, 17 N. P. n. s. 27.

The corporation may rescind a contract for the purchase of property, negotiated for the corporation by the promoter, who received secret commissions from the seller of such property. The corporation may return the property to the seller and recover the purchase price paid, less depreciation and net earnings on the property. *Shipbuilding Co. v. Steamship Co.*, 215 Fed. 296, 304; 12 O. L. R. 455 (C. C. A. Ohio 1914).

The corporation may sue for and obtain cancellation of certificates of its stock, issued to promoters in exchange for options at excessive valuation, secretly, without the knowledge of other stockholders who had paid cash for their stock, the promoters being also directors of the corporation and acting for it in issuing the stock. Where such stock has been sold by the promoters, the corporation may recover judgment against each promoter, for the value of the stock so sold by him. *Bertram Coal Mining Co. v. Bigger*, 22 N. P. n. s. 369 (1919); *aff'd* by court of appeals.

Mechanic's lien on property sold to corporation.

See *Burnap v. Sylvania Butter Co.*, 12 C. C. 639; 5 C. D. 582 (1896).
West v. Klotz, 37 O. S. 420 (1881).

C. Compensation for services. Where a corporation avails itself of the services and contracts of promoters, before organization, and ratifies the same, it becomes liable therefor. But the services may be shown to have been gratuitously rendered.

Third Ward Bldg. Assn. v. Lotze, 11 W. L. B. 285 (Dist. Ct.).
Ritchie v. McMullen, 79 Fed. 523 (C. C. A. Ohio 1897).

D. Liability. Where a corporation is formed merely as an instrumentality for the accomplishment of an illegal purpose, the promoters may be personally liable. Incorporation is no defense.

Brundred v. Rice, 49 O. S. 640 (1892).
Bank v. Trebein, 59 O. S. 316 (1898).
Andres v. Morgan, 62 O. S. 236 (1900).

E. Liability to purchasers of stock. Several joint promoters may be liable to purchasers of stock who were induced to purchase by the fraud of one of the promoters. Champney v. Braun, 23 C. C. n. s. 533 (1912); reversed on other grounds, 91 O. S. 386.

Circulars as evidence. See Russell v. Weiler, 7 C. C. n. s. 596 (1905).

F. Limitation of action. An action against a promoter for fraud in misrepresenting the value of property sold by him to the corporation is barred in four years from the date of consummation of the sale. Bank v. Raridon, 4 Ohio App. 161; 24 C. C. n. s. 161 (1916); affirming, 17 N. P. n. s. 27.

G. Contracts with third persons. See below, *Transactions before incorporation*.

IX. TRANSACTIONS BEFORE INCORPORATION.

A. With third persons. Until a corporation has been organized and directors elected, no one is authorized to bind the corporation. Contracts made by promoters with third persons are not binding on the corporation.

Dayton, etc., Co. v. Coy, 13 O. S. 84 (1861).

Mosier v. Parry, 60 O. S. 388, 401, 402 (1899).

After organization such contracts may be adopted and ratified by the directors either expressly or impliedly, by accepting the benefits of the transaction.

City Bldg. Assn. v. Zahner, 6 W. L. B. 389; 10 Am. L. Rec. 181 (Dist. Ct.).

Third Ward Bldg. Assn. v. Lotze, 11 W. L. B. 285 (Dist. Ct.).

But if there is a failure to incorporate, or if the corporation does not adopt or ratify such contract, the corporation is not bound, and the promoters may be personally liable.

Mosier v. Parry, 60 O. S. 388 (1899).

Magill v. Rendigs, 12 L. D. 558 (Cin. Super. Ct. 1902).

Validity of charitable bequest to corporation not yet incorporated.

See Trustees v. Zanesville, etc., Co., 9 Ohio 203 (1839).

B. Agreements between individuals to form a corporation. An agreement between individuals for the formation of a corporation and providing for its future control is valid as between the parties.

Doan v. Rogan, 79 O. S. 372, 386 (1909).

Provisions in such an agreement are deemed waived by inconsistent provisions inserted by the parties in the charter.

Cronin v. Potters Co-op. Co., 29 W. L. B. 52, 56 (Com. Pleas 1892).

An agreement by a promoter to employ, or procure a future corpora-

tion to employ, a person is not invalid as an agreement to secure a corporate office.

Magill v. Rendigs, 12 L. D. 558 (Cin. Super. Ct. 1902).

Doan v. Rogan, 79 O. S. 372, 386 (1909).

See Mosier v. Parry, 60 O. S. 388 (1899).

Mullen v. Gaffery, 8 Am. L. R. 101 (Dist. Ct. 1879).

Where the owner of a secret process or formula sold an interest therein to another person, and the formula was deposited in escrow, to be delivered to the secretary of a corporation which the parties agreed to organize for the manufacture of goods by such process, it was held that upon repudiation of the contract by the seller, the purchaser was not entitled to equitable relief and a receiver to obtain possession of the formula, the corporation not having been organized. Eckerman v. Hensch, 16 C. C. n. s. 361 (1905).

Where persons interested in a proposed corporation hold meetings and effect a preliminary organization, wholly in the interest of such corporation the preliminary organization does not continue as a separate and distinct organization after the corporation is organized.

Mulhauser v. Cleveland Hospital, etc., 21 C. C. 88; 11 C. D. 391 (1900); aff'd, no rep., 66 O. S. 688.

X. INCORPORATION OF PARTNERSHIPS.

The entire plant and assets of a partnership may be purchased by a corporation formed to engage in a like business. As a part of such a transaction it may acquire valid title to property not indispensable for its business, such as a claim for damages to partnership property caused by negligence of other persons.

Gas & Fuel Co. v. Dairy Co., 60 O. S. 96 (1899).

Where partnership assets, including good will, are sold through a receiver, and the purchaser transfers the same to a corporation, the corporation may adopt the name previously used by the partnership.

Snyder Mfg. Co. v. Snyder, 54 O. S. 86 (1896).

Liability of corporation for the partnership debts.

See Andres v. Morgan, 62 O. S. 236 (1900).

Right of partnership creditors in property transferred to the corporation.

See Bank v. Trebein, 59 O. S. 316 (1898).

Liability of partners on stock issued to them for the partnership property at an overvaluation.

See Gates v. Tippecanoe Stone Co., 57 O. S. 60 (1897).

Saylor v. Simpson, 12 L. D. 148 (Super. Ct. Cin. 1888).

Ford v. Lamson, 17 C. C. 539; 9 C. D. 374 (1899).

XI. ULTRA VIRES ACTS.

An act of a corporation is *ultra vires* when it is beyond the chartered powers of the corporation.

Railroad Co. v. Furnace Co., 37 O. S. 321, 327 (1881).

In determining whether the act is *ultra vires* regard must be had to its effect and the real object in view.

Bank v. Flour Co., 41 O. S. 552, 558 (1885).

In applying the doctrine of *ultra vires*, in a particular case, regard must be had not only to the unauthorized agreement or transaction, but also to the relation which the litigating parties sustain to it.

Ehrman v. Ins. Co., 35 O. S. 324, 337 (1880).

Gas & Fuel Co. v. Dairy Co., 60 O. S. 96, 106 (1899).

A conveyance to a corporation to secure two debts, one valid and the other *ultra vires*, will be upheld to the extent of the valid debt.

Morris v. Way, 16 Ohio 469 (1847).

See also Dayton, etc., Ry. v. P. C. C. & St. L. Ry., 6 C. C. n. s. 537; 15 C. D. 705 (1902); aff'd, no rep., 67 O. S. 523.

A. Unauthorized act when incident or part of authorized transaction. Acts which would otherwise be *ultra vires* may be valid when merely incidental to, or forming part of an entire transaction that, in its general scope, is within the corporate powers. Where a corporation purchases the assets and business of a partnership, for its corporate purposes, it may acquire a valid title to its outstanding claims, including a claim for damages caused by negligence, although it would have no general power to purchase claims of that nature.

Gas & Fuel Co. v. Dairy Co., 60 O. S. 96 (1899).

B. When void. Where there is an absolute or total want of power in a corporation to deal in respect to a certain subject, acts done in its corporate name, in regard to such subject, may, as corporate acts, be void for all purposes and as against all persons.

Ehrman v. Insurance Co., 35 O. S. 324, 337 (1880).

But where the corporation deals with a subject within the scope of its powers, but for a purpose or in a mode not authorized, the act is not necessarily void.

Ehrman v. Insurance Co., 35 O. S. 324, 337 (1880).

White's Bank v. Toledo, etc., Co., 12 O. S. 601, 610 (1861).

Pickaway Co. Bank v. Prather, 12 O. S. 497, 511 (1861).

C. Effect on corporate existence and valid powers. *Ultra vires* acts do not per se dissolve a corporation or deprive it of its valid powers, in the absence of a proceeding by the state for that purpose.

Finnell v. Burt, 2 Handy 202 (1856).

Benninger v. Gall, 1 C. S. C. R. 331, 336 (1871).

Webb v. Moler, 8 Ohio 552 (1838).

Nor does a corporation, by an *ultra vires* act, lose its *de jure* existence and become a corporation *de facto*.

Dayton, etc., Ry. v. P. C. C. & St. L. Ry., 6 C. C. n. s. 537; 15 C. D. 705 (1902); aff'd, no rep., 67 O. S. 523.

D. Contracts performed by one party. Where a contract has been executed and fully performed on the part of the corporation or of the other party, neither may object that the contract or performance is *ultra vires*.

Larwell v. Hanover, etc., Society, 40 O. S. 274, 285 (1883).

Hays v. Galion, etc., Co., 29 O. S. 330, 340 (1876).

Armstrong v. Karshner, 47 O. S. 276, 296 (1890).

Dayton, etc., Ry. v. P. C. C. & St. L. Ry., 6 C. C. n. s. 537, 546; 15 C. D. 705 (1902); aff'd, no rep., 67 O. S. 523.

Siders v. Gem City Concrete Co., 13 C. C. n. s. 481 (1910).

Newburg Petroleum Co. v. Weare, 27 O. S. 343 (1875).

Railway Co. v. Iron Co., 46 O. S. 44 (1888).

Compare Simpson v. Building, etc., Assn., 38 O. S. 349 (1882).

When the contract has been fully performed by the other party, and the corporation has received the benefits, it can not raise the question of *ultra vires* either as a defense or as a basis for action.

Lewis v. Bank, 274 Fed. 587 (C. C. A. 6th Cir. 1921).

E. Guaranty of *ultra vires* contract. A written guaranty of the performance of a contract is valid, although the contract itself may be void as *ultra vires*.

Zerkle v. Price, 5 N. P. 480; 7 L. D. 465 (C. P.)

F. Corporate acts presumed valid. It is presumed that a corporation has acted within its powers, and its contract or note will be presumed to be valid until the contrary is shown.

Straus v. Eagle Insurance Co., 5 O. S. 59, 62 (1855).

G. Notice of corporate powers. Persons dealing with a corporation are charged with notice of the limits of its corporate powers.

James v. Cincinnati, etc., R. Co., 2 Dis. 261, 272 (1858).

Treadwell v. Commissioners, 11 O. S. 183, 192 (1860).

Zabriskie v. Cleveland, etc., R. Co., 64 U. S. (23 How.) 381, 398 (1860).

Holmes v. Hayes, 32 W. L. B. 346-348 (Sup. Ct. no rep., 52 O. S. 617 (1894)).

H. Who may object to ultra vires acts. (a) The state may object to ultra vires acts, by quo warranto.

State v. Standard Oil Co., 49 O. S. 137 (1892).

State v. Ohio, etc., Co., 6 C. C. 412; 3 C. D. 516 (1892).

Miller v. Ratterman, 47 O. S. 141, 165 (1890).

State v. Loan Ass'n, 35 O. S. 258 (1879).

(b) A stockholder may, by injunction, restrain threatened acts which are not within the express or implied powers of the corporation.

Zabriskie v. Cleveland, etc., R. Co., 64 U. S. (23 How.) 381 (1860).

Port Clinton, etc., Co. v. Cleveland, etc., Co., 13 O. S. 544, 561 (1862).

Kuhn v. Woolson Spice Co. 13 C. C. 547; 7 C. D. 294 (1897).

C. H. & D. Ry. v. Duckworth, 2 C. C. 518; 1 C. D. 618 (1887); affirmed, 21 W. L. B. 36.

A stockholder may in federal court enjoin the corporation from a threatened diversion of funds by illegal payment of an unconstitutional tax.

Pollock v. Farmers' Loan & Trust Co., 157 U. S. 429 (1895).

Under equity rule No. 27, in such a case the petition must allege that the suit is not a collusive one for the purpose of conferring jurisdiction on the federal court, and also that unsuccessful efforts have been made to induce the corporation to bring the suit, or the reasons for not making such efforts. *Wathen v. Jackson Oil Co.*, 235 U. S. 635 (1915).

A stockholder can not enjoin the payment of the federal income tax, as the income tax act provides a remedy at law, to-wit: the recovery of taxes paid under protest.

Straus v. Realty Co., 200 Fed. 327 (1912).

A member of a religious corporation may, by injunction, prevent a breach of trust by the corporation or a majority of its members.

Wiswell v. First Congregational Church, 14 O. S. 31 (1862).

But a stockholder must assert his rights promptly upon notice of the ultra vires act. If he delay until the act has been performed and benefits received thereunder, he will be held to have assented to the act.

Hill v. Cincinnati Hotel Co., 25 W. L. B. 425 (Cin. Super. Ct. 1891).

Sanderson v. Aetna Iron & Nail Co., 34 O. S. 442 (1878).

Goodin v. Cincinnati, etc., Co., 18 O. S. 169 (1869).

Chapman v. Mad River, etc., R. Co., 6 O. S. 119 (1856).

Baldwin v. Hillsborough R. R., 10 W. L. J. 337 (C. P.).

Zabriskie v. Cleveland, etc., R. Co., 64 U. S. (23 How.) 381 (1860).

(c) A stranger to the transaction can not question its validity. The maker of a note, payable to a corporation and endorsed to an

other corporation, can not, in an action brought by such endorsee, question the powers of the corporations to make the transfer.

Ehrman v. Insurance Co., 35 O. S. 324, 337 (1880).

Gas & Fuel Co. v. Dairy Co., 60 O. S. 96, 107 (1899).

Bank v. McIntire, 40 O. S. 528, 537 (1884).

White's Bank v. Toledo, etc., Co., 12 O. S. 601, 610 (1861).

Pickaway Co. Bank v. Prather, 12 O. S. 497, 511 (1861).

Bank v. Water Works Co., 22 C. C. n. s. 529 (1915).

Gould v. Union, etc., Co., 8 W. L. B. 281 (Cin. Super. Ct.).

(d) **Party who has received benefits.** Where a contract has been executed and fully performed on the part of one party and the other party has received the benefits, such party can not avoid liability on the ground of *ultra vires*. This rule applies to the corporation.

Hays v. Galion, etc., Co. 29 O. S. 330, 340 (1876).

Hill v. Cincinnati Hotel Co., 25 W. L. B. 425 (Cin. Super. Ct. 1891).

Norwalk Sgs. Bk. v. Norwalk, etc., Co., 14 C. C. 1; 7 C. D. 275 (1897); *aff'd*, no rep., 60 O. S. 603.

See Herrick v. Wardwell, 58 O. S. 294, 308 (1898).

And to the other party.

Newburg Petroleum Co. v. Weare, 27 O. S. 343 (1875).

Hamilton, etc., Co. v. C. H. & D. Ry., 29 O. S. 341 (1876).

Allen v. 1 N. B., 23 O. S. 97, 104 (1872).

Victoria Bldg. Assn. v. Arbeiter Bund, 6 W. L. B. 823; 10 Am. L. R. 485.

Constable Bros. Co. v. Faulhaber, 15 L. D. 700 (C. P. 1904).

The party receiving the benefits is estopped from denying the power of the corporation to make the contract.

Newburg Petroleum Co. v. Weare, 27 O. S. 343 (1875).

Tone v. Columbus, 39 O. S. 281, 308-310.

Dayton, etc., Ry. v. P. C. C. & St. L. Ry., 6 C. C. n. s. 537, 546; 15 C. D. 705 (1902); *aff'd*, no rep., 67 O. S. 523.

(e) **Estoppel.** The doctrine that a party who has received benefits under a contract is estopped from denying the power of the corporation to make the contract does not in all cases apply to creditors. As between creditors whose claims are founded on authorized transactions and creditors relying on an *ultra vires* contract, the former would prevail.

Miller v. Ratterman, 47 O. S. 141, 165 (1890).

Compare Central Trust Co. v. Columbus, etc., Ry., 87 Fed. 815 (1898).

A national bank is not estopped, by its purchase and temporary operation of a street railway, from pleading its want of power to operate. *Gress v. Fort Loramie*, 100 O. S. 35 (1919); reversing, 21 N. P. n. s. 81.

A corporation, which has made an *ultra vires* guaranty of the performance of a contract by another party, is not estopped from denying its power to give the guaranty, although the party to whom the guaranty was given has performed his part of the contract.

Humboldt Min. Co. v. American, etc., Co., 62 Fed. 256; 9 O. F. D. 153 (C. C. A. 1894).

I. Personal liability for *ultra vires* acts.

(a) **Directors and officers.** Where the officers of a corporation transcend the corporate authority they are, under some circumstances, personally liable; but the extent of this doctrine is not clearly defined.

Medill v. Collier, 16 O. S. 599, 610 (1866).

See *Manufacturers', etc., Ass'n. v. Lynchburg Drug Mills*, 8 C. C. 112; 4 C. D. 352 (1893).

Where such a liability exists it is not a bar to an action by a creditor on stock subscriptions made by such officers.

Dickason v. Grafton Sav. Bank, 6 C. C. n. s. 329, 335; 17 C. D. 357 (1905); *aff'd*, no rep., 76 O. S. 612.

See note to § 8674. *Irregular or incomplete incorporation.*

Officers and others actively managing the business of corporations have been held personally liable in the following cases: For debts incurred in carrying on a banking business in the corporate name without complying with a statutory condition precedent, where the statute prohibited the carrying on of such business until the condition precedent had been complied with;

Medill v. Collier, 16 O. S. 599 (1866).

For debts incurred in the name of a corporation incorporated under a former statute authorizing savings societies, where the trustees made no attempt to organize or conduct it as a savings society, but instead carried on a general banking business:

Ridenour v. Mayo, 40 O. S. 9 (1884).

On unauthorized bank notes:

Kearny v. Buttles, 1 O. S. 362 (1853).

Lawler v. Burt, 7 O. S. 340 (1857).

For debts incurred in the corporate name, where the amount of stock required by law as a condition precedent to the election of directors and to the transaction of business had not been subscribed.

Trust Co. v. Floyd, 47 O. S. 525 (1890).

(b) Stockholders are not liable unless they engage in or authorize the prohibited acts.

Medill v. Collier, 16 O. S. 599 (1866).

Bank v. Hall, 35 O. S. 158, 166 (1878).

Paul v. Groene, 4 O. L. R. 632 (Cin. Super. Ct. 1907).

Morrison v. Stevens, 4 O. L. R. 671 (Cin. Super. Ct. 1907).

Kearny v. Buttles, 1 O. S. 362 (1853).

Rainhard v. Hovey, 13 Ohio 300 (1844).

(c) Overissue of bonds. Where a corporation, having power to issue bonds, issues bonds in excess of the amount allowed by law, the stockholders and directors causing the issue are not liable on the bonds.

Raymond v. Spring Grove, etc., Ry., 21 W. L. B. 103.

XII. CORPORATE POWERS.

A. General rule. A corporation has such powers, and such only (1) as are expressly conferred by the statutes under which it is incorporated, or (2) as are necessary for the purpose of carrying into effect the powers specifically conferred.

Straus v. Eagle Ins. Co., 5 O. S. 59 (1855).

Gas & Fuel Co. v. Dairy Co., 60 O. S. 96 (1899).

Franklin Bank v. Commercial Bank, 36 O. S. 350, 355 (1881).

State v. Eagle Insurance Co., 50 O. S. 252, 267 (1893).

Railway Co. v. Iron Co., 46 O. S. 44, 49 (1888).

Railroad Co. v. Hinsdale, 45 O. S. 556, 572 (1888).

Lessee of Overmyer v. Williams, 15 Ohio 26, 31 (1846).

State v. Granville, etc., Soc., 11 Ohio 1, 12 (1841).

Lessee of Kemper v. Cincinnati, etc., Co., 11 Ohio 392 (1842).

State v. Washington, etc., Co., 11 Ohio 96 (1841).

Bonham v. Taylor, 10 Ohio 108, 109 (1840).

Bank v. Swayne, 8 Ohio 257, 286 (1838).

B. Implied powers. The implied powers of a corporation are not limited to those which are *indispensable* for carrying into effect the powers expressly conferred, but comprise all that are *necessary* in the sense of appropriate, convenient and suitable, including the right of reasonable choice of means to be employed.

Gas & Fuel Co. v. Dairy Co., 60 O. S. 96 (1899).

State v. Railway Co., 68 O. S. 9, 40 (1903).

Railroad Co. v. Furnace Co., 37 O. S. 321 (1881).

Power granted to a corporation to engage in a certain business carries with it the authority to act precisely as an individual would act, in carrying on such business.

Larwell v. Hanover Sgs. Fund Soc., 40 O. S. 274, 282 (1883).

C. Powers outside of Ohio. Foreign corporations in Ohio. Statutes conferring corporate powers apply only to domestic corporations. A foreign corporation has only the powers conferred by its charter, although it transacts business in a state where domestic corporations possess other powers.

Ewing v. Bank, 43 O. S. 31 (1885).

Humphreys v. State, 70 O. S. 67, 83 (1904).

Kit Carter Cattle Co. v. McGillin, 21 C. C. 210; 11 C. D. 413 (1900).

A foreign corporation has no greater powers in Ohio than domestic corporations of a like character.

G. C. § 5508.

See State v. Aetna Life Ins. Co., 69 O. S. 327 (1903).

Mannington v. H. V. Ry. Co., 8 O. L. R. 451, 484; 183 Fed. 133;

16 O. F. D. 552 (C. C. Ohio 1910).

G. C. § 178.

A bank authorized to make loans at a limited rate of interest can not make loans in another state at a higher rate, although the higher rate is valid in such state.

Ewing v. Bank, 43 O. S. 31 (1885).

D. Burden of proof as to corporate powers. Where a corporation asserts that it is clothed with a given power and the right to exercise it, the burden is on it to show where such power and right are derived.

State v. Vanderbilt, 37 O. S. 591 (1882).

Mannington v. H. V. Ry. Co., 8 O. L. R. 451, 472; 183 Fed. 133;

16 O. F. D. 552 (C. C. 1910).

E. Statutes conferring corporate powers. Rules of construction. Special charters granted prior to the constitution of 1851 were strictly construed against the corporations and liberally in favor of the public.

National Bank v. Insurance Co., 41 O. S. 1, 12 (1884).

See Zanesville v. Gaslight Co., 47 O. S. 1, 30-31 (1889).

The rule of strict construction is still applied to statutes which grant special privileges or immunities. Such statutes are held to carry only those privileges and exemptions which are granted expressly and without ambiguity.

State v. Eagle Insurance Co., 50 O. S. 252, 267 (1893).

State v. Vanderbilt, 37 O. S. 590, 641 (1882).

Debolt v. Ohio, etc., Trust Co., 1 O. S. 563, 573 (1853).

Matheny v. Golden, 5 O. S. 361, 417 (1856).

State v. Railway, 12 C. C. n. s. 145, 147 (1909).

But the rule of strict construction is not now invariably applied to incorporation statutes in general. Such statutes are under some circumstances interpreted under the same rules which apply to other statutes.

National Bank v. Insurance Co., 41 O. S. 1, 12 (1884).

James v. C. H. & D. Ry. Co., 2 Dis. 261, 269, 270 (1858).

Gas & Fuel Co. v. Dairy Co., 60 O. S. 96, 104 (1899).

Larwell v. Hanover, etc., Soc., 40 O. S. 274, 285 (1883).

Gaff v. Flesher, 33 O. S. 107, 114 (1877).

Contra, Humboldt Mining Co. v. American, etc., Co., 62 Fed. 356 (C. C. A. Ohio 1894).

State v. Railway, 12 C. C. n. s. 145, 147 (1909).

An act of incorporation, like any other statute, should be construed in such a manner as will best answer the intention of the legislature; and all its parts should, if possible, be made subservient to, and in harmony with, the leading purposes and objects intended to be accomplished.

Straus v. Eagle Insurance Co., 5 O. S. 59 (1855).

White's Bank v. Toledo Ins. Co., 12 O. S. 601, 605 (1861).

Shoemaker v. Goshen Twp., 14 O. S. 569, 575 (1863).

Articles of incorporation should be construed as an entirety, in determining the powers of a corporation, and the powers should not be limited by reading single sentences or clauses and excluding all else. Eaton v. Society, 264 Ill. 88; 105 N. E. 746 (1914).

F. Mode of exercise. The mode or manner of exercising corporate powers rests in the sound discretion of the corporate authorities.

Railroad Co. v. Furnace Co., 37 O. S. 321 (1881).

Gas & Fuel Co. v. Dairy Co., 60 O. S. 96 (1899).

Central Trust Co. v. Columbus, etc., Ry. Co., 87 Fed. 815 (1898).

G. By whom exercised.

(a) **Directors.** Corporate powers and business are exercised and conducted by the directors or trustees;

See § 8660.

Bradford Belting Co. v. Gibson, 68 O. S. 442 (1903).

except in certain cases where, by special statutory provisions, action by the stockholders is required.

See §§ 8710 to 8718, 8698, 8700, 8720.

(b) **Stockholders.** Where all or a majority of the stockholders of a corporation do an act designed to affect its property and business, and which, through their control of the corporate agencies, does affect the property and business of the company in the same manner as if done by a resolution of its directors, which act is *ultra vires* and illegal, and was done individually to conceal the real purpose, the act should be regarded as that of the corporation.

State v. Standard Oil Co., 49 O. S. 137 (1892).

(c) **Who may question.** A person against whom a corporation may claim the right to exercise a power may call the power into question and require the corporation to show its existence.

Zanesville v. Gas-Light Co., 47 O. S. 1 (1889).

Gas-Light Co. v. Zanesville, 47 O. S. 35, 47 (1889).

See Bank v. Telegraph Co., 79 O. S. 89 (1908).

See above, *ultra vires acts—who may object to.*

XIII. TO SUE AND BE SUED.

Pleading and proof of corporate existence.

See note to § 8629.

A. In general. A corporation may sue, or be sued by, its own stockholders.

Norton v. Norton, 43 O. S. 509 (1885).

Lamson v. Farmers' Bank, 1 O. S. 206, 211 (1853).

A *de facto* corporation may sue, and its corporate existence can

not be collaterally attacked. *Kardo Co. v. Adams*, 231 Fed. 950; 14 O. L. R. 223 (C. C. A. Ohio 1916).

A corporation may sue for slander upon it in the way of its business or trade.

Brayton v. Cleveland Special Police Co., 63 O. S. 83, 85 (1900).

But it has been held that a corporation can not recover for a libel, where the only damage shown is hindrance in obtaining subscriptions to its stock, although its objects may be defeated thereby. *Farmers Co. v. Lawrence Co.*, 22 C. C. n. s. 273 (1908).

An insolvent corporation may be required to give security for costs.

G. C. § 11614.

Pleadings of a corporation should be verified by an officer.

Mfg. Co. v. Hedges, 76 O. S. 91 (1907).

In an action against a corporation by an administrator the general manager is not disqualified by G. C. § 11495 from testifying to facts occurring before the death of the decedent.

Cockley Milling Co. v. Bunn, 75 O. S. 270 (1906).

Although involuntary bankruptcy proceedings have been brought against a corporation, it may maintain an action on a claim due it, until adjudication and the appointment of a trustee. *Superior Co. v. Amdur Co.*, 19 C. C. n. s. 510 (1912).

Disqualification of a judge holding stock in a corporation litigant. See *Ashland Bank v. Houseman*, 5 Ohio App. 165 (1915).

B. Criminal liability. A corporation may be indicted and prosecuted for creating a nuisance;

Strawboard Co. v. State, 70 O. S. 140 (1904).

See *State v. Cincinnati Fertilizer Co.*, 24 O. S. 611 (1874).

and for a violation of the anti-trust act.

State v. General Fire Extinguisher Co., 9 N. P. n. s. 438; 20 L. D. 240 (1910).

The word "person" in a criminal statute has been held not to apply to a corporation.

State v. Cincinnati Fertilizer Co., 24 O. S. 611 (1874).

Leo Ebert Brewing Co. v. State, 2 C. C. n. s. 537; 15 C. D. 601 (1904); *aff'd*, in part, 71 O. S. 476.

But since the adoption of the general code in 1910 the word "whoever" in the penal code includes "all persons, natural and artificial."

G. C. § 12371.

C. Civil liability. A corporation is liable, as an individual would be for the acts of its agents within the course of their employment;

Bank v. Blakesley, 42 O. S. 645, 652 (1885).

although the act is wilful or malicious.

Nelson Business College Co. v. Lloyd, 60 O. S. 448 (1899).

It may be liable for punitive damages.

Western Union Tel. Co. v. Smith, 64 O. S. 106, 117 (1901).

Pittsburg, etc., R. Co. v. Slusser, 19 O. S. 157 (1869).

Atlantic, etc., Co. v. Dunn, 19 O. S. 162 (1869).

See *Cleveland Ry. Co. v. Wiesenberger*, 15 Ohio App. 437 (1922).

A corporation may be liable for libel:

Union, etc., Ins. Co. v. Mutual, etc., Ins. Co., 2 W. L. B. 269 (1877) slander;

Gas Co. v. Black, 95 O. S. 42 (1916).

deceit;

First N. B. v. Kehnast, 22 L. D. 15 (C. P. 1910).

malicious prosecution;

Canton Assn. v. Slayman, 99 O. S. 28 (1919).

Adams Co. v. Robertson, 16 C. C. n. s. 278 (1908); *aff'd*, no rep. 82 O. S. 400.

false imprisonment:

Farmers Bank v. Frazier, 13 Ohio App. 245; 32 O. C. A. 7 (1920).
Nichols v. L. S. & M. S. Ry., 1 Cleve. L. R. 268 (1878).

assault and battery;

Nelson Business College Co. v. Lloyd, 60 O. S. 448 (1899).
Passenger R. R. Co. v. Young, 21 O. S. 518 (1871).
See Little Miami R. R. Co. v. Wetmore, 19 O. S. 110 (1869).
Contra, Orr v. Bank of U. S., 1 Ohio 36 (1822).

and negligence.

Railway Co. v. Bank, 56 O. S. 351, 383 (1897).
Cleveland, etc., R. Co. v. Keary, 3 O. S. 201 (1854).

A corporation not for profit maintaining a charity hospital or other purely charitable institution is not liable for negligence of its servants.

Taylor v. Protestant, etc., Ass'n., 85 O. S. 90 (1911).
Conner v. Sisters of Poor, 7 N. P. 514 (1900).

Johnson v. Lawrence Hospital, 12 L. D. 795 (1902).

Unless it has failed to exercise proper care in the selection of such servants. Taylor v. Hospital, 104 O. S. 61 (1922).

A street railway company can not be held directly liable for malpractice of medicine.

Youngstown, etc., Co. v. Kessler, 84 O. S. 74 (1911).

It has been held that an action of trespass *quare clausum fregit* would not lie **against a corporation.**

Foote v. Cincinnati, 9 Ohio 31 (1839).

Ward v. Toledo, etc., R. Co., 10 W. L. J. 365 (1853).

D. Federal corporations. A national bank may be sued in a state court.

Hade v. McVay 31 O. S. 231 (1877).

See Zinn v. Baxter, 65 O. S. 341 (1901).

But a soldiers' home incorporated by congress for the purpose of performing a governmental function only, can not be sued in a state court in a tort action.

Overholser v. National Home, etc., 68 O. S. 236 (1903).

XIV. TO CONTRACT AND BE CONTRACTED WITH.

A. In general. The right to enter into contracts is general and is denied only when prohibited by statute or some consideration of public policy recognized by the courts.

Stafford v. Produce Exch. Bkg. Co., 61 O. S. 160, 169 (1899).

"Unless expressly restrained by its charter, every corporation has the incidental power to make any contract, and evidence it by any instrument that may be necessary and proper to accomplish the objects for which it is created."

Straus v. Eagle Insurance Co., 5 O. S. 59, 62 (1855).

But the power to contract has reference to and is limited by the nature of the corporate business.

Hays v. Galion, etc., Co., 29 O. S. 330, 338 (1876).

A bank may furnish a surety bond for the protection of its depositors. Rep. Atty. Gen. 1912, p. 707.

B. Contract for term of years binding future directors. A corporation may make a contract for a term of years extending beyond the term of the directors by whom it is made.

Railroad Co. v. Furnace Co., 37 O. S. 321 (1881).

C. Presumption as to validity of corporate contracts. The presumption is in favor of the validity of a corporate contract. A note made or received by a corporation is, *prima facie*, within its corporate powers and therefore valid; but it may be shown to have been made or taken for an unauthorized purpose.

Straus v. Eagle Insurance Co., 5 O. S. 59, 62 (1855).

Stone v. Traction Co., 4 N. P. n. s. 104, 107; 16 L. D. 645 (1906).

D. Right to contract as a constitutional right. The right to acquire property includes the right to make contracts with reference to property which can not be alienated by the legislature. The provisions of Sec. 1, bill of rights of the constitution which guarantee the liberty of acquiring property by contract apply to private corporations as well as to individuals.

Stewart v. Gardner, 10 C. C. n. s. 408; 20 C. D. 218 (1907); *aff'd*, no rep., 78 O. S. 451.

Shaw v. Cleveland, etc., Ry., 173 Fed. 746, 751 (C. C. A. 1909).

E. Form. A contract reading "I" or "we" promise, etc., but signed in the corporate name by one or more of its officers, is the contract of the corporation and not of the officers individually.

Aungst v. Creque, 72 O. S. 551 (1905).

Baldwin v. Egan, 11 C. C. n. s. 584 (1908).

See below *Form and execution of corporate deeds and instruments*.

F. Contracts for usurious interest. A stipulation for interest, to be received or paid by a corporation, at a rate higher than permitted by the usury laws does not render the loan or debt void. The principal may be recovered together with interest at the lawful rate.

National Bank v. Insurance Co., 41 O. S. 1 (1884).

Larwell v. Hanover, etc., Soc., 40 O. S. 274 (1883).

Ewing v. Toledo Sav. Bank, 43 O. S. 31 (1883).

State v. Urbana, etc., Co., 14 Ohio 6 (1846).

First N. B. v. Garlinghouse, 22 O. S. 492 (1872).

Lawful interest on loan to corporation evidenced by long term obligation. See § 8705.

Under former statutes and certain special charters which expressly prohibited corporations from charging more than a certain rate of interest, it was held that a contract for a higher rate was wholly void and that neither principal nor interest could be recovered.

Bank v. Swayne, 8 Ohio 257 (1838).

Miami Exporting Co. v. Clark, 13 Ohio 1 (1853).

Preble Co. v. Russell, 1 O. S. 313 (1853).

Bank of Wooster v. Stevens, 1 O. S. 233 (1853).

Russell v. Failor, 1 O. S. 327, 329 (1853).

Union Bank v. Bell, 14 O. S. 200, 209 (1863).

Kilbreth v. Bates, 38 O. S. 187 (1882).

See *Laskey v. Board of Education*, 35 O. S. 519 (1880).

Southern Bank v. Gassoway, 1 Dis. 207 (1856).

Kilbreth v. Wright, 1 W. L. B. 1; 4 Am. L. R. 449 (1876).

Creed v. Commercial, etc., Bank, 11 Ohio 489 (1842).

Spaulding v. Bank, 12 Ohio 544 (1841).

Dunkle v. Renick, 6 O. S. 527 (1856).

McLean v. LaFayette, 3 McLean (U. S.) 587; 2 O. F. D. 412.

National banks may charge interest at the same rate as individuals.

La Dow v. Bank, 51 O. S. 234 (1894).

Decisions under former statutes.

Shunk v. National Bank, 22 O. S. 508 (1872).

Bank v. Slemmons, 34 O. S. 142 (1877).

Hade v. McVay, 31 O. S. 231 (1877).

Allen v. First N. B., 23 O. S. 97 (1872).

First N. B. v. Garlinghouse, 22 O. S. 492 (1872).

Illegal contracts. For contracts in violation of anti-trust act see § 6393 and note.

A corporation can not enforce payment of a mortgage loan made by it where the mortgagor, as a part of the transaction, agreed to purchase the debentures of the corporation, which debentures were in the nature of a lottery.

Heintz v. Sawyer, 5 C. C. n. s. 249; 17 C. D. 10 (1904); aff'd, no rep., 72 O. S. 678.

A contract by a street railway company to perform medical services is in violation of the laws of medicine and surgery and void.

Youngstown, etc., Ry. Co. v. Kessler, 84 O. S. 74 (1911).

For other void contracts see *ultra vires* above.

Contracts between corporations having same directors. See note to § 8660.

Contracts between a corporation and its directors. See note to § 8660.

XV. TO ACQUIRE, HOLD AND CONVEY PROPERTY.

A. Constitutional property rights. The inalienable right to acquire, hold and dispose of property, and to make contracts relating thereto, appertains to corporations as well as to individuals.

Stewart v. Gardner, 10 C. C. n. s. 408; 20 C. D. 218 (1907); aff'd, no rep., 78 O. S. 451.

Shaw v. Cleveland, etc., Ry., 173 Fed. 746, 751; 8 O. L. R. 43, 49 (C. C. A. 1909).

Wheeling, etc., Co. v. Gilmore, 8 C. C. 658; 4 C. D. 369 (1894).

The property of a corporation is "private property" within the meaning of Sec. 19, Art. 1 of the constitution which provides that "private property shall ever be held inviolate."

Ohio, ex rel., v. Neff, 52 O. S. 375, 404 (1895).

A corporation is a "person" within the 14th amendment of the federal constitution forbidding the deprivation of property without due process of law.

Covington, etc., Co. v. Sandford, 164 U. S. 578 (1896).

B. Property in general. A corporation may, within the limits of its charter, acquire and deal with property as freely as an individual might do.

Lee v. Sturges, 46 O. S. 153, 161 (1889).

Wheeling, etc., Co. v. Gilmore, 8 C. C. 658; 4 C. D. 369 (1894).

A corporation not for profit, formed for social purposes, may acquire and hold real estate for a club house. Rep. Atty. Gen. 1914, p. 1125.

A corporation may acquire and hold land in another state, for its corporate purposes. The language of G. C. 8627—"in conformity with * * * the laws of this state" does not limit its power to the state of Ohio. Eaton v. Society, 264 Ill. 88; 105 N. E. 746 (1914).

C. Acquisition of property by devise or bequest. A foreign corporation may acquire property by devise or bequest, in the absence of a prohibitory statute.

American Bible Soc. v. Marshall, 15 O. S. 537 (1864).

But such devise or bequest is, in general, liable to the collateral inheritance tax.

Humphreys v. State, 70 O. S. 67 (1904).

The supreme court of Illinois has held that a women's home missionary society, incorporated under the laws of Ohio, not for profit, was empowered by § 8627 to accept a devise of land in Illinois for the purpose of establishing a home for orphans. *Eaton v. Society*, 264 Ill. 88; 105 N. E. 746 (1914).

D. Choses and rights in action. Where a corporation purchases all the assets of another corporation or of a partnership, the choses in action of the seller pass to the purchasing corporation and it may sue thereon. *Gas & Fuel Co. v. Dairy Co.*, 60 O. S. 96 (1899; claim for property damage caused by negligence); *Crown Co. v. Levy Co.*, 16 N. P. n. s. 561; aff'd, 24 C. C. n. s. 556 (1914; injunction against vendor of good will of business); *Steamship Co. v. Shipbuilding Co.*, 215 Fed. 296; 12 O. L. R. 455 (1914; rescission of contract of vendor corporation because of fraud of its promoter).

E. In exchange for stock. See notes to §§ 8630, 8674.

F. Property not necessary for corporate business may be acquired by a corporation as a part of an entire transaction, whereby it acquired other property for its corporate purposes.

Gas & Fuel Co. v. Dairy Co., 60 O. S. 96 (1899).

G. Subject to police regulations. A corporation holds its property subject to all valid police regulations.

Millcreek, etc., Co. v. St. Bernard, 8 N. P. 288; 11 L. D. 454 (1901).

H. Corporate property as a trust fund. A corporation holds its property as trustee for the benefit of its creditors and stockholders.

Niles v. Olszak, 87 O. S. 229 (1912).

Rouse v. Bank, 46 O. S. 493, 503 (1899).

Bank v. Mfg. Co., 67 O. S. 306, 314 (1902).

See note to § 8684.

I. Real property. Office building, etc., companies, see § 10210.

Real estate companies, see §§ 8648-8650.

A corporation may acquire and hold such real property as may be necessary in the transaction of its business.

Lessee of Overmyer v. Williams, 15 Ohio 26 (1846).

Walsh v. Barton, 24 O. S. 28, 42 (1873).

See *Baldwin v. Egan*, 11 C. C. n. s. 584 (1908); aff'd, no rep., 84 O. S. 460.

It may receive a conveyance of land as security for, or in payment of, a debt.

Morris v. Way, 16 Ohio 469 (1847).

J. Purchase for unauthorized purpose. Where a corporation purchases unnecessary land, or acquires land for unauthorized purposes, the rules governing other *ultra vires* contracts apply. The corporation may resell such land and the title of its vendee becomes indefeasible, both the corporation and its vendor being estopped from questioning the transaction.

Walsh v. Barton, 24 O. S. 28, 42 (1873).

While the corporation holds such land its proprietary rights can not be questioned by persons with whom it has made contracts relating to the land and who have received benefits thereunder. The corporation may collect rent, and may recover damages for breach of contract.

Hamilton, etc., Co. v. C. H. & D. R. Co., 29 O. S. 341 (1876).
 Rector v. Hartford Deposit Co., 190 Ill. 380; 60 N. E. Rep. 528.

K. Miscellaneous. A corporation having purchased land at a judicial sale and acquiesced in the confirmation of the sale can not, in error proceedings, set up its want of power to purchase.

Bank of U. S. v. White, Wright 574 (1834).

A turnpike company can not acquire the fee in land occupied by it, under an easement sufficient for its purposes, for the purpose of preventing a railroad company from building a bridge over the road.

Wooster Turnpike Co. v. C. P. & V. R. Co., 15 C. C. 268; 8 C. D. 269 (1897).

L. Commercial paper. A corporation may acquire commercial paper in the course of its corporate business.

Straus v. Eagle Ins. Co., 5 O. S. 59, 62 (1855).

Durrell v. Belding, 9 C. C. 74; 4 C. D. 264 (1894).

Cuyahoga, etc., Co. v. Lewis, 1 Cleve. L. Rec. 15 (Dist. Ct.).

A note received by a corporation is presumed to have been acquired in the usual course of business.

Straus v. Eagle Ins. Co., 5 O. S. 59, 62 (1855).

A corporation authorized to purchase commercial paper has no power to purchase a note for the sole purpose of assisting a third person in collecting the same by acquiring a lien on stock of the corporation owned by the maker of the note.

White's Bank v. Toledo Ins. Co., 12 O. S. 601 (1861).

An insurance company has no power to purchase a promissory note on credit for the purpose of setting off such note against a claim against the company.

Straus v. Eagle Ins. Co., 5 O. S. 59 (1855).

M. Sale and conveyance of corporate property. The power of disposition is a necessary incident to the power of acquiring and holding property and a corporation has, in general, the same capacity to sell and convey its property that an individual has.

Reynolds v. Commissioners, 5 Ohio 204 (1831).

Nearing v. Toledo, etc., Co., 9 C. C. 596; 6 C. D. 664 (1893).

Wiswell v. First Congregational Church, 14 O. S. 31, 43 (1862).

At a time when individuals were permitted by law to prefer certain creditors, it was held that an insolvent corporation had no such power, the corporate property being a trust fund for creditors and stockholders.

Rouse v. Bank, 46 O. S. 493 (1889).

Corporate property may be levied on by creditors and sold at judicial sale.

Coe v. Knox County Bank, 10 O. S. 412 (1859).

Coe v. Peacock, 14 O. S. 187 (1863).

N. Entire property. Sales of the entire property of corporations are regulated by statute.

See §§ 8710 to 8718.

O. Corporate franchise. A corporation has no power to sell or convey its franchise to be a corporation:

Coe v. Columbus, etc., Co., 10 O. S. 372 (1859).

Atkinson v. Marietta, etc., Co., 15 O. S. 21 (1864).

Railroad Co. v. Furnace Co., 37 O. S. 321, 330 (1881).

except when specially authorized by statute.

State v. Sherman, 22 O. S. 411, 428 (1872).

P. Property necessary in performance of public duty. A railroad

company or other corporation which owes duties to the public can not alienate property or franchises which are essential to the performance of such duties.

Railroad Co. v. Furnace Co., 37 O. S. 321, 330 (1881).

Coe v. Columbus, etc., Co., 10 O. S. 372 (1859).

Q. Authority of corporate officers to convey. Authority to make a sale or conveyance of corporate property is vested in the board of directors.

§ 8660 and note.

But instruments of conveyance are usually executed by one or more executive officers. A deed executed in the name of the corporation, by its president, under the corporate seal, is presumed to have been authorized by the directors, and is *prima facie* valid.

R. R. Co. v. Harter, 26 O. S. 426 (1875).

Bank v. Flour Co., 41 O. S. 552, 557 (1885).

Sheehan v. Davis, 17 O. S. 571, 581 (1867).

Bosche v. Toledo, etc., Co., 14 C. C. 289, 295; 7 C. D. 377 (1897).

The officer who executes a deed on behalf of a corporation and affixes its corporate seal is the proper person to acknowledge the deed.

Sheehan v. Davis, 17 O. S. 571 (1867).

R. Form and execution of corporate deeds and instruments. The word "successors" is not necessary, in a deed to a corporation, in order to convey a fee simple.

Railway v. Bosworth, 46 O. S. 81, 84 (1888).

A conveyance by a corporation should be in the name of the corporation. A conveyance in the name of an individual, although describing him as an officer of the corporation, is not the act of the corporation, and does not transfer the title;

Norris v. Dains, 52 O. S. 215 (1894).

Hatch v. Barr, 1 Ohio 390 (1824).

although good as an equitable conveyance as against the corporation.

Bundy v. Iron Co., 38 O. S. 300 (1882).

Where the corporate name was not signed, but in the body of the deed the corporation was named as grantor, and the duly authorized officer affixed the corporate seal and subscribed his own name to the instrument, it was held properly executed.

Sheehan v. Davis, 17 O. S. 571 (1867).

Hays v. Galion, etc., Co., 29 O. S. 330, 334 (1876).

A contract signed in the corporate name, followed by the signatures and titles of its officers, is the contract of the corporation alone, although the word "we" is used in the body of the instrument and the word "by" does not precede the signatures of the officers.

Aungst v. Creque, 72 O. S. 551 (1905).

S. Corporate seal. Necessity of. The omission of the corporate seal does not invalidate a corporate deed which is otherwise properly executed. The use of the corporate seal by a corporation is not compulsory.

East End Building & Loan Co. v. Hughey, 16 C. C. 19; 8 C. D. 724 (1898).

Poyser v. Standard Paving Brick Co., 46 W. L. B. 84 (Sup. Ct. 1901).

In re Farmer's Supply Co., 170 Fed. 502 (D. C. 1909).

See below *Corporate seal*.

T. Stockholder or officer as witness or notary. A stockholder of a corporation may act as notary public and take the acknowledgment of a person executing a deed to it.

Reed v. Loan Co., 68 O. S. 280 (1903).

A stockholder may act as witness to such a deed.

Reed v. Loan Co., 68 O. S. 280 (1903).

Johnson v. Turner, 7 Ohio (pt. 2); 216 (1836).

The secretary and treasurer of a corporation may, as notary, take the acknowledgment of a person executing a mortgage to it.

Horton v. Columbian, etc., Soc., 6 W. L. B. 141.

U. Proof of execution. A corporate deed, if objected to, can not be given in evidence without proof of its execution. The signature of the president does not prove itself, nor is it proven by the corporate seal.

Walsh v. Barton, 24 O. S. 28, 41 (1873).

See 9 W. L. B. 253, paper by S. H. Wilder.

XVI. CORPORATE SEAL.

A. Necessity and effect. At common law the signature of a corporation was its corporate seal.

Tiffin v. Shawhan, 43 O. S. 178, 185 (1885).

See Railway Co. v. Lynde, 55 O. S. 23, 49 (1896).

Cincinnati v. Cameron, 33 O. S. 364 (1878).

Under present statutes a corporate deed or mortgage, when otherwise properly executed, is not rendered invalid by the omission to affix the corporate seal.

Poyser v. Standard Paving Brick Co., 46 W. L. B. 84 (Sup. Ct. 1901).

East End, etc., Co. v. Hughey, 16 C. C. 19; 8 C. D. 724 (1898).

In re Farmers' Supply Co., 170 Fed. 502 (D. C. 1909).

But the affixing of the corporate seal to an instrument affords a presumption that the instrument has been authorized by the board of directors and, when otherwise properly executed, renders the instrument prima facie valid.

Sheehan v. Davis, 17 O. S. 571 (1867).

Perin v. Cincinnati, etc., R. Co., 17 W. L. B. 261; s. c., 18 W. L. B. 382 (Super. Ct. Cin.).

R. R. Co. v. Harter, 26 O. S. 426 (1875).

Bank v. Flour Co., 41 O. S. 552, 557 (1885).

Stetson v. Durrell, 3 W. L. B. 154.

See 38 W. L. B. 204 (paper by Clement Bates).

9 W. L. B. 19 (paper by F. M. Coppock).

Negotiable bonds of a corporation do not become "sealed instruments" and nonnegotiable by the affixing of the corporate seal thereto.

Railway Co. v. Lynde, 55 O. S. 23 (1896).

G. C. § 8111.

Certain instruments are required by special statutes to be executed under the corporate seal; including the deed of a railway company (§ 8761); certificate of amendment of articles of incorporation (§ 8721); statement of a foreign corporation (§ 179), and some certificates of railroad companies (§§ 9028, 8748, 9033, 9081), and turnpike companies (§§ 9260, 9262).

B. Form. The seal may be an impression upon the paper on which the instrument is written, or upon wax, wafer or other adhesive substance.

G. C. § 32.

Where a corporation had no seal, an instrument signed in the corporate name by the president, with his private seal, in scrawl, attached, was held valid against the corporation.

Western Female Seminary v. Blair, 1 Dis. 370 (Cin. Super. Ct. 1857).

XVII. POWER TO ACQUIRE ITS OWN STOCK.

A. In general. It has been stated as a general principle, subject to some exceptions, that an Ohio corporation can not purchase or deal in its own stock. This principle was held to rest upon a lack of power in the corporation and not upon any statutory prohibition.

Coppin v. Greenles, 38 O. S. 275, 279 (1882).

Morgan v. Lewis, 46 O. S. 1, 6 (1888).

State v. Oberlin, etc., Ass'n., 35 O. S. 258, 263 (1879).

C. & P. R. Co. v. Kelley, 5 O. S. 180, 193.

Stunt v. Newark, etc., Co., 22 C. C. 120; 12 C. D. 175 (1901); aff'd, no rep., 67 O. S. 555.

Merchants N. B. v. Overman Carriage Co., 17 C. C. 253; 9 C. D. 738 (1898).

Shaw v. Ohio Edison Inst. Co., 19 W. L. B. 292 (Super. Ct. Cin. 1888).

Lewis v. Reed, 5 W. L. B. 79 (1880).

Hubbard v. Riley, 3 W. L. B. 434 (1878).

De La Croix v. Eid Concrete Steel Co., 8 N. P. n. s. 489 (1909).

See Holcomb v. Gibson, 39 W. L. B. 380 (58 O. S. 710).

Some doubt has been expressed as to whether the foregoing statement should be recognized as a general rule since the abrogation of the double liability of stockholders in 1903.

Siders v. Gem City Concrete Co., 13 C. C. n. s. 481, 486; 23 C. D. 552 (1910); aff'd, no rep., weight of evidence being involved, 87 O. S. 519.

Mannington v. Hocking Valley Ry. Co., 8 O. L. R. 451, 465 (U. S. C. C. 1910).

State B. & T. Co. v. Mitchell Co., 14 N. P. n. s. 49 (1913).

Contra, De La Croix v. Eid Concrete Steel Co., 8 N. P. n. s. 489, 507 (1909).

It is not doubted, however, that where the purchase by a corporation of its own stock results in injury to creditors, or is not made in good faith, it may be set aside.

Siders v. Gem City Concrete Co., 13 C. C. n. s. 481, 488, 489; 23 C. D. 552 (1910); aff'd, no rep., 87 O. S. 519.

B. An executory agreement for the purchase by a corporation of its own stock can not be enforced either by action for specific performance or for damages.

Coppin v. Greenles, 38 O. S. 275 (1882).

An agreement whereby subscribers to stock bind themselves to first offer their shares to the corporation, before selling to others, is, as between the corporation and the state, unauthorized. Opins. Atty. Gen. 1920, p. 184.

C. An executed transaction comes within the general rules governing other *ultra vires* contracts which have been executed. Where a corporation gave its note for the purchase price of its own stock, and thereafter sold the stock, it can not defend against the note on the ground that it had no power to purchase the stock.

Siders v. Gem City Concrete Co., 13 C. C. n. s. 481; 23 C. D. 552 (1910); aff'd, no rep., 87 O. S. 519.

See Morgan v. Lewis, 46 O. S. 1, 7, 8 (1888).

Railway Co. v. Iron Co., 46 O. S. 44 (1888).

Hubbard v. Riley, 3 W. L. B. 434 (1878).

State B. & T. Co. v. Mitchell Co., 14 N. P. n. s. 49 (1913).

Where a corporation purchased stock from a dissatisfied stockholder with the assent of all other stockholders, at a time when the corporation

was free from debt and the purchase was fully executed in good faith, being made to avoid dissensions among the directors and stockholders, the transaction was upheld.

State B. & T. Co. v. Mitchell Co., 14 N. P. n. s. 49 (1913).

Where a corporation purchased shares of its stock, giving its notes and mortgage in payment, it is estopped from setting up *ultra vires* as a defense against the same, where an undeserved benefit would thereby be conferred upon the holder of the bulk of its stock, and where no rights of creditors are involved. Strauss v. Imperial Motor Co., 28 O. C. A. 574 (1918).

D. To secure debt due to corporation. A corporation may buy or take its own stock in order to avoid loss on a preexisting debt due to it.

Taylor v. Miami Exporting Co., 6 Ohio 176 (1833).

Coppin v. Greenles, 38 O. S. 275, 278 (1882).

Morgan v. Lewis, 46 O. S. 1, 6 (1889).

State v. Building Assn, 35 O. S. 258, 263 (1879).

State v. Franklin Bank, 10 Ohio, 91, 97 (1840).

And it may obtain and enforce a lien on the stock to secure its claim.

Stafford v. Produce Exchange Banking Co., 61 O. S. 160 (1899).

Railway Co. v. Burke, 19 W. L. B. 27 (C. P. 1887).

Bellevue Bank v. Higbee, 4 C. C. 222; 2 C. D. 512 (1889); affirmed, 28 W. L. B. 336.

E. Stock fraudulently issued. A corporation may, in order to avoid loss, expend money to regain stock which has been fraudulently issued by its officers.

Cincinnati, etc., R. Co. v. Duckworth, 2 C. C. 518; 1 C. D. 618 (1887); affirmed, 21 W. L. B. 36.

F. Rescission of exchange of stock for property. Where a corporation issued stock in exchange for property, but, other stockholders being dissatisfied, the transaction was rescinded by agreement and in good faith, the return of such stock to the corporation is not void.

Morgan v. Lewis, 46 O. S. 1 (1888).

Sanderson v. Aetna, etc., Co., 34 O. S. 442 (1878).

Biggio v. Sandheger, 8 N. P. 13; 10 L. D. 319 (1900).

State B. & T. Co. v. Mitchell Co., 14 N. P. n. s. 49 (1913).

For power of corporation to compromise with and release subscribers to stock see notes to §§ 8630 and 8674.

G. Stock issued under agreement to repurchase. Where stock was issued under an agreement by the corporation to repurchase the same, such agreement to repurchase may be enforced if the rights of creditors are not impaired.

Zerkle v. Price, 5 N. P. 480; 7 L. D. 465.

Shoemaker v. Goshen Township, 14 O. S. 569, 583 (1863).

Weeden v. Lake Erie, etc., Co., 14 Ohio 563 (1846).

Fleitman v. Stone Cotton Mills, 186 Fed. 466 (C. C. A. 1911).

Compare Stunt v. Newark, etc., Co., 22 C. C. 120; 12 C. D. 175 (1901); aff'd, no rep., 67 O. S. 555.

H. On retirement of officer. The retirement of the owner of stock from his corporate office does not authorize the corporation to purchase his stock.

Merchants N. B. v. Overman Carriage Co., 17 C. C. 253, 255; 9 C. D. 738 (1898).

See Siders v. Gem City Concrete Co., 13 C. C. n. s. 481, 489 (1910).

State B. & T. Co. v. Mitchell Co., 14 N. P. n. s. 49 (1913).

I. What constitutes a purchase by a corporation of its own stock. The redemption of preferred stock issued by a railroad company under G. C. §§ 8817 and 8805 is not a reduction of its capital stock by a purchase of its shares.

Mannington v. Hocking Valley Ry. Co., 183 Fed. 133; 8 O. L. R. 451; 16 O. F. D. 552 (U. S. C. C. 1910); s. c., 9 N. P. n. s. 641; 20 L. D. 468 (C. P.).

The purchase of stock by a director, as trustee for the corporation, authorized by a resolution of the directors and paid for by notes of the corporation, is a purchase by the corporation.

Merchants N. B. v. Overman Carriage Co., 17 C. C. 253; 9 C. D. 738 (1898).

Status of stock in itself acquired by a corporation. Stock which has been transferred to the corporation by which it was issued becomes treasury stock and is held subject to control and disposition by the directors.

See *Taylor v. Miami Exporting Co.*, 6 Ohio 176, 220 (1833).

Allen v. De Lärgerberger, 20 W. L. B. 368.

It can not be voted while held by the corporation.

Allen v. De Lärgerberger, 20 W. L. B. 368.

Ryan v. Miami Valley R. Co., 10 Am. L. R. 263, 267 (1881).

J. Agreement of corporation to sell stock for stockholder. Liability for breach. Where a bank stockholder, who is indebted to the bank, is about to sell his stock through a broker to raise funds to pay the debt, and the bank agrees to sell the stock for him for the same price at which he has authorized the broker to sell, the bank is liable to him for such price, where it fails to sell the stock or to notify him of its failure. *Brown v. Ginn*, 21 C. C. n. s. 85 (1907); aff'd, no rep. 80 O. S. 718.

XVIII. TO ACQUIRE AND HOLD STOCK OF OTHER CORPORATIONS.

See § 8683 and note.

XIX. TO EXECUTE AND INDORSE COMMERCIAL PAPER.

A corporation may become a party to commercial paper in the course of its corporate business. A note or bill of exchange made or received by a corporation is prima facie valid.

Straus v. Eagle Ins. Co., 5 O. S. 59, 62 (1855).

Larwell v. Hanover Sgs. Fund Soc., 40 O. S. 274, 282 (1883).

Andres v. Morgan, 62 O. S. 236, 248 (1900).

Hays v. Galion, etc., Co., 29 O. S. 330 (1876).

White's Bank v. Toledo Ins. Co., 12 O. S. 601 (1861).

A bona fide holder of the note of a corporation is protected to the same extent as the bona fide holder of a note made by an individual.

Holmes v. Hayes, 32 W. L. B. 346, 349 (52 O. S. 617; Sup. Ct. 1894).

A. Accommodation paper. A corporation has no power to become an accommodation maker or endorser of commercial paper. Such an instrument can not be enforced against the corporation by a holder having notice of its character.

Bank v. Oil Co., 101 O. S. 217 (1920).

Benedict v. Market N. B., 4 N. P. 231; 6 L. D. 320; s. c., 19 C. C. 408; 10 C. D. 505.

In re Continental Iron Co., 2 O. L. R. 563 (1904).

See *Vos v. Building Ass'n*, 9 W. L. B. 194 (Super. Ct. Cin.).

Where it did not appear that a corporation was insolvent and that it had ceased to prosecute the objects for which it was created at a time when its funds were used to pay notes, executed by its president and endorsed by the corporation, held by a bank to cover a loss by the failure of a former corporation, the funds so used are not so impressed with a trust as to be recoverable by the trustees in bankruptcy of the corporation.

Haines v. Bank, 203 Fed. 225 (C. C. A. 1913).

B. Corporate note payable to officer. It has been held that a note signed in the corporate name by an officer of the corporation and made payable to himself is presumptively unauthorized and that subsequent purchasers take with notice.

In re Hartwell Furniture Co., 7 O. L. R. 555 (1909).

In re Continental Iron Co., 2 O. L. R. 563 (1904).

Arnkens v. Rouse, 26 W. L. B. 221 (C. P. 1891).

Compare in re Troy, etc., Co., 136 Fed. 420 (1905); *aff'd*, 142 Fed. 1038.

Railway Co. v. Bank, 56 O. S. 351 (1897). (Stock certificates required by statute to be signed by president and secretary.)

See G. C. § 8147.

C. Form. A note reading "we promise to pay . . ." and signed "The A. B. Co., C. D., Secy. & Treas.; E. F., Pres.," is on its face the note of the corporation alone and not the note of the officers personally.

Aungst v. Creque, 72 O. S. 551 (1905).

For note held properly executed although corporate name not signed.

See Hays v. Galion, etc., Co., 29 O. S. 330, 334 (1876).

See note to § 8660. *Officers and agents. Liability.*

XX. MISCELLANEOUS POWERS.

A. To act as trustee. A corporation may hold property in trust for purposes within its corporate powers.

State v. Toledo, 3 C. C. n. s. 468; 13 C. D. 327 (1902); *s. c.*, 5 C.

C. n. s. 277; 16 C. D. 628.

Chapin v. School District, 1 Warden's W. L. B. 227.

Vidal v. Girard, 43 U. S. (2 How.) 128 (187-188).

Perin v. Carey, 65 U. S. (24 How.) 465.

But it can not act as administrator or assignee for creditors unless expressly authorized by statute.

Schumacher v. McCalip, 69 O. S. 500 (1904).

Powers of trust companies, see § 710-150 et seq.

B. To enter into partnership. A corporation has no power to enter into partnership with an individual or another corporation.

Guerinck v. Alcott, 66 O. S. 94, 104 (1902).

Merchants N. B. v. Wehrmann, 69 O. S. 160, 173, 174 (1903); reversed on other grounds, 202 U. S. 295; 4 O. L. R. 344.

Merchants N. B. v. Standard Wagon Co., 6 N. P. 264; 9 L. D. 380; affirmed, 7 N. P. 539; 10 L. D. 81; affirmed, no rep., 65 O. S. 559.

See State v. Standard Oil Co., 49 O. S. 137, 185 (1892).

But a corporation may enter into a joint adventure, the purposes of which are within its corporate purposes.

Guerinck v. Alcott, 66 O. S. 94, 105 (1902).

Pomeroy Salt Co. v. Davis, 21 O. S. 555, 573 (1871).

Mestier v. Chevalier Pavement Co., 108 La. An. 562; 32 So. Rep. 520.

And may become a member of a voluntary association.

Miller, etc., Co. v. Laidlaw, etc., Co., 4 N. P. n. s. 554; 17 L. D. 499 (1905).

See Webster v. Taplin, Rice & Co., 9 C. C. n. s. 587; 19 C. D. 543 (1904); aff'd, no rep., 76 O. S. 590.

A contract between corporations to hire guards for their properties, at joint expense, to be paid ratably by each is not a partnership contract. Coal Co. v. Osborne, 17 C. C. n. s. 599 (1910).

C. To become surety or guarantor. A corporation has, in general, no power to become surety on a bond, or to guarantee the contract or debt of another. Pollitz v. Commission, 96 O. S. 49 (1917).

A corporation has no power to become an accommodation maker or endorser of commercial paper. Such an instrument can not be enforced against the corporation by a holder having notice of its character.

Benedict v. Market N. B., 4 N. P. 231; 6 L. D. 320; s. c., 19 C. C. 408; 10 C. D. 505.

In re Continental Iron Co., 2 O. L. R. 563 (1904).

But a corporation, engaged in the sale of building materials which becomes surety or guarantor of the performance of a building contract, by the contractor, to whom the corporation sells materials, may be held liable as such guarantor, where the party to whom the guaranty was given has fully performed his part of the contract. Western Strawboard Co. v. Variety Iron Works Co., 17 C. C. n. s. 205 (1910); aff'd, no rep. 87 O. S. 478; Builders Supply Co. v. Investment Co., 14 N. P. n. s. 383 (1913); Glenville v. Prout, 6 N. P. 152; 8 L. D. 99. *Contra*. Humbolt Min. Co. v. American, etc., Co., 62 Fed. 356; 9 O. E. D. 153 (C. C. A. 1894).

See *Ultra Vires Acts*, *supra*.

A railroad company which owns stock in another company (as authorized by § 8683) and for its protection has acquired bonds of such other company, may, in order to sell such bonds at an adequate price, guarantee their payment. But it has no power to enter into a joint contract with other guarantors to guarantee an entire bond issue of which it owns only a portion. Pollitz v. Commission, 96 O. S. 49 (1917). See § 614-57a.

A corporation may give security for the debt of a third person, where it is indebted to such third person, and the real object and effect of the transaction is to secure the debt owing by the corporation.

Bank v. Flour Co., 41 O. S. 552 (1885).

A corporation selling bonds, not its own property, has no power to guarantee their payment. But, in making the sale, it may agree to repurchase the bonds on demand at the same price.

Bank v. Schaeffer, 16 C. C. 457; 9 C. D. 182 (1898).

For guaranty by railroad company of bonds of coal company see note to § 8806.

D. To carry on professional business. A corporation can not carry on professional business.

§ 8623: State v. Laylin, 73 O. S. 90 (Law).

Union Painless Dentists Co. v. Mullen, 6 O. L. R. 475; 19 L. D. 136 (Dentistry).

Youngstown, etc., Ry. v. Kessler, 84 O. S. 74 (Medicine).

E. To borrow money, issue bonds, etc. See §§ 8705 to 8709 and notes.

Section 8628. (Same or similar names.) The secretary of state shall not file or record any articles of incorporation

wherein the corporate name is likely to mislead the public as to the nature or purpose of the business its charter authorizes, nor if such name is that of an existing corporation, or so similar thereto as to be likely to mislead the public, unless the written consent of the existing corporation, signed by its president and secretary, be filed with such articles. (R. S. Sec. 3238; March 31, 1902, 95 v. 76; April 27, 1896, 92 v. 320; R. S. 1880.)

Requirement as to name of corporation for profit, see § 8625.

Change of name, § 8719.

The secretary of state has discretion to determine whether a name is misleading.

Rep. Atty. Gen. 1911-1912, p. 127.

Opins. Atty. Gen. 1918, p. 536.

Whether the words "Police" or "Special Police" in the name of a corporation organized under G. C. § 10199 are misleading, is a question within the discretion of the secretary of state. Rep. Atty. Gen. 1912, p. 55.

The words "existing corporation" in this section include a foreign corporation authorized to do business in Ohio. A new corporation can not adopt the name of such foreign corporation without its consent. Rep. Atty. Gen. 1912, pp. 14, 22.

But it is said that this section does not apply to a foreign corporation seeking authority to do business in Ohio under § 178 et seq., and that the secretary of state has no authority to refuse a certificate on the ground that the name of such foreign corporation is similar to that of an existing Ohio corporation. Opins. Atty. Gen. 1915, p. 2216.

A corporation whose articles of incorporation have been cancelled for non-payment of franchise taxes under § 5509 is deemed to continue in existence during the two-year period allowed for reinstatement by § 5511, and articles of a new corporation bearing a name similar to that of the delinquent corporation can not be filed during such two year period. Rep. Atty. Gen. 1912, p. 48.

Corporations organized to manufacture near beer may use the words "Products" and "Brewing" as a parts of their names. Opins. Atty. Gen. 1919, p. 228.

Filing of articles not conclusive. The action of the secretary of state in receiving and filing articles of incorporation is not conclusive against another corporation having a similar name. The older corporation may enforce its rights by injunction.

Cincinnati Vici Shoe Co. v. Cincinnati Shoe Co., 7 N. P. 135; 9 L. D. 579 (1899).

Backus Oil Co. v. Backus, etc., Co., 5 W. L. B. 546 (1880).

Incorporation no defense where name infringes. The use by a corporation of a name which infringes the trade name of an individual, or of another corporation, may be enjoined. The fact of being incorporated by such name is no defense.

Thayer, etc., Co. v. Thayer Co., 6 N. P. 300; 9 L. D. 288.

Backus Oil Co. v. Backus, etc., Co., 5 W. L. B. 546 (1880).

R. W. Rogers Co. v. Wm. Rogers Mfg. Co., 70 Fed. 1017 (1895).

Bissell etc., Works v. Bissel, etc., Co., 121 Fed. 357 (1902).

Chickering v. Chickering, 120 Fed. 69 (1903).

Higgins v. Higgins Soap Co., 144 N. Y. 462.

Bear Lithia Springs Co. v. Great Bear Spring Co., 71 N. J. Eq. 595; 71 Atl. 383.

Corporation not for profit. A corporation not for profit may, by injunction, protect its name against infringement.

People v. Rose, 225 Ill. 496; 80 N. E. 293.

Salvation Army in U. S. v. American Salvation Army, 120 N. Y. Suppl. 471; 135 App. Div. 268.

B. P. O. E. v. Improved B. P. O. E. (Tenn. 1909); 118 S. W. 389.

B. P. O. E. v. Improved B. P. O. E., 111 N. Y. Suppl. 1067.

Name misleading as to nature of business. "The Trustee company" may be adopted by a real estate company proposing to sell certificates entitling the holders to undivided interests in land held by the company as agent or trustee for all of the investors.

Rep. Atty. Gen. 1910-1911, p. 218.

A foreign corporation, having in its name the words "bank" or "trust company", but not intending to do such business in Ohio, should be refused authority to do business in the state, as its name would be misleading to the public. *Rep. Atty. Gen. 1912*, p. 706.

New banks. The name of a proposed bank should be approved by the superintendent of banks and not by the secretary of state. *Opins. Atty. Gen. 1919*, p. 1485; 11 Dept. Rep. 272; G. C. § 710-44.

Two corporations of same name having common agent. Where two corporations had the same name, occupied the same office, and were represented by the same agent, a creditor of one of them purchased goods from the agent under the belief that he was dealing with his debtor. When sued by the other corporation for the price of the goods, he was held entitled to set off his claim. *Coal Co. v. Coal Co.*, 17 C. C. n. s. 491 (1911); *aff'd*, no rep. 88 O. S. 621.

Right to adopt name of individual or former partnership. A corporation can not adopt or use the name of an individual so as to infringe the name of another corporation.

Thayer, etc., Co. v. Thayer, etc., Co., 6 N. P. 300; 9 L. D. 288.

L. Martin Co. v. L. Martin & Wickes Co., 75 N. J. Eq. 39; 71 Atl. 409.

Where partnership assets, including good will, are sold through a receiver, and the purchaser transfers the same to a corporation, the corporation may adopt the name previously used by the partnership.

Snyder Mfg. Co. v. Snyder, 54 O. S. 86 (1896).

A corporation may adopt and use the name of an individual connected with it, provided it is not so used as to mislead the public into a belief that its products are those of another corporation having a similar name.

Herring, etc., Co. v. Hall Co., 208 U. S. 554.

See Pflueger Co. v. Enterprise Mfg. Co., 85 O. S. 450.

Star Dist. Co. v. Mihalovitch, 23 L. D. 342 (C. P. 1911).

And may, by injunction, protect such name against infringement.

French Bros. Dairy Co. v. Giacin, 12 C. C. n. s. 134 (1909); affirming 8 N. P. n. s. 549.

Use of word "Edisonia" in name of corporation giving moving picture exhibitions, and authorized to use "Edison" kinetoscopes therein, held not calculated to mislead the public to believe that the manufacturer of the machines was interested in the exhibitions or the corporation.

Edison v. Mills-Edisonia, 74 N. J. Eq. 521; 70 Atl. Rep. 191.

A corporation which so adopts the name of another company, com-

posed mainly of the same individuals, as reasonably to induce the belief that they are one and the same company, will be bound by contracts made by a common agent of the two, with parties acting in such belief, although made in the name of the other company and in its behalf.

Adams v. Brown, 16 O. S. 75 (1865).

Names held to be infringements. "National Liberty League" infringes the name "National Liberty Legion."

People v. Rose, 225 Ill. 496; 80 N. E. 293.

"Grand Lodge Knights of Pythias" is infringed by the name "Grand Lodge Knights of Pythias of North America, South America, Europe, Asia," etc.

Creswill v. Grand Lodge K. P., 133 Ga. 837; 67 S. E. 188.

"The George A. Thayer Co." is an imitation of "The George A. Thayer Carpet Cleaning and Rug Manufacturing Co."

Thayer, etc., Co. v. Thayer Co., 6 N. P. 300; 9 L. D. 288 (1899).

"The Kansas City Real Estate Exchange" is an imitation of "The Kansas City Real Estate and Stock Exchange Co."

State v. McGrath, 92 Mo. 355.

"The Holmes, Booth & Atwood Mfg. Co." is an imitation of "Holmes, Booth & Hayden."

Holmes, etc., v. Holmes, etc., Co., 37 Conn. 278.

"United States Commercial Agency & Collecting Co." is an infringement of "United States Mercantile Reporting Co."

In re U. S. Mercantile Co., 4 N. Y. Supp. 916.

Names held not to be infringements. "Corning Glass Works" held not so similar to "Corning Cut Glass Company" as to confuse the public where the companies produce different kinds of glass and cater to different customers.

Corning Glass Works v. Corning Cut Glass Co., 197 N. Y. 173; 90 N. E. 449.

"John Cashatt Company" is not so similar to the "Cashatt Cigar Company" as to mislead the public.

Rep. Atty. Gen. 1908, p. 79.

"Bank of Michigan" does not necessarily infringe the name "Michigan Savings Bank."

Michigan Savings Bank v. Dime Sav. Bank, 162 Mich. 297; 127 N. W. 364.

Acquiring new name by usage or reputation. See Rep. Atty. Gen. 1904-1905, p. 110.

Misnomer. A devise or conveyance is not defeated by a misnomer provided the corporation intended can be sufficiently ascertained from the terms used.

Chapin v. School District, 1 Gaz. 227.

A stock subscription can not be avoided because of a mistake in the corporate name, where there is no doubt as to the corporation intended.

Milford, etc., Turnpike Co. v. Brush, 10 Ohio 111, 114 (1840).

Commissioners v. Perry, 5 Ohio 56 (1831).

Royce v. Tyler, 2 C. C. 175, 183; 1 C. D. 428 (1887).

See Biggio v. Sandheger, 8 N. P. 13; 10 L. D. 316 (1900).

In a suit against a corporation, the name of which is composed of several words, a slight mistake in the name such as the omission of one word, will be disregarded by the court unless pleaded in abatement.

State v. Telephone Co., 36 O. S. 296 (1880).

See Cleveland, etc., R. Co. v. Fredenbur, 3 C. C. 23; 2 C. D. 15 (1887).

Boehmke v. Traction Co., 88 O. S. 156 (1913).

Section 8629. (Certified copy evidence of incorporation.)

A copy of articles of incorporation so filed, and duly certified by the secretary of state, shall be prima facie evidence of the existence of the corporation therein named. (R. S. Sec. 3238; March 31, 1902, 95 v. 76; April 27, 1896, 92 v. 320; R. S. 1880.)

Certified copy.

When not sufficient evidence of corporate existence. The filing of articles of incorporation does not create a corporation for profit. The articles are merely authority to the incorporators to do so. The corporate existence does not commence until the requisite stock has been subscribed and the first installment paid thereon and the directors chosen.

State v. Insurance Co., 49 O. S. 440 (1892).

See note to § 8627.

In appropriation proceedings by a corporation, it must prove not only the filing of articles of incorporation, but also complete organization, by the subscription and payment of the required percentage on its capital stock and the due and regular election of directors.

Cemetery Assn. v. Traction Co., 93 O. S. 161 (1915).

Telephone Co. v. Cincinnati, 73 O. S. 64 (1905).

Effect and admissibility. The certificate of the secretary of state can only be as to the correctness of the copy; not that the articles are valid.

Doyle v. Mizner, 42 Mich. 332.

Where the certified copy shows that the articles are prima facie invalid, the instrument can not be used as evidence.

Baptist Church v. R. R. Co., 4 Mackey, 43 (D. C.).

McCallon v. Hybernian Soc., 70 Cal. 163.

Harris v. McGregor, 29 Cal. 127.

But unauthorized provisions contained in the articles do not render a certified copy inadmissible, where it contains all the provisions required by statute.

Toledo, etc., Ry. v. Toledo, etc., Ry., 6 C. C. 362, 391; 3 C. D. 493, 507 (1892).

See note to § 8625.

Imperfect articles can not be aided, varied or contradicted by evidence aliunde.

Atty. Gen. v. Lorman, 59 Mich. 157.

Hallett v. Harrower, 33 Barb. (N. Y.) 537.

People v. Selfridge, 52 Cal. 331.

Where a condition precedent to the right of incorporation is prescribed by law, a certified copy of articles is inadmissible in the absence of evidence as to performance of such condition precedent.

Raccoon River Nav. Co. v. Eagle, 29 O. S. 238 (1876).

ALLEGATION AND PROOF OF CORPORATE EXISTENCE.

In an action by a corporation, either foreign or domestic, its petition need not aver that it is a corporation. Such an averment, if made, is mere surplusage, and a general denial to the petition will not require proof of such averment.

Brady v. National Supply Co., 64 O. S. 267 (1901); affirming 19 C. C. 687; 10 C. D. 27.

Kardo Co. v. Adams, 231 Fed. 950; 14 O. L. R. 223 (C. C. A. Ohio 1916); reversing, 222 Fed. 967; 13 O. L. R. 137.

Elektron Mfg. Co. v. Jones Bros. Co., 8 C. C. 311; 4 C. D. 555 (1894).
 Minzey v. Marcy Mfg. Co., 6 C. C. n. s. 593; 15 C. D. 593 (1903).
 Illinois, etc., Co. v. Whitman, 13 N. P. n. s. 362; 23 L. D. 12 (1911).

See Spence v. Insurance Co., 40 O. S. 517 (1884).

To raise the issue of nul tiel corporation the defendant must specially plead that the plaintiff is not a corporation, in which event the plaintiff must prove its corporate existence.

Brady v. National Supply Co., 64 O. S. 267 (1901); affirming 19 C. C. 687; 10 C. D. 27.

Smith v. Weed Sewing Machine Co., 26 O. S. 562 (1875).

Lewis v. Bank, 12 Ohio 146 (1843).

Where a corporation is defendant in an action involving its charter, powers or franchises, the same must be specially pleaded in the petition. If a foreign corporation, the name of the state of organization and the substantial terms of its charter, etc., should be set forth.

Brady v. National Supply Co., 64 O. S. 267 (1901).

Devoss v. Gray, 22 O. S. 159 (1871).

See State v. Granville, etc., Soc., 11 Ohio 9 (1841).

Streit v. Hoster Brewing Co., 12 L. D. 619 (C. P. 1902).

As a general rule, corporate existence can be attacked only by the state in a direct proceeding. A private party, suing or defending in his own interest, usually can not question the sufficiency of incorporation proceedings. Kardo Co. v. Adams, 231 Fed. 950; 14 O. L. R. 223 (C. C. A. Ohio 1916); Railway Co. v. Cleveland, 19 N. P. n. s. 574, 590 (1916).

There are some exceptions to this rule, notably in appropriation proceedings by corporations (Cemetery Assn. v. Traction Co., 93 O. S. 161) and where a corporation attempts to interfere with the property rights of others under a franchise or special privilege. Railway Co. v. Cleveland, 19 N. P. n. s. 574 (1916).

In appropriation proceedings by a corporation, it must prove its complete organization, including the due and regular election of directors. A general denial places the burden of proof of such organization on the plaintiff.

Cemetery Assn. v. Traction Co., 93 O. S. 161 (1915).

Telephone Co. v. Cincinnati, 73 O. S. 64 (1905).

See note to § 11046.

In criminal cases. In an indictment for burglary or larceny it is not necessary to aver or prove that the injured party was incorporated.

Murphy v. State, 36 O. S. 628 (1881).

Burke v. State, 34 O. S. 79 (1877).

Hamilton v. State, 34 O. S. 82 (1877).

See also Calkins v. State, 18 O. S. 366 (1868).

In an action by a building and loan association to recover special rates of interest, the association must prove that it is a corporation which possesses the right to such interest. Loan Co. v. Philen, 18 C. C. n. s. 419 (1910).

How proved. The existence of a corporation for profit may be proved by a certified copy of the articles, the certificate of subscription, and the corporate minutes showing the election and qualification of directors and officers.

Toledo, etc., Co. v. Toledo, etc., Co., 26 W. L. B. 172 (Probate Ct. 1891); s. c., 6 C. C. 362, 391; 3 C. D. 493 (1892); affirmed, 50 O. S. 603.

Realty Company v. Railway, 18 C. C. n. s. 86 (1910).

See *Memphis, etc., Packet Co. v. Fogarty*, 9 C. C. 418; 6 C. D. 375 (1895).

The existence of a foreign corporation may be proved by its certificate of compliance with the foreign corporation law. § 190-1.

Evidence of charitable nature of corporation. A corporation not for profit may show by its charter, constitution and by-laws, or by oral evidence not inconsistent therewith, that it is organized solely for the purpose of administering a public charity, the foundation of which is derived from private donations: *O'Brien v. Hosp. Assn.*, 96 O. S. 1 (1917).

Section 8630. (Subscription books.) The persons named in the articles of incorporation of a corporation for profit, or a majority of them, shall order books to be opened for subscriptions to the capital stock of the corporation at such time or times and place or places as they deem expedient. (R. S. Sec. 3242; April 6, 1891, 88 v. 280; March 5, 1883, 80 v. 42; R. S. 1880; May 1, 1852, 50 v. 274, § 9; S. & C. 276.)

Payment of subscriptions. See § 8632 and note.

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The opening of subscription books, though one, is not the exclusive mode in which subscriptions to stock may be made. A subscription is not invalid because made on a separate sheet of paper.

Ashtabula etc., R. Co. v. Smith, 15 O. S. 328, 337 (1864).

Incorporators need not become subscribers for stock. *Kardo Co. v. Adams*, 231 Fed. 950, 964; 14 O. L. R. 223 (C. C. A. Ohio 1916).

Agreement by incorporators to pay commissioners to agents for obtaining subscriptions. In the opinion of the attorney general, incorporators are authorized to make an agreement to pay commissions to agents for obtaining subscriptions to stock. Rep. Atty. Gen. 1914, p. 147.

I. SUBSCRIPTIONS BEFORE INCORPORATION.

A mutual agreement between individuals to become stockholders in a corporation thereafter to be organized is valid.

Doan v. Rogan, 79 O. S. 372, 386 (1909).

But such an agreement differs from a mere subscription to stock made before incorporation. A subscription before incorporation is a continuing offer only and not a present contract. Prior to incorporation no person is authorized to accept the subscription. Such a subscription may be withdrawn by the person making it, providing he acts before the corporation is organized and his subscription accepted.

Mill Co. v. Felt, 87 Me. 234.

Hudson, etc., Co. v. Tower, 161 Mass. 10.

Auburn Bolt Works v. Schultz, 143 Pa. St. 256.

See *Wallace v. Townsend*, 43 O. S. 537 (1885).

It is held in many states that where such a subscription is not withdrawn, but permitted to stand until the corporation is organized and the subscription accepted, the contract becomes complete and enforceable.

Nebraska Chicory Co. v. Lednicky, 79 Neb. 587; 113 N. W. 245.

McNaught v. Fisher, 96 Fed. 168 (1899).

Athol Music Hall Co. v. Carey, 116 Mass. 471.

Planters', etc., Co. v. Webb, 144 Ala. 666.

Cook on Corporations, § 72.

Thompson on Corporations, §§ 521, 522.

In Ohio, however, it has been held that subsequent incorporation and acceptance of the subscription do not render a prior subscription enforceable.

Dayton, etc., Co. v. Coy, 13 O. S. 84, 91 (1864).

See Milford, etc., Co. v. Brush, 10 Ohio 111, 113, 114 (1840).

Where the stock subscription book shows that the subscriptions were made after incorporation, evidence is not admissible to prove that in fact the subscriptions were made before incorporation.

Royce & Pulling v. Tyler, 2 C. C. 175; 1 C. D. 428 (1887).

Where a subscription to stock, made before organization, is silent as to the state in which the proposed corporation will be organized, the subscriber is entitled to a voice in its determination. Ginter v. Blain, 2 Ohio App. 482; 21 C. C. n. s. 366 (1913).

II. SUBSCRIPTIONS AFTER INCORPORATION.

A. Received by whom. After the filing of articles of incorporation the incorporators are authorized to receive subscriptions.

Sims v. Street Railroad Co., 37 O. S. 556, 565 (1882).

Subscriptions received by the incorporators after books have been opened are not void for want of mutuality but are binding.

Milford, etc., Co. v. Brush, 10 Ohio 113, 114 (1840).

Ashtabula, etc., R. R. Co. v. Smith, 15 O. S. 334, 336 (1864).

The right to dispose of stock which remains unsubscribed after the directors are elected and qualified is vested in the board of directors.

Sims v. Street Railroad Co., 37 O. S. 565 (1882).

See James v. C. H. & D. R. Co., 2 Dis. 261, 275 (Super. Ct. Cin. 1858.)

B. Should be in writing. A subscription for stock should be in writing. A verbal agreement to take shares is not enforceable in the absence of facts constituting an estoppel.

Fanning v. Insurance Co., 37 O. S. 339 (1881).

Hanes v. Dayton, etc., Co., 40 O. S. 98 (1883).

Persons who have not subscribed for stock but who accept certificates of stock, issued to them directly by the corporation without full payment, may be liable. An agreement to pay the par value is implied from their acceptance of the certificate.

Handley v. Stutz, 139 U. S. 417, 427 (1891).

Gates v. Tippecanoe Stone Co., 57 O. S. 60 (1897).

In re Flood-Pratt Dairy Co., 7 O. L. R. 603; 16 O. F. D. 396 (1909).

First N. B. v. Patton Co., 13 C. C. n. s. 289 (1910).

See also note to § 8674.

Where stock is exchanged for property or services at an overvaluation, the persons receiving the stock may be treated as original subscribers to such stock, credited with the actual value of the property or services and sued as debtors for the unpaid balance.

Gates v. Tippecanoe Stone Co., 57 O. S. 60 (1897).

Kiskadden v. Steinle, 203 Fed. 375 (C. C. A. 1913).

C. Form. The form of a subscription to stock is not prescribed by statute. It need not contain a statement of the times of payment, as payment is provided for by statute. (§ 8632).

Chamberlain v. R. R. Co., 15 O. S. 225, 249 (1864).

Ashtabula, etc., R. Co. v. Smith, 15 O. S. 328, 336 (1864).

A subscription need not be made in the subscription book provided by the incorporators. It may be made on a separate sheet of paper.

Ashtabula, etc., R. Co. v. Smith, 15 O. S. 328, 336 (1864).

See Ohio, etc., College v. Love, 16 O. S. 20 (1864).

D. Is a contract creating a several, not joint, liability. A subscription received by incorporators is a contract.

Gaff v. Flesher, 33 O. S. 107, 112 (1877).

An ordinary subscription is a several, and not a joint, contract.

Smith v. Johnson, 57 O. S. 486, 490 (1898).

See Burnap v. Sylvania Butter Co., 7 N. P. 217 (1894); reversed on other grounds, 12 C. C. 639; 5 C. D. 582.

E. Withdrawal and release of subscriptions. A subscription received by the incorporators or directors is a contract which can not be rescinded without the consent of both parties. The subscriber can not relieve himself from liability by attempting to withdraw or cancel his subscription.

Gaff v. Flesher, 33 O. S. 107, 112, 113 (1877).

The corporation can not release the subscriber to the prejudice of any intervening creditor.

Gaff v. Flesher, 33 O. S. 107, 113 (1877).

Royce & Pulling v. Tyler, 2 C. C. 175; 1 C. D. 428 (1887).

North Fairmount, etc., Co. v. Ashbrook, 12 L. D. 10 (Super. Ct. Cin. 1901).

Niles v. Olszak, 87 O. S. 229 (1912).

Directors have no power to release a subscriber except with the unanimous consent of the other subscribers.

Royce & Pulling v. Tyler, 2 C. C. 175, 187; 1 C. D. 428 (1887).

A subscriber may be released by the unanimous consent of the other subscribers before debts are incurred. Such consent need not be express. Where a subscriber stated in open meeting that he would withdraw his subscription for five shares, but agreed to take one share, and all other subscribers had knowledge of his withdrawal and made no objection, he was held not liable to subsequent creditors. Ginn v. Sanitarium Co., 16 C. C. n. s. 90 (1909).

Withdrawal of unaccepted offer to subscribe or of conditional subscription.

See Wallace v. Townsend, 43 O. S. 537 (1885).

Armstrong v. Karshner, 47 O. S. 276, 297 (1890).

See below *Conditional Subscriptions*.

F. Compromise and release of subscription. Where there is a bona fide controversy as to the liability of the subscriber, or where the subscriber is insolvent, the directors may, for a valuable consideration, compromise with and release the subscriber.

Warner v. Callender, 20 O. S. 190, 198 (1870).

State v. Building Assn., 35 O. S. 258, 263 (1879).

Wangerein v. Aspell, 47 O. S. 250 (1890).

Biggio v. Sandheger, 8 N. P. 13, 15 (1900).

See also Morgan v. Lewis, 46 O. S. 1 (1888).

Sanderson v. Aetna Iron & Nail Co., 34 O. S. 442 (1878).

The agreement of compromise must be fully executed.

Frost v. Johnson, 8 Ohio 393 (1838).

G. Subscription obtained by fraud. A person is entitled to relief where he has subscribed to stock relying on material and fraudulent

representations, made by authorized agents of the corporation, as to the past or present status of the corporate enterprise.

False statements as to the future intention, purpose or expectation of the corporation do not, as a rule, entitle a subscriber to relief.

Armstrong v. Karshner, 47 O. S. 276, 294 (1890).

Freeman v. Muth, 3 W. L. B. 914 (Dist. Ct. 1878).

Donnell v. Sugar Co., 16 N. P. n. s. 331 (1914); aff'd by Ct. of App.

Fraudulent representations as to the amount of stock already subscribed (*Nugent v. Cincinnati, etc., Ry. Co.*, 2 Dis. 302), and that the soliciting agent had seen the railway plans providing for bridges and culverts over the subscriber's farm (*Freeman v. Muth*, 3 W. L. B. 914), were held to entitle the subscriber to relief.

But a false representation that all of the stock had been subscribed was held not to entitle the subscriber to rescind his subscription, where at the time ninety percent of the stock had been subscribed and the remaining ten percent was disposed of before active business was begun. *National Co. v. Roberts*, 221 Fed. 922 (C. C. A. Ohio 1915).

A false representation, made by officers at a stockholders meeting, that the company had not lost money and its business was on a sure footing, was held to entitle persons, who subscribed on the faith thereof, to relief. *National Co. v. Roberts*, 221 Fed. 922 (C. C. A. Ohio 1915).

A representation that the stock offered for sale was treasury stock; whereas in fact it belonged to the seller personally, was held not to render the seller liable. *Hill v. Roper*, 22 C. C. n. s. 455 (1915).

A statement that a certain rate of dividend would pay the interest on a note given for a subscription does not constitute fraud, for its accuracy would have appeared from a mathematical calculation. *Bank v. McDonald*, 2 Ohio App. 497; 21 C. C. n. s. 245 (1913).

Where a subscription was made on the faith of a prior subscription by another person, a fraudulent cancellation or alteration of such prior subscription will not affect the validity of the subsequent subscription.

Jewett v. Railway, 34 O. S. 601 (1878).

Delay by the subscriber to take action within a reasonable time after discovery of the fraud will defeat his right to relief where the rights of creditors intervene.

Gill v. Printing Co., 16 C. C. n. s. 568 (1907); aff'd, no rep. 80 O. S. 742; 81 O. S. 515.

Mansfield v. Woods, Jenks & Co., 29 W. L. B. 111 (C. P.)

Ryan v. Miami, etc., Ry. Co., 10 A. L. R. 263 (C. P. 1881).

See *Painesville N. B. v. King Varnish Co.*, 8 C. C. 563; 4 C. D. 511 (1894); reversed in part, 56 O. S. 744.

H. Remedies of subscriber. (a) Action to rescind. A subscriber whose subscription was obtained by fraud may bring an action to set aside the subscription and to recover back the payments made by him thereon.

Nugent v. Cincinnati, etc., R. Co., 2 Dis. 302 (1858).

See *Bank v. Greenville, etc., Co.*, 3 C. C. n. s. 372; 13 C. D. 274 (1899).

After insolvency of the corporation, while a defrauded subscriber can not rescind, to the prejudice of the creditors, yet as against other stockholders he may be treated as a creditor. And the liability of the other stockholders must be exhausted before his liability is resorted to. *Gill v. Printing Co.*, 16 C. C. n. s. 568 (1907); aff'd, no rep. 80 O. S. 742; 81 O. S. 515.

Laches may also bar relief where no rights of creditors inter-

vene. Where a purchaser of oil stock waited six months until after a well was drilled, having had opportunity of discovering the fraud, he was held not entitled to rescind. *Hamilton v. Carr*, 17 C. C. n. s. 395 (1911).

Where a bonus of common stock was offered to purchasers of preferred, but one purchaser was induced to accept preferred stock without a bonus, by a false representation that the preferred had been contracted for by a prior subscriber, who insisted on retaining the common stock, he was held entitled to a rescission. *National Co. v. Roberts*, 221 Fed. 922 (C. C. A. Ohio 1915).

(b) **Defense to action on subscription.** Fraud in obtaining a subscription is a defense to an action brought thereon against the subscriber except where rights of creditors have intervened.

Jewett v. Railway, 34 O. S. 601, 609 (1878).

Armstrong v. Karshner, 47 O. S. 276, 294 (1890).

Freeman v. Muth, 3 W. L. B. 914 (Dist. Ct. 1878).

James v. Cincinnati, etc., R. Co., 2 Dis. 261, 266 (1858).

Gill v. Printing Co., 16 C. C. n. s. 568 (1907); *aff'd*, no rep. 80 O. S. 742; 81 O. S. 515.

Even after bankruptcy of the corporation, fraud is a defense where no corporate debts were contracted after the subscription was made. *Yoder v. Hoyt*, 18 C. C. n. s. 433 (1910).

(c) **Action for damages against officers or agents.** The subscriber may bring an action for damages against the officers or agents of the corporation by whom the fraud was perpetrated. An officer or agent who makes material and false representations is personally liable where he had knowledge of their falsity, or where the representations were made under such circumstances that knowledge of their falsity must necessarily be imputed to him.

See Mason v. Moore, 73 O. S. 275, 291, 293 (1906).

Cable v. Bowlus, 21 C. C. 53; 11 C. D. 526 (1900); *aff'd*, 69 O. S. 563.

Schenck v. Knott, 13 C. C. n. s. 41 (1910).

Russell v. Weiler, 7 C. C. n. s. 596; 18 C. D. 175 (1905).

See G. C. § 6373-18.

But an agent is not personally liable, unless it is shown that he acted in bad faith, or that his belief as to the truth of the representations was not justified by the facts. *Johns v. Hopper*, 26 C. C. n. s. 452 (1916).

Several joint promoters may be personally liable for the misrepresentations of one of their number. *Champney v. Braun*, 23 C. C. n. s. 533 (1912); reversed on other grounds, 91 O. S. 386.

(d) **Measure of damages.** The measure of damages is the difference between the price paid for the stock and its actual value at the time of the sale.

Schenck v. Knott, 13 C. C. n. s. 41, 46 (1910).

See Degraw v. Lampert, 17 C. C. n. s. 401, 403 (1911).

The purchaser can not recover damages for mental suffering, disappointment or disgrace; nor in general can he recover punitive damages.

Cable v. Bowlus, 21 C. C. 53; 11 C. D. 526 (1900); *aff'd*, 69 O. S. 563.

I. Construction of subscriptions. A subscription must be construed with reference to the statutes in force at the time it was made. Such statutes enter into and form a part of the subscription.

Armstrong v. Karshner, 47 O. S. 276, 299 (1890).

Jewett v. Railway, 34 O. S. 601, 607 (1878).

Mansfield, etc., R. Co. v. Stout, 26 O. S. 241, 254 (1875).
Compton v. Railway Co., 45 O. S. 592, 620 (1888).

J. Stipulation for interest to subscribers. Where interest is stipulated to be paid to subscribers on the amounts paid in on their subscriptions, such interest is not payable except out of the profits of the corporation.

Ryan v. Miami Valley Ry. Co., 10 A. L. R. 263, 265 (C. P. 1881).
Wood v. Pearce, 2 Dis. 411 (1858).
Painesville, etc., R. Co. v. King, 17 O. S. 534 (1867).
See § 8724.

K. Assignment of subscriptions.

(a) **By subscriber.** A subscription to stock upon which installments have been paid may be assigned by the subscriber.

Railroad Co. v. Fink, 41 O. S. 321 (1884).

But an assignee is not liable for an unpaid balance on the subscription unless he accepted the assignment. The corporate books showing the transfer are, alone, not sufficient evidence of the acceptance so as to render him liable.

Tripp v. Appleman, 35 Fed. 19; 6 O. F. D. 71 (C. C. Ohio 1888).

(b) **By corporation.** A corporation may assign subscriptions to its capital stock after calls have been made thereon.

Dungan v. Safford, 41 O. S. 15 (1884).

The trustee of a bankrupt corporation may, under proper order, sell and assign claims for unpaid subscriptions and the assignee may bring suit thereon, although it may be doubtful whether he is entitled to recover more than he paid for the same. Yoder v. Tubman, 19 C. n. s. 225 (1911).

L. Abandonment of subscriptions. An attempted withdrawal of his subscription, or a transfer by a subscriber to a fictitious person may perhaps be treated by the corporation as an abandonment of the subscription.

Royce v. Tyler, 2 C. C. 175, 185; 1 C. D. 428 (1887).

Muskingum, etc., Co. v. Ward, 13 Ohio 120 (1844).

But if the corporation subsequently does any act which amounts to an admission of the existence of the contract it can not thereafter elect to treat it as abandoned.

Railroad Co. v. Fink, 41 O. S. 321, 330 (1884).

III. CONDITIONAL SUBSCRIPTIONS.

A corporation may receive and accept conditional subscriptions to its stock at any time after its actual incorporation.

Armstrong v. Karshner, 47 O. S. 276, 295 (1890).

Ashtabula, etc., R. Co. v. Smith, 15 O. S. 328, 336 (1864).

Conditions in subscriptions may be precedent or subsequent.

Chamberlain v. Painesville, etc., Ry., 15 O. S. 247 (1864).

A. Conditions precedent. A subscription on a condition precedent should be accepted by the corporation and the condition must be performed by the corporation before the subscription can become absolute.

Chamberlain v. Painesville, etc., Ry., 15 O. S. 247 (1864).

Armstrong v. Karshner, 47 O. S. 276, 296 (1890).

B. Acceptance. Before acceptance by the corporation a subscription on a condition precedent may be revoked or withdrawn by the subscriber.

Wallace v. Townsend, 4 O. S. 537 (1885).

After acceptance by the corporation the subscriber can not, in general, withdraw or revoke the subscription, unless performance of the condition is unreasonably delayed. He is, as a rule, bound to await such performance.

Armstrong v. Karshner, 47 O. S. 276, 296 (1890).

When neither withdrawn by the subscriber nor expressly accepted by the corporation a subscription on a condition precedent is a continuing offer to subscribe, on the specified condition, which, on performance of the condition, becomes an absolute and unconditional subscription.

Armstrong v. Karshner, 47 O. S. 276, 296 (1890).

Mansfield, etc., Co. v. Stout, 26 O. S. 241 (1875).

Acceptance and performance are usually matters to be acted upon by the directors.

Ashtabula, etc., R. Co. v. Smith, 15 O. S. 328, 336 (1864).

C. Performance. A subscriber does not become a stockholder or liable on his subscription until the conditions precedent have been performed.

Railroad Co. v. Hinsdale, 45 O. S. 556, 570 (1888).

But on performance of the conditions the subscription becomes absolute and unconditional.

Ashtabula, etc., R. Co. v. Smith, 15 O. S. 328, 336 (1864).

Mansfield, etc., Co. v. Brown, 26 O. S. 223 (1875).

Performance of the conditions may be made by the corporation itself or by a consolidated company into which the original corporation was merged under statutes in force when the subscription was made which authorize the consolidated company to acquire debts due on subscriptions.

Mansfield, etc., Co. v. Brown, 26 O. S. 223 (1875).

Mansfield, etc., Co. v. Stout, 26 O. S. 241 (1875).

But conditional subscriptions can not be sold and transferred without statutory authority and an assignee under an unauthorized transfer can not recover although having performed the conditions.

Railroad Co. v. Hinsdale, 45 O. S. 556 (1888).

Where the corporation refuses to perform the condition the subscriber may recover back moneys paid by him on the subscription.

Weeden v. Lake Erie, etc., Co., 14 Ohio 563 (1846).

D. Waiver. The giving, by a subscriber, of a note in payment is prima facie a waiver of conditions precedent.

Chamberlain v. Painesville, etc., R. Co., 15 O. S. 225 (1864).

Four Mile, etc., Co. v. Bailey, 18 O. S. 208 (1868).

So also, payment of the first installment, voting the stock at an election of directors and acting as an officer of the company.

Dayton, etc., R. Co. v. Hatch, 1 Dis. 84 (Super. Ct. Cin. 1855).

E. Illegal conditions. A condition or stipulation in a subscription which attempts to secure to the subscriber advantages and privileges not common to other subscribers, and without their knowledge or consent, is contrary to public policy. The subscription is valid, and the condition or stipulation is no defense against its enforcement.

Jewett v. Railway, 34 O. S. 601, 609 (1878).

Stunt v. Newark, etc., Co., 22 C. C. 120; 12 C. D. 175 (1901);
aff'd, no rep., 67 O. S. 555.

Rianhard v. Hovey, 13 Ohio 300 (1844).

Henry v. Vermillion, etc., Co., 17 Ohio 187 (1848).

Noble v. Callender, 20 O. S. 199 (1870).

Compare Weeden v. Lake Erie, etc., Co., 14 Ohio 563 (1846).

Shoemaker v. Goshen Twp., 14 O. S. 569, 583 (1863).

F. Conditions subsequent. A subscription on a condition subsequent is not, strictly speaking, a conditional subscription.

Shoemaker v. Goshen Twp., 14 O. S. 569, 583 (1863).

It combines an absolute and unconditional subscription with an agreement by the corporation to perform one or more acts. For a breach of the agreement by the corporation the remedy is an action for damages.

Chamberlain v. Painesville, etc., R. Co., 15 O. S. 225 (1864).

Stunt v. Newark, etc., Co., 22 C. C. 120, 123; 12 C. D. 175 (1901);
aff'd, no rep., 67 O. S. 555.

Shoemaker v. Goshen Township, 14 O. S. 569 (1863).

Zerkle v. Price, 5 N. P. 480.

G. Conditions construed.

(a) **Precedent or subsequent.** Where a subscription to the stock of a railroad company was given on condition that the road be "permanently located" on a given route and that a "freight house and depot be built" at a point named, it was held that the permanent location of the road on the specified route was a condition precedent, while the erection of the buildings was a condition subsequent.

Chamberlain v. Painesville, etc., R. Co., 15 O. S. 225 (1864).

(b) **Certain amount to be subscribed.** A subscription not to be binding until subscriptions to a specified amount have been made becomes absolute and unconditional as soon as subscriptions in the required amount are obtained.

Emmitt v. Springfield, etc., R. Co., 31 O. S. 23 (1876).

(c) **Road to "pass through" or be "built" in a certain locality.** Where the condition is that the road shall "pass through" or be "built" in a certain locality, the permanent location of the road, without its actual construction, is a compliance with such condition.

Ashtabula, etc., R. Co. v. *Smith*, 15 O. S. 328 (1864).

Mansfield, etc., R. Co. v. *Stout*, 26 O. S. 241, 254 (1875).

Warner v. Callender, 20 O. S. 190 (1870).

See Elder v. Bellaire, etc., Ry. Co., 1 C. C. 256; 1 C. D. 140 (1885).

(d) **Limiting amount and time of calls.** A condition "that not more than ten percent shall be required at any one call, nor shall calls be made more frequently than once in sixty days" operates as a waiver of the statutory right of the directors to make calls in their discretion, and is not included in a general call for ten percent per month.

Mansfield, etc., R. Co. v. *Pettis*, 26 O. S. 259 (1875).

(e) **Agreement by corporation to repurchase stock.** Where stock is issued by a corporation under an agreement giving the stockholder the right to return the stock and receive back the purchase money, the agreement is a condition subsequent which may be enforced if the rights of creditors are not impaired.

Zerkle v. Price, 5 N. P. 480; 7 L. D. 465.

Shoemaker v. Goshen Township, 14 O. S. 569, 583 (1863).

Fleitman v. Stone Cotton Mills, 186 Fed. 466 (C. C. A. 1911).

See Weeden v. Lake Erie, etc., Co., 14 Ohio 563 (1846).

Hubbard v. Riley, 3 W. L. B. 434 (Dist. Ct. 1878).

(f) **Rules of construction of conditions.** Where a subscription contract admits of two interpretations the one which facilitates the enterprise is preferred.

Ashtabula, etc., Co. v. *Smith*, 15 O. S. 328, 335 (1864).

And the interpretation which makes all the parts of the instrument consistent is preferred to one which makes them contradictory.

Leshner v. Karshner, 47 O. S. 302, 305 (1890).

(g) **Evidence as to conditions.** Parol evidence is not admissible to annex conditions to a written subscription, in the absence of fraud or mistake.

Freeman v. Muth, 3 W. L. B. 914 (Dist. Ct. 1878).

Parol evidence is admissible to prove delivery to and acceptance of a conditional subscription by a corporation.

Mansfield, etc., R. Co. v. Brown, 26 O. S. 223, 234 (1875).

IV. DISPOSITION OF STOCK BY CORPORATION AFTER ELECTION OF DIRECTORS.

A. In general. The directors have power to dispose of the stock which remains unsubscribed after their election.

Sims v. Street Railroad Co., 37 O. S. 565 (1882).

The board may dispose of it by subscription, or may sell it outright without subscriptions;

See Peter v. Union Mfg. Co., 56 O. S. 181, 197 (1897).

exchange it for property or services;

Gates v. Tippecanoe Stone Co., 57 O. S. 75 (1897).

Orton v. Edson, etc., Co., 5 C. C. n. s. 540; 17 C. D. 107 (1905);
aff'd, no rep., 75 O. S. 580.

or use it in payment of corporate debts.

Dayton, etc., R. Co. v. Hatch, 1 Dis. 84, 96 (Super. Ct. Cin. 1855).

Sims v. Street Railroad Co., 37 O. S. 566 (1882).

Where surplus profits have arisen from the corporate business a stock dividend may be declared.

See note to § 8724.

Sales of stock and other corporate securities are regulated by statute popularly known as the "blue sky" law. G. C. §§ 6373-1 to 6373-22.

B. Sales below par. A corporation can not, in general, sell its stock for less than par. Purchasers from the corporation who pay less than par for stock may be held liable to creditors for the difference between the amount paid and the par value of the stock, although the stock was issued as full paid and nonassessable.

Security Trust Co. v. Ford, 75 O. S. 322 (1906).

Vandeusen v. Ransom, 23 C. C. n. s. 194 (1912).

Handley v. Stutz, 139 U. S. 417 (1891).

In re Flood-Pratt Dairy Co., 7 O. L. R. 603; 16 O. F. D. 396
(Referee in Bkry. 1909).

Sturges v. Stetson, 1 Bis. (U. S.) 246 (C. C. Ohio 1858).

Fosdick v. Sturges, 1 Bis. (U. S.) 255 (C. C. Ohio 1858).

Under some circumstances of financial embarrassment a corporation which is a going concern may, in order to raise money to continue its business, make sales for less than par. Even in such cases the purchasers may be liable to subsequent creditors who have no knowledge of the terms of such purchase.

See Peter v. Union Mfg. Co., 56 O. S. 181, 203 (1897).

Rickerson, etc., Co. v. Farrell, etc., Co., 75 Fed. 554 (C. C. A. 1896).

Although the federal circuit court of appeals for the sixth circuit has held that purchasers are not liable to creditors where stock is necessarily sold by a corporation below par, at its market value, because of impairment of its capital. Thoms v. Goodman, 254 Fed. 39; 17 O. L. R. 31 (1918).

Where the sales were made in good faith the purchasers are not liable to the corporation, or as against other stockholders.

Peter v. Union Mfg. Co., 56 O. S. 181 (1897).

Kinsey v. Mt. Auburn Cable Co., 6 C. C. n. s. 305; 17 C. D. 633 (1905); aff'd, no rep., 75 O. S. 602.

See Security Trust Co. v. Ford, 75 O. S. 322, 335 (1906).

Nor are they liable to creditors whose claims were incurred prior to the purchase.

See Peter v. Union Mfg. Co., 56 O. S. 181, 203 (1897).

Handley v. Stutz, 139 U. S. 417 (1891).

Nor to subsequent creditors who have knowledge of the terms of the purchase.

See Kinsey v. Mt. Auburn Cable Co., 6 C. C. n. s. 305, 314; 17 C. D. 633 (1905); aff'd, no rep., 75 O. S. 602.

Rickerson, etc., Co. v. Farrell, etc., Co., 75 Fed. 554 (C. C. A. 1896).

Sales for less than par can be made, in general, only by corporations engaged in conducting business and under circumstances of financial embarrassment. They can not be made at the time of organization of a new corporation.

Kinsey v. Mt. Auburn, etc., Co., 6 C. C. n. s. 305, 319-320; 17 C. D. 633 (1905); aff'd, no rep., 75 O. S. 602.

Transferees of stock which has not been fully paid are not liable unless they knew that it has not been paid. A transferee may rely on the representation of the corporation that it has been fully paid. The statement "full paid" on stock certificates is such a representation.

Roebblings Sons Co. v. Shawnee, etc., Co., 4 N. P. n. s. 113, 121-122; 17 L. D. 8 (1906); aff'd, no rep., 78 O. S. 408.

C. Common stock given as a bonus with preferred stock. Persons who receive par value common stock, as a bonus with preferred stock, may be liable to subsequent creditors, and stockholders who do not receive such bonus may be entitled to a remedy, but stockholders who receive the bonus can not complain, in the absence of fraud, although they receive proportionately less bonus stock than other stockholders. In such a case there can be no recovery as between themselves. Hof-fard v. Shoe Co., 95 O. S. 376 (1917); affirming, 27 C. C. n. s. 513. See also Williamson v. Collins, 243 Fed. 835 (C. C. A. 6th Cir. 1917).

Where a bonus of common stock was offered to subscribers for preferred stock, but one subscriber was induced to accept preferred stock, without the bonus, by a false representation that the preferred had been contracted for by a prior subscriber who insisted on retaining the common stock, the subscriber was held not entitled to a rescission of his subscription. National Co. v. Roberts, 221 Fed. 922 (C. C. A. 1915).

When stock was issued for a secret process and two shares of such stock were given with each share subscribed and paid for in cash, it was held that the subscribers who received such "bonus stock" were not liable merely because the secret process had "no market value" and its utility had not been demonstrated. Oldham v. Munitions Co., 23 N. P. n. s. 77 (1920).

A subscription for preferred stock, with which the subscriber is to receive a bonus of common stock, is not illegal, so as to release the subscriber from his obligation to pay for the preferred. Yoder v. Tubman, 19 C. C. n. s. 225 (1911).

No-par-value common stock may be given as a bonus. § 8728-1.

D. Exchange of stock for property. The directors, acting in good faith, may exchange stock for property or services.

Gates v. Tippecanoe Stone Co., 57 O. S. 60, 74, 75 (1897).

Orton v. Edson, etc., Co., 5 C. C. n. s. 540; 17 C. D. 107 (1905); aff'd no rep., 75 O. S. 580.

Leman v. McLennan, 7 C. C. n. s. 205; 18 C. D. 137 (1905); aff'd, no rep., 75 O. S. 643.

Sims v. Street Railroad Co., 37 O. S. 556 (1882).

Kunz v. National Valve Co., 9 C. C. n. s. 593; 19 C. D. 519 (1907).

Dayton, etc., R. Co. v. Hatch, 1 Dis. 84, 96 (Super. Ct. Cin. 1855).

See *Sanderson v. Iron & Nail Co.*, 34 O. S. 442, 449 (1878).

Goodin v. Evans, 18 O. S. 150 (1868).

The property should be of a character which may be purchased by the corporation in the prosecution of its business.

Dayton, etc., R. Co. v. Hatch, 1 Dis. 84, 96 (Super. Ct. Cin. 1855).

It should be taken at a fair and adequate valuation, and the directors must have no personal interest in the transaction. Directors can not, acting for the corporation, exchange its stock for their own property.

Gates v. Tippecanoe Stone Co., 57 O. S. 60 (1897).

As to whether the valuation placed upon the property by the directors in good faith is conclusive, the authorities in other states are conflicting. In many states it is held that the director's valuation is conclusive in the absence of fraud. This "good faith" rule has been approved by one circuit court in Ohio.

Kunz v. National Valve Co., 9 C. C. n. s. 607; 19 C. D. 519 (1907).

E. Property fraudulently overvalued. Liability of stockholders.

(a) **To the corporation.** Where directors have issued stock as fully paid up in exchange for property the corporation can not thereafter treat the stock as only partially paid up and assess the stockholder with the difference between the actual value of the property and the par value of the stock. If the transaction was fraudulent the remedy of the corporation is to rescind the agreement, tender back the property and recover the stock or its market value.

Orton v. Edson, etc., Co., 5 C. C. n. s. 540; 17 C. D. 107 (1905); aff'd, no rep., 75 O. S. 580.

Leman v. McLennan, 7 C. C. n. s. 205, 208; 18 C. D. 137 (1905); aff'd, no rep., 75 O. S. 643.

See *Peter v. Union Mfg. Co.*, 56 O. S. 181, 202 (1897).

Old Dominion, etc., Co. v. Lewisohn, 210 U. S. 206; s. c., 136 Fed. 915.

(b) **To creditors.** Where the property was fraudulently overvalued corporate creditors may recover the difference between the actual value of the property and the par value of the stock. The transaction is regarded as a subscription for the amount of stock issued, the actual value of the property is credited thereon, and the balance deemed a debt due from the stockholder.

Gates v. Tippecanoe Stone Co., 57 O. S. 60 (1897).

Kiskaden v. Steinle, 203 Fed. 375 (C. C. A. 1913).

If the property has no value (as where an insolvent partnership is converted into a corporation which takes the partnership assets in payment of subscriptions, and also assumes all the partnership debts), nothing is credited and the stockholders are liable to creditors for the full amount of their subscriptions.

Ford v. Lamson, 17 C. C. 539; 9 C. D. 374 (1899).

Sayler v. Simpson, 12 L. D. 148 (Super. Ct. Cin. 1888).

Preston v. Cincinnati, etc., R. Co., 36 Fed. 54 (U. S. C. C. 1888).

F. Transferee of stock fraudulently issued. A purchaser of such stock from the original stockholder is not liable unless he knew of its fraudulent character. He is entitled to rely on the representation of the corporation that it has been fully paid.

Roeblings Sons Co. v. Shawnee, etc., Co., 4 N. P. n. s. 113; 17 L. D. 8 (C. P. 1906); aff'd, no rep., 78 O. S. 408.

G. President signing "full paid" certificate. The president of a corporation who signed stock certificates, which certify that the stock is "full paid and nonassessable," is not liable to a person who purchased such stock in the open market, for less than par without inquiry as to the assets of the corporation, although the president knew that such stock was issued for property at an overvaluation.

Nutt v. Wheeler, 10 C. C. n. s. 217; 20 C. D. 86 (1907).

H. Sales to directors and officers. A director or officer may purchase unissued or treasury stock from the corporation, when the sale is authorized by a quorum of disinterested directors and where no action has been taken to withhold the stock from sale to other stockholders or the public.

Sims v. Street Railroad Co., 37 O. S. 556 (1882).

Taylor v. Miami Exporting Co., 6 Ohio 176, 223 (1833).

Sales below par to directors have been sustained as against other stockholders, where the directors made diligent efforts to sell the stock at the same price to the public, and to the other stockholders, before purchasing themselves, and where the corporation was pressed for money to continue business.

Peter v. Union Mfg. Co., 56 O. S. 181 (1897).

Stock of a railroad company purchased below par by a director is void. G. C. § 8798.

A purchase made in order to vote at an election for directors and obtain control of the corporation is valid, when full value is paid for the stock.

Hall v. Hall, 11 C. C. n. s. 335; 20 C. D. 826 (1908); aff'd, no rep., 79 O. S. 456.

Taylor v. Miami Exporting Co., 6 Ohio 176, 223 (1833).

Directors will not be enjoined from selling treasury stock at public sale to the highest bidder although with the intention of selling to persons friendly to their management.

Loomis v. Dexter, 20 W. L. B. 5 (Super. Ct. Cin. 1888).

But sales to directors can not be made on more favorable terms than to other stockholders.

Kinsey v. Mt. Auburn Cable Co., 6 C. C. n. s. 305; 17 C. D. 633 (1905); aff'd, no rep., 75 O. S. 602.

Nor without any valuable consideration.

Straman v. North Baltimore, etc., Co., 8 C. C. 89; 4 C. D. 339 (1893).

Stock issued by directors to themselves, in consideration only of their promissory notes, in order to maintain control of the corporation, may be cancelled at the suit of other stockholders. Dreher v. Supply Co., 23 C. C. n. s. 54 (1907).

A sale to one director at par on a cash payment of 2% and the balance in ten annual instalments, no efforts being made to sell to others, but cash offers having been rejected, the stock being worth more than par, and there being no need for additional capital, was set aside as a fraud on the corporation and other stockholders. Callahan v. Steel Co., 20 C. C. n. s. 78 (1912).

Where stock subscribed for by directors was paid for by secret profits made by the directors on a fraudulent sale of property to the corporation, the stock may be cancelled in a suit by the corporation.

Yeiser v. U. S. Board & Paper Co., 107 Fed. 340 (C. C. A. (1901)).

I. Libel hindering the obtaining of subscriptions. It has been held that a corporation can not recover for libel where the only damage shown is hindrance to the obtaining of subscriptions for its stock. Farmers Co. v. Lawrence Co., 22 C. C. n. s. 273 (1908).

J. Stock purchased to procure employment. Where stock in an existing manufacturing corporation is purchased only in consideration of an agreement by the corporation to employ the purchaser, which agreement is broken by the corporation, the purchaser may rescind the stock purchase agreement, and recover the amount paid. *Buschmeyer v. Machinery Co.*, 7 Ohio App. 202; 27 O. C. A. 337 (1916); motion to certify record overruled.

K. Sales to employes payable out of dividends. Where stock is sold to employes payable out of dividends, the directors are not obligated to declare dividends, otherwise than in their discretion. *Smitt v. Aultman Co.*, 25 C. C. n. s. 561; 28 C. D. 46 (1916); aff'd, no rep. 95 O. S. 415.

Where an employe is induced by officers of a corporation in whom he has confidence to buy stock, a fiduciary relation may exist, but the corporation is not liable to the employe for losses due to changed business conditions or honest mistakes of judgment. *Smitt v. Aultman Co.*, 25 C. C. n. s. 561; 28 C. D. 46 (1916); aff'd, no rep. 95 O. S. 415.

Section 8631. (Opening of books.) Such persons shall give at least thirty days' notice of the times and places of opening such books of subscription, by publication in a newspaper published or generally circulated in the county or counties where they are to be opened. Such notice however, may be waived in writing by all the incorporators, but the waiver shall be entered or copied in the corporate records. (R. S. Sec. 3242; April 6, 1891, 88 v. 280; March 5, 1883, 80 v. 42; R. S. 1880; May 1, 1852, 50 v. 274, § 9; S. & C. 276.)

The notice need not be published for thirty consecutive days. One notice, published at least thirty days before the day set, is sufficient. *Muskingum, etc., Co. v. Ward*, 13 Ohio 120 (1844).

Craig v. Fox, 16 Ohio 563, 566 (1847).

Newport News v. Potter, 122 Fed. 321, 332 (C. C. A. 1903).

Newman v. Lynchburg Co., 236 U. S. 692 (1915).

The newspaper in which the notice is inserted, should be published in the English language.

Cincinnati v. Purcell, 26 O. S. 49 (1875).

Proof of waiver of notice. Waiver of notice of publication may be proved by the corporate record in which the same was entered, the authenticity and genuineness of the record having been proved.

Toledo, etc., Ry. Co. v. Toledo, etc., Ry. Co., 6 C. C. 362, 392; 3 C. D. 493 (1892).

Section 8632. (Payment of subscription.) At the time of making a subscription to the capital stock of a corporation, ten per cent on each share subscribed for, shall be payable. The residue shall be paid in such installments at the times and places, and to such persons, as the directors require. (R. S. Sec. 3243; May 1, 1852, 50 v. 274, § 6; R. S. 1880; S. & C. 276.)

Subscriptions generally. See note to § 8630.

Subscriptions to increased stock. See note to § 8698.

Subscriptions to no-par-value common stock. See § 8728-1.

Enforcement of subscriptions and defenses. See note to § 8674.

Purpose of section. This section is designed to fix the time of payment of the first installment and to provide the mode for determining the time at which the residue should become payable.

Chamberlain v. R. R. Co. 15 O. S. 225, 249 (1864).

First installment of ten percent.

Payable to incorporators. The incorporators are authorized to receive payment of the first installment on subscriptions received by them.

Sims v. Street Railroad Co., 37 O. S. 556, 565 (1882).

The incorporators may, by order, designate one of their number to receive payment.

Cincinnati v. Queen City Tel. Co., 2 N. P. n. s. 349, 364; 15 L. D. 43 (1904); aff'd, 73 O. S. 64.

Payable in money. The incorporators have no authority to receive anything but money in payment of the first installment.

Dayton, etc., R. Co. v. Hatch, 1 Dis. 84, 96 (Super. Ct. Cin. 1855).

Payment by check is regarded as payment in money where sufficient funds are on deposit to meet the check.

Cincinnati v. Queen City Telephone Co., 2 N. P. n. s. 349, 357, 364; 15 L. D. 43 (1904); aff'd, 73 O. S. 64.

Payment by note is not authorized.

Kilbreath v. Gaylord, 3 W. L. B. 525 (Super. Ct. Cin. 1878); aff'd, 34 O. S. 305.

See Latham v. Union, etc., Ins. Co., 1 W. L. B. 127 (Dist. Ct. 1876).

Effect of nonpayment. Failure to pay the first installment does not release a subscriber from liability.

Henry v. Vermillion, etc., R. Co., 17 Ohio 187 (1848).

Latham v. Union, etc., Ins. Co., 1 W. L. B. 127 (Dist. Ct. 1876).

See Chamberlain v. R. R. Co., 15 O. S. 225, 249 (1864).

Ashtabula, etc., R. Co. v. Smith, 15 O. S. 328, 336 (1864).

But a subscriber in default for payment may be excluded from voting at elections for directors. § 8636.

Telephone Co. v. Cincinnati, 73 O. S. 64, 77 (1905).

And a railroad company is not in existence so as to be able to appropriate property, until the requirements of § 8632 have been complied with. Cemetery Assn. v. Traction Co., 93 O. S. 161 (1915).

Conditional subscriptions. The first installment on a conditional subscription is due at the time when the subscription becomes unconditional and absolute.

Ashtabula, etc., R. Co. v. Smith, 15 O. S. 328, 336 (1864).

Subsequent installments. After the first installment of ten percent has been paid nothing is due on a subscription until a call has been made by the directors.

Thomas v. Kalbfus, 97 O. S. 232 (1918).

Mansfield, etc., Co. v. Hall, 26 O. S. 310 (1875).

Railroad Co. v. Fink, 41 O. S. 321, 329 (1884).

Gibson v. Columbia, etc., Co., 18 O. S. 396 (1868).

Mansfield, etc., Co. v. Pettis, 26 O. S. 259 (1875).

Although demand notes have been given by subscribers in payment of their subscriptions they are not due until a call has been made.

Kilbreath v. Gaylord, 34 O. S. 305 (1877); affirming 3 W. L. B. 525.

Calls.

May be made when. Calls may be made by the directors when ten percent of the capital stock has been subscribed. It is not necessary that the entire capital stock should have been subscribed.

Jewett v. Railway, 34 O. S. 601 (1878).

Clarke v. Thomas, 34 O. S. 46 (1877).

As soon as conditional subscriptions become absolute they become subject to general calls previously made.

Mansfield, etc., Co. v. Stout, 26 O. S. 241 (1875).

A general call made by a constituent company continues for the benefit of the consolidated company, if an officer authorized to receive payment is continued at the place designated in the call.

Mansfield, etc., Co. v. Stout, 26 O. S. 241 (1875).

Calls after insolvency. Where a corporation has become insolvent and suit is brought by the receiver or a creditor, the subscriptions will either be regarded as due without a call being made, or the court will make the call.

Thomas v. Kalbfus, 97 O. S. 232 (1918).

Turnbull v. Pomeroy Salt Co., 24 W. L. B. 133.

Henry v. Vermillion R. Co., 17 Ohio 187, 191.

See Roebblings Sons Co. v. Shawnee, etc., Co., 4 N. P. n. s. 113; 17 L. D. 8 (1906); aff'd, no rep., 78 O. S. 408.

A court of bankruptcy may make the call.

In re Flood-Pratt Dairy Co., 7 O. L. R. 603; 16 O. F. D. 396.

Notice of calls. Whether notice of a call must be given has not been decided in Ohio except in Proprietors v. Wade, 7 W. L. J. 95 (Commercial Court of Cincinnati, 1849), in which five calls were involved and payment of the first four had been demanded before suit. It was held that demand for the fifth call was not necessary except perhaps as affecting costs.

In other states under statutes somewhat similar to §§ 8632 and 8674 the authorities are conflicting.

Cook on Corporations, §§ 117, 118.

The safer practice is to give notice.

Before stock can be forfeited for nonpayment of calls notice must be published.

See § 8675.

A notice to pay to the treasurer of a corporation implies that payment is to be made at his office, and is a sufficient designation of the place of payment.

Muskingum, etc., Co. v. Ward, 13 Ohio 120 (1844).

Waiver by corporation of right to make calls. A subscription made on condition that "not more than ten percent shall be required at any one call, nor shall calls be made more frequently than once in sixty days," was held to operate as a waiver of the statutory right of the directors to make calls in their discretion, and a general call requiring more frequent payments was held to not apply to such subscription.

Mansfield, etc., Co. v. Pettis, 26 O. S. 259 (1875).

Amount of payment.

Interest. A corporation is entitled to interest on installments from the time for payment fixed in the call.

Railroad Co. v. Fink, 41 O. S. 321, 327 (1884).

Natl. Bank v. Greenville, etc., Co., 3 C. C. n. s. 372, 381; 13 C. D. 274 (1899).

Less than the amount of the subscription. Subscribers who pay less than the full amount of their subscriptions may be held liable to creditors for the difference between the amount paid and the full amount, although stock is issued therefor as full paid and nonassessable.

Trust Co. v. Ford, 75 O. S. 322 (1906).

See note to § 8630. *Sales below par.*

Stock is not full paid until its par value has been paid in money or its equivalent. The obligation imposed by a subscription is to pay at the par value.

Gates v. Tippecanoe Stone Co., 57 O. S. 60, 76 (1897).

Wood v. Pearce, 2 Dis. 411 (Super. Ct. Cin. 1858).

Where less than par is paid by a subscriber, the difference being credited to a Board of Trade as commission on the subscription, and assigned by the Board of Trade to the purchaser, the subscriber is liable to creditors for the difference. Vandeusen v. Ransom, 23 C. C. n. s. 194 (1912).

Medium of payment.

Money. Subscriptions to the stock of corporations are *prima facie* payable in money.

Gates v. Tippecanoe Stone Co., 57 O. S. 60, 74 (1897).

Property. Directors, acting in good faith, have power to receive property in payment of subscriptions.

Sims v. Street Railroad Co., 37 O. S. 556 (1882).

Gates v. Tippecanoe Stone Co., 57 O. S. 60, 74, 75 (1897).

Orton v. Edson, etc., Co., 5 C. C. n. s. 540; 17 C. D. 107 (1905);
aff'd, no rep., 75 O. S. 580.

Kunz v. National Valve Co., 9 C. C. n. s. 593; 19 C. D. 519 (1907).

Goodin v. Evans, 18 O. S. 150 (1868).

For liability of subscriber where property is fraudulently overvalued see note to § 8630. *Exchange of stock for property.*

By dividends. A subscriber is entitled to credit for dividends, both in cash and in stock, declared after his subscription was made.

Railroad Co. v. Fink, 41 O. S. 321 (1884).

See Stewart v. Herron, 77 O. S. 130 (1907).

White v. Cooper Co., 7 C. C. n. s. 114; 17 C. D. 703 (1903); aff'd, no rep., 72 O. S. 615, 691.

Rhodes v. Equitable Life Insurance Co., 3 C. C. 501; 2 C. D. 188 (1888); aff'd, 27 W. L. B. 160.

By note. A subscriber to stock of an insurance company who, as authorized by a statute, gave his note and mortgage in payment of his subscription, was held to stand in the position of a borrower from the company, and not in the position of a subscriber.

Union, etc., Ins. Co. v. Curtis, 35 O. S. 343 (1880).

Latham v. Union, etc., Ins. Co., 1 W. L. B. 127 (Dist. Ct. 1876).

Andes Ins. Co. v. Waters, 1 W. L. B. 172 (Super. Ct. Cin. 1876).

A subscriber for national bank stock, who gave his note for the amount of his subscription, can not defend against the note on the theory that it was an ultra vires loan by the bank secured by its own stock as collateral. Bank v. McDonald, 2 Ohio App. 497; 21 C. C. n. s. 245 (1913).

Nor can such a subscriber for national bank stock defend on the ground that he was induced to execute the note on the assurance of the president that it was for the accommodation of the bank and that he would not be called on to pay. Robinson v. Bank, 9 Ohio App. 124 (1917).

Where a note given for a subscription is not shown to have been given or accepted in payment, it is no defense to an action on the subscription.

Kilbreath v. Gaylord, 3 W. L. B. 525 (Super. Ct. Cin. 1878); *aff'd*, 34 O. S. 305.

Set off of debt due subscriber. A subscriber may set off a bona fide debt due him from the corporation, both as against the corporation and as against its assignee for creditors.

Niles v. Olszak, 87 O. S. 229 (1912).

Dungan v. Safford, 41 O. S. 15 (1884).

Sims v. Street Railroad, 37 O. S. 556, 558 (1882).

Compare Handley v. Stutz, 139 U. S. 417 (1891).

Bank v. Varnish Co., 8 C. C. 563; 4 C. D. 511 (1894); reversed in part, 56 O. S. 744.

Union, etc., Co. v. Jones, 35 O. S. 351 (1880).

Where an officer of a corporation, who owed the corporation \$750.00 on a subscription and who had a claim of \$500.00 for salary, executed the note of the corporation and transferred it in payment of an individual debt, after insolvency of the corporation, it was held that the note in the hands of such creditor should be cancelled and the amount set off against the indebtedness of the officer to the corporation.

In re Empress, etc., Co., 1 N. P. n. s. 20 (C. P. 1903).

Section 8633. (Certificate when ten per cent is subscribed.) When ten per cent of the capital stock is subscribed, the subscribers to the articles of incorporation, or a majority of them at once shall so certify in writing to the secretary of state. (R. S. Sec. 3244; April 2, 1906, 98 v. 294; April 22, 1904, 97 v. 170; May 18, 1894, 91 v. 304; April 15, 1880, 77 v. 266; May 1, 1852, 50 v. 274, § 9; R. S. 1880; S. & C. 276.)

Certificate of subscription to no-par-value common stock. See § 8728-2.

By signing a "certificate of subscription" incorporators certify, in effect, not only that ten percent of the capital stock had been subscribed but that an installment of ten percent has been paid on each share subscribed for.

Hessler v. Cleveland, etc., Co., 61 O. S. 621 (1899).

An insurance company organized under § 9510 et seq. is not required to file a certificate of subscription. Rep. Atty. Gen. 1914, p. 229.

Where no certificate of subscription appears on the records of the secretary of state, but the incorporators claim to have filed one, a copy of such certificate, authenticated by the affidavit of the secretary of the corporation may be filed. Opins. Atty. Gen. 1916, p. 1009.

Failure to file a certificate of subscription does not render the incorporators or directors personally liable to a creditor who dealt with the company as a corporation, where the required percentage of stock was properly subscribed for and the required payments made. *Garwood v. Oil Co.*, 11 Ohio App. 96 (1919).

Conditional subscriptions should not be included as a part of the ten percent.

Fairview R. Co. v. Spillman, 23 Ore. 587; 32 Pac. 688.

Except subscriptions conditioned upon the securing of subscriptions to a specified amount, where the condition has been performed.

Emmitt v. Springfield, etc., R. Co., 31 O. S. 23 (1876).

Subscription of ten percent a condition precedent to corporate organization and the transaction of business. Until ten percent of the capital stock has been subscribed, directors can not be elected, nor can corporate business be transacted, nor are subscribers liable on their subscriptions beyond the first installment.

Trust Co. v. Floyd, 47 O. S. 525, 542 (1890).

Telephone Co. v. Cincinnati, 73 O. S. 64, 77 (1905).

See *Jewett v. Valley Railway Co.*, 34 O. S. 601 (1878).

See note to 8674. Suits to collect subscriptions. *Conditions precedent*.

But subscribers may waive the right to have ten percent subscribed.

Emmitt v. Springfield, etc., Co., 31 O. S. 23 (1876).

And as against creditors subscribers are estopped from setting up such defense.

Dickason v. Grafton Sav. Bank, 6 C. C. n. s. 329; 17 C. D. 357 (1905); *aff'd*, no rep., 76 O. S. 612.

Certificate of subscription to increased stock. Where capital stock is increased under § 8698 a certificate of subscription to the increased stock need not be filed.

Rep. Atty. Gen. 1911-1912, p. 66.

Opins. Atty. Gen. 1916, p. 289.

Section 8634. (Incorporators' liability.) The incorporators shall be liable to any person affected thereby, in the amount of any deficiency in the actual payment of ten per cent on the stock subscribed for at the time of so certifying to the secretary of state. (R. S. Sec. 3244; April 2, 1906, 98 v. 294; April 22, 1904, 97 v. 170; May 18, 1894, 91 v. 304; April 15, 1880, 77 v. 266; May 1, 1852, 50 v. 274, § 9; R. S. 1880; S. & C. 276.)

The liability of incorporators is a security for corporate creditors, and it is not necessary, to entitle a creditor to its benefit, that he should have knowledge of the making of the certificate, or of its contents.

Hessler v. Cleveland, etc., Co., 61 O. S. 621 (1899).

Before the adoption of the General Code, incorporators, under Rev. Stats. §§ 3244 and 3243 (now G. C. §§ 8634 and 8632), were liable for any deficiency in the actual payment of ten percent of the entire authorized capital stock, and not merely for one-tenth of that amount.

Hessler v. Cleveland, etc., Co., 61 O. S. 621 (1899).

Ames v. McGaughey, 88 O. S. 297 (1913).

Under the changed language of these sections, however, incorporators are liable only for the deficiency in the payment of ten percent on the stock subscribed for.

Incorporators of a foreign corporation, who have falsely certified that a certain amount has been paid in, may be liable in damages for deceit; but it was held that the mere signing of the certificate without knowing whether the statements were true or false did not necessarily constitute a fraudulent statement, recklessly made, where there was evidence tending to show that the incorporators believed the statement to be true.

Schenck v. Knott, 13 C. C. n. s. 41 (1910).

Suit to enforce the liability of incorporators should be prosecuted for the benefit of all the creditors, and may be joined with an action to collect unpaid stock subscriptions.

Hessler v. Cleveland, etc., Co., 61 O. S. 621 (1899).

Attorneys' fees may be allowed to plaintiff's counsel out of the fund realized.

Hessler v. Cleveland, etc., Co., 61 O. S. 621 (1899).

Section 8635. (Notice of election of directors.) As soon as such certificate is made, the signers thereto, shall give notice to the stockholders, as provided in section eighty-six hundred and thirty-one, to meet at such time and place as the notice designates, for the purpose of choosing not less than five nor more than thirty directors, to continue in office until the time fixed for the annual election, and until their successors are elected and qualified. But if all subscribers to stock are present in person or by proxy, such notice may be waived by them in writing. (R. S. Sec. 3244; April 2, 1906, 98 v. 294; April 22, 1904, 97 v. 170; May 18, 1894, 91 v. 304; April 15, 1880, 77 v. 266; May 1, 1852, 50 v. 274, § 9; R. S. 1880; S. & C. 276.)

Annual elections, terms of offices, etc., see § 8647.

Directors generally, see §§ 8660 to 8666 and notes.

The organization meeting should be held in Ohio.

Myers v. Manhattan Bank, 20 Ohio 283 (1851).

Duke v. Taylor, 37 Fla. 64 (1896).

Smith v. Silver, etc., Co., 64 Md. 85 (1885).

Hodgson v. Duluth, etc., R. Co., 46 Minn. 454 (1891).

Harding v. American Glucose Co., 182 Ill. 551 (1899).

Conditions precedent to election of directors.

Subscription of ten percent of capital stock. Directors can not be elected until ten percent of the authorized capital stock has been subscribed, and an instalment of ten percent paid on each share subscribed for.

Cemetery Assn. v. Traction Co., 93 O. S. 161 (1915).

Trust Co. v. Floyd, 41 O. S. 525 (1890).

Telephone Co. v. Cincinnati, 73 O. S. 64, 77 (1905).

Powers v. Hazelton, etc., Ry. Co., 33 O. S. 429 (1878).

Directors are personally liable for acting as such and incurring debts before ten percent has been subscribed.

Trust Co. v. Floyd, 41 O. S. 525 (1890).

Notice or waiver of notice of stockholders' organization meeting. Where no notice of a meeting was given, and notice was not waived in writing, the directors elected thereat may be ousted by a proceeding in quo warranto (§§ 12303 and 12318). But persons elected at such a meeting may become *de facto* directors.

First, etc., Soc. v. First, etc., Soc., 25 O. S. 128, 133 (1874).

And the validity of their acts can not be questioned collaterally.

Chamberlain v. Painesville etc., R. Co., 15 O. S. 225, 250 (1864).

That notice was neither given nor waived is no defense to an action by creditors on stock subscriptions.

Dickason v. Grafton Sav. Bank, 6 C. C. n. s. 329, 332; 17 C. D. 357 (1905); aff'd, no rep., 76 O. S. 612.

Organization presumed to have been regular. In general it is presumed that the steps requisite to a valid organization have been taken.

Ashtabula, etc., R. Co. v. Smith, 15 O. S. 328, 334 (1864).

Except in appropriation proceedings. A corporation seeking to condemn property must prove its incorporation according to law including the due and legal election of directors.

Cemetery Assn. v. Traction Co., 93 O. S. 161 (1915).

Telephone Co. v. Cincinnati, 73 O. S. 64, 77 (1905).

Powers v. Hazelton, etc., Ry. Co., 33 O. S. 429 (1878).

Method of proof, see note to § 8629.

Section 8636. (Conduct of election; voting.) At the time and place appointed, directors shall be chosen by ballot, by the stockholders who attend, either in person or by lawful proxies. At such and all other elections of directors, each stockholder shall have the right to vote in person or by proxy the number of shares owned by him for as many persons as there are directors to be elected, or to cumulate his shares and give one candidate as many votes as the number of directors multiplied by the number of his shares of stock equals, or to distribute them on the same principal among as many candidates as he thinks fit. Such directors shall not be elected in any other manner. A majority of the number of shares shall be necessary for a choice, but no person shall vote on a share on which an installment is due and unpaid. (R. S. Sec. 3245; April 23, 1898, 93 v. 230; May 1, 1852, 50 v. 274, § 9; S. & C. 276.)

Annual elections. See § 8647 and note.

"A majority of the number of shares shall be necessary for a choice" means a majority of the stock represented at the meeting. It does not require a majority of the entire authorized capital stock, nor a majority of the issued stock.

Lutterby v. Herancourt Brewing Co., 12 L. D. 67 (Super. Ct. Cin. 1901).

This provision applies only when the shares are voted without cumulating.

Schwartz v. State, 61 O. S. 497, 505 (1899).

Lutterby v. Herancourt Brewing Co., 12 L. D. 67 (Super. Ct. Cin. 1901).

CUMULATIVE VOTING.

Cumulative voting being authorized by this section, one receiving a majority of the votes so cast is elected a director, though he does not receive the votes of the holders of a majority of the shares.

Schwartz v. State, 61 O. S. 497 (1899).

See *Hall v. Hall*, 11 C. C. n. s. 335; 20 C. D. 826 (1908); aff'd, no rep., 79 O. S. 456.

In general. For each director to be elected a stockholder is entitled to one vote for each share of stock registered in his name. Where there are five directors, a person owning one share is entitled to five votes, all of which may be cast for one candidate. Or one vote may be cast for each of five candidates, or the votes may be divided among the candidates in any other manner desired.

If 500 shares are represented at a stockholders' meeting at which five directors are to be elected, a minority which controls 85 shares is enabled, under the cumulative system, to elect one director. The 85 shares are entitled to 425 votes. The balance of 415 shares is entitled to 2075 votes. If the 425 minority votes are cast solidly for one candidate, it is impossible for the majority to defeat him.

The minority can not obtain control of the board of directors if the majority act together and cumulate their votes. But if the majority scatter their votes, a strong minority may obtain a majority of the board.

Schwartz v. State, 61 O. S. 497 (1899).

State v. Du Brul, 100 O. S. 272 (1919).

The cumulative privilege may be exercised on the first ballot and on successive ballots, as long as directors remain to be elected. *State v. Du Brul*, 100 O. S. 272 (1919).

Not obligatory. This section authorizes two methods of voting, either by or without cumulating shares.

Schwartz v. State, 61 O. S. 497, 505 (1899).

State v. Du Brul, 100 O. S. 272 (1919).

Unauthorized prior to 1898. Prior to the amendment of this section in 1898 (93 v. 230) cumulative voting was unauthorized.

State v. Stockley, 45 O. S. 304 (1887).

Schwartz v. State, 61 O. S. 505 (1899).

State v. Holloway, 1 C. C. 157; 1 C. D. 90 (1885).

State v. Fosdick, 1 C. C. 265; 1 C. D. 145 (1885).

Corporations organized prior to 1898. Stockholders in corporations organized prior to the amendment of 1898 (93 v. 230) may cumulate their votes. The legislature, under its right to alter, amend or repeal general corporation laws, may authorize cumulative voting.

Looker v. Maynard, 179 U. S. 46 (1900).

Cross v. West Va., etc., Co., 35 W. Va. 174 (1891).

Gregg v. Granby, etc., Co., 164 Mo. 616 (1901).

Section 8637. (Inspectors of the election.) At such first election the subscribers of the articles of incorporation present, shall be inspectors of election, certify what persons are elected directors, and appoint the time and place for holding their first meeting. (R. S. Sec. 3245; April 23, 1898, 93 v. 230; May 1, 1852, 50 v. 274, § 9; S. & C. 276.)

Subsequent elections. At elections subsequent to the first election, the right to choose the inspectors is vested in the stockholders and not in the directors.

State v. Merchant, 37 O. S. 251 (1881).

Appointment of inspectors by common pleas court on application of holders of one-tenth of the stock.

§§ 8640 to 8645.

Powers and duties of inspectors of election. The duties of inspectors are, in general, ministerial and not judicial. An inspector may be a candidate for election.

Commonwealth v. Woelper, 3 S. & R. (Pa.) 29 (1817).

Ex parte Willcocks, 7 Cow. (N. Y.) 402 (1827).

When inspectors have once received a vote they can not afterwards reject it on the ground that it is illegal.

Hartt v. Harvey, 32 Barb. (N. Y.) 55 (1860).

People v. White, 11 Abb. Pr. (N. Y.) 168, 179 (1860).

Where the time for keeping the polls open has not been specified, the inspectors may exercise a reasonable discretion as to closing the polls.

In re Chenango, etc., Co., 19 Wend. (N. Y.) 635 (1839).

In re Mohawk, etc., R. Co., 19 Wend. (N. Y.) 135 (1838).

People v. Albany, etc., R. Co., 55 Barb. (N. Y.) 344 (1869); *aff'd*, 57 N. Y. 161.

Certificate of election. A certificate of election is *prima facie* evidence of the facts stated therein; but where it contains a statement not only of the result, but also of the facts upon which the decision was based, if the facts show the decision to be erroneous it may be set aside by the court.

Hartt v. Harvey, 32 Barb. (N. Y.) 55 (1860).

An election is valid although the inspectors fail to certify the result or certify it erroneously.

People v. Peck, 11 Wend. (N. Y.) 604 (1834).

Hartt v. Harvey, 32 Barb. (N. Y.) 55, 61 (1860).

State v. Smith, 15 Ore. 98, 115 (1887).

A certificate is valid though made long after the election.

People v. Peck, 11 Wend. (N. Y.) 604 (1834).

Section 8638. (Limit on votes of stockholders.) A corporation may provide in the articles of incorporation that each stockholder, irrespective of the amount of stock he owns shall be entitled to one vote, and no more, at an election of directors or upon any subject submitted at a stockholders' meeting. When such provision is made the corporation shall be governed thereby. (R. S. Sec. 3245a (1); March 19, 1884, 81 v. 54, 55.)

This section permits corporations to adopt the common law rule that each shareholder is entitled to but one vote irrespective of the number of shares which he holds.

State v. Stockley, 45 O. S. 304, 306 (1887).

Section 8639. (Provisions to which such corporations are subject.) Corporations whose articles of incorporation contain the limitation provided for in the next preceding section, also shall be subject to the following:

1. No person shall hold or own stock therein in excess of one thousand dollars face value.

2. Annually, within thirty days after the thirty-first day of December, the directors shall make and file with the recorder of the county in which the corporation is doing business, a statement of its financial condition upon such thirty-first day of December, plainly setting forth its assets and liabilities in detail, the amount of its paid up capital stock, the names of its stockholders, and the number of shares owned by each. Such statement shall be signed and duly sworn to before any officer authorized to administer oaths in this state, by a majority of the directors, including

the treasurer. If the directors fail to make the statements above required, or make a false statement, they personally shall be liable for all claims and demands against such corporation.

3. By-laws for the government of the corporation, and for the distribution of its net earnings among its workmen, patrons and shareholders, consistent with the constitution and laws of the state, may be made by the stockholders. (R. S. Sec. 3245b (1); March 19, 1884, 81 v. 54, 55.)

Statements filed with the county recorder are not required to be recorded. Opins. Atty. Gen. 1921, p. 119.

No fee for filing statements with the recorder has been provided for. Opins. Atty. Gen. 1921, p. 119.

The restrictions placed by this section upon the voting power of stockholders are intended to protect the minority and to place the workmen in a co-operative organization of employer and employee on a plane with persons owning a great number of shares. In England, under a similar provision, it was held possible for a person to exceed the limit placed by the law, and to increase his voting power by placing his stock in the hands of third persons to hold and vote according to his directions.

In re Stranton I. & S. Co., L. R. 16 Eq. Cas. 559 (1873).

Pender v. Lushington, L. R. 6 Ch. Div. 70 (1877).

Moffat v. Farquhar, L. R. 7 Ch. Div. 591 (1877).

In other jurisdictions such evasions have not been sanctioned.

Mack v. Bardelben Co., 90 Ala. 396; 9 L. R. A. 650 (1889).

Campbell v. Poultney, 6 G. & J. (Md.) 94 (1834).

Webb v. Ridgley, 38 Md. 364 (1873).

Where a corporation for many years acquiesced in a subscription to stock, made by a person in the name of his children, permitting them to vote and to exercise acts of ownership, the corporation was held to be estopped from claiming that the transaction was a fraudulent use of names to secure a greater number of votes that he would be entitled to, if the stock had stood in his name.

Creed v. Lancaster Bank, 1 O. S. 1 (1852).

Section 8640. (Application for appointment of inspectors of election.) Within fifteen days next before a meeting held for the election of directors or trustees, or for the determination of any question, by the stockholders of a corporation, or by the subscribers to its stock, or by its creditors and stockholders for its reorganization, any person or persons entitled to vote thereat and owning at least one-tenth interest in its stock may apply to the common pleas court of the county wherein such meeting is to be held, or, if the court be not in session, to a judge thereof, or, in case of the absence or disability of such judge, then to the probate court, for the appointment of inspectors for such meeting. No such application shall be acted upon until notice thereof has been served upon the corporation at its general office. The court or judge may require such additional notice by

newspaper publication, or otherwise, as is deemed proper. (R. S. Sec. 3245a (2); March 18, 1887, 84 v. 115.)

In one case, the common pleas court refused to appoint inspectors under this section where it believed that, by such action, contractual rights would be disturbed, without proper adjudication. *Craig v. Bessie Co.*, 19 N. P. n. s. 545 (1917).

This section does not require 15 days' notice to be given of every special stockholders meeting for the election of directors. *Toledo Co. v. Smith*, 205 Fed. 643, 660 (D. C. 1913).

Section 8641. (Appointment of inspectors.) Upon the hearing of such application, if deemed proper, the court or judge shall appoint three competent disinterested persons inspectors for such meeting, and for good cause may thereafter vacate the appointment of one or more and appoint another or others instead. In case an inspector fails to attend such meeting, or to act thereat, the stockholders may fill the vacancy so caused. (R. S. Sec. 3245b (2); March 18, 1887, 84 v. 115, 116.)

Section 8642. (List of stockholders for inspectors.) Before every such meeting, the officer or the agent of the corporation having charge of the transfer of its stock, under oath must make out a list of its stockholders, showing the number and classes of shares held by each, as shown by its books, on the date fixed for closing the stock transfers before its meetings; or if no time be fixed therefor, then on the tenth day prior to the date of such meeting. Such list shall be delivered to the inspectors of the meeting, and be prima facie evidence of the ownership of its stock. (R. S. Sec. 3245c; March 18, 1887, 84 v. 115, 116.)

Section 8643. (Stock ownership, how ascertained.) In case of the absence of such list the inspectors shall ascertain the ownership of stock by the corporation books, stock certificates or other proof. (R. S. Sec. 3245c; March 18, 1887, 84 v. 115, 116.)

Section 8644. (Conduct of election.) The inspectors so appointed, or if none be appointed, then those selected by the meeting, shall receive and count the votes cast at such meeting, or at any adjournment thereof, either upon an election or for the decision of any question to be decided by vote, and determine the result. Their certificate shall be prima facie evidence thereof. (R. S. Sec. 3245d; March 18, 1887, 84 v. 115, 116.)

Section 8645. (Compensation of inspectors.) The court or judge making the appointment of inspectors may fix their compensation, and require the applicants for their appointment to secure its payment; but the corporation shall be liable therefor if the meeting by vote so determines. (R. S. Sec. 3245e; March 18, 1887, 84 v. 115, 116.)

Section 8646. (Election of club-house corporation.) A corporation, the principal object of which is the owning and operating of a club-house for the use of its stockholders, which is not kept open and operated for their use during the winter season, shall hold its annual election of directors on the third Monday in July of each year. Such election shall be held at its club-house. (R. S. Sec. 3246; April 16, 1900, 94 v. 375; May 1, 1852, 50 v. 274, § 64; R. S. 1880.)

Section 8647. (Elections.) Except club-house companies, unless the regulations of a corporation otherwise provide, an annual election for trustees or directors shall be held on the first Monday in January of each year. When for any cause, trustees or directors are not elected at the annual meeting, or other meeting called for that purpose, they may be chosen at a members' or stockholders' meeting, if all the members or stockholders are present in person or by proxies, or at a meeting called by the trustees or directors, or any two members or stockholders, notice of which has been given, in writing, to each stockholder, or by publication for ten days in some newspaper printed in the county where the corporation is situated, or has its principal office. Trustees and directors in all cases shall continue in office until their successors are elected and qualified. (R. S. Sec. 3246; April 16, 1900, 94 v. 375; May 1, 1852, 50 v. 274, § 64; R. S. 1880.)

Cumulative voting. See note to § 8636.

Votes necessary to choice. See § 8636 and note.

Tellers or inspectors of election. See §§ 8637 and 8640 to 8645 inclusive.

Directors generally. See § 8660 to 8665 and notes.

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I. "ANNUAL MEETING" AND "ANNUAL ELECTION."

The terms "annual meeting" and "annual election" are used interchangeably in this section. In general the term "annual meeting" includes the "annual election."

State v. Burial Assn., 8 C. C. n. s. 233, 250; 18 C. D. 397 (1906); (Dismissed by Supreme Court for want of jurisdiction; 4 O. L. R. 708).

II. TERM OF OFFICE OF DIRECTORS. RESIGNATION. REMOVAL. VACANCIES.

A. Term. The term of directors chosen at the first election continues until the time fixed for the annual election. § 8635.

The term of directors elected at an annual meeting is one year.

Lutterby v. Herancourt Brewing Co., 12 L. D. 67 (Super. Ct. Cin 1901).

Toledo Co. v. Smith, 205 Fed. 643, 647 (D. C. 1913).

State v. Clough, 18 C. C. n. s. 509 (1912); aff'd, no rep. 88 O. S. 590.

See §§ 9646 and 9515 for terms of office of directors of building and loan associations and certain insurance companies.

Where no election is held at the time fixed for the annual meeting, or if an attempted election is held invalid, the directors previously elected hold over and continue in office until their successors are legally elected and qualified.

State v. Bonnell, 35 O. S. 10, 17 (1878).

State v. Smalley, 7 C. C. 400; 4 C. D. 653 (1893).

See Bartholomew v. Bentley, 1 O. S. 37, 42 (1852).

And the hold-over board may elect new executive officers, under G. C. § 8664. State v. Clough, 18 C. C. n. s. 509 (1912); aff'd, no rep. 88 O. S. 590.

The term of office of a director can not be shortened by a decrease in the number of the directors made after his election.

Lutterby v. Herancourt Brewing Co., 12 L. D. 67 (Super. Ct. Cin. 1901).

Nor can his term be shortened by an amendment to the corporate regulations, advancing the date of the annual election, to go into immediate effect.

Toledo Co. v. Smith, 205 Fed. 643. (D. C. 1913).

But the office of trustee of a church is not one coupled with such an interest that the members can not terminate the tenure of office.

Munsel v. Boyd, 10 C. C. n. s. 121, 127; 20 C. D. 182 (1907).

B. Resignation. A director may resign at any time, although under the statute his term of office is for one year. Such resignation may be either oral or in writing.

Briggs v. Spaulding, 141 U. S. 132, 154 (1891).

Where a corporation is insolvent and has transacted no business for a number of years, directors elected before business was discontinued are presumed to have abandoned or resigned their offices, notwithstanding the provision that they shall continue in office until their successors are elected.

Bartholomew v. Bentley, 1 O. S. 37 (1852).

C. Removal. An officer can not be removed during his term of office unless the right of removal is reserved in the regulations, or unless the removal is for cause, such as embezzlement, breach of trust, etc.

State v. Bryce, 7 Ohio, pt. 2, p. 83 (1836).

Lutterby v. Herancourt Brewing Co., 12 L. D. 67 (Super. Ct. Cin. 1901).

State v. Railway Co., 6 C. C. 412; 3 C. D. 516 (1892); s. c., 49 O. S. 668.

17 W. L. B. 130 (article by W. E. Talcott).

Compare Munsel v. Boyd, 10 C. C. n. s. 121, 127; 20 C. D. 182 (1907).

Regulations can not be adopted authorizing the removal, at stockholders' meetings, of officers or employes chosen or appointed by the directors nor to arbitrarily remove directors. Directors are entitled to hold office for the term for which they are elected, unless removed for cause upon notice and hearing.

Toledo Co. v. Smith, 205 Fed. 643 (D. C. 1913).

Where an officer disposes of his stock in the corporation he becomes disqualified.

G. C. § 8661.

But where he continues to act, he is recognized as a de facto officer, and his acts as to third persons held valid.

Campbell Ptg. Press Co. v. Bellman Bros. Co., 11 C. C. 360; 5 C. D. 389 (1896).

D. Vacancies caused by resignation, death, etc., may be filled by

the remaining directors for the unexpired term unless the by-laws otherwise provide.
G. C. § 8662.

III. RIGHT OF STOCKHOLDERS TO HAVE ANNUAL ELECTION.

The right of stockholders to elect directors is not affected by the sale of the corporate property by a receiver under order of court.
State v. Merchant, 37 O. S. 251 (1881).
See Lutterby v. Herancourt Brewing Co., 12 L. D. 67, 75 (Super. Ct. Cin. 1901).

Neither the incorporators nor the first trustees of a corporation not for profit are authorized to adopt a by-law or regulation providing that the trustees shall hold office during life and, in case of vacancy, to fill the same by appointment. The members or stockholders are the elective and controlling body.
State v. Standard Life Assn., 38 O. S. 281 (1882).
See Wiswell v. First, etc., Church, 14 O. S. 31 (1862).

IV. REMEDY TO COMPEL OFFICERS TO CALL MEETING.

Injunction is the proper form of remedy to compel corporate officers to call a stockholders' meeting.
State v. Unida, etc., Co., 13 C. C. n. s. 100; 22 C. D. 54 (1910).
See Cincinnati, etc., Co. v. Hoffmeister, 62 O. S. 189 (1900).
Mandamus is not a proper remedy.
State v. Unida, etc., Co., 13 C. C. n. s. 100; 22 C. D. 54 (1910).
Fraternal Mystic Circle v. State, 61 O. S. 628 (1899).

V. TIME FOR ANNUAL ELECTION.

A. First Monday in January. The provisions of this section fixing the time for annual elections is directory merely and not imperative.
State v. Lakamp, 4 C. C. 257; 2 C. D. 533 (1889).
This section applies to corporations not for profit as well as to corporations for profit.
State v. Standard Life Assn., 38 O. S. 281, 289 (1882).

B. Other date provided in regulations. Where the corporate regulations provide for an "annual meeting" at a time other than the first Monday in January, the time for the "annual election" is thereby changed, and the election should be held at such annual meeting.
State v. Burial Assn., 8 C. C. n. s. 233, 250; 18 C. D. 397 (1906);
(Dis. by Sup. Ct. for want of jurisdiction, 4 O. L. R. 708).
Regulations which have not been properly adopted are not effective to change the time of election from the first Monday in January.
State v. Burial Assn., 8 C. C. n. s. 233, 249; 18 C. D. 397 (1906).
The term of office of a director can not be shortened by an amendment to the regulations, to go into immediate effect, advancing the date of the annual election.

Toledo T. L. & P. Co. v. Smith, 58 Bull 201 (U. S. D. C. 1913).

Where no election was held on the date fixed by corporate regulations, which provided that in such case the directors should fix the time for a special election, the fact that the president fixed the time and sent out notices, which action was ratified by the directors, does not invalidate the special election.

Lutterby v. Herancourt Brewing Co., 12 L. D. 67 (Super. Ct. Cin. 1901).

VI. PLACE OF ANNUAL MEETING.

The place of holding the annual meeting may be fixed in the regulations. *State ex rel. v. Shaw*, 103 O. S. 660 (1921); *State v. Kreutzer*, 100 O. S. 246 (1919).

VII. NOTICE OF MEETINGS.

A. In general. Where a meeting is stated and general, as where the time and place are provided for in the regulations, notice to the stockholders need not be given, unless the regulations provide for notice. *State v. Kreutzer*, 100 O. S. 246 (1919); *State v. Clough*, 18 C. C. n. s. 342 (1912); *aff'd*, no rep. 88 O. S. 590; *State v. Bonnell*, 35 O. S. 10, 15 (1878); *Wiswell v. First, etc., Church*, 14 O. S. 31 (1862).

An adjourned meeting is merely a continuation of the original meeting, and where the original meeting was properly commenced any business proper to be transacted thereat may be done at an adjourned meeting without further notice to the stockholders.

State v. Bonnell, 35 O. S. 10, 16 (1878).

Wiswell v. First, etc., Church, 14 O. S. 31 (1862).

See *State v. Smalley*, 7 C. C. 400; 4 C. D. 653 (1893).

Notice need be given only to stockholders of record. § 8673-3; *Railway Co. v. Bank*, 68 O. S. 582 (1903); *In re Mfg. & Sales Co.*, 246 Fed. 1005; 16 O. L. R. 163 (D. C. Ohio 1917).

When a regularly convened annual meeting has been adjourned by action of a majority of the shares represented thereat to a future date subject to call, stockholders may not under § 8647 legally call another meeting during the interim between the annual meeting and the adjourned session. *State ex rel. v. Shaw*, 103 O. S. 660 (1921).

B. Failure to give notice. Where notice is required to be given, persons elected trustees or directors at a meeting of which no notice was given may become directors *de facto*.

First, etc., Soc. v. First, etc., Soc., 25 O. S. 128, 133 (1874).

And the validity of their election can not be questioned collaterally.

Chamberlain v. Painesville, etc., R. Co., 15 O. S. 225, 250 (1864).

Stockholders may be estopped from setting up irregularities in calling or giving notice of meetings.

Lutterby v. Herancourt Brewing Co., 12 L. D. 67 (Sup. Ct. Cin. 1901).

State v. Lakamp, 4 C. C. 257; 2 C. D. 533 (1889).

C. Notice of special meeting under § 8647. "Publication for ten days" means that the publication must continue for ten days. If the newspaper is a daily paper, the notice must be inserted daily for ten days. If the newspaper is a weekly paper, the notice must be inserted in each issue during the ten-day period. *State v. Shaw*, 103 O. S. 660, 665 (1921).

The ten days notice of special meetings required by § 8647 applies only to notice by publication, and does not apply where the corporate regulations provide for notice by mail. A provision in the corporate regulations for five days' notice by mail is valid. *Toledo Co. v. Smith*, 205 Fed. 643, 660 (D. C. 1913).

VIII. ADJOURNMENT OF MEETING.

An adjourned meeting is a continuation of the original meeting. *State v. Bonnell*, 35 O. S. 16 (1878).

The stockholders, by majority vote, may adjourn the meeting. *State v. Shaw*, 103 O. S. 660 (1921).

The directors have no power to postpone a meeting. *State v. Kreutzer*, 100 O. S. 246 (1919).

IX. QUORUM.

The stockholders may adopt a regulation providing for the number of stockholders constituting a quorum. § 8704; *State v. Shaw*, 103 O. S. 660 (1921).

Where there is no regulation on the subject, the stockholders present in person or by proxy may elect officers and transact business although a majority of the stock is not represented.

Lutterby v. Herancourt Brewing Co., 12 L. D. 67, 72, 73 (Super Ct. Cin. 1901).

X. WHO MAY VOTE STOCK.

A. Registered holders. In general only the person in whose name stock is registered on the books of the corporation is entitled to vote, although he is only a trustee. Officers in charge of the election can not take notice of the right of third persons in the stock.

Hafer v. N. Y., etc., R. Co., 14 W. L. B. 68, 72 (Super. Ct. Cin. 1885).

Franklin v. Commercial Bank, 36 O. S. 350, 355 (1881).

See §§ 8642, 8643, 8673-3.

Closing of transfer books prior to election. See § 8642.

B. Stockholders in default for installment on stock. No person may vote on any stock on which an installment is due and unpaid.

See § 8636.

Telephone Co. v. Cincinnati, 73 O. S. 64, 77 (1905).

But persons elected by such votes are de facto directors and their acts can not be attacked collaterally;

Raymond v. Spring Grove, etc., Ry. Co., 21 W. L. B. 103 (Super. Ct. Cin. 1889).

except by a defendant in an appropriation proceeding.

Cemetery Assn. v. Traction Co., 93 O. S. 161 (1915).

Telephone Co. v. Cincinnati, 73 O. S. 64, 77 (1905); affirming, 2 N. P. n. s. 349.

C. Treasury stock can not be voted while held by the corporation.

Allen v. De Lagerberger, 20 W. L. B. 368 (Super. Ct. Cin. 1888).

Ryan v. Miami Valley R. Co., 10 Am. L. R. 263, 267 (C. P. 1881).

But where the directors pledge treasury stock to secure a corporate loan, they may give pledgee the right to vote thereon.

Allen v. De Lagerberger, 20 W. L. B. 368 (Super. Ct. Cin. 1888).

D. Corporation holding stock. A corporation, empowered to own stock, has an incidental right to vote it. *Toledo Co. v. Smith*, 205 Fed. 643, 653 (D. C. 1913).

A corporation holding stock may, by power of attorney, authorize an agent to vote the same. *Toledo Co. v. Smith*, 205 Fed. 643, 653 (D. C. 1913).

E. Preferred stockholders have equal voting right with common stockholders unless such voting rights are restricted by the terms of the issue of the preferred stock. *State v. Urschel*, 104 O. S. 172 (1922).

Preferred stock may, by the terms of its issue, be given exclusive voting rights. *Krell v. Piano Co.*, 23 N. P. n. s. 193 (1920); aff'd, 14 Ohio App. 74; motion to certify record overruled, 19 O. L. R. 125; Opins. Atty. Gen. 1919, p. 138.

F. Proxies. Stockholders may vote by proxy. One person may act as proxy for a number of stockholders.

Railway Co. v. State, 49 O. S. 668 (1892); affirming 6 C. C. 413; 3 C. D. 518.

See § 8636.

A written proxy may be revoked at any time by the stockholder although by its terms "irrevocable."

Griffith v. Jewett, 15 W. L. B. 419 (Super. Ct. Cin. 1886).

But where an "irrevocable" proxy was given as a condition to loans being made to the corporation and additional capital raised, the stockholder who gave the proxy and his assigns may not be entitled to revoke it. Craig v. Furnace Co., 19 N. P. n. s. 545 (1917).

The holder of a proxy, in general, has discretionary power to vote as he deems best.

Burch v. Coan, 17 L. D. 717 (Super. Ct. Cin. 1907).

But a proxy given by an executor is not valid unless it contains express instructions for whom the votes shall be cast, leaving no discretion to the holder of the proxy. State v. Voight, 2 Ohio App. 145; 17 C. C. n. s. 448 (1913).

A proxy which merely directs the holder to vote for certain specified men, as directors, does not authorize its holder to vote on any other question—even on a motion to adjourn the meeting. State v. McIntosh, 23 C. C. n. s. 305 (1912).

An infant can not give a valid proxy. State v. Voight, 2 Ohio App. 145; 17 C. C. n. s. 448 (1913).

An officer or director of the corporation may act as proxy. Rep. Atty. Gen. 1912, p. 681.

A regulation of a corporation, requiring proxies to be deposited with the secretary at least one day before the time set for the annual meeting, is valid. Rep. Atty. Gen. 1913, p. 798.

Where the secretary of a mutual insurance company obtains proxies from policyholders, he is not obliged to vote the same for the old directors, nor can the board control him in voting the proxies, unless the proxies were obtained under representations to that effect.

Burch v. Coan, 17 L. D. 717 (Super. Ct. Cin. 1907).

G. Sale of voting rights. A sale by a stockholder of the right to vote his stock is illegal.

Hafer v. N. Y., etc., R. Co., 14 W. L. B. 68 (Super. Ct. Cin. 1885).

H. Voting trusts. Stock pooling agreements. Where stockholders place their certificates of stock in the possession of a depository, with instructions to vote as directed by a committee of the stockholders appointed by themselves; or where the certificates are deposited with trustees who are empowered to vote the stock, the validity of the agreement depends upon its purpose. If the purpose is a lawful one, the agreement is valid.

Railway Co. v. State, 49 O. S. 668 (1892); affirming 6 C. C. 415; 3 C. D. 518.

Toledo Company v. Smith, 205 Fed. 643, 653 (D. C. 1913).

Griffith v. Jewett, 15 W. L. B. 419 (Super Ct. Cin. 1886).

Article by William P. Rogers, 7 O. L. R. 561 (1910).

But if the purpose is unlawful, as for instance tending to create a monopoly, the agreement is invalid.

State v. Standard Oil Co., 49 O. S. 137 (1892).

But even a valid voting trust agreement may be revoked at any time by any one of the stockholders notwithstanding it is in terms "irrevocable."

Griffith v. Jewett, 15 W. L. B. 419 (Super Ct. Cin. 1886).

Where stockholders entered into a pooling agreement, but for years ignored its existence, it was held that one of such stockholders who purchased stock in violation thereof and refused to pool it, could

not compel the other parties to perform. *Metzler v. Laundry Co.*, 24 C. C. n. s. 74 (1904).

Common law joint stock company, or voluntary association, as a means of maintaining stock control.

See article by William P. Rogers, 7 O. L. R. 561 (1910).

Cook on Corporations, § 622h.

I. Agreements to elect certain persons directors or officers. An agreement between individuals to form a corporation, providing for its future management and control, and specifying the future directors and officers and their compensation, is not void or illegal, where the parties to the contract subscribe for and own all the stock of the corporation.

Doan v. Rogan, 79 O. S. 372, 386 (1909).

See *Mullen v. Gaffey*, 8 Am. L. R. 101 (Dist. Ct. 1879).

State v. Ry. Co., 6 C. C. 415; aff'd in 49 O. S. 668.

And where in an agreement between individuals it is provided that one of the parties shall be employed for a specified time at a stipulated salary by the other parties, or by a corporation to be thereafter organized by them, on breach of such agreement an action for damages may be maintained against the individuals in default.

Doan v. Rogan, 79 O. S. 372 (1909).

Magill v. Rendigs, 12 L. D. 558 (Super. Ct. Cin. 1902).

See *Mosier v. Parry*, 60 O. S. 388 (1899).

But where there are other stockholders who are not parties to the agreement, or where the corporation is not a private business corporation but is one in which the public has an interest (such as an educational corporation), an agreement by a director or by one or more stockholders owning a majority of the stock to elect another person to a salaried corporate office is void as against public policy.

Jones v. Scudder, 2 C. S. C. R. 178 (1872).

West v. Camden, 135 U. S. 507 (1890).

Subscription to stock on condition that subscriber be employed by corporation. Remedy for breach of condition.

See *Stunt v. Newark, etc., Co.*, 22 C. C. 120; 12 C. D. 175 (1901); aff'd, 67 O. S. 555.

XI. ELECTIONS.

A. Conduct of election. Successive ballots, where no election on first ballot. In the case of a tie on the first ballot, stockholders have a right to ask for successive voting until it is demonstrated that further balloting is futile. The chairman has no right to deny a call for successive voting. Where in such a case one faction does not exercise its privilege, while the other faction continues to vote and, by cumulative ballots, elects other directors, the former faction can not question the validity of the election. *State v. Du Brul*, 100 O. S. 272 (1919).

B. Election of part of board. Where a corporation has five directors, the election of four persons entitles them to be inducted into office in the place of the former board of five. *State v. Du Brul*, 100 O. S. 272 (1919).

C. Right to fair election. A stockholder has a right to a fair and lawful election of directors, without regard to pecuniary injury.

Hafer v. N. Y., etc., R. Co., 14 W. L. B. 68, 71 (Super. Ct. Cin. 1885).

D. Unfair elections. Where a corporation was enjoined from holding an election on the day specified in the notice of the annual meeting,

in consequence of which no meeting was held until several hours after the hour specified, when a small number of stockholders, without the knowledge of the others, met and adjourned until the next day, at which time an election was held by a minority, without notice to others who might readily have been notified, the election was held to be unfair and invalid.

State v. Bonnell, 35 O. S. 10 (1878).

Where a part of the stockholders assembled, but adjourned by agreement, and by a misunderstanding as to the time of the adjournment a minority met and elected directors, and subsequently the majority met and elected other directors, it was held that neither election was valid.

State v. Smalley, 7 C. C. 400; 4 C. D. 653 (1893).

Fraud by a managing officer of an insurance company in bringing about, through a misuse of proxies, an election of directors friendly to his interests, renders such election unfair.

Burch v. Coan, 4 O. L. R. 731; 17 L. D. 563 (Super. Ct. Cin. 1907).

E. Repeating. To vote more than once at a corporate election is not a penal offense.

Lane v. State, 39 O. S. 312 (1883).

F. Injunction against voting of stock. Where stock of a railroad company is illegally held by another railroad company, the voting of such stock may be enjoined by the suit of another stockholder.

Mannington v. H. V. Ry. Co., 9 N. P. n. s. 641, 687; 20 L. D. 468 (C. P. 1910); removed to U. S. Ct., see 183 Fed. 133; 8 O. L. R. 451; 16 O. F. D. 552.

Gould v. Railway, 10 N. P. n. s. 313 (C. P. 1910).

Likewise where stock is held by a trustee under an illegal agreement, in the interest of another corporation, the voting rights thereon having been sold.

Hafer v. N. Y., etc., R. Co., 14 W. L. B. 68 (Super. Ct. Cin. 1885).

See *Allen v. De Lagerberger*, 20 W. L. B. 368 (Super. Ct. Cin. 1888).

In a suit to enjoin a stockholder from voting stock, such stockholder is a necessary party. *General Co. v. Railway*, 250 Fed. 160 (1918).

G. Injunction against election. Where there is a dispute as to whether a vacancy exists in the board of directors, it being claimed that one director has never been a stockholder, the holding of a special election to choose his successor will not be enjoined. His remedy is quo warranto after the election.

Hooe v. Hall, 9 C. C. 654; 4 C. D. 547 (1893).

H. Validity of election. How determined.

(a) **Quo warranto.** In general the proper proceeding to test the validity of an election of directors is a proceeding in quo warranto. §§ 12303, 12318, 12319.

Hullman v. Honcamp, 5 O. S. 237 (1855).

Presbyterian Soc. v. Smithers, 12 O. S. 248 (1861).

See *State v. Bonnell*, 35 O. S. 10 (1878).

Where an election is held invalid the court may, in its discretion, order a new election.

§ 12319.

Henderson v. Hogan, 1 W. L. B. 227 (Dist. Ct. 1876).

(b) **Injunction against illegal directors.** Where the sole object of a suit is to test the legality of an election, it must be by proceedings

in quo warranto, and a suit for injunction or other suit in equity will not lie.

Hullman v. Honcamp, 5 O. S. 237 (1855).

Hooe v. Hall, 9 C. C. 654; 4 C. D. 547 (1893).

Messenger v. Wardens, 6 W. L. B. 397 (C. P. 1881).

A restraining order may be granted, during the pendency of a quo warranto proceeding, to restrain a taking possession of the office by other than legal means.

Hooe v. Hall, 9 C. C. 654; 4 C. D. 547 (1893).

But the validity of an election may be determined in an injunction suit, or other suit in equity, where other and proper equitable relief is sought in the suit; as where the plaintiffs are members of a corporation not for profit and are wrongfully excluded from the use and enjoyment of the corporate property or privileges by persons claiming to be directors, but whose election was void or illegal.

Munsel v. Boyd, 10 C. C. n. s. 121; 20 C. D. 182 (1907).

Bartholomew v. Lutheran Cong., 35 O. S. 567 (1880).

See Presbyterian Soc. v. Smithers, 12 O. S. 248.

Messinger v. Wardens, 6 W. L. B. 397 (C. P. 1881).

Or where the suit seeks to set aside a fraudulent contract made by directors whose election was brought about by fraud.

Burch v. Coan, 4 O. L. R. 731; 17 L. D. 563, 717 (Super. Ct. Cin. 1907).

Or where the right of directors to represent the corporation arises incidentally in the course of an action.

Lutterby v. Herancourt Brewing Co., 12 L. D. 67 (Super Ct. Cin. 1901).

In such case the court may enjoin the persons illegally elected from interfering with the lawful directors in possession and control of the corporate property.

Bartholomew v. Lutheran Cong., 35 O. S. 567 (1880).

Munsel v. Boyd, 10 C. C. n. s. 121; 20 C. D. 182 (1907).

Although it may not render a judgment of ouster against the illegal directors.

Burch v. Coan, 4 O. L. R. 731; 17 L. D. 563 (Super. Ct. Cin. 1907).

In federal courts it has been held that the remedy in equity may be invoked where the interests affected by the litigation would suffer by the delays incident necessary to a quo warranto proceeding.

Toledo Co. v. Smith, 205 Fed. 643, 662 (D. C. 1913).

(c) **Collateral attack.** The title of *de jure* directors can not be questioned in a collateral proceeding. The acts of *de facto* directors are, as to third persons, valid, although they may have been elected by illegal votes.

Presbyterian Soc., etc., v. Smithers, 12 O. S. 248 (1861).

Chamberlain v. Painesville, etc., Co., 15 O. S. 225, 250 (1864).

Ehrman v. Ins. Co., 35 O. S. 324, 339.

Harrison v. Ellis, 15 L. D. 501 (C. P. 1905).

Raymond v. Spring Grove, etc., Ry. Co., 21 W. L. B. 103 (Super. Ct. Cin. 1889).

In a collateral proceeding the court may, however, determine who are the *de facto* directors.

Presbyterian Soc. v. Smithers, 12 O. S. 248, 251 (1861).

(d) **Corporate record or minute book as evidence.** The records of a corporation are the best evidence of its officers, but it is competent to prove the existence of such officers by other evidence.

State v. Buchanan, Wright 233 (1833).

See Stillwater Turnpike Co. v. Coover, 25 O. S. 558 (1874).

Toledo, etc., Co. v. Toledo, etc., Co., 12 C. C. 367; 5 C. D. 643 (1893).

Section 8648. (Life of corporations to deal in real estate; renewal of such charters.) A corporation formed to buy or sell real estate, shall expire by limitation in twenty-five years from the date on which its articles of incorporation were issued by the secretary of state unless before twenty-four years from the date on which such articles were issued the corporation shall file with the secretary of state a certificate that a meeting of its stockholders called for the purpose of considering a renewal of the charter three-fourths of all the votes cast at the meeting were in favor of a renewal of the charter in which case the corporation may continue with the same powers and subject to the same obligations as when originally created for an additional period of twenty-five years and the secretary of state shall issue a certificate of renewal of its articles of incorporation for such period. Ten days' notice of the time and place of holding such meeting and the object thereof shall be given by registered letter containing a written or printed notice addressed to each of the persons in whose names the stock of the corporation stands on its books and also by like notice published in some newspaper in the city or village where the corporation has its principal office or place of business. When all the stockholders are present at such meeting in person or by proxy, notice may be waived in writing. For each share of stock on which all the installments called for by the board of directors are paid the holder thereof shall be entitled to one vote and the voting shall be by ballot cast in person or by proxy. (109 v. 197; R. S. Sec. 3235; May 12, 1902, 95 v. 623; March 22, 1900, 94 v. 65; April 6, 1894, 91 v. 126; April 20, 1893, 90 v. 205; R. S. 1880.)

For powers of building companies to acquire and hold real estate for office, hotel, factory, etc., buildings see § 10210.

A corporation formed for the purpose of dealing in real estate is necessarily for profit and can not be organized without a capital stock.

State v. Home Co-op. Union, 63 O. S. 547 (1900).

A foreign corporation organized to deal in real estate may be admitted to do business in Ohio, but the application for admission should expressly limit its life in Ohio to twenty-five years.

5 Opins. Attys. Gen. 1002.

Although not expressly required by statute, it is proper that the articles of an Ohio corporation formed to deal in real estate should expressly limit its life to twenty-five years. The omission of such a limitation from the articles, however, does not invalidate the articles nor authorize the secretary of state to refuse to file the same.

Rep. Atty. Gen. 1911-1912, pp. 71, 61.

A real estate company may not, by amendment to its articles, acquire the powers of a building company under § 10210.

Rep. Atty. Gen. 1908-1909, p. 78.

At the expiration of twenty-five years (or, if extended, fifty years)

a real estate corporation is ipso facto dissolved and should be wound up under § 8742 et seq.

People v. Anderson, etc., Road Co., 76 Cal. 190.

La Grange, etc., R. Co. v. Rainey, 7 Colw. (Tenn.) 420, 432 (1870).

Scanlan v. Crawshaw, 5 Mo. App. 337 (1878).

See Myers v. Lucas, 16 C. C. 545; 8 C. D. 431 (1898); reversed on other grounds, 63 O. S. 101.

A corporation not for profit, organized for social and gymnastic purposes, which owns a building where societies meet for such purposes, and a part of which is rented, does not, because of such ownership, become a real estate corporation. Its life is not limited to twenty-five years. Becker v. Germannia Co., 22 C. C. n. s. 395 (1908).

There is no limit to the amount of land which a real estate company may hold.

Market St. Ry. Co. v. Hellman, 109 Cal. 571.

Leases for more than twenty-five years under former law.

See Beckett Paper Co. v. Hamilton, etc., Co., 18 C. C. 200; 10 C. D. 57.

Section 8649. (Procedure if real estate not disposed of in twenty-four or forty-nine years.) If within twenty-four years from the date of its articles, or forty-nine years from such date if its articles are extended, the real estate of such corporation is not wholly disposed of, its directors shall at once bring an action against it, and the owners of liens upon such real estate, in the common pleas court of the county wherein such realty is situated, by filing a petition praying for its sale as therein described. Should the board not begin such action within sixty days after such twenty-four years, or forty-nine years if the articles are extended, expire the prosecuting attorney of the county in which the realty is situated, on the expiration of the sixty days at once shall begin and prosecute it. (109 v. 198; R. S. Sec. 3235; May 12, 1902, 95 v. 623; March 22, 1900, 94 v. 65; April 6, 1894, 91 v. 126; April 20, 1893, 90 v. 205; R. S. 1880.)

Section 8650. (Service of summons, sale and distribution.) Service of summons upon the defendants, appraisal and sale of such real estate, and distribution of the proceeds of the sale shall be made as provided in actions of foreclosure of mortgages and marshalling liens. The court may allow the plaintiff, in case he be the prosecuting attorney, a just attorney fee, to be taxed with the costs of the action. (R. S. Sec. 3235; May 12, 1902, 95 v. 623; March 22, 1900, 94 v. 65; April 6, 1894, 91 v. 126; April 20, 1893, 90 v. 205; R. S. 1880.)

Section 8651. (Articles of incorporation not for profit.) An association of five or more persons, resident of this state, who are associated not for profit, but as the principal or

ruling organization over subordinate organizations, associated, not for profit, and having a definite location or place of business in the state, may be incorporated, having its location or principal place of business therein, without naming in its articles of incorporation a permanent place where it is to be located, or its principal business transacted; but it must name therein the place where it is to be located, or its principal business transacted at the time of incorporation, with the name and places of residence of its then principal officers. (R. S. Sec. 3236; April 10, 1889, 86 v. 224; April 16, 1885, 82 v. 134; R. S. 1880.)

Articles of incorporation under this section must state the names and residences of the principal officers.
Rep. Atty. Gen. (1908-1909), 57.

Section 8652. (Duties of officers when location is changed.) When such association changes its location, or the place where its principal business is transacted, its principal officer, under its seal, if it has one, countersigned by the officer acting as secretary of such association, shall certify the place then selected as its location, or where its principal business is to be transacted, with the name of its principal officers, and their places of residence, to the secretary of state of Ohio, which certificate he shall record for public use in the records of his office. (R. S. Sec. 3236; April 10, 1889, 86 v. 224; April 16, 1885, 82 v. 134; R. S. 1880.)

Section 8653. (Members of corporation not for profit.) The subscribers to articles of incorporation for a purpose other than profit, shall have them copied into a book they provide, which shall be the property of the corporation. Any person who has the qualifications which the corporate body prescribes, may become a member thereof by signing his name to such copy. (R. S. Sec. 3241; March 16, 1887, 84 v. 85; May 15, 1886, 83 v. 168; R. S. 1880.)

Whether compliance with this section is indispensable to legal organization of the corporation *quaere*.

State v. Burial Assn., 8 C. C. n. s. 233, 248, 249; 18 C. D. 397 (1906);

(Dismissed by Sup. Ct. for want of jurisdiction, 4 O. L. R. 708).
This section applies to religious societies.

3 Opins. Attys. Gen. 333.

Contract of membership, what constitutes.

See notes to §§ 9468 and 9427.

Corporations not for profit, such as hospitals, country clubs, etc., which regularly employ five or more workmen, are "employers" within the meaning of the workmen's compensation law. Rep. Atty. Gen. 1914, p. 292.

Articles of incorporation. The articles of incorporation of a social club should not include in the purpose clause the terms "for mutual protection and relief," as such terms are used in the statutes to describe certain insurance business.

Rep. Atty. Gen. 1911-1912, p. 65.

Property rights of members. A member of a corporation not for profit has no severable right in its property but merely the enjoyment and use of it while he remains a member. On his withdrawal or expulsion he is not entitled to a proportionate share of the property.

Hershiser v. Williams, 24 W. L. B. 314; 4 L. D. 17 (1890); affirmed, 6 C. C. 147; 3 C. D. 389 (1892); 53 O. S. 663.

Gasely v. Separatists Soc. of Zoar, 13 O. S. 144 (1862).

Wiswell v. First Cong. Church, 14 O. S. 31 (1863).

Secession. Members who secede from a corporation not for profit forfeit all right to its property. But the members may, by agreement, separate into two bodies and divide the property.

Wiswell v. First Cong. Church, 14 O. S. 31 (1863).

M. E. Church v. Wood, 5 Ohio 283 (1831).

Ex parte Shoup, 16 W. L. B. 71 (C. P.).

Rike v. Floyd, 6 C. C. 80 (1891); aff'd, no rep., 53 O. S. 653.

Sale of real estate. The trustees of a religious society have no power to dispose of its real estate without the consent of its members and without authority of court under § 10051.

South Kenton, etc., Assn. v. Espy, 17 C. C. 524; 9 C. D. 695 (1899).

Liability of members. Members of a corporation not for profit are not individually liable for its debts.

See § 8666.

Myers v. Jenkins, 63 O. S. 101 (1900).

EXPULSION OF MEMBERS.

Power of corporation to expel. A corporation not for profit has inherent power to expel a member for conduct detrimental to its welfare.

State v. Aurora Relief Soc., 2 W. L. B. 125 (Dist. Ct. 1877).

Hershiser v. Williams, 24 W. L. B. 314; 4 L. D. 17 (1890); affirmed, 6 C. C. 147; 3 C. D. 389; 53 O. S. 663.

State v. Society, 8 Am. L. R. 627; 5 W. L. B. 124.

Blumenthal v. Cincinnati Chamber of Commerce, 9 W. L. B. 76 (Dist. Ct.); affirming 7 W. L. B. 327.

When organized with a capital stock a corporation not for profit may expel a member who is a stockholder.

Cheney v. Ketcham, 5 N. P. 139, 140; 7 L. D. 183.

A corporation for profit, however, can not legally provide, in its regulations, for the expulsion or suspension of its stockholders. Paxson v. Cleveland, etc., Co., 17 C. C. n. s. 55 (1909); Rep. Atty. Gen. 1911-1912, p. 88.

Grounds. Causes specified in regulations or constitution. The members of a corporation are bound by the provisions of its regulations or constitution, and may be expelled or suspended for any cause specified therein.

Blumenthal v. Cincinnati Chamber of Commerce, 7 W. L. B. 327; affirmed, 9 W. L. B. 76 (Dist. Ct.).

State v. Verein, 3 W. L. B. 295 (Dist. Ct. 1878).

Hershiser v. Williams, 24 W. L. B. 314; 4 L. D. 17 (1890); affirmed, 6 C. C. 147; 3 C. D. 389; 53 O. S. 663.

Pete v. Woodmen of the World, 5 C. C. n. s. 446; 16 C. D. 653 (1904); aff'd, no rep., 74 O. S. 445.

Causes not specified. In the absence of a provision in the regulations a member may be expelled (1) for an indictable offense which renders him unfit for association, or (2) for an offense against his duty as a member of the corporation.

State v. Aurora Relief Soc., 2 W. L. B. 125 (Dist. Ct. 1877).

State v. Society, 8 Am. L. R. 627; 5 W. L. B. 124 (Dist. Ct.).

Hershiser v. Williams, 24 W. L. B. 314; 4 L. D. 17 (1890); affirmed, 6 C. C. 147; 3 C. D. 389; 53 O. S. 663.

Blumenthal v. Cincinnati Chamber of Commerce, 9 W. L. B. 76; affirming 7 W. L. B. 327.

Immoral or vicious conduct is a valid ground for the expulsion of a member of a social, fraternal or religious society.

State v. Aurora Relief Soc., 2 W. L. B. 125 (Dist. Ct. 1877).

"Unmercantile conduct," consisting of making sales by false weight, is a valid ground for the expulsion of a member of a chamber of commerce.

Blumenthal v. Chamber of Commerce, 9 W. L. B. 76 (Dist. Ct.); affirming 7 W. L. B. 327.

See § 10144.

Unmasonic conduct.

Hershiser v. Williams, 24 W. L. B. 314; 4 L. D. 17 (1890); affirmed, 6 C. C. 147; 3 C. D. 389; 53 O. S. 663.

Expulsion of members of fraternal benefit societies, see note to § 9468.

Trial. A member can not be expelled without a trial, even where the regulations contain no provisions on the subject. Reasonable notice of the trial must be given him and an opportunity afforded for him to present his defense.

State v. Bryce, 7 Ohio (pt. 2) 82 (1836).

Munsel v. Boyd, 10 C. C. n. s. 121; 20 C. D. 182 (1907).

Schwartz v. Catholic Union, 9 C. C. n. s. 337; 19 C. D. 471 (1907).

Cheney v. Ketcham, 5 N. P. 139; 7 L. D. 183.

Stein v. Sherlock, 6 W. L. B. 203 (Dist. Ct. 1881).

The provisions of the regulations, if any, relating to proceedings for expulsion must be followed.

State v. Bryce, 7 Ohio (pt. 2) 82 (1836).

Foxhever v. Order of Red Cross, 2 C. C. n. s. 394; 14 C. D. 56 (1901); aff'd, no rep., 68 O. S. 717.

But such provisions may be waived by the member on trial.

State v. Cincinnati Chamber of Commerce, 4 N. P. 244; 6 L. D. 363.

Blumenthal v. Cincinnati Chamber of Commerce, 9 W. L. B. 76 (Dist. Ct.).

Where the regulations or constitution provide for a committee or board to hear and determine charges, the trial should be held before such special tribunal.

Stein v. Sherlock, 6 W. L. B. 203 (Dist. Ct. 1881).

Blumenthal v. Chamber of Commerce, 9 W. L. B. 76; affirming 7 W. L. B. 327.

Where the regulations do not provide for such a tribunal the trial must be held before the members of the corporation.

Cheney v. Ketcham, 5 N. P. 139; 7 L. D. 183.

The person by whom charges have been filed against the accused member can not act as judge or vote.

Cheney v. Ketcham, 5 N. P. 139; 7 L. D. 183.

The strictness of judicial proceedings is not required either in the wording of the charges against the accused member, or in the notice given him, or in the admission of evidence.

Blumenthal v. Cincinnati Chamber of Commerce, 9 W. L. B. 76 (Dist. Ct.); affirming 7 W. L. B. 327.
 State v. Aurora Relief Society, 2 W. L. B. 125 (Dist. Ct. 1877).

Remedies for wrongful expulsion. A member unlawfully expelled may bring an action for damages against the corporation.

State v. Slavovska Lipa, 28 O. S. 665 (1876).

Fraternal Mystic Circle v. State, 61 O. S. 628 (1899); reversing 9 C. C. 364; 6 C. D. 385.

An injunction against wrongful exclusion may be granted where the remedy at law is inadequate.

Cheney v. Ketcham, 5 N. P. 139; 7 L. D. 183.

State v. Zesch, 5 N. P. 274; 7 L. D. 298.

Mandamus is not a proper remedy.

Fraternal Mystic Circle v. State, 61 O. S. 628 (1899); reversing 9 C. C. 364; 6 C. D. 385.

A member of a chamber of commerce who is suspended until he submits to a public reprimand is not confronted by an irreparable injury with no adequate remedy at law.

Bishop v. Cincinnati, etc., Exchange, 5 N. P. 365.

Remedies within corporation must be exhausted before suit. A member against whom charges are preferred must submit to trial by the corporation. An injunction will not be granted against a threatened expulsion. The court will presume that a fair trial will be had within the corporation.

Hershiser v. Williams, 6 C. C. 147; 3 C. D. 389 (1892); aff'd, no rep., 53 O. S. 663.

Where a member has been wrongfully expelled he can not maintain an action until he has exhausted all the remedies within the corporation. If appellate tribunals exist in the corporation, he must carry his appeal to the highest tribunal.

Hershiser v. Williams, 6 C. C. 147; 3 C. D. 389 (1892); aff'd, no rep., 53 O. S. 663.

State v. Knights of Golden Rule, 10 W. L. B. 2 (Dist. Ct. 1883).

Catholic Union v. Herron, 4 O. L. R. 686; 17 L. D. 789 (1907).

Myers v. Jenkins, 63 O. S. 101 (1900).

Supreme Court Foresters v. Herlinger, 6 C. C. n. s. 28; 17 C. D. 151 (1905).

Klein v. Amazon Lodge, 16 C. C. n. s. 606 (1907).

But where the expulsion is void, as in the case of expulsion without a trial, the member may sue without resorting to the appellate tribunals.

Cheney v. Ketcham, 5 N. P. 139; 7 L. D. 183.

See dissenting opinion, Catholic Union v. Herron, 4 O. L. R. 686; 17 L. D. 789 (1907).

And where the corporation has no appellate tribunal, a member claiming sick benefits may bring suit. St. John Soc. v. Zoulek, 20 C. C. n. s. 146 (1912).

While a member must first exhaust his remedies within the corporation, he can not be denied the right to sue in court. A corporate regulation prohibiting resort to the courts is invalid. Myers v. Jenkins, 63 O. S. 101 (1900); Railway v. Stankard, 56 O. S. 224 (1897).

Pleading. The better practice is for the plaintiff to set out in his petition the existence of tribunals within the corporation and to aver that he has exhausted all such remedies. But the existence of appellate tribunals within the corporation, and failure to resort thereto, may be alleged in the answer.

Myers v. Jenkins, 63 O. S. 101, 116 (1900).

See *Webster v. Taplin Rice & Co.*, 9 C. C. n. s. 587; 19 C. D. 543 (1904); *aff'd*, 76 O. S. 590.

Judicial relief granted when. Judicial relief will not be granted unless civil or property rights are involved.

Hershiser v. Williams, 24 W. L. B. 314; 4 L. D. 17 (1890); *affirmed*, 6 C. C. 147; 3 C. D. 389; 53 O. S. 663.

When such a right exists, relief will be granted where the expulsion has been brought about by fraud.

Kent v. Odd Fellows, etc., Assn., 14 W. L. B. 237 (C. P. 1885).

Or where a member has been expelled without a trial.

Cheney v. Ketcham, 5 N. P. 139; 7 L. D. 183 (C. P.).

A court will not, as a rule, sit as a reviewing court upon the judgment of a corporate tribunal. An expulsion will not be set aside for irregularity in the proceedings, providing the cause is one for which the corporation may expel, and the accused member had notice of the trial and opportunity to defend.

State v. Aurora Relief Society, 2 W. L. B. 125 (Dist. Ct. 1887).

Hershiser v. Williams, 24 W. L. B. 314; 4 L. D. 17 (1890); *affirmed*, 6 C. C. 147; 3 C. D. 389; 53 O. S. 663.

State v. Verein, 3 W. L. B. 295 (Dist. Ct. 1878).

State v. Cincinnati, etc., Exchange, 4 N. P. 244; 6 L. D. 263.

Bishop v. Cincinnati, etc., Exchange, 5 N. P. 365.

The admission of hearsay evidence does not invalidate a conviction.

Blumenthal v. Cincinnati Chamber of Commerce, 9 W. L. B. 76 (Dist. Ct.); *affirming*, 7 W. L. B. 327.

Even where a member was expelled without notice or opportunity to defend, he was refused reinstatement where it clearly appeared that he had forfeited his right to membership and, if reinstated, would at once be expelled by formal proceedings.

State v. Society, 8 Am. L. R. 627; 5 W. L. B. 124.

See *State v. Verein*, 3 W. L. B. 295 (Dist. Ct. 1878).

Acquiescence in expulsion. A member of a fraternal benefit society, although wrongfully expelled, will be held to have acquiesced in the action taken, where he did not appeal therefrom, apply for reinstatement, and did not thereafter pay or tender dues, attend meetings or otherwise act as a member. After his death there can be no recovery on his benefit certificate or policy.

Foxhever v. Order of Red Cross, 2 C. C. n. s. 394; 14 C. D. 56 (1901); *aff'd*, no rep., 68 O. S. 717.

Dimmer v. Catholic Knights, 22 C. C. 366; 12 C. D. 413 (1901).

Herron v. Catholic Union, 2 O. L. R. 352; 15 L. D. 703 (1904); s. c., 4 O. L. R. 686; 17 L. D. 789.

Suspension of members. A member of a beneficial association is bound by a provision in its regulations to the effect that failure to pay dues and assessments, when due, shall ipso facto suspend the delinquent from membership.

Pete v. Woodmen of the World, 5 C. C. n. s. 446; 16 C. D. 653 (1904); *aff'd*, no rep., 74 O. S. 445.

But where the regulations do not provide that non-payment of dues shall ipso facto suspend the delinquent, his membership continues until he is suspended by formal proceedings. *Schwartz v. Union*, 21 C. C. n. s. 165 (1907).

Section 8654. (Members of a religious, secret or benevolent society.) When the incorporators of such a corporation

now or hereafter formed, are or become members of a church, religious, secret or benevolent society, and have signed or sign articles to incorporate either thereof, any person who is or becomes a member of such church, religious, secret or benevolent society, in good standing, thereby shall be a member of such corporation, with the right to vote at all of its meetings for the election of officers or for any other purpose. (R. S. Sec. 3241; March 16, 1887, 84 v. 85; May 15, 1886, 83 v. 168; R. S. 1880.)

Where membership in a specified church is one of the qualifications of membership in a benefit society, a member of the society, on withdrawal from the church, becomes liable to expulsion.

State v. Society, 8 Am. L. R. 627; 5 W. L. B. 124 (Dist. Ct.).

Power of majority. A majority of the members of a religious corporation have a right to control the use and occupation of land purchased by it. They do not lose such right of control by any supposed error of doctrine.

Keyser v. Stansifer, 6 Ohio 363 (1834).

Brundage v. Deardorf, 92 Fed. 214 (C. C. A. 1899).

Voting rights. Where in a special charter of a religious corporation the right to vote was granted to "each member," a further provision giving to pew owners the privileges of membership was held not to restrict the right of voting to them.

Wiswell v. First Cong. Church, 14 O. S. 31 (1863).

Membership in mutual protective association. After a mutual protective association has been formed under § 9427 et seq., its members are those mutually engaged in promoting the purposes of the organization and who, by virtue of their relation to the corporation, are entitled to protection.

State v. Standard Life Assn., 38 O. S. 281 (1882).

Section 8655. (Election.) Except as otherwise provided, a majority of the subscribers to articles of incorporation not for profit, may elect not less than five trustees for such corporation, to hold their offices until the next annual meeting, or until their successors are elected and qualified. (R. S. Sec. 3240; May 10, 1902, 95 v. 547; April 6, 1888, 85 v. 166; March 26, 1883, 80 v. 79; April 20, 1881, 78 v. 200; R. S. 1880.)

Qualifications of trustees. See § 8661.

Powers and duties of trustees. See § 8660.

Liability of trustees. See § 8666.

Neither the incorporators nor the trustees first elected are authorized to adopt a by-law or regulation providing that they shall hold office during life, and in case of vacancy to fill the same by appointment.

State v. Standard Life Assn., 38 O. S. 281 (1882).

The provisions of § 8647 relating to the time of annual meetings apply to corporations not for profit.

State v. Standard Life Assn., 38 O. S. 281 (1882).

Validity of election; procedure to determine.

See note to § 8647.

Articles of incorporation of a religious society which recited the election of the incorporators as trustees, prior to filing the articles, were refused filing by the secretary of state.

3 Opins. Attys. Gen. 699.

Section 8656. (Term and number of trustees.) Religious corporations, and institutions incorporated for the purpose of promoting education, science or art, may prescribe the time trustees thereof may hold their offices, except that the term of none shall exceed in number of years the number of its trustees. (R. S. Sec. 3240; May 10, 1902, 95 v. 547; April 6, 1888, 85 v. 166; March 26, 1883, 80 v. 79; April 20, 1881, 78 v. 200, R. S. 1880.)

Powers of trustees of religious corporations. See note to § 10013.

The tenure of office of a trustee of a religious corporation may be terminated by the members, at a meeting properly called and held, before the expiration of the term for which he was elected.

Munsel v. Boyd, 10 C. C. n. s. 121; 20 C. D. 182 (1907).

See note to § 8647.

Section 8657. (Term and number of trustees in secret or benevolent order.) Lodges, societies, or bodies of a secret or benevolent order, incorporated under the laws of this state, may elect such number of trustees not less than three as the laws or regulations governing such lodge, society, or body, provides, and their election shall be at the time therein specified. (R. S. Sec. 3240; May 10, 1902, 95 v. 547; April 6, 1888, 85 v. 166; March 26, 1883, 80 v. 79; April 20, 1881, 78 v. 200; R. S. 1880.)

The trustees of a fraternal beneficial association, elected for the first year, have no right to adopt regulations, but they have a right to adopt by-laws relating to the conduct of its business.

Chevaliers v. Shearer, 6 C. C. n. s. 587; 17 C. D. 509 (1905).

Section 8658. (Term and number of trustees of a hospital.) Members of any corporation heretofore or hereafter organized for the purpose of owning and conducting a hospital for sick and disabled persons, may provide for the election of a board of not less than five nor more than fifteen trustees, to serve during life, and that in case of vacancy in such board by death, resignation or otherwise, the remaining members thereof shall fill the vacancy. (R. S. Sec. 3240; May 10, 1902, 95 v. 547; April 6, 1888, 85 v. 166; March 26, 1883, 80 v. 79; April 20, 1881, 78 v. 200; R. S. 1880.)

Section 8659. (Trustees of corporations organized prior to May 10th, 1902.) If such corporation was organized prior to May 10th, 1902, regulations providing that its trustees are

to hold office during life may be adopted at an annual meeting, or a special meeting of the association, duly and regularly called. But notice of such proposed change shall be published for three successive weeks in some newspaper published and of general circulation at the place where such hospital is located. (R. S. Sec. 3240; May 10, 1902, 95 v. 547; April 6, 1888, 85 v. 166; March 26, 1883, 80 v. 79; April 20, 1881, 78 v. 200; R. S. 1880.)

DIRECTORS AND TRUSTEES.

Section 8660. (Controlling body of a corporation.) The corporate powers, business and property of corporations formed under this title shall be exercised, conducted, and controlled by the board of directors; or, if there is no capital stock, by the board of trustees. (R. S. Sec. 3248; R. S. 1880.)

First election of directors. § 8636 and note.

Annual elections. § 8647 and note.

Term of office, resignation, removal, etc., see note to § 8647.

Qualifications of directors. §§ 8661, 8663.

I. Meetings.

- A. Directors must act as a board, p. 1012.
- B. Notice of meetings, p. 1012.
- C. Quorum, p. 1012.
- D. Proceedings and minutes, p. 1013.

II. De facto directors or officers, p. 1013.

III. Duties of directors.

- A. Are largely supervisory, p. 1014.
- B. To keep books, p. 1014.
- C. To supervise issue of certificates of stock, p. 1014.
- D. To advance personal funds to corporation, p. 1014.
- E. When director charged with knowledge of contents of corporate records and books, p. 1014.
- F. Where corporation insolvent, p. 1015.
- G. Delegation of duties to executive committee, p. 1015.
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- I. Trust relation of directors to stockholders, p. 1016.

IV. Powers of directors.

- A. Controlling body of corporation, p. 1016.
- B. Control of directors by stockholders, p. 1016.
- C. Control of directors by court on application of stockholders, p. 1017.
- D. Contracts limiting powers of directors, p. 1017.
- E. Power to dispose of unissued stock, p. 1018.
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- G. To bring or defend suits, p. 1018.
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- I. To make assignment for creditors, p. 1018.
- J. To release subscriptions to stock, p. 1018.
- V. Corporate contracts.
 - A. Power to make is vested in directors, p. 1018.
 - B. Authority of agents to contract, p. 1018.
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 - A. In general, p. 1027.
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- (b) Statute of limitations, p. 1031.
- (c) Laches of stockholder, p. 1031.
- (d) Offer to sell stock, p. 1031.
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- (f) Motive of stockholder. Suit not brought in good faith, p. 1032.
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XVI. Liability of officers and agents.

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- (a) Secret profits from contracts with corporation, p. 1033.
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- (c) Corporate property wrongfully converted by director, p. 1034.
- (d) Accounting for corporate property, p. 1034.

B. Liability to stockholders.

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- (b) Shares of assets on winding up, p. 1035.
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- (a) Fraud in inducing subscription, p. 1036.
- (b) Bank directors attesting false statements of condition, p. 1037.
- (c) President signing "full paid" stock certificate, p. 1037.
- (d) Verbal promise of dividends to subscriber, p. 1037.

D. Liability to creditors.

- (a) Acting before ten percent of capital is subscribed, p. 1037.
- (b) Acting without authority, p. 1037.
- (c) Conducting unauthorized business, p. 1037.
- (d) On notes improperly signed, p. 1038.
- (e) On stock exchanged for property at an overvaluation, p. 1038.
- (f) Declaring dividends otherwise than out of surplus profits, p. 1038.
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E. Criminal liability, p. 1038.

I. MEETINGS.

A. Directors must act as a board. Individual directors, as such, have no authority to represent a corporation. To bind the corporation the directors must act together as a board.

State v. People's; etc., Assn., 42 O. S. 579 (1885).

Belting Co. v. Gibson, 68 O. S. 442, 449 (1903).

State v. Railway, 6 C. C. 412; 3 C. D. 516 (1892); s. c., 49 O. S. 668.

Schot, etc., Co. v. Security, etc., Ins. Co., 7 N. P. n. s. 548; 19 L. D. 249 (C. P. 1908); aff'd, 11 C. C. n. s. 401; 20 C. D. 656.

Tyson v. Miller-Tyson Co., 15 C. C. n. s. 177, 182, 433; 23 C. D. 418, 424 (1912).

Young, etc., Co. v. Taylor, etc., Church, 5 N. P. 378; 7 L. D. 449 (C. P. 1898).

See Ohio v. Treasurer, etc., 22 O. S. 144 (1871).

McCortle v. Bates, 29 O. S. 419, 422 (1876).

The board can not exclude minority directors from the privileges and duties of office.

State v. Railway, 6 C. C. 412; 3 C. D. 516 (1892); s. c., 49 O. S. 668.

B. Notice of meeting. Where regular meetings of the board are provided for in the by-laws, no notice thereof need be given unless notice is required by the regulations or by-laws.

Mitchell v. Bookwalter Wheel Co., 4 N. P. n. s. 609, 619 (1905); aff'd, no rep., 75 O. S. 639.

State v. Bonnell, 35 O. S. 10, 15 (1878).

State v. Clough, 18 C. C. n. s. 509 (1912); aff'd, no rep., 88 O. S. 590.

Toledo Co. v. Smith, 205 Fed. 643, 660 (D. C. 1913).

But where the directors had held no meetings for several years, and the attendance of one director was procured by fraud, and his presence was necessary to make a quorum, the meeting was held to be illegal, although held at a time specified in the by-laws. Remelin v. Bumiller, 16 N. P. n. s. 22 (1914).

Notice of special meetings should be given to all directors. But transactions at a special meeting, at which a quorum was present, may be ratified by the absent members who were not notified.

Bank v. Flour Co., 41 O. S. 552, 559 (1885).

Where a meeting is adjourned no further notice of the adjourned meeting is necessary.

Mitchell v. Bookwalter Wheel Co., 4 N. P. n. s. 609, 619 (1905); aff'd, no rep., 75 O. S. 639.

C. Quorum. A majority of the directors constitutes a quorum for the transaction of business. § 8664.

Dickason v. Grafton, etc., Co., 6 C. C. n. s. 329, 333; 17 C. D. 357 (1905); aff'd, no rep., 76 O. S. 612.

Where a quorum has assembled a majority of those present may act and bind the corporation, although a minority of the board.

Kalb v. American N. B., 21 C. C. 1, 7, 8; 11 C. D. 437 (1900); aff'd, 65 O. S. 566.

Remelin v. Bumiller, 16 N. P. n. s. 22, 30 (1914).

A director can not vote by proxy, nor in counting a quorum can he be regarded as present by proxy.

Ohio, etc., Bank v. Iron Co., 30 W. L. B. 382 (Super. Ct. Cin. 1893).

A director who is personally interested in an action taken at a meeting is disqualified and can not be counted in estimating a quorum.

Remelin v. Bumiller, 16 N. P. n. s. 22 (1914). See Rolling Stock Co. v. Railroad, 34 O. S. 450, 465 (1878).

The authorities are conflicting as to whether a director who is present, but does not vote, may be counted as a part of quorum. See Remelin v. Bumiller, 16 N. P. n. s. 22, 32 (1914).

Where the attendance of a director was obtained by fraud, and he remained to protest against proposed action, it was held that he could not be counted. Remelin v. Bumiller, 16 N. P. n. s. 22, 32 (1914). It is presumed, in the absence of evidence, that a quorum was present.

Young, etc., Co. v. Taylor, etc., Church, 5 N. P. 378, 380; 7 L. D. 449, 452 (C. P. 1898).

Where less than a quorum is present, the acts of the directors present are voidable; but may be ratified by the board either expressly or by acquiescence and delay in taking steps to avoid the same.

U. S., etc., Co. v. Atlantic, etc., Co., 34 O. S. 450 (1878).

But an approval of the minutes of such a meeting, at a subsequent meeting, is not a ratification. It is merely an approval of the form of statement or correctness of the proceedings.

Ohio, etc., Bank v. Iron Co., 30 W. L. B. 382 (Super. Ct. Cin. 1893).

D. Proceedings and minutes. A director can not vote by proxy. Ohio, etc., Bank v. Iron Co., 30 W. L. B. 382 (Super. Ct. Cin. 1893). An approval of the minutes of a previous meeting is an approval of the form of statement or correctness of the previous proceedings, but not a ratification of the action of the board.

Ohio, etc.; Bank v. Iron Co., 30 W. L. B. 382 (Super. Ct. Cin. 1893). Where an action of the board is not entered in the minutes it may be proved by parol evidence.

First N. B. v. Mansfield Sav. Bank, 10 C. C. 233, 237; 6 C. D. 454 (1895).

Dixon v. Subdistrict, etc., 3 C. C. 517; 2 C. D. 298 (1888).

C. H. & D. R. Co. v. Harter, 26 O. S. 426 (1875).

Fritsch Mfg. Co. v. Elmont, etc., Co., 11 C. C. n. s. 356; 21 C. D. 47 (1908).

Railroad v. Railroad, 233 U. S. 601 (1914).

In construing the proceedings of directors the court will examine the entire record to ascertain the intention.

Lockwood v. Wildman, 13 Ohio 430 (1844).

Where the record is ambiguous, the proceedings will be construed so as to be consistent with all other proceedings pertaining to the same subject matter.

East Cleveland R. Co. v. Everett, 19 C. C. 205; 10 C. D. 493.

A purchaser of oil company stock, who was present at a directors meeting at which the organization record was read, can not after a lapse of six months, during which a well was drilled, rescind his purchase of stock on the ground of fraud, when the record disclosed the true facts as to the alleged fraud. Hamilton v. Carr, 18 C. C. n. s. 395 (1911).

Record as evidence.

See Stillwater Turnpike Co. v. Coover, 25 O. S. 558 (1874).

Toledo, etc., Co. v. Toledo, etc., Co., 12 C. C. 367; 5 C. D. 643 (1893).

II. DE FACTO DIRECTORS OR OFFICERS.

A person who acts as a director or officer, after a supposed election or appointment, but which in fact is illegal, may bind the corporation. He may be ousted by proceedings in quo warranto. But so long as no proceeding is instituted nor objection made his acts as to third persons are binding on the corporation.

- Clarke v. Thomas, 34 O. S. 46, 58 (1877).
Campbell Pty. Press Co. v. Bellman Bros. Co., 11 C. C. 360; 5 C. D. 389 (1896).
Lattimer v. Mosaic Glass Co., 13 C. C. 163; 7 C. D. 430 (1896).
Ehrman v. Union, etc., Ins. Co., 35 O. S. 324, 339 (1880); (affirming 2 W. L. B. 3).
First Pres. Soc. v. First Pres. Soc., 25 O. S. 128, 133 (1874).
See State v. Burial Assn., 8 C. C. n. s. 233; 18 C. D. 397 (1906).
His acts can not be collaterally attacked by creditors or debtors of the corporation.
Ehrman v. Union, etc., Ins. Co., 35 O. S. 324 (1880).
Lattimer v. Mosaic Glass Co., 13 C. C. 163; 7 C. D. 430 (1896).
Raymond v. Spring Grove, etc., Co., 21 W. L. B. 103 (Super. Ct. Cin. 1889).
Nor by stockholders.
Chamberlain v. Painesville, etc., R. Co., 15 O. S. 225, 250.
Nor by other persons claiming to be the lawful directors.
Presbyterian Soc. v. Smithers, 12 O. S. 248 (1861).
A de facto board of directors may make an assignment for creditors.
Harrison v. Ellis, 15 L. D. 501 (C. P. 1905).

III. DUTIES OF DIRECTORS.

A. Are largely supervisory. The duties of directors are, to a considerable extent, supervisory. Directors are not required to devote themselves to details of the corporate business which may be left to the executive officers and to subordinate employees.

Mason v. Moore, 73 O. S. 275, 296 (1906).

Cincinnati v. Cameron, 33 O. S. 336, 364 (1878).

Glass v. Courtright, 14 N. P. n. s. 273; 23 L. D. 253 (C. P. 1913).

B. To keep books. It is the duty of directors to see that proper books and accounts are kept.

Freon v. Carriage Co., 42 O. S. 30, 40 (1884).

C. To supervise issue of certificates of stock. Directors are charged with the duty of observing care in supervising the issue of certificates of stock.

Railway Co. v. Bank, 56 O. S. 351 (1897).

D. To advance personal funds to corporation. A director is not required to finance the corporation out of his own resources, to enable it to take advantage of a favorable option, in the absence of a contract on his part to do so. Koblitz v. Brick Co., 20 C. C. n. s. 67 (1912).

E. When director charged with knowledge of contents of corporate records and books. In general directors are not held, as a matter of law, to know all its affairs or what its books would show.

Mason v. Moore, 73 O. S. 275, 296 (1906).

Pugh v. City, etc., Co., 1 N. P. n. s. 253, 257, 14 L. D. 50, 53 (Super. Ct. Cin. 1901); aff'd, 68 O. S. 730.

Murray v. Bank, 234 Fed. 481, 490 (C. C. A. Ohio 1916).

A director is not conclusively presumed to know what the dividend rate had been, in a suit for damages based on fraudulent representations relating to dividends, by which the plaintiff was induced to purchase stock in the corporation. DeGraw v. Lampert, 17 C. C. n. s. 401 (1911).

But where a director is dealing in corporate property on his own account, he is chargeable with notice of the action of the board as to

such property, whether he was present or not at the meeting which took such action.

Greenville Gas Co. v. Reis, 54 O. S. 549 (1896).

A director, who continued as such for a year prior to the adjudication of insolvency of the corporation, is presumed to have acquired knowledge of the insolvency before the adjudication and where he subsequently attempted to rescind his stock subscription on the ground of fraud, he was held guilty of laches. *Gill v. Printing Co.*, 16 C. C. n. s. 568 (1907); *aff'd*, no rep. 80 O. S. 742.

A purchaser of oil stock who was present at a directors meeting at which the organization record was read from the minute book, can not after a lapse of six months, during which a well was drilled, rescind his purchase of stock on the ground of fraud, when the record discloses the true facts as to the alleged fraud. *Hamilton v. Carr*, 17 C. C. n. s. 395 (1911).

F. Where corporation insolvent. Where a corporation becomes insolvent it is the duty of the directors to take steps to preserve the corporate property and see that it is applied to the payment of creditors' claims.

Cheney v. Maumee Cycle Co., 20 C. C. 19; 10 C. D. 717 (1900); *aff'd*, 64 O. S. 205.

G. Delegation of duties to executive committee. The supervision and control of transactions in the usual course of business may be delegated to an executive committee of the board.

Lutterby v. Herancourt Brewing Co., 12 L. D. 67, 74 (Super. Ct. Cin. 1901).

See *Bank v. Iron Co.*, 30 W. L. B. 382 (Super. Ct. Cin. 1893).

Whether powers involving discretion may be delegated to a committee composed of directors has not been decided in Ohio.

In other jurisdictions the authorities are conflicting but it is said that, by weight of authority, such powers may be so delegated and that the acts and contracts authorized by such committee are binding.

Cook on Corporations, § 715.

Thompson on Corporations, § 1207 (2d ed.).

Lutterby v. Herancourt Brewing Co., 12 L. D. 67, 74 (Super. Ct. Cin. 1901).

An executive committee should transact its business at a meeting of which all members should have reasonable notice.

Hayes v. Canada, etc., Co., 181 Fed. 289 (C. C. A. 1910).

Executive committee of bank directors, see § 710-62.

H. Delegation of powers by directors in general. The powers of directors can not be delegated except to a committee of directors. A corporation can not enter into partnership for the reason that the powers of directors would thereby be delegated to third persons.

Miller, etc., Co. v. Laidlaw, etc., Co., 4 N. P. n. s. 554; 17 L. D. 499 (C. P. 1905).

Care required of directors. Negligence. The general management and supervision of the business of a corporation are committed to the directors. They are authorized to appoint executive officers and agents and may properly entrust the custody of the corporate property and books to such officers. This does not absolve the directors from the duty of reasonable supervision and the exercise of that degree of care which is exercised by ordinarily careful and prudent men acting under similar circumstances. But they are not insurers of the fidelity of the officers and agents. Where directors act with ordinary care, they are not liable for losses caused by dishonest or wrongful acts of such officers or agents.

Directors are not, as a rule, required to devote themselves to the details of the business.

Directors of a corporation are not held, as a matter of law, to know all its affairs, or what its books and papers would show, and such knowledge can not be imputed to them for the purpose of charging them with liability.

Mason v. Moore, 73 O. S. 275, 296 (1906).

See Kalb v. American N. B., 21 C. C. 1; 11 C. D. 437; aff'd, 65 O. S. 566.

Glass v. Courtwright, 14 N. P. n. s. 273; 23 L. D. 253 (C. P. 1913).

Directors are not liable for errors or mistakes occurring while they are acting in good faith and in accordance with their best judgment as reasonably prudent men.

Baldwin v. Egan, 5 O. L. R. 476 (1907); aff'd, 11 C. C. n. s. 584.

See below *Liability of officers and agents*.

I. Trust relation of directors to stockholders. Directors occupy a fiduciary relation to the stockholders and are accountable to them on principles governing that relationship. Thomas v. Matthews, 94 O. S. 32 (1916). See also, 12 O. L. R. 619. Article by W. P. Rogers.

See also note to § 8684.

Officers do not occupy a fiduciary relation toward a purchaser of their individual stock.

Cook v. Henderson, 8 Am. L. R. 429 (Dist. Ct. 1879).

IV. POWERS OF DIRECTORS.

A. Controlling body of corporation. Section 8660 constitutes the directors acting as a board the controlling body of a corporation.

Bradford Belting Co. v. Gibson, 68 O. S. 442 (1903).

Sims v. Street Railroad Co., 37 O. S. 556 (1882).

Goodin v. Evans, 18 O. S. 150 (1868).

The corporate powers which are exercised by the directors are those which pertain to the ordinary transactions of the corporation. Directors can not make fundamental changes in the composition or business of the corporation.

Mannington v. H. V. Ry. Co., 9 N. P. n. s. 641, 684; 20 L. D. 468 (1910); removed to U. S. Ct., 8 O. L. R. 451; 16 O. F. D. 552.

Chicago City Railway Co. v. Allerton, 18 Wall. (U. S.) 233 (1874).

B. Control of directors by stockholders. The stockholders can not control the board of directors in its management of corporate affairs (except as to acts which by statute require ratification by stockholders. See §§ 8709, 8710 to 8718, 8699, 8720). Majority stockholders at a meeting can not take charge of the corporate business, or withdraw it from the control of the directors.

Dayton, etc., R. Co. v. Hatch, 1 Dis. 84, 91 (Cin. Super. Ct. 1855).

See Sims v. Street Railroad Co., 37 O. S. 556 (1882).

Donner v. Dayton, etc., R. Co., 1 C. S. C. R. 130, 140-141 (1871).

Stewart v. Little Miami, etc., Co., 14 Ohio 353, 357 (1846).

Oldham v. Munitions Co., 23 N. P. n. s. 77.

Ownership of the majority of the stock is not legal control of the corporation. Toledo Co. v. Smith, 205 Fed. 643, 673 (D. C. 1913).

Where the directors have declared a dividend out of surplus profits, the stockholders have no power to rescind such action.

Mitchell v. Bookwalter Wheel Co., 4 N. P. n. s. 609; 17 L. D. 483 (C. P. 1905); aff'd, no rep., 75 O. S. 639.

A cognovit note executed by the president of a corporation without authority from the directors, is not rendered valid by the fact that the president was the owner of a majority of the stock.

Smead Foundry Co. v. Chesbrough, 18 C. C. 783, 787; 6 C. D. 670 (1895).

But stockholders may at a special meeting under § 8665 increase the number of directors.

See *Gold Bluff, etc., Corp. v. Whitlock*, 75 Conn. 669 (1903).

In re *Griffing Iron Co.*, 63 N. J. L. 168, 357 (1898).

Under some circumstances a corporation may be bound by the action of all of its stockholders. See note to § 8627.

C. Control of directors by court on application of stockholders. A court of equity will not interfere with the board of directors in its management and control of corporate affairs, on the application of stockholders, while the board is acting within the scope of its authority, and in the absence of fraud or breach of trust.

Sims v. Street Railroad Co., 37 O. S. 556 (1882).

Coss v. Mansfield Lodge, 4 C. C. n. s. 11; 14 C. D. 36 (1902).

Koblitz v. W. R. U., 21 C. C. 144; 11 C. D. 515 (1901).

De Lacroix v. Eid, etc., Co., 8 N. P. n. s. 489; 19 L. D. 767 (1909).

A stockholder can not sue to enforce an active duty within the powers of directors.

Port Clinton, etc., R. Co. v. Cleveland, etc., R. Co., 13 O. S. 544, 561 (1862).

But a breach of trust may be prevented by injunction or a receivership.

Port Clinton, etc., R. Co. v. Cleveland, etc., R. Co., 13 O. S. 544, 561 (1862).

C. H. & D. R. Co. v. Duckworth, 2 C. C. 518; 1 C. D. 618 (1887).

See *infra* *When stockholder may sue on behalf of corporation*.

A court of equity will not interfere, at the suit of a stockholder who is acting for a competitor, to prevent directors from cutting prices or from exercising their discretion with respect thereto.

Kuhn v. Woolson Spice Co., 13 C. C. 547; 7 C. D. 289 (1897).

D. Contracts limiting powers of directors. A contract, made by a director of a corporation, that limits or restricts him in the free exercise of his judgment or discretion, or that places him under direct and powerful inducements to disregard his duties to the corporation, its creditors and other stockholders, in the management of its corporate affairs, is against public policy and void. *Thomas v. Matthews*, 94 O. S. 32 (1916).

A provision in a consolidation agreement which prohibits the consolidated company from issuing bonds, or making leases which entail fixed charges, without the consent of a majority in interest of holders of preferred stock, is not in conflict with § 8660.

Burke v. Cleveland, etc., Ry. Co., 22 W. L. B. 11 (C. P. 1889).

A contract for a term of years, extending beyond the term of office of the directors by whom it is made, is valid and binding upon future directors.

Railroad Co. v. Furnace Co., 37 O. S. 321 (1881).

Compare *Port Clinton, etc., R. Co. v. Cleveland, etc., R. Co.*, 13 O. S. 544, 560 (1862).

The powers of directors can not be delegated, except to a committee composed of directors. A corporation can not enter into partnership for the reason that the powers of the directors would thereby be delegated to third persons.

Miller, etc., Co. v. Laidlaw-Gordon Co., 4 N. P. n. s. 554; 17 L. D. 499 (C. P. 1907).

See note to § 8627. *Power to enter into partnership.*

E. Power to dispose of unissued stock. The directors have power to dispose of the stock which remains unsubscribed after their election. *Sims v. Street Railroad Co.*, 37 O. S. 565 (1882).

See note to § 8630. *Disposition of stock by corporation after election of directors.*

F. To sell property. Directors have the right to sell corporate property.

Donner v. Dayton, etc., R. Co., 1 C. S. C. R. 130, 140 (1871).

But a sale of the entire property of a corporation must be ratified by the stockholders.

See §§ 8710 to 8718.

The trustees of a religious society organized under §§ 8653 and 8654 have no power to dispose of its real estate without the consent of its members and without authority of the court.

South Kenton, etc., Assn. v. Espy, 17 C. C. 524; 9 C. D. 695 (1899).

G. To bring or defend suits. The power to bring or dispose of suits is vested in the board of directors.

Wadsworth v. Davis, 13 O. S. 123, 130 (1862).

For authority of president to bring suit see

Kalb v. American N. B., 21 C. C. 1; 11 C. D. 437 (1900); *aff'd*, no rep., 65 O. S. 566.

The employment and discharge of attorneys is vested in the directors. *Toledo Co. v. Smith*, 205 Fed. 643, 661 (D. C. (1913)).

H. To authorize bankruptcy proceedings. Directors may authorize the filing of a voluntary petition in bankruptcy. *In re Mfg. & Sales Co.*, 246 Fed. 1005; 16 O. L. R. 163 (D. C. Ohio 1917); *In re De Camp Co.*, 272 Fed. 558 (C. C. A. 6th Cir. 1921).

I. To make assignment for creditors. The directors of an insolvent corporation may make an assignment for creditors.

Commercial N. B. v. Cincinnati N. B., 3 C. C. 513, 517; 2 C. D. 295 (1889).

(*De facto* directors) *Harrison v. Ellis*, 15 L. D. 501 (C. P. 1905).

See *Keystone Bank v. Union Oil Co.*, 2 C. C. n. s. 420; 15 C. D. 464. (Foreign corporation. Assignment authorized by stockholders.)

A fraudulent assignment for creditors made by directors, against the interest of stockholders, may be vacated in a stockholders' suit.

Home & Sav. Assn. v. Jones, 64 O. S. 147 (1901).

Collins v. Williamson, 229 Fed. 59 (C. C. A. Ohio 1915); *s. c.*, 243 Fed. 835.

An assignment may also be vacated at the instance of stockholders upon their giving a bond to pay all the corporate debts.

Harrison v. Ellis, 15 L. D. 501 (C. P. 1905).

J. To release subscriptions to stock.

See notes to §§ 8630, 8674.

V. CORPORATE CONTRACTS.

A. Power to make is vested in directors. The power of making contracts on behalf of a corporation rests in the board of directors.

Bradford Belting Co. v. Gibson, 68 O. S. 442 (1903).

B. Authority of agents to contract. Corporate contracts are usually negotiated and executed by executive officers or agents, but the authority of such an officer or agent should in some manner be traced to the board of directors.

Bradford Belting Co. v. Gibson, 68 O. S. 442 (1903).
 Minor v. Board of Control, 20 C. C. 4; 11 C. D. 16 (1899).
 Tyson v. Miller-Tyson Co., 15 C. C. n. s. 177, 182; 23 C. D. 418, 424 (1912).

See note to § 8664. *Executive officers. Powers.*

In the absence of express authority, and of such a course of dealing with the world as clearly implies authority to do a controverted act, a corporation can be bound only by its board of directors.

Bradford Belting Co. v. Gibson, 68 O. S. 442 (1903).

A salesman for a corporation engaged in the sale of building materials has no authority to execute a release of a mechanics lien for materials sold by him. Scallan v. Lammers, 14 Ohio App. 130 (1921).

Whether the attorney of record of a corporation may bind the corporation by signing an injunction bond without special authority was discussed but not decided in Grossner v. State, 17 C. C. n. s. 72 (1909); aff'd, no rep. 85 O. S. 312, 318.

C. Authority of agent to contract. How conferred. Authority may be conferred upon an executive officer or agent by the directors expressly in the by-laws or by motion or resolution.

Dickason v. Grafton, etc., Co., 6 C. C. n. s. 329, 332, 333; 17 C. D. 357 (1905); aff'd, 76 O. S. 612.

Kalb v. American N. B., 21 C. C. 1, 7; 11 C. D. 437 (1900); aff'd, 65 O. S. 566.

When express authority to issue negotiable paper is relied on, it must be clearly proved.

Bank v. Machine Co., 9 N. P. n. s. 449 (1910).

A corporation may be bound by the acts of an agent upon whom it has conferred apparent authority. An agent of a warehouse company, authorized to receive goods for storage, may bind the corporation by an agreement to effect insurance thereon.

Storage Co. v. Cbx, 74 O. S. 284 (1906).

Authority may be given informally by consent or acquiescence of the board. Unauthorized acts may be ratified by the directors.

Baldwin v. Hillsborough, etc., R. Co., 10 W. L. J. 337 (C. P. 1853).

Smead Foundry Co. v. Chesbrough, 18 C. C. 783; 6 C. D. 670 (1895).

E. Cleveland R. Co. v. Everett, 19 C. C. 205; 10 C. D. 493 (1900).

Western N. B. v. Armstrong, 152 U. S. 346; 7 O. F. D. 499 (1894).

Armstrong v. Chemical N. B., 83 Fed. 556 (1897).

Sun, etc., Assn. v. Moore, 183 U. S. 642 (1902).

Ratification may be express, by resolution, or implied from acquiescence and failure to object after knowledge of the acts.

U. S., etc., Co. v. Atlantic, etc., R. Co., 34 O. S. 450 (1878).

Marriott v. Columbus, etc., Co., 16 L. D. 135 (C. P. 1905); aff'd, 10 C. C. n. s. 573, 575.

Jackson v. Nelsonville Co., 6 Ohio App. 171; 27 C. C. n. s. 81 (1916).

But knowledge by two directors only is not the knowledge of the board so as to effect a ratification of an unauthorized contract.

East Cleveland R. Co. v. Everett, 19 C. C. 205; 10 C. D. 493 (1900).

A general resolution of the board commending the officers and their official conduct is not a ratification of unlawful acts of which the board had no knowledge.

Columbus, etc., Co. v. McManigal, 6 N. P. n. s. 193 (C. P. 1907).

Where a petition for a street improvement was signed by the secretary and general manager without authority, it was held that a subsequent ratification by the directors did not render the petition valid, although it would estop the corporation.

Minor v. Board of Control, 20 C. C. 4; 11 C. D. 16 (1899).

Where a corporation, for several years, received and retained benefits of a contract entered into on its behalf by its president, making no attempt to repudiate the contract and by further corporate action expressly recognized its existence its ratification was held to be established.

Coney Island Co. v. McIntyre-Paxton Co., 200 Fed. 901 (C. C. A. 1912).

Where the by-laws authorize the president to make contracts, he may bind the corporation by a ratification of a contract, entered into by the secretary, without authority. Grabler Co. v. Leahy, 18 C. C. n. s. 17 (1910); *aff'd*, no rep. 85 O. S. 442.

D. Refusal to perform contracts. The power of refusing to perform contracts is vested in the board of directors.

Bradford Belting Co. v. Gibson, 68 O. S. 442 (1903).

E. Stockholder not authorized to act for corporation. A stockholder as such has no authority to bind the corporation.

Hogg v. Zanesville Mfg. Co., Wright 139 (1832).

Loomis v. Eagle Bank, 1 Dis. 285, 288 (Super. Ct. Cin. 1857); *aff'd*, 10 O. S. 327.

State v. Liberty Township, 22 O. S. 144 (1871).

Read v. Loan Co., 68 O. S. 280 (1903).

Trevitt v. Converse, 31 O. S. 60 (1876).

Although he may own a majority of the stock.

Smead Foundry Co. v. Chesbrough, 18 C. C. 783, 787; 6 C. D. 670 (1895).

But under some circumstances the acts of all the stockholders will be regarded as corporate acts. A person who owns all the stock of a corporation may bind the corporation by a contract of sale, although made in his own name. Insurance Co. v. Brown, 16 C. C. n. s. 518 (1905). See Norris v. Dains, 52 O. S. 15 (1894).

Under a contract by all stockholders, for a sale of a part of their stock, providing that the purchasers "are in no way to assume or pay the whole or any part of any unearned interest heretofore due", which had been paid by money contributed by such stockholders, future corporate earnings cannot be used to repay such contributions to the stockholders. The corporate form can not be used as an instrument to defeat their agreement. H. V. Ry. Co. v. Toledo Co., 99 O. S. 35 (1918). See also note to § 8627. *Corporation as a legal entity.*

F. A receiver is not the agent of a corporation. A contract by the receiver of a railroad for coal for its use for a certain time is not binding on the railway company after his discharge.

Consolidated, etc., Co. v. Cincinnati, etc., R. Co., 10 W. L. B. 42 (Dist. Ct. 1883).

G. Contract should be in name of corporation. The contract or conveyance of a corporation should be in the corporate name.

Norris v. Dains, 52 O. S. 215 (1894).

Although a contract in the name of an individual officer may be enforced by or against the corporation.

Commissioners v. Perry, 5 Ohio 56, 64 (1831).

State v. Mfg. Co., 22 C. C. n. s. 100 (1908).

A note signed by "H. H. F., Cashier" and by other individuals, upon a loan to a bank, the name of the bank not appearing on the note, was, upon insolvency of the bank, allowed as a claim against the assets, upon proof of minutes of a directors meeting authorizing the loan, and parol evidence in explanation of the signature of the cashier. In re Metropolitan Bank, 1 Ohio App. 409, 17 C. C. n. s. 324; 34 C. D. 381 (1913).

VI. PRESUMPTIONS AND BURDEN OF PROOF AS TO AUTHORITY OF OFFICERS AND AGENTS.

A. Authority conferred by statute. Where duties are conferred on certain officers by statute, their acts in the performance of such duties are binding on the corporation. Stock certificates, required by statute to be signed by the president and secretary, are valid in the hands of innocent purchasers although fraudulently issued.

Railway Co. v. Bank, 56 O. S. 351, 378, 388.

B. Authority conferred by regulations. See § 8704.

Bradford Belting Co. v. Gibson, 68 O. S. 442, 449.

Dickason v. Grafton, etc., Co., 6 C. C. n. s. 329, 333; 17 C. D. 357; aff'd, 76 O. S. 612.

C. Deeds and instruments under corporate seal. A deed executed in the name of a corporation by its president, under the corporate seal, is presumed to have been authorized by the directors and is prima facie valid. The mere fact that such authority is not found on the directors' minutes will not rebut the presumption.

R. R. Co. v. Harter, 26 O. S. 426 (1875).

Bank v. Flour Co., 41 O. S. 552, 557 (1885).

Sheehan v. Davis, 17 O. S. 571, 581 (1867).

Bosche v. Toledo, etc., Co., 14 C. C. 289, 295; 7 C. D. 377.

See notes to §§ 8627 and 8664.

But, when objected to, such an instrument can not be admitted in evidence without proof of its execution. The signature of the president does not prove itself, nor is it proved by the corporate seal.

Walsh v. Barton, 24 O. S. 28, 41 (1873).

D. Promissory notes. The promissory note of a corporation signed in its name by its president has been held to be prima facie valid and binding on the corporation.

Dexter Sav. Bank v. Friend, 90 Fed. 703 (C. C. Ohio 1898).

See Andres v. Morgan, 62 O. S. 236 (1900).

Security, etc., Ins. Co. v. Schott, 11 C. C. n. s. 401; aff'd, 83 O. S. 507.

But not a note payable to the president himself. There is no presumption that such a note is authorized.

In re Hartwell Furniture Co., 7 O. L. R. 555 (Ref. in Bkry. 1909).

In re Continental Iron Co., 2 O. L. R. 563 (Ref. in Bkry. 1904).

Arnkens v. Rouse, 26 W. L. B. 221 (C. P. 1891).

Compare In re Troy, etc., Co., 136 Fed. 420; aff'd, 142 Fed. 1038.

A cognovit note signed by the president is not binding on the corporation in the absence of proof of authority from the directors.

Smead Foundry Co. v. Chesbrough, 18 C. C. 783; 6 C. D. 670 (1895).

In re Metropolitan Bank, 1 Ohio App. 409; 17 C. C. n. s. 324 (1913).

But where directors, with knowledge that cognovit notes have been executed, acquiesce therein, a cognovit judgment will not be vacated. Jackson v. Nelsonville Co., 6 Ohio App. 171; 27 C. C. n. s. 81 (1916).

E. Chattel mortgage. It has been held that a chattel mortgage executed by the president and secretary of a corporation, in its name and under its corporate seal, is presumptively authorized and valid.

Bosche v. Toledo, etc., Co., 14 C. C. 289; 7 C. D. 374 (1897).

Fritsch Mfg. Co. v. Elmont, etc., Co., 11 C. C. n. s. 356; 21 C. D. 47 (1908).

F. Verbal statements. Admissions. A statement, by the secretary of a corporation, that the corporation would not perform a contract, and that he was authorized by the directors and stockholders to so state, does not bind the corporation without further evidence showing his authority. Such a statement is not prima facie evidence that the directors had decided not to perform the contract.

Bradford Belting Co. v. Gibson, 68 O. S. 442 (1903).

A stipulation in an express contract of a corporation can not be proved merely by admissions of the president made after the transaction.

National Starch Co. v. Gruner, 13 C. C. n. s. 355 (1910).

Declarations of an officer or agent are not admissible unless made while transacting business of the corporation.

Worthington v. Cleveland City Ry., 9 C. C. n. s. 433; 19 C. D. 321 (1904); aff'd, 75 O. S. 626.

A corporation is not bound by an admission made by an officer after the transaction, unless the circumstances are such as to constitute an estoppel.

Marmet Co. v. Cincinnati, 12 C. C. n. s. 225, 227 (1909).

Cincinnati, etc., Co. v. Cincinnati, 19 C. C. 607 (1899).

Loomis v. Eagle Bank, 1 Dis. 285, 288 (Super. Ct. Cin. 1857); aff'd, 10 O. S. 327.

Sloss, etc., Co. v. Smith, 11 C. C. 213; 5 C. D. 79 (1895); reversed on other grounds, 57 O. S. 518.

Admissions of individual directors are not admissible in evidence to prove a contract alleged to have been made by the board.

Dixon v. Subdistrict, etc., 3 C. C. 517; 2 C. D. 298 (1888).

Admissions of stockholders who are not officers are not admissible in evidence to charge the corporation.

Hogg v. Zanesville Mfg. Co., Wright 139 (1832).

G. Notice to corporation. Where a notice is given by mail to a corporation, it is not necessary to prove that the notice actually reached an officer authorized to contract on the subject. Hand, etc., Line v. Canada S. S. Lines, 281 Fed. 779 (C. C. A. Ohio 1922).

VII. DUTY OF PERSON DEALING WITH AGENT TO INQUIRE AS TO ACTION OF DIRECTORS.

It has been held that a person dealing with executive officers need not inquire whether the directors have met and passed a resolution authorizing the transaction, where the transaction is within the corporate powers.

Bosche v. Toledo, etc., Co., 14 C. C. 289; 7 C. D. 374 (1897).

Fritsch Mfg. Co. v. Elmont, etc., Co., 11 C. C. n. s. 356; 21 C. D. 47 (1908).

Toledo Co. v. Smith, 205 Fed. 643, 659 (D. C. 1913).

Compare Bradford Belting Co. v. Gibson, 68 O. S. 442 (1903).

VIII. FRAUDULENT ACTS OF AGENTS OR OFFICERS. LIABILITY OF CORPORATION.

Acts which are within the scope of the authority of an agent or officer are binding on the corporation as to innocent third persons, although a fraud upon the corporation.

Railway Co. v. Bank, 56 O. S. 351 (1897).

Citizens Sav. Bank v. Blakesley, 42 O. S. 645 (1885).

Orme v. Baker, 74 O. S. 337, 349, 354 (1906).

IX. NOTICE TO CORPORATION.

A. Knowledge of executive officer or agent. A corporation is charged with notice of facts which are within the knowledge of its officer or agent while such officer is engaged in corporate business which he is authorized to transact. *Bank v. Burns*, 88 O. S. 434 (1913).

Paul v. Caldwell Furnace Co., 7 C. C. n. s. 272; 17 C. D. 768 (1905).

Trustees v. Deposit Co., 76 O. S. 253, 265 (1907).

Burgoyne v. Clarkson, 2 W. L. J. 325 (C. P. 1845).

Holmes v. Hayes, 32 W. L. B. 346; 52 O. S. 617.

Although the agent is a special agent.

Mass, etc., Ins. Co. v. Eshelman, 30 O. S. 647 (1876).

And although the officer is acting fraudulently.

Orme v. Baker, 74 O. S. 337, 348, 354 (1906).

The knowledge of the agent becomes at once the knowledge of the corporation without any actual or constructive communication from the agent to the corporation. *Bank v. Burns*, 88 O. S. 434 (1913).

A corporation is chargeable with the knowledge of its president and vice-president as to defects in property purchased, as well as with knowledge of defects discovered by its superintendent. *Marmet v. Peoples Co.*, 226 Fed. 646 (C. C. A. 1915).

A corporation is chargeable with the composite knowledge which comes to it through the channels of its several agents. It is not necessary that one agent should know all the facts.

Neal v. Union Stock Yards Co., 1 C. C. n. s. 13; 15 C. D. 299 (1903).

Where an officer sells property to the corporation, acting both for himself and the corporation, and the transaction is ratified by the corporation, his knowledge of equities affecting the title is chargeable to the corporation. *Bank v. Burns*, 88 O. S. 434 (1913). *Contra. Alt v. Weber*, 20 W. L. B. 467 (Super Ct. Cin. 1888).

The transaction must be within the authority of the officer or agent.

Railway Co. v. McCoy, 42 O. S. 251, 252 (1884).

Ashtabula, etc., Co. v. Stephenson, 12 C. D. 631.

Knowledge of the insolvency of a bank by its cashier and vice president is imputable to the bank so as to entitle a depositor to recover a deposit, although the insolvency was caused by the fraudulent acts of such officers and although the deposit was made after such officers had absconded.

Orme v. Baker, 74 O. S. 337 (1906).

Where a corporation takes over the business of another corporation, retaining the same officers, knowledge by the president, who is authorized to employ men, of a contract of employment of the old corporation is knowledge of the new corporation.

Paul v. Caldwell Furnace Co., 7 C. C. n. s. 272; 17 C. D. 768 (1905).

B. Knowledge of director. Knowledge of one director is imputed to the corporation only while he is acting official in the business of the corporation, unless he is acting under some special authority other than that of a director.

Railway Co. v. McCoy, 42 O. S. 251, 252 (1884).

Loomis v. Eagle Bank, 1 Dis. 285 (Super. Ct. Cin. 1857); s. c., 10 O. S. 327.

The knowledge of two directors is not the knowledge of the board so as to work a ratification of an unauthorized contract.

East Cleveland R. Co. v. Everett, 19 C. C. 205; 10 C. D. 493 (1900).

If the position of the director is adverse to that of the corporation the knowledge of such director can not be imputed to the corporation.

Where a bank discounted a note for one of its directors, who was also a member of its discount committee, the bank is not charged with knowledge of such director that there was a defense to the note.

Loomis v. Eagle Bank, 1 Dis. 285 (Super. Ct. Cin. 1857); s. c., 10 O. S. 327.

Antioch College v. Carroll, 25 W. L. B. 289, 294 (Super. Ct. Cin. 1890).

Saylor v. Simpson, 12 L. D. 148, 151 (Super. Ct. Cin. 1888).

But see Bank v. Burns, 88 O. S. 434 (1913).

X. CONTRACTS BETWEEN DIRECTORS AND CORPORATION.

A. In general. A contract between a corporation and its directors is not void, but merely voidable at the option of the corporation within a reasonable time.

Browne v. U. S. Board & Paper Co., 20 C. C. 351 (1900); s. c., 6 N. P. 254; 1 C. C. n. s. 345; 15 C. D. 347 (1903); 7 C. C. n. s. 15; 18 C. D. 44 (1905); aff'd, 75 O. S. 604 (1906); s. c., 4 O. L. R. 539; 17 L. D. 261 (1906).

U. S., etc., Co. v. Atlantic, etc., R. Co., 34 O. S. 450, 461 (1878).

Larwell v. Burke, 19 C. C. 449; 10 C. D. 579 (1900).

Where such a contract is fair and beneficial to the corporation it will not be set aside at the suit of minority stockholders.

Sims v. Street Railroad Co., 37 O. S. 556, 566 (1882).

Roth v. St. Clair, etc., Co., 13 L. D. 154 (Super. Ct. Cin. 1902).

But the relation of the directors to the corporation being a fiduciary one, entire good faith and fair dealing are required on the part of the directors.

Yeiser v. U. S. Board, etc., Co., 7 C. C. n. s. 15, 16; 18 C. D. 44; aff'd, 75 O. S. 604.

And a contract in fraud of the corporation may be set aside at the suit of a minority stockholder.

Burch v. Coan, 4 O. L. R. 731; 17 L. D. 563 (Super. Ct. Cin. 1907).

An illegal purchase of stock in other corporations, made by a corporation from its directors who owned all its capital stock, was held invalid as to creditors.

Railway Co. v. Burke, 19 W. L. B. 27 (C. P. 1887).

A contract by a manufacturing company giving the disposal of its product to a sales agency, in which some of the directors are interested, and thereby permitting them to make profits to which the corporation is entitled, may be rescinded and cancelled by the corporation.

U. S., etc., Co. v. Browne, 1 C. C. n. s. 345; 15 C. D. 347 (1903); s. c., 7 C. C. n. s. 15; 18 C. D. 44 (1905); aff'd, 75 O. S. 604.

A chattel mortgage to directors, securing a loan, authorized at a directors' meeting at which there was no quorum, excluding the mortgagees, may be ratified by the stockholders. McLean v. Bradley, 282 Fed. 1011 (D. C. Ohio 1922).

Where corporate property was bid in at a foreclosure sale by a director for less than its value, the sale was set aside by the court on the application of a bondholder, upon the giving of security that upon a resale the bondholder would bid at least a certain larger amount.

Secor v. Maumee, etc., Co., 1 N. P. 100; 1 L. D. 80 (1894).

B. Liability to corporation for profits. Secret profits made by directors in transactions with the corporation may be recovered by the corporation.

Yeiser v. U. S. Board & Paper Co., 107 Fed. 340 (C. C. A. Ohio 1901).

U. S. Board & Paper Co. v. Yeiser, 4 O. L. R. 539; 17 L. D. 261 (Super. Ct. Cin. 1906).

Where directors sell their own property to the corporation at a fraudulent overvaluation, they are liable in damages to the corporation. *Shawnee, etc., Co. v. Miller*, 1 C. C. n. s. 569; 14 C. D. 199 (1902). See *Railway Co. v. Burke*, 19 W. L. B. 27 (C. P. 1887).

C. Directors fixing their own salaries as executive officers. Where the corporate regulations authorize the directors to fix the compensation of the president, treasurer and other executive officers, action of directors in voting on their own salaries as such officers is not void, in the absence of a showing of fraud or unfair dealing toward the stockholders. *Kirn v. Plumbing Co.*, 12 Ohio App. 55; 31 O. C. A. 47 (1919); motion to certify record overruled, 17 O. L. R. 392.

D. Purchases of stock by directors. A director may purchase unissued or treasury stock when the sale is authorized by a quorum of disinterested directors and where no action has been taken to withhold the stock from sale to other stockholders or the public.

Sims v. Street Railroad Co., 37 O. S. 556 (1882).

Taylor v. Miami Exporting Co., 6 Ohio 176, 223 (1833).

Metzler v. Laundry Co., 24 C. C. n. s. 74 (1904).

Purchases below par by directors have been sustained as against other stockholders, where the corporation was pressed for money to continue business, and the stock had been previously offered at the same price to the other stockholders.

Peter v. Union Mfg. Co., 56 O. S. 181 (1897).

But a sale at par to a director, for a cash payment of two percent and a promise to pay the balance in ten annual instalments, was set aside as fraudulent, where no effort was made to sell the stock to others, cash offers having been made and refused, and twenty percent dividends were being declared. *Callahan v. Steel Crane Co.*, 20 C. C. n. s. 78 (1912).

Under § 8798 stock of a railroad company purchased below par by a director is void.

A purchase made in order to vote at an election for directors is valid, when full value is paid for the stock.

Hall v. Hall, 11 C. C. n. s. 335; 20 C. D. 826 (1908).

Taylor v. Miami Exporting Co., 6 Ohio 176, 223 (1833).

See *Loomis v. Dexter*, 20 W. L. B. 5 (Super. Ct. Cin. 1888).

But sales to directors can not be made on more favorable terms than to other stockholders,

Kinsey v. Mt. Auburn Cable Co., 6 C. C. n. s. 305; 17 C. D. 33 (1905); aff'd, 75 O. S. 602.

nor without valuable consideration.

Straman v. No. Baltimore, etc., Co., 8 C. C. 89; 4 C. D. 339 (1893).

Where stock subscribed for by directors was paid for with secret profits made by the directors out of a fraudulent sale of property to the corporation, the stock was cancelled at the suit of the corporation.

Yeiser v. U. S. Board & Paper Co., 107 Fed. 340 (C. C. A. Ohio (1901)).

Where directors exchanged stock for their own property at an overvaluation they were held liable for the difference between the par value of the stock and the actual value of the property.

Gates v. Tippecanoe Stone Co., 57 O. S. 60 (1897).

A sale to a director, not authorized by a quorum of disinterested directors, may be enjoined by a non-consenting director. *Remelin v. Bumiller*, 16 N. P. n. s. 22 (1914).

XI. WHEN DIRECTORS MAY ACT FOR TWO CORPORATIONS.

A contract made between two corporations through their respective boards of directors is not voidable at the election of one of the corporations merely because a minority of its directors were also directors of the other company, in the absence of fraud or a breach of trust.

U. S., etc., Co. v. Atlantic, etc., Co., 34 O. S. 450 (1878).

Henry v. Pittsburg, etc., Ry. Co., 2 N. P. 118, 154 (1895).

Where one corporation owns a majority of the stock of another corporation, its representatives constituting a majority of the board of directors, who attempt to expend large sums for equipment, chiefly for the benefit of the stockholding corporation, resulting in injunction suits and controversies with the minority stockholders, the corporation may be dissolved under § 11938. In re Mansfield Co., 3 Ohio App. 253; 21 C. C. n. s. 95 (1914).

When two corporations have a majority of their directors in common, transactions between such corporations are subject to scrutiny and are sustained only when fair and made in good faith. Truman v. Supply Co., 11 Ohio App. 220; 30 O. C. A. 425 (1919).

Where one corporation sold property to another corporation for its full value, the directors of the selling company being also directors of the purchasing company, the sale being ratified by the stockholders of the vendor, and the directors thereafter incurred personal financial risks and realized large profits, it was held that stockholders in the selling corporation could not, years afterward, recover a share of the profits.

Larwill v. Burke, 19 C. C. 449; 10 C. D. 579 (1900).

That officers and directors of a burial association, not for profit, were also officers and directors of an undertaking company was held not to be a ground for the forfeiture of the charter of the burial association where it was not subsidiary to or controlled by the undertaking company.

State v. Burial Assn., 8 C. C. n. s. 233; 18 C. D. 397 (1906).

See G. C. § 666.

Unfair contracts. Where a railroad company purchased a majority of the stock of another corporation, elected a friendly board of directors, purchased property of such other corporation for less than its value, and constructed a railroad thereon, it was held that, although stockholders and creditors of such other company could not, after the road had been completed, reclaim the property or enjoin its use, they could, by action, compel the railroad company to account for its actual value.

Goodin v. Cincinnati, etc., Co., 18 O. S. 169, 182 (1868).

See Mannington v. H. V. Railway Co., 9 N. P. n. s. 641, 680; 20 L. D. 468; (removed to U. S. Ct., 8 O. L. R. 451; 16 O. F. D. 552).

Where directors appoint a partnership, of which they are members, as selling agent of the product of the corporation on a commission, the burden of proof to show that the contract is fair and reasonable rests on the directors, in a suit by minority stockholders. Ross v. Quinnessee Co., 227 Fed. 337 (C. C. A. Ohio 1915).

XII. CONTRACT BY DIRECTOR WITH THIRD PERSON, WITH REFERENCE TO HIS OFFICIAL ACTION.

A contract made by a director of a corporation with reference to his official action as such, based on a consideration personal to himself, is against public policy and void. Thomas v. Matthews, 94 O. S. 32 (1916).

XIII. CORPORATE CONTRACT WITH A BOARD OF EDUCATION OR OTHER PUBLIC BODY, WHERE PUBLIC OFFICIAL IS A STOCKHOLDER OR DIRECTOR.

A corporation having a stockholder or director who is a member of a board of education can not legally make contracts with such board of education. The same rule applies to contracts with certain other public corporations. Rep. Atty. Gen. 1914, p. 848 (sinking fund trustees; trustees of a municipal library); Rep. Atty. Gen. 1914, p. 1201 (board of education); Rep. Atty. Gen. 1912, p. 1598 (member of civil service commission).

But the president of a board of education, who is also a director and stockholder of a material company which sells materials to a contractor, to whom a contract is let by the board of education, is not criminally liable. Opins. Atty. Gen. 1915, p. 267.

XIV. WHEN STOCKHOLDER MAY SUE ON BEHALF OF CORPORATION.

See also *Liability of officers and agents*, below.

A. In general. Suits to remedy wrongs against the corporate property or rights should, in the first instance, be brought by the corporation itself.

Zinn v. Baxter, 65 O. S. 341, 364 (1901).

Hamilton v. Hamilton Coal Co., 12 C. D. 637 (1894).

But where the corporation fails or refuses to sue, one or more stockholders may bring suit.

Zinn v. Baxter, 65 O. S. 341, 364 (1901).

Taylor v. Miami Exporting Co., 5 Ohio 162 (1831).

Zabriskie v. Railroad Co., 64 U. S. (23 How.) 381 (1860).

The suit must be for the common benefit of all the stockholders. One stockholder can not sue the directors for his share of the common damages suffered by all stockholders in consequence of the misconduct of directors.

Zinn v. Baxter, 65 O. S. 341, 365 (1901).

Where suit is brought by the corporation itself upon demand of a stockholder, such stockholder can not bring a representative suit while the corporation's suit is pending. In case of bad faith in prosecuting the suit, the stockholder may intervene therein by cross petition. Wasmer v. Massillon Co., 7 Ohio App. 488; 29 O. C. A. 230 (1916); motion to certify record overruled, 14 O. L. R. 209.

A suit by one stockholder for accounting of corporation funds and a receiver may not be maintained on the ground that the corporation was organized and doing business illegally. Ellis v. Savings Co., 104 O. S. 599 (1922).

Distinction between stockholders representative suits on behalf of corporation, and stockholders suits to protect individual property rights.

See *Mannington v. H. V. Railway Co.*, 9 N. P. n. s. 641, 657-659; 20 L. D. 468 (C. P. 1910); (removed to U. S. Ct., 8 O. L. R. 451; 16 O. F. D. 552).

A suit against corporate officers may be in equity if an accounting is demanded.

Meisse v. Loren, 5 N. P. 307; 8 L. D. 448 (1898).

Nonconsenting stockholders may sue to rescind a contract made by the corporation in violation of the anti-trust act.

National Salt Co. v. United Salt Co., 12 L. D. 386 (C. P. 1902).

Members of a religious corporation can not bring a suit in its name to enjoin a proposed consolidation, without first calling on the trustees to act. *First Church v. Young*, 21 N. P. n. s. 569 (1919)."

B. Suits against officers of corporation. Rescission of fraudulent contracts, etc. Stockholders' suits are usually based on misconduct on the part of directors. A stockholder may sue to compel officers to account for corporate property;

Taylor v. Miami Exporting Co., 5 Ohio 162 (1831).
to recover losses occasioned by negligence or mismanagement of the directors;

Zinn v. Baxter, 65 O. S. 341 (1901).

to rescind fraudulent contracts or conveyances made by agents or officers;
Goodin v. Cincinnati, etc., Co., 18 O. S. 169, 183 (1868).

Shaw v. Edison Inst. Co., 19 W. L. B. 292 (Super. Ct. Cin. 1888).

Dye v. Hermes, 32 W. L. B. 120 (1894).

Heintzman v. Tenacity, etc., Co., 4 O. L. R. 552; 17 L. D. 554 (Super. Ct. Cin. 1906).

to enjoin the performance of acts not authorized by a valid quorum of directors;

Remelin v. Bumiller, 16 N. P. n. s. 22 (1914).

or to vacate a fraudulent assignment for creditors.

Home & Sgs. Assn. v. Jones, 64 O. S. 147 (1901).

C. Interference with directors' management. A court of equity will not, on the application of a stockholder, interfere with the board of directors in its management and control of the corporate affairs when acting within the scope of its authority and in the absence of fraud or breach of trust.

Sims v. Street Railroad Co., 37 O. S. 556 (1882).

Coss v. Mansfield Lodge, 4 C. C. n. s. 11; 14 C. D. 36 (1902).

Koblitz v. Western Reserve University, 21 C. C. 144; 11 C. D. 515 (1901).

De Lacroix v. Eid, etc., Co., 8 N. P. n. s. 489; 19 L. D. 767 (C. P. 1909).

Cronin v. Potters, etc., Co., 29 W. L. B. 52 (C. P. 1892).

A stockholder can not sue to enforce an active duty within the powers of directors.

Port Clinton R. R. Co. v. Cleveland, etc., R. Co., 13 O. S. 544, 561 (1862).

Straman v. North Baltimore, etc., Co., 8 C. C. 89, 101; 4 C. D. 339 (1893).

But fraudulent acts or a breach of trust on the part of directors may be prevented by injunction or a receivership.

Port Clinton, etc., R. Co. v. Cleveland, etc., R. Co., 13 O. S. 544, 560, 561 (1862).

C. H. & D. R. Co. v. Duckworth, 2 C. C. 518; 1 C. D. 618 (1887).

A stockholder can not maintain a bill in equity in federal court against a foreign corporation for an accounting, where the accounting relates to the internal affairs and management of the corporation.

Eberhard v. Insurance Co., 210 Fed. 520 (D. C. 1914).

Where the directors management is in the interest of another corporation, which owns a majority of the stock, minority stockholders may petition for a dissolution of the corporation under G. C. § 11938.

In re Mansfield Co., 3 Ohio App. 253; 21 C. C. n. s. 95 (1914).

Where managing officers wilfully and fraudulently refuse to set up a valid defense to an action brought against the corporation, a stockholder may be permitted to intervene, upon proper allegations showing the defense and the failure of the managing officers to set it up. Buckeye Co. v. Young, 18 C. C. n. s. 429 (1910).

D. Injunction or receiver. Threatened fraudulent acts or a breach of trust on the part of directors may be enjoined.

Port Clinton, etc., R. Co. v. Cleveland, etc., R. Co., 13 O. S. 544, 560-561 (1862).

C. H. & D. R. Co. v. Duckworth, 2 C. C. 518; 1 C. D. 618 (1887).

See note to § 8627: *Who may object to ultra vires acts.*

An injunction will not be granted because of past illegal acts where there is no threatened repetition of such acts.

No. Fairmount, etc., Co. v. Rehn, 6 N. P. 185; 8 L. D. 594 (Super. Ct. Cin. 1899).

Injunction, and not dissolution under § 11938, is the proper remedy where profits are diverted from stockholders through excessive salaries. Oppenheimer v. Ptg. Co., 24 N. P. n. s. 483 (1923).

A receiver will not be appointed where injunction will afford full relief and protection. The appointment of a receiver under such circumstances would be an abuse of discretion.

C. H. & D. R. Co. v. Duckworth, 2 C. C. 518; 1 C. D. 618 (1887).

Benson v. Columbia Life Ins. Co., 7 N. P. n. s. 113; 19 L. D. 17 (Super. Ct. Cin. 1908).

Behrens v. Equality Bldg. Assn., 2 N. P. 259; 3 L. D. 275 (Super. Ct. Cin. 1895).

No. Fairmount, etc., Co. v. Rehn, 6 N. P. 185, 191; 8 L. D. 594 (Super. Ct. Cin. 1899).

Schone v. Consolidated Bldg. & Sav. Co., 4 N. P. 216; 6 L. D. 246 (Super. Ct. Cin. 1897).

A receiver will not be appointed merely because of differences of opinion in conducting the corporate business.

Straman v. No. Baltimore Water Wks. Co., 8 C. C. 89, 100; 4 C. D. 339 (1893).

Nor because of past or present irregularities or mismanagement in the absence of actual fraud.

Benson v. Columbia Life Ins. Co., 7 N. P. n. s. 113; 19 L. D. 17 (Super. Ct. Cin. 1908).

No. Fairmount, etc., Co. v. Rehn, 6 N. P. 185; 8 L. D. 594 (Super. Ct. Cin. 1899).

But a receiver will be appointed where it clearly appears that the corporate property will be fraudulently disposed of, unless taken charge of by an officer of the court;

C. H. & D. R. Co. v. Duckworth, 2 C. C. 518; 1 C. D. 618 (1887).

where both the corporation and the directors are insolvent and a fraudulent disposition of assets is threatened;

Upson v. Rocky River, etc., Co., 2 Cleve. L. R. 355 (C. P. 1879).

where the directors have made a fraudulent sale of the entire corporate property for their personal profit;

Heintzman v. Tenacity, etc., Co., 4 O. L. R. 552; 17 L. D. 554 (Super. Ct. Cin. 1906).

See Hamilton v. Hamilton Coal Co., 12 C. D. 637 (1894).

and where the corporation has no legal directors or officers to care for the property.

National Salt Co. v. United Salt Co., 8 N. P. 325; 11 L. D. 348 (C. P. 1901).

See note to § 11894.

The appointment of a receiver in a stockholders' action can not be collaterally attacked.

Egbert v. Third Ward Bldg. Assn., 8 N. P. 507; 9 L. D. 646 (Super. Ct. Cin. 1899).

E. Pleading and practice. Demand on directors to bring suit. A stockholder should, in his petition, allege a demand on the directors (or assignee or receiver where one has been appointed) and their refusal to bring suit; or an excuse for not making such demand.

Ellis v. Savings Co., 104 O. S. 599 (1922).

Carpenter v. Williamson, 24 C. C. n. s. 499 (1905).

Egbert v. Third Ward Bldg. Assn., 8 N. P. 507; 9 L. D. 646 (Super. Ct. Cin. 1899).

Reeder v. Wade, 2 C. S. C. R. 19 (1870).

It is an excuse for not making such demand that the corporation is in control of the wrongdoers.

Koblitz v. Brookside Co., 20 C. C. n. s. 67 (1912).

Bates Pldg., etc., p. 1360.

Heintzman v. Tenacity, etc., Co., 4 O. L. R. 552; 17 L. D. 554 (Super. Ct. Cin. 1906).

Divine v. Auto M. C. Co., 9 N. P. n. s. 204 (C. P. 1909).

That there is no director or officer to whom the stockholder could apply is an excuse for not making a demand.

Kuhn v. Woolson Spice Co., 8 N. P. 686; 10 L. D. 292 (C. P. 1897).

See *Dye v. Hermes*, 32 W. L. B. 120 (C. P. 1894).

Under equity rule 27, a bill filed in federal court by a minority stockholder, to set aside a contract, sets out a sufficient reason for not applying to the new directors or stockholders where it alleges that the directors by whose votes the contract was authorized are in control of the corporation by stock ownership and are beneficiaries of the contract. *Ross v. Quinnesec Co.*, 227 Fed. 337 (C. C. A. Ohio 1915). See also, *Forbes v. Wilson*, 243 Fed. 264 (D. C. Ohio 1917).

F. Plaintiffs. One who has transferred his stock can not sue in the state courts, unless perhaps after dissolution of the corporation. *Zinn v. Baxter*, 65 O. S. 341 (1901).

Dissette v. Lawrence Pbg. Co., 9 C. C. n. s. 118; 19 C. D. 168 (1906).

In federal courts under equity rule 94 of the U. S. Supreme Court a transferee of stock can not sue on transactions which took place before he acquired his stock.

See *Mannington v. H. V. Ry. Co.*, 9 N. P. n. s. 641, 662; 20 L. D. 468 (1910); (removed to U. S. Ct., 183 Fed. 133; 8 O. L. R. 451; 16 O. F. D. 552).

An equitable owner—as one whose stock has not been transferred on the corporate records—may sue.

Larwill v. Burke, 19 C. C. 449; 10 C. D. 579 (1900).

Where the corporation is insolvent and in the hands of a receiver who refuses to sue, a creditor and stockholder may join as plaintiffs.

Miesse v. Loren, 5 N. P. 307; 8 L. D. 448 (1898).

G. Defendants. The corporation is a necessary party defendant.

Zinn v. Baxter, 65 O. S. 341, 364 (1901).

Taylor v. Miami Exporting Co., 5 Ohio 162 (1831).

But in federal courts it is not necessary to join the corporation in all cases where the court is able to do justice to the parties before it, without injury to others not made parties. *Toledo Co. v. Smith*, 205 Fed. 643, 662 (D. C. 1913); *M'CLean v. Bradley*, 282 Fed. 1011 (D. C. Ohio 1922).

Creditors and other stockholders may become defendants on their application, where they allege an interest in the subject matter of the suit.

Miesse v. Loren, 5 N. P. 307; 8 L. D. 448 (1898).

In an action to enjoin the corporation from acquiring stock in other corporations, such other corporations are not proper parties.

Westfall v. Lake Shore, etc., Ry., 13 N. P. n. s. 217; 22 L. D. 75 (C. P. 1910).

H. Venue. An action by a stockholder in a railroad company to enjoin the unlawful acquisition of stock in other corporations must be

brought in a county in which jurisdiction over the railroad company may be acquired.

Westfall v. Lake Shore, etc., Ry., 13 N. P. n. s. 217; 22 L. D. 75 (C. P. 1910).

I. Judgment. When the judgment is for the recovery of money, it must be in favor of the corporation for the full amount of damages sustained by all stockholders combined, and when collected must be paid to the corporation.

Zinn v. Baxter, 65 O. S. 341, 364 (1901).

J. Attorney fees. Where a stockholder's suit realizes a fund for the corporation, the court may order his attorney fees paid from such fund. Truman v. Supply Co., 11 Ohio App. 220; 30 O. C. A. 425 (1919).

K. Defenses.

(a) **Acquiescence of stockholders in acts complained of.** Where directors of a corporation added a new feature to its business, acting in good faith, and the stockholders were aware of the facts and acquiesced therein, the directors are not liable to the corporation, or stockholders, for losses sustained thereby.

Bond v. Poe, 12 C. C. 281; 4 C. D. 10 (1893).

See De La Croix v. Eid Concrete Steel Co., 8 N. P. n. s. 489, 495; 19 L. D. 767 (C. P. 1909).

Larwill v. Burke, 19 C. C. 513; 10 C. D. 605 (1900).

See note to § 8627: *Who may object to ultra vires acts.*

A stockholder is not barred by acquiescence unless he had knowledge of the wrongful acts. A stockholder is not charged with knowledge of the acts of directors or details of management, although he might have ascertained such facts from the corporate books.

Heintzman v. Tenacity, etc., Co., 4 O. L. R. 552; 17 L. D. 554 (Super. Ct. Cin. 1906).

Stockholders who have no knowledge of a contract made in violation of the anti-trust act are not in *pari delicto* and may sue to rescind the same.

National Salt Co. v. United Salt Co., 12 L. D. 386 (C. P. 1902).

(b) **Statute of limitations.** A stockholders' representative suit against the directors for loss by mismanagement is governed by the ten year statute. (G. C. § 11227.)

Glass v. Courtright, 14 N. P. n. s. 273; 23 L. D. 253 (C. P. 1913).

(c) **Laches of stockholder.** A delay of ten years was held to bar a stockholder from attacking a foreclosure sale of corporate property under a judgment by confession, where the facts could have been ascertained at the time of the sale, or shortly thereafter.

Foster v. Mansfield, etc., R. Co., 36 Fed. 627 (U. S. C. C. Ohio 1888).

See also McLean v. Bradley, 282 Fed. 1011 (D. C. Ohio 1922).

A delay of six weeks in bringing suit to set aside a fraudulent sale of the entire corporate property, was held not to be a defense, where the stockholders' knowledge of the transaction was incomplete.

Heintzman v. Tenacity, etc., Co., 4 O. L. R. 552; 17 L. D. 554 (Super. Ct. Cin. 1906).

(d) **Offer to sell stock.** That the complaining stockholder offered to sell his stock to any one who would take it is no defense.

Heintzman v. Tenacity, etc., Co., 4 O. L. R. 552; 17 L. D. 554 (Super. Ct. Cin. 1906).

(e) **Estoppel.** A stockholder may be barred by estoppel from maintaining a suit to rescind an unauthorized transaction, where, after having knowledge of the transaction, he took no action until a time when it was impossible to restore the status quo. *Smith v. Gowen*, 18 C. C. n. s. 99 (1911).

A decree in a foreclosure suit by the trustee of a corporate mortgage securing a bond issue does not estop the trustee, who was also a bondholder, from suing as a stockholder of the mortgagor corporation.

Henry v. Pgh., etc., Ry. Co., 2 N. P. 118, 142; 5 L. D. 41 (C. P. 1895).

(f) **Motive of stockholder. Suit not brought in good faith.** If the plaintiff has a legal right which he seeks to protect in the suit, the motive which induced him to bring the action can not be inquired into.

Traction Co. v. Parish, 67 O. S. 181, 189 (1902).

Isom v. Low Fare Ry. Co., 10 C. C. n. s. 89, 102; 19 C. D. 583 (1907); aff'd, no rep., 77 O. S. 638.

Raynolds v. Cleveland, 2 C. C. n. s. 139; 14 C. D. 215 (1902); aff'd, no rep., 76 O. S. 619.

Cincinnati Volksblatt Co. v. Hoffmeister, 62 O. S. 189, 198 (1900).

Nicholson v. Franklin Brewing Co., 82 O. S. 94, 110 (1910).

These cases were not stockholders' suits on behalf of corporations, but the principle is stated as a general one in *Traction Co. v. Parish* (page 189).

In many other jurisdictions the rule is established that a stockholders' representative suit must be brought in good faith.

See *Manning v. H. V. Ry. Co.*, 9 N. P. n. s. 641, 659-660; 20 L. D. 468 (1910).

Dissette v. Lawrence Pbg. Co., 9 C. C. n. s. 118, 120; 19 C. D. 168 (1906).

Relief has been denied where it appeared that the complaining stockholder was acting for competitors or other persons, who have agreed to pay the costs and to indemnify him against risk.

Kuhn v. Woolson Spice Co., 13 C. C. 547; 7 C. D. 289 (1897).

Buning v. Cincinnati St. Ry. Co., 1 C. C. 323, 325; 1 C. D. 178 (1886).

Gallagher v. Johnson, 31 W. L. B. 24 (C. P. 1894).

Compare *Raynolds v. Cleveland*, 2 C. C. n. s. 139; 14 C. D. 215 (1902); aff'd, no rep., 76 O. S. 619.

That a stockholder has interests, other than his stock, which will be benefited by the relief sought has been held not to be a defense to his suit.

Henry v. Pgh., etc., Co., 2 N. P. 118; 5 L. D. 41 (C. P. 1895).

Sommers v. Cincinnati, 8 Am. L. Rec. 612, 624 (C. P. 1880).

Compare *Stewart v. Little Miami R. Co.*, 14 Ohio 353, 358 (1846).

(g) **That stockholder's interest is small.** That the plaintiff owns but one or two shares is no defense where his right have been violated. *Heintzman v. Tenacity, etc., Co.*, 4 O. L. R. 552; 17 L. D. 554 (Super. Ct. Cin. 1906).

See *C. H. & D. R. Co. v. Duckworth*, 2 C. C. 518, 523; 1 C. D. 618 (1887).

Acquiescence of a majority of the stockholders is no defense, where the plaintiff did not consent.

See *Goodin v. Cincinnati, etc., Co.*, 18 O. S. 169, 183 (1868).

(h) **That some defendants have been directors longer than others.** In a suit against directors for losses occasioned by their negligence, it is not a ground of demurrer that some of the defendants have been directors longer than others. The court can fix their liability according to the circumstances.

Meisse v. Loren, 5 N. P. 307, 309; 8 L. D. 448 (C. P. 1898).

But where some of the directors were elected directors after the wrongful acts were committed, the liability may in equity be apportioned by the court according to the loss of assets resulting from their acts. Such variant liability, however, does not amount to separate causes of action.

Glass v. Courtright, 14 N. P. n. s. 273; 23 L. D. 253 (C. P. 1913).

New directors of a national bank constituting a minority of the board are not liable for mismanagement of former directors, where they relied on reports of the bank examiners and comptroller of currency although an examination would have disclosed insolvency.

Glass v. Courtright, 14 N. P. n. s. 273; 23 L. D. 253 (C. P. 1913).

(i) **Settlement.** It is no defense to a stockholders' suit brought to vacate a fraudulent assignment for creditors, that the directors and the assignee have made a settlement, where the complaining stockholders do not assent thereto.

Home & Sgs. Assn. v. Jones, 64 O. S. 147 (1901).

(j) **Right of a stockholder to defend action against corporation.** A stockholder may be granted leave to intervene in a suit brought against the corporation, upon a showing that there is a valid defense which the managing officers wrongfully and fraudulently refuse to make. Buckeye Co. v. Caldwell, 18 C. C. n. s. 429 (1910).

M. Right of stockholder to appeal from or prosecute error proceeding to judgment against corporation. A stockholder may appeal from a judgment against the corporation when there is reason to believe that the officers in neglecting to appeal are actuated by an adverse interest.

Henry v. Jeanes, 47 O. S. 116 (1890).

But a stockholder, not a party to the suit, can not prosecute error.

Dunbar v. American Casket Co., 19 C. C. 585; 10 C. D. 684 (1900).

XV. RIGHT OF CREDITORS TO SUE.

Where directors have committed a breach of trust, and have misapplied corporate property, creditors may sue.

Columbus, etc., R. Co. v. Burke, 19 W. L. B. 27 (C. P. 1887).

See Meisse v. Loren, 4 N. P. 100; 6 L. D. 258 (C. P. 1897).

Cheney v. Maumee Cycle Co., 20 C. C. 19; 10 C. D. 717 (1900); aff'd, 64 O. S. 205.

XVI. LIABILITY OF OFFICERS AND AGENTS.

A. To the corporation.

(a) **Secret profits from contracts with corporation.** Where directors fraudulently sell their own property to the corporation for a sum greatly exceeding its actual value, they are liable in damages to the corporation.

Shawnee, etc., Co. v. Miller, 1 C. C. n. s. 569; 14 C. D. 199 (1902).

Secret profits made by directors in transactions with the corporation may be recovered by the corporation.

Yeiser v. U. S., etc., Co., 107 Fed. 340 (C. C. A. Ohio 1901).

U. S., etc., Co. v. Yeiser, 4 O. L. R. 539; 17 L. D. 261 (Super. Ct. Cin 1906).

Beck v. Fishel, 16 C. C. n. s. 130 (1909).

(b) **Negligence.** An officer or agent is liable to the corporation where corporate property is lost or wasted through his negligence.

Meisse v. Loren, 5 N. P. 307; 8 L. D. 448 (1898); s. c., 4 N. P. 100; 6 L. D. 258 (1897).

Glass v. Courtright, 14 N. P. n. s. 273; 23 L. D. 253 (1913).

See 12 O. L. R. 619. Article by W. P. Rogers.

Directors, executive officers and agents are bound to exercise that degree of care in the affairs of the corporation which ordinarily careful and prudent men would exercise acting under similar circumstances.

Mason v. Moore, 73 O. S. 275 (1906).

Kalb v. American N. B., 21 C. C. 1; 11 C. D. 437 (1900); aff'd, 65 O. S. 566.

Baldwin v. Egan, 5 O. L. R. 476 (1907); aff'd, 11 C. C. n. s. 584.

See *supra*, *care required of directors*.

A bank cashier is liable for negligence in the matter of locking the doors of the vault in which the funds are kept.

Kalb v. American N. B., 21 C. C. 1; 11 C. D. 437 (1900); aff'd, 65 O. S. 566.

Directors are not liable for irregularities of action, where neither the corporation nor the stockholders have been injured.

Larwill v. Burke, 19 C. C. 513; 10 C. D. 605 (1900).

Acquiescence of stockholders in mismanagement as a bar to recovery against directors therefor.

See Bond v. Poe, 12 C. C. 281; 4 C. D. 10 (1893).

De LaCroix v. Eid Concrete Steel Co., 8 N. P. n. s. 489, 495; 19 L. D. 767 (C. P. 1909).

(c) **Corporate property wrongfully converted by director.** A director may be compelled to surrender to the corporation property belonging to the corporation which he has converted to his own use. Where a director has disposed of such property to persons having notice of the transaction, the corporation may recover from such persons the property or its value.

Greenville Gas Co. v. Reis, 54 O. S. 549 (1896).

Goodin v. Cincinnati, etc., Co., 18 O. S. 169 (1868).

Columbus, etc., Ry. Co. v. Burke, 19 W. L. B. 27 (C. P. 1887).

(d) **Accounting for corporate property.** Directors may be required to account for corporate funds and property in their possession or control. Taylor v. Miami Exporting Co., 5 Ohio 162 (1831).

B. Liability to stockholders.

(a) **In general** the liability of directors for negligence, breach of trust, etc., is to the corporation only, and individual stockholders can not sue.

Zinn v. Baxter, 65 O. S. 341, 364 (1901).

Nor can a pledgee of stock sue.

Barnes v. Swift, 26 W. L. B. 110 (Super. Ct. Cin. 1891).

But where the corporation refuses to sue, a stockholder may bring suit on behalf of all stockholders, making the corporation a party defendant.

Zinn v. Baxter, 65 O. S. 341, 364 (1901).

Stockholders of an insolvent national bank, in the hands of a receiver appointed by the comptroller of the currency, may bring suit in a state court in their own names against its directors for damages both under U. S. R. S. § 5239 and at common law.

Glass v. Courtright, 14 N. P. n. s. 273; 23 L. D. 253 (C. P. 1913).

A stockholders' representative suit against directors for mismanagement is governed by the ten years statute of limitations (G. C. § 11227).

Glass v. Courtright, 14 N. P. n. s. 273; 23 L. D. 253 (C. P. 1913).

Where directors became sureties for a corporate debt, and one director paid the debt and brought suit for contribution, it is no defense to his co-sureties that the plaintiff took possession of the cor-

porate property and converted it to his own use, or wasted it, or that he is indebted to the corporation. *Steele v. Gonyer*, 24 L. D. 327 (1913); *aff'd*, 18 C. C. n. s. 470.

Where the president and general manager of a corporation induced the stockholders to transfer their stock for 200 percent of its par value, stating in open meeting that he expected to make "a good thing for himself" over and above what the other stockholders received, and it subsequently appeared that he received 1,450 percent for his stock and agreement on his part not to re-engage in business, it was held that his disclosure was not complete enough to protect him in an action for accounting. *Beck v. Fishel*, 16 C. C. n. s. 130 (1909).

A director of a national bank, who wilfully fails to attend meetings of the board, and otherwise to inform himself of the condition of the bank and to supervise its affairs, is guilty of a breach of his common-law obligation and is liable for losses resulting from gross mismanagement by the executive officers which a proper attention to his duty would have avoided. *Bowerman v. Hamner*, 250 U. S. 504 (1919).

(b) Share of assets on winding up. Where a corporation has ceased business, its debts have been paid, and the directors personally undertake to divide the assets among the stockholders, a stockholder, after demand, may maintain an action for his share against the directors.

Larwill v. Burke, 19 C. C. 513; 10 C. D. 605 (1900).

And where one stockholder acquires nearly all of the stock and converts the corporate property to his own use, and where the corporation has not been dissolved, but has no directors or officers, the other stockholders need not sue the corporation but may sue such stockholder individually for an accounting.

Dye v. Hermes, 32 W. L. B. 120 (C. P. 1894).

See *Beck v. Fishel*, 16 C. C. n. s. 130 (1909).

In such case the statute of limitations begins to run against the stockholder from the time of the demand and refusal.

Larwill v. Burke, 19 C. C. 513; 10 C. D. 605 (1900).

(c) Conspiracy to depreciate price of stock. Where a stockholder has pledged his stock as collateral to secure his indebtedness to directors, and the directors enter into a conspiracy to depreciate the price of such stock, using their powers as directors, for the purpose of buying it in for less than its value, the directors are directly liable to such stockholder, the wrong being against the stockholder individually, as well as against the corporation.

Ritchie v. McMullen, 79 Fed. 522 (C. C. A. Ohio 1897).

(d) Dividends when declared by the directors become a debt of the corporation. Officers are not personally liable to stockholders therefor.

Snodgrass v. Morrison, etc., Co., 4 O. L. R. 622; 17 L. D. 497 (Super. Ct. Cin. 1907).

(e) Refusal to transfer stock. An officer is not liable to a transferee of stock for refusing to transfer the same on the corporate books.

Snodgrass v. Morrison, 4 O. L. R. 622; 17 L. D. 497 (Super. Ct. Cin. 1907).

(f) Declaring dividends otherwise than out of surplus profits. See § 8728 and note.

Dividends illegally paid by directors may, in an action by stockholders for mismanagement, be deducted from the stockholders' losses and may be adjudicated in the action.

Glass v. Courtright, 14 N. P. n. s. 273; 23 L. D. 253 (C. P. 1913).

(g) **Refusal to permit inspection of corporate books.** A petition by a stockholder to enforce his right to inspect the corporate books does not state a cause of action against the president individually, where the only allegation involving him is that he is president. He is entitled to be dismissed from the case, on demurrer.

Pearce v. Atkins, 13 N. P. n. s. 580 (1913).

C. Liability to subscribers or purchasers of stock.

(a) **Fraud in inducing subscription.** The liability of officers and agents of a corporation to subscribers, and purchasers of stock is controlled by the rules of law governing actions for deceit. Where an officer is applied to for information by one intending to purchase stock (Cable v. Bowlus, 21 C. C. 53; 11 C. D. 526; aff'd, 69 O. S. 563), or where an agent or officer is engaged in making sales or soliciting subscriptions, and makes material and false representations regarding the past or present status of the corporate enterprise, which are relied on by the purchasers or subscribers, to their injury, such officer or agent is personally liable if he had knowledge of the falsity of the representations, or if the same were made under such circumstances that knowledge of their falsity must necessarily be imputed to him.

Mason v. Moore, 73 O. S. 275, 291-293 (1906).

Cable v. Bowlus, 21 C. C. 53; 11 C. D. 526 (1900); aff'd, 69 O. S. 563.

See Schenck v. Knott, 13 C. C. n. s. 41 (1910).

Russell v. Weiler, 7 C. C. n. s. 596; 18 C. D. 176 (1905).

Merchants N. B. v. Thoms, 28 W. L. B. 164; s. c., 31 W. L. B. 137.

Where the alleged false representations related to the dividend rate, it has been held that knowledge of the dividend rate is not conclusively imputed to the defendant director. Degraw v. Lampert, 17 C. C. n. s. 401 (1911).

Where the purchaser did not rely upon the representations but made independent investigations, he can not recover. Donnell v. Sugar Co., 16 N. P. n. s. 331 (1914).

By statute directors are made personally liable to persons who purchase stock relying on untrue statements in a prospectus, etc., issued by the corporation unless they had just and reasonable grounds for believing them to be true, etc.

See G. C. § 6373-18.

Measure of damages. The measure of damages is the difference between the price paid for the stock and its actual value at the time of the sale.

Schenck v. Knott, 13 C. C. n. s. 41, 46 (1910).

See Degraw v. Lampert, 17 C. C. n. s. 401, 403 (1911).

The purchaser can not recover damages for mental suffering, disappointment or disgrace; nor in general can he recover punitive damages.

Cable v. Bowlus, 21 C. C. 53; 11 C. D. 526 (1900); aff'd, 69 O. S. 563.

No fiduciary relation toward purchasers of individual stock. Directors do not occupy a fiduciary relation toward persons to whom they sell their individual stock.

Cook v. Henderson, 8 Am. L. R. 429 (Dist. Ct. 1879).

See Hetteshimer v. Swisher, 7 O. L. R. 629 (C. P. 1909).

Where oil stock was purchased under the false representation that it was treasury stock, whereas it belonged to individuals, but the purchaser having had opportunity of learning the facts waited for six months until after a well had been drilled, he was held not entitled to rescind. Hamilton v. Carr, 17 C. C. n. s. 395 (1911).

And it has been held that an action for damages can not be maintained where the only false representation was that the stock

sold was treasury stock, whereas in fact it belonged to the defendant. *Hill v. Roper*, 22 C. C. n. s. 455 (1905).

(b) **Bank directors attesting false statements of condition.** Where bank directors attest a report of its condition, made and published as required by statute, the statements of which were false, and a person relying on such statement purchases stock of such bank, the liability of the directors to the purchaser at common law is controlled by the law governing actions for deceit.

Mason v. Moore, 73 O. S. 275, 291 (1906).

Barnes v. Pogue, 29 W. L. B. 382 (Super. Ct. Cin. 1893).

See *Barnes v. Swift*, 3 N. P. 291; 3 L. D. 688 (1894).

Under the national banking act a director is not liable to third persons for mere negligence in attesting such a report. He is liable only for a knowing violation of the act.

Mason v. Moore, 73 O. S. 275, 290 (1906).

Yates v. Jones N. B., 206 U. S. 158, 178 (1906).

(c) **President signing "full paid" stock certificate.** A president is not liable in an action for deceit based on his having signed a stock certificate containing the statement "full paid and nonassessable" to a person who bought such stock in the open market for less than par, although the president knew that such stock had been exchanged for property at an overvaluation.

Nutt v. Wheeler, 10 C. C. n. s. 217; 20 C. D. 86 (1907).

(d) **Verbal promise of dividends to subscriber.** A verbal promise, by the president of the corporation, that if a person would subscribe and pay for \$500.00 of stock he should, within one year, receive 15 percent on the amount invested, is valid. Such an agreement is not within the Statute of Frauds.

Moorehouse v. Crangle, 36 O. S. 130 (1880).

D. Liability to creditors.

(a) **Acting before ten percent of capital is subscribed.** Persons who act as directors before ten percent of the capital stock is subscribed, and incur obligations, are personally liable therefor.

Trust Co. v. Floyd, 47 O. S. 525 (1890).

(b) **Acting without authority.** A person who assumes to make a contract for a corporation, but without authority, is personally liable to the persons who contract with him, in ignorance of his want of authority.

Trust Co. v. Floyd, 47 O. S. 525 (1890).

An officer who executes notes, without authority to issue commercial paper for any purpose, is liable to a bona fide purchaser of the notes in damages for falsely representing his authority. But if authorized to issue paper for the corporate business, the notes are binding on the corporation when held by a bona fide purchaser, and the officer is liable only to the corporation and not to the purchaser.

Dexter Sav. Bank v. Friend, 90 Fed. 703 (U. S. C. C. Ohio 1898).

(c) **Conducting unauthorized business.** The officers are, under some circumstances, personally liable when they transcend the corporate authority and engage in *ultra vires* business. The limits of this doctrine are not clearly defined.

See note to § 8627, *Ultra vires acts. Personal liability.*

Medill v. Collier, 16 O. S. 599, 610.

Mfgs., etc., Assn. v. Lynchburg Drug Mills, 8 C. C. 112; 4 C. D. 350 (1893).

Ridenour v. Mayo, 40 O. S. 9 (1883).

(d) **On notes improperly signed.** A note reading "We promise to pay" and signed "The A. B. Co., C. D., Secy. and Treas., E. F., Pres.," is on its face the note of the corporation alone and the officers who signed it are not personally liable.

Aungst v. Creque, 72 O. S. 551 (1905).

See Snyder v. Bank, 22 C. C. 624 (1897); aff'd, 60 O. S. 605.

But a note signed "A. B., President," or "A. B., Agent K. & O. C. Co.," is the note of the officer personally and he is liable thereon.

Robinson v. Kanawha Valley Bank, 44 O. S. 441 (1886).

Bank v. Cook, 38 O. S. 442 (1882).

Eells v. Shea, 20 C. C. 527; 11 C. D. 304 (1900); aff'd, 66 O. S. 682.

Parol evidence is not admissible, in such a case, to show that the intention of the parties was not to bind the officer but the corporation.

Robinson v. Kanawha Valley Bank, 44 O. S. 441 (1886).

Collins v. Buckeye State Ins. Co., 17 O. S. 215 (1867).

Eells v. Shea, 20 C. C. 527; 11 C. D. 304 (1900); aff'd, 66 O. S. 682.

See Barnhisel v. Commercial N. B., 14 C. C. 124; 7 C. D. 533 (1897).

A note reading "we, as directors of The A. B. Company promise to pay, etc.," and signed by the makers individually is the note of the individuals and they are personally liable.

Titus v. Kyle, 10 O. S. 444 (1859).

McKisson v. Thomas, 18 C. C. n. s. 443 (1911).

A note reading "we or either of us promise to pay" signed "The Oberlin Gas & Electric Co., J. C. H., President; A. E. H., Treasurer" is the note of the individuals as well as of the corporation. Banking Co. v. Gas Co., 19 C. C. n. s. 151 (1911).

And a note reading "I promise to pay" signed "H. H. W. for The C. Company" is the note of H. H. W. personally. Wylie v. Kingsley Co., 24 C. C. n. s. 143 (1902).

But where the intention, indicated on the face of the note, is to charge only the corporation, the officers are not liable although the note is signed "A. B., President."

Second N. B. v. Wilcox, 2 C. C. 325; 1 C. D. 511 (1887).

Hays v. Galion, etc., Co., 29 O. S. 330, 334 (1876).

Sheehan v. Davis, 17 O. S. 571.

(e) **On stock exchanged for property at an overvaluation.**

Gates v. Tippecanoe Stone Co., 57 O. S. 60 (1897).

See note to § 8630. *Sales to directors and officers.*

(f) **Declaring dividends otherwise than out of surplus profits.**

See § 8728.

(g) **On guaranty of corporate debts.** A director, who has guaranteed the performance of a corporate contract, can not defend on the ground that no notice of default was given him until after insolvency of the corporation. He is charged with notice of its condition. Bowler v. Garland, 24 C. C. n. s. 391 (1901).

E. Criminal liability. An officer of a corporation may be criminally liable, although the act was committed by an agent under his instructions, and in conducting the corporate business.

(Violation of pure food law.)

Meyer v. State, 54 O. S. 242 (1896); affirming, 9 C. C. 714; 6 C. D. 712.

The treasurer of an insolvent corporation, who converts funds of another person to the use of the corporation, may be criminally liable. Brown v. State, 3 Ohio App. 52; 21 C. C. n. s. 545 (1914); affirming, 15 N. P. n. s. 65 (1913); motion to certify record overruled.

Where corporate officers or agents are the actual and efficient

actors in committing a fraud or an offense, they can not shield themselves behind the corporation. A count in an indictment charging violation of federal revenue laws by defendants, "while engaged as officers, agents and employes" of a corporation, was sustained. *Kelly v. U. S.*, 258 Fed. 392, 401 (C. C. A. 6th Cir. 1919).

Although a corporation may not be imprisoned, its agent who commits the act may be. *Meyer v. O'Dwyer*, 15 N. P. n. s. 129, 146 (1913).

Section 8661. (Qualifications of directors and trustees.)

A majority of such directors must be citizens of this state. All directors and executive officers shall be holders of stock of the company for which they are chosen, in an amount to be fixed by the by-laws, and trustees of corporations must be members thereof. (R. S. Sec. 3248; R. S. 1880.)

Holders of stock. A person not a stockholder may be voted for and elected and may, after election, qualify himself by acquiring stock.

Greenough v. Alabama, etc., R. Co., 64 Fed. 22 (C. C. 1894).

A person is not ineligible because his stock is subject to an option to sell. Until the option is exercised he is a stockholder.

Kuhn v. Woolson Spice Co., 13 C. C. 547; 7 C. D. 289 (1897).

A director is presumed to be a stockholder.

Gates v. Tippecanoe Stone Co., 9 C. C. 99, 103; 6 C. D. 23 (1894); *aff'd*, 57 O. S. 60.

Holder of "qualifying shares." It has been held that a person is not properly qualified where a share of stock is transferred to him merely for the purpose of qualifying him as a director, where he has no real interest in the stock.

Cemetery Assn. v. Traction Co., 93 O. S. 161 (1915).

State v. McIntosh, 23 C. C. n. s. 305 (1912).

Bartholomew v. Bentley, 1 O. S. 37 (1852).

But a director may obtain his stock by a gift, or hold it upon a trust, where there is no secret agreement that the stock is held merely as a qualifying share to be surrendered on demand. *Kardo Co. v. Adams*, 231 Fed. 950; 14 O. L. R. 223 (C. C. A. Ohio 1916); reversing, 229 Fed. 967; 13 O. L. R. 137.

Where a corporation issued a certificate of stock to a director to qualify him, he agreeing to retransfer the same on ceasing to be a director, a third person who purchased such certificate from the director, without notice, is entitled to the stock, as against the corporation.

Dueber Co. v. Dougherty, 62 O. S. 589 (1900).

A person to whom stock was transferred by relatives to enable him to be elected secretary and treasurer is a trustee of the stock for such relatives. Such trust may be established by parol.

Bonnell v. Brown, 11 C. C. n. s. 58; 20 C. D. 712 (1908).

Director ceasing to be a stockholder. Where a director parts with all his stock he ceases to be a director *de jure*.

Commercial N. B. v. Colwell, 132 N. Y. 250 (1892).

Bartholomew v. Bentley, 1 O. S. 37 (1852).

Henderson v. Hogan, 1 W. L. B. 227 (Dist. Ct. 1876).

See State v. Bryce, 7 Ohio (pt. 2) 82 (1836).

The vacancy may be filled immediately.

See § 8662.

Hooe v. Hall, 9 C. C. 654; 4 C. D. 547 (1893).

But where he continues to act as a director, his acts are those of a *de facto* officer and valid as to third persons.

Campbell Printing Press Co. v. Bellman Bros. Co., 11 C. C. 360; 5 C. D. 389 (1896).

Ehrman v. Insurance Co., 35 O. S. 324, 339 (1880).

See also note to § 8660.

Removal of directors from state. Where the directors change their residence to another state, remove the plant of the corporation to such state and there continue business as an Ohio corporation, they are *de facto* officers and may bind the corporation.

Lattimer v. Mosaic Glass Co., 13 C. C. 163; 7 C. D. 430 (1896).

See State v. Bryce, 7 Ohio (pt. 2) 82 (1836).

Executive officers. The executive officers are the president, secretary and treasurer (§ 8664) and such other officers as may be provided for in the regulations. (§ 8704.)

The treasurer must be a stockholder. Opins. Atty. Gen. 1915, p. 1974.

Interlocking directors. The Clayton Act enacted by Congress in 1914 provides that "no person at the same time shall be a director in any two or more corporations, any one of which has capital, surplus, and undivided profits aggregating more than \$1,000,000 engaged in whole or in part in (interstate) commerce * * * if such corporations are or shall have been theretofore, by virtue of their business and location of operation, competitors, so that the elimination of competition by agreement between them would constitute a violation of * * * the anti-trust laws."

Interlocking directors of certain banks are also prohibited. 38 U. S. Stats. L. 732, c. 323, § 8.

Decisions under former statutes. In the absence of a statute requiring it, a director need not be a stockholder.

State v. McDaniel, 22 O. S. 354 (1872).

Where the special charter of a bank provided that no person should be a director who was a director of any other bank, or the partner of any director of any other bank, it was held that such provision applied to directors of banks in other states as well as in Ohio.

State v. Buchanan, Wright 233 (1833).

Section 8662. (Vacancies.) When the office of director or trustee becomes vacant, the board may fill it for the unexpired term unless the by-laws otherwise provide. (R. S. Sec. 3248; R. S. 1880.)

Where a director ceases to own stock, his successor may be chosen immediately.

Hoe v. Hall, 9 C. C. 654; 4 C. D. 547 (1893).

Bartholomew v. Bentley, 1 O. S. 37, 43 (1852).

Henderson v. Hogan, 1 W. L. B. 227 (Dist. Ct. 1876).

Where no officers were elected for sixteen years, the corporation being insolvent, it was held that vacancies could not then be filled by the remaining directors as all directors were presumed to have resigned.

Bartholomew v. Bentley, 1 O. S. 37 (1852).

Where a majority of directors resign, or cease to be stockholders, the remaining minority have no power to fill vacancies.

Moses v. Tompkins, 84 Ala. 613 (1887).

Section 8663. (Oath.) Before entering upon his duties as such, each trustee and director must take an oath faithfully to discharge them. (R. S. Sec. 3247; March 15, 1909, 100 v. 12; R. S. 1880.)

An officer of a corporation who acts as such without being sworn is a de facto officer and his acts are binding as to third persons.
Simpson v. Garland, 76 Me. 203 (1884).

Section 8664. (Organization.) As soon thereafter as is convenient, the board of trustees or directors chosen at any election, shall select one of their number to be president thereof, and unless the regulations of the body otherwise provide for the election of such officers, also appoint a secretary and treasurer of the corporation. A majority of the directors of a corporation for profit and such a number of the trustees as the regulations of a corporation not for profit may provide, shall form a board. (R. S. Sec. 3247; March 15, 1909, 100 v. 12; R. S. 1880.)

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II. Executive officers, p. 1042.

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- (i) Authority to sell bonds of corporation, p. 1047.
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- L. Vice-president, p. 1048.
- M. Secretary, p. 1048.
- N. Treasurer, p. 1048.
- O. General manager, p. 1049.
- P. Comptroller, p. 1049.
- Q. Cashier of bank, p. 1050.

I. ORGANIZATION.

This section authorizes a regulation fixing the number of trustees of a corporation not for profit. Rep. Atty. Gen. 1915, p. 89.

Majority of the directors. See note to § 8660. *Quorum.*

Where, of five directors elected, only three qualified and assumed to act, their acts are binding.

Dickason v. Grafton, etc., 6 C. C. n. s. 329, 333; 17 C. D. 357 (1905); aff'd, no rep., 76 O. S. 612.

The majority contemplated by this section is a majority of the whole number of directors, although there may be vacancies. Rep. Atty. Gen. 1914, p. 31, citing Ry. Co. v. Buffalo, 180 N. Y. 192, 197.

II. EXECUTIVE OFFICERS.

A director is an officer.

§ 8704.

Railway Co. v. McCoy, 42 O. S. 253 (1884).

But not an executive officer.

See § 8661.

State v. Peoples, etc., Assn., 42 O. S. 583 (1884).

A. Qualifications. All executive officers must be stockholders. § 8661.

See Bonnell v. Brown, 11 C. C. n. s. 58.

See note to § 8660. *De facto directors or officers.*

The president must be a director. See § 8664.

A corporation can not be the secretary or recording officer.

Burch v. Trust Co., 12 N. P. n. s. 86, 91 (1911).

But see § 710-158 for power of a trust company to act as registrar or transfer agent of stock.

Where the president ceases to be a director, and such vacancy in the board is filled, the office of president becomes vacant, and a new president may be chosen. Toledo Co. v. Smith, 205 Fed. 643, 660 (D. C. 1913).

B. Election and term. See also § 8704.

Where no directors are elected at the annual meeting of stockholders, the hold-over board of directors may, under this section, elect new executive officers. If, however, a new board of directors is subsequently elected by the stockholders (see G. C. 8647) the new board may elect executive officers under this section. State v. Clough, 18 C. C. n. s. 509 (1912); aff'd, no rep. 88 O. S. 590.

This section contemplates an annual election of officers.. State v. Clough, 18 C. C. n. s. 509 (1912); aff'd, no rep. 88 O. S. 590.

C. Removal. Regulations can not be adopted providing for the removal at stockholders' meetings, of officers or employes chosen or

appointed by the directors. *Toledo Co. v. Smith*, 205 Fed. 643 (D. C. 1913).

See also note to § 8647.

D. Powers. (a) Derived from statute. The president and secretary are authorized and required by statute to execute stock certificates. (§ 8672.) A certificate of stock issued to the president or secretary personally is valid in the hands of a bona fide holder, although issued fraudulently.

Railway Co. v. Bank, 56 O. S. 351 (1897).

An officer should verify pleadings of a corporation.

Mfg. Co. v. Hedges, 76 O. S. 91 (1907).

(b) Conferred by regulations. The duties of officers may be provided for by the stockholders in the corporate regulations, except duties which are provided for by statute.

§ 8704.

Bradford Belting Co. v. Gibson, 68 O. S. 442, 449 (1903).

(c) Conferred by directors. All authority of executive officers, except that conferred by statute or corporate regulations, must be derived from the board of directors. The active business of a corporation is managed and controlled by the board of directors. While corporate contracts are usually negotiated and executed by executive officers, the authority to do so must, in some manner, be traced to the board of directors.

Belting Co. v. Gibson, 68 O. S. 442 (1903).

Minor v. Board of Control, 20 C. C. 4; 11 C. D. 16 (1899).

Tyson v. Miller-Tyson Co., 15 C. C. n. s. 177, 182; 23 C. D. 418, 424 (1912).

Executive officers are agents merely.

Smead Foundry Co. v. Chesbrough, 18 C. C. 783; 6 C. D. 670 (1895).

For further powers of executive officers see note to § 8660, *Corporate contracts*, and see below, *President* and various other officers.

E. Not disqualified to testify by G. C. § 11495. In an action against a corporation by an administrator, the general manager is not disqualified by G. C. § 11495 from testifying to facts occurring before the death of the decedent.

Cockley Milling Co. v. Bunn, 75 O. S. 270 (1906).

F. Compensation of directors and officers.

The stockholders have a right to fix the compensation of the corporate officers by provisions in the regulations.

§ 8704.

(a) Directors. In general, directors are entitled to reasonable compensation for their time, and reimbursement for expense incurred in attending meetings of the board.

State v. Peoples, etc., Assn., 42 O. S. 579, 583 (1885).

Where directors have accepted compensation for a period of service, they have no power, in subsequent terms, to vote themselves back pay for the same period.

State v. Peoples, etc., Assn., 42 O. S. 579 (1885).

(b) Executive officers. Where directors elect one of their number as secretary, he is entitled to reasonable compensation for his services as secretary although no agreement was made in advance regarding compensation, where the circumstances show that it was the intention of all parties that he should be paid.

Dalton v. Brush, etc., Co., 13 C. C. 505; 7 C. D. 141 (1897).

But where there was no expectation of payment, the officer can not recover compensation.

McMullen v. Ritchie, 64 Fed. 253; 8 O. F. D. 314 (U. S. C. C. Ohio 1894).

See State v. Peoples, etc., Assn., 42 O. S. 579 (1885).

Where the corporate regulations authorize the directors to fix the compensation of the president, treasurer and other executive officers, the action of directors in voting on their own salaries as such officers is not void, in the absence of a showing of fraud or unfair dealing toward the stockholders. Kirn v. Plumbing Co., 12 Ohio App. 55; 31 O. C. A. 47 (1919); motion to certify record overruled, 17 O. L. R. 392.

G. Directors and officers are not preferred creditors.

(a) Under statute giving preferences to "operatives." The secretary of a corporation is not an "operative" under G. C. § 11138 and not entitled to priority payment from the estate of an insolvent corporation, although he at times performed manual labor.

Green v. Weller, 6 C. C. 351; 3 C. D. 488 (1892).

In *In re Armleder, etc., Co.*, 20 C. C. 699 (1900) it was held that a person who performed manual labor was entitled to priority payment although he was a director.

Contra, Williams v. Southard, 40 W. L. B. 287 (C. P. 1898).

(b) No right to appropriate corporate funds to payment of claim. A director or officer of a corporation has no right to appropriate corporate property or funds, in his possession for other purposes, in payment of a debt due him from the corporation.

Greenville Gas Co. v. Reis, 54 O. S. 549 (1896).

Dunbar v. Harrison, 18 O. S. 24, 38 (1868).

Where an officer, who owed the corporation \$750.00 on a subscription to stock and had a claim of \$500.00 for salary, executed the note of the corporation for \$500.00 and transferred it in payment of an individual indebtedness, upon insolvency of the corporation it was held that the note in the hands of such creditor should be cancelled and the amount set off against the indebtedness of the officer.

In re Empress, etc., Co., 1 N. P. n. s. 20 (C. P. 1903).

(c) Estoppel to set up unrecorded mortgage. An officer of a corporation who holds a mortgage from the corporation which he has withheld from record, is estopped from setting up such mortgage as against subsequent mortgages which have been recorded and of which he had knowledge.

Jacobs v. Jacobs, 7 L. D. 486.

H. Liability. See note to § 8660.

I. Agreements to procure corporate office. An agreement between individuals to form a corporation, providing for its future management and control and specifying the future directors and officers and their compensation, is not void or illegal where the parties to the contract become the owners of all the capital stock of the corporation.

Doan v. Rogan, 79 O. S. 372, 386 (1909).

See Mullen v. Gaffery, 8 Am. L. R. 101 (Dist. Ct. 1879).

And where, in an agreement between individuals, it is provided that one of the parties shall be employed at a specified salary for a specified time by the other parties, or by a corporation to be thereafter formed by

them, on breach of such agreement an action for damages may be maintained against the individual in default.

Doan v. Rogan, 79 O. S. 372 (1909).^{*}

Magil v. Rendigs, 12 L. D. 558 (Super. Ct. Cin. 1902).

See Mosier v. Parry, 60 O. S. 388 (1899).

But where there are other stockholders who are not parties to the contract, an agreement, by a director or by one or more stockholders owning a majority of the stock, to elect another person to a salaried corporate office is void as against public policy.

Jones v. Scudder, 2 C. S. C. R. 178 (1872).

West v. Camden, 135 U. S. 507 (1890).

Where a subscription to stock was made on condition that the subscriber be employed by the corporation at a certain salary, a breach by the corporation of the employment condition was held not to constitute a defense against the subscription, but to be an independent stipulation or condition subsequent for breach of which the remedy would be an action for damages.

Stunt v. Newark, etc., Co., 22 C. C. 120; 12 C. D. 175 (1901); *aff'd*, 67 O. S. 555.

But where stock in an existing corporation is purchased only in consideration of an agreement by the corporation to employ the purchaser, the latter, on a breach of the employment agreement by the corporation, may rescind the stock purchase contract and recover the amount paid by him thereon. Buschmeyer v. Machinery Co., 7 Ohio App. 202; 27 O. C. A. 337 (1916); motion to certify record overruled.

Where money was loaned to a corporation on a note due in two years, on condition that the son of the lender be employed by the corporation for the same time, without discharge except for specified causes, the sale by the corporation of its business, necessitating the retirement of the son, is equivalent to his discharge and renders the note due as of the date of retirement.

Benton v. Standard Carbonic Co., 6 O. L. R. 568; 19 L. D. 551; C. P. (1908).

J. Insurable interest of corporation in life of director or officer.

Where a person owns a large portion of the stock of a corporation, and his skill and experience are largely relied on to make the corporate business a success, and when, in borrowing money of banks, and in dealing with creditors, and in inducing other persons to buy stock in the corporation, he represents that he has insured his life for the benefit of the corporation, such facts disclose an insurable interest in the corporation; and the insured and his legal representatives are estopped from claiming that such policies are not based upon an insurable interest, or that the amounts due thereon do not belong to the corporation.

Keckley v. Coshocton Glass Co., 86 O. S. 213 (1912); *affirming*, 13 C. n. s. 229, 240; 21 C. D. 665, 676.

Where an officer made application for insurance specifying the corporation as beneficiary, and the premiums were paid by the corporation, it is entitled to the proceeds of the policy as against the executor of the insured, although the insured, before his death, had retired as such officer or director.

Insurance Co. v. Coshocton Glass Co., 13 C. C. n. s. 229; 21 C. D. 665 (1910); *affirmed*, Keckley v. Coshocton Glass Co., 86 O. S. 213.

And where a policy in which the widow was named as beneficiary was assigned to a corporation in which the insured was an officer, and all premiums were paid by the corporation, it is entitled to the proceeds of the policy as against the widow.

Coshocton Glass Co. v. Insurance Co., 13 C. C. n. s. 240; 21 C. D. 676 (1910); affirmed, Keckley v. Coshocton Glass Co., 86 O. S. 213.

In Schott, etc., Co. v. Insurance Co., 11 C. C. n. s. 401; 20 C. D. 656 (affirming 7 N. P. n. s. 548; 19 L. D. 249; and affirmed no report, 83 O. S. 507), it was said that a corporation has no insurable interest in the life of an officer or director who is not indebted to it, and that a note given for premiums on a policy on the life of a director or officer is without consideration. The note involved in that case, however, was given by the secretary and general manager without authority from the directors.

K. President.

(a) Chosen by directors, not by stockholders. Under a Colorado statute providing that the directors shall elect one of their number to be president, it was held that an election of a president by the stockholders was a nullity.

Walsenberg Water Co. v. Moore, 5 Colo. App. 144; 38 Pac. 60.

(b) Qualifications. The president must be a stockholder (§ 8661) and a director. (§ 8664.)

(c) Powers. The powers of the president, in the making of contracts, as those of other executive officers, must be traced to the board of directors.

See *Executive officers supra*; and note to § 8660. *Corporate contracts*.

The president of a mutual life insurance company has no authority to levy a call or assessment, where the laws of the company provided two different methods of restoring a deficiency in its mortuary fund. The power of levying the call or assessment is vested in the directors. Beckel v. Insurance Co., 15 N. P. n. s. 266 (C. P. 1913).

The president of a corporation, who also owns all of its stock, may bind the corporation by a contract of sale, although made in his own name. Insurance Co. v. Brown, 16 C. C. n. s. 518 (1905).

Where the president is authorized to make contracts, he may bind the corporation by ratification of a contract made by the secretary, without authority. Grabler Mfg. Co. v. Leahy, 18 C. C. n. s. 17 (1910); aff'd, no rep. 85 O. S. 442.

(d) Presumption as to. Written contracts are usually signed by the president, and it is held that a written instrument or contract executed in proper form under the corporate seal by the president is presumed to have been authorized by the directors, and that the burden of proof rests on the party denying such authority.

Bank v. Flour Co., 41 O. S. 552, 557 (1885).

C. H. & D. R. Co. v. Harter, 26 O. S. 426 (1875).

Dexter Sav. Bank v. Friend, 90 Fed. 703 (1898).

The presumption is not rebutted by the mere fact that authority to execute the instrument is not found on the minutes of the directors.

C. H. & D. R. Co. v. Harter, 26 O. S. 426 (1875).

The presumption does not apply to unusual instruments or contracts. There is no presumption that the president is authorized to convey the entire property of a corporation.

De Lavergne, etc., Co. v. German Sgs. Int., 175 U. S. 40 (1889).
Nor to make an assignment for creditors.

Commercial N. B. v. Cincinnati N. B., 3 C. C. 513, 517; 2 C. D. 295 (1889).

(e) **To sign notes.** The promissory note of a corporation, signed in its name by the president, is *prima facie* valid and binding on the corporation.

Dexter Sav. Bank v. Friend, 90 Fed. 703 (U. S. C. C. Ohio 1898).

See Andres v. Morgan, 62 O. S. 236, 248 (1900).

But a *cognovit* note signed by the president is not binding on the corporation in the absence of proof of authority from the directors.

Smead Foundry Co. v. Cheesbrough, 18 C. C. 783; 6 C. D. 670 (1895).

See Jackson v. Nelsonville Co., 6 Ohio App. 171; 27 C. C. n. s. 81 (1916) for ratification of *cognovit* notes.

A note signed by the president and payable to himself is not binding unless authority from the directors is shown.

In re Hartwell Furniture Co., 7 O. L. R. 555 (Referee in Bkry. 1909).

In re Continental Iron Co., 2 O. L. R. 563 (Referee in Bkry. 1904).

Arnkens v. Rouse, 26 W. L. B. 221 (C. P. 1891).

In re Empress Josephine, etc., Co., 1 N. P. n. s. 20 (C. P. 1903).

Compare In re Troy, etc., Co., 136 Fed. 420; *aff'd*, 142 Fed. 1038.

Where the president is authorized to sign notes, a note signed by him is valid in the hands of a bona fide holder although executed for an unauthorized purpose.

Dexter Sav. Bank v. Friend, 90 Fed. 703 (U. S. C. C. Ohio 1898).

(f) **To execute chattel mortgage.** Where the president and secretary were authorized to execute notes and mortgages, a chattel mortgage executed by them to secure a preexisting debt was held valid as against other creditors, although executed without the knowledge of other directors.

Bosche v. Toledo, etc., Co., 14 C. C. 289; 7 C. D. 374 (1897).

(g) **To bring or defend suits.** The president of an insolvent corporation may bring or defend suits to protect the property of the corporation, without specific authority from the directors.

Kalb v. American N. B., 21 C. C. 1; 11 C. D. 437 (1900); *aff'd*, no rep., 65 O. S. 566.

(h) **To appropriate corporate property in payment of debt due him from corporation.** The president of a corporation can not, without consent of the directors, appropriate a bond of the corporation, entrusted to him for sale, in payment of a debt due him from the corporation.

Greenville Gas Co. v. Reis, 54 O. S. 549 (1896).

(i) **To sell bonds of corporation.** The president of a corporation has no implied authority to sell its mortgage bonds, nor to employ another person to sell them; although the president was authorized to act as general manager in the conduct of its ordinary business.

East Cleveland R. Co. v. Everett, 19 C. C. 205; 10 C. D. 493 (1900).

But where bonds complete in form and negotiable by delivery, are placed in the custody of the president, he thereby becomes clothed with apparent authority of disposition, and a bona fide purchaser acquires a valid title although the president negotiates them wrongfully and for his own benefit.

Railway Co. v. Lynde, 55 O. S. 23 (1896); *aff'd*, 172 U. S. 493.

Railway Co. v. Bank, 56 O. S. 351 (1897).

(j) **To surrender franchise of corporation.** It has been held that the president had no power, without special authority, to surrender or dispose of franchises granted by special charter under a former constitution.

Sebastian v. Covington, etc., Co., 21 O. S. 451 (1871).

To sign consent for street railway. The president of a corporation has no authority to execute a consent to a street railway.

Rapp v. Cincinnati, etc., R. Co., 12 W. L. B. 119 (C. P.).

(k) **Liability.** Signing stock certificate representing stock to be "full paid." The president of a corporation who signed a stock certificate containing the statement "full paid and nonassessable" was held not liable to a person who purchased such stock in the open market, for less than par without inquiry as to the assets of the corporation, although the president knew that such stock had been issued for property at an overvaluation.

Nutt v. Wheeler, 10 C. C. n. s. 217; 20 C. D. 86 (1907).

See note to § 8660. *Officers and agents. Liability.*

L. Vice-president. Where no authority is given to the vice-president in the regulations or by-laws, and where he was not accustomed to sign notes, the corporation is not liable on notes signed by him.

Morris v. Griffith, 34 W. L. B. 191 (U. S. C. C. Ohio 1895).

The vice-president of a bank has no implied power to borrow money.

Western N. B. v. Armstrong, 152 U. S. 346; 7 O. F. D. 499 (1894).

M. Secretary.

A secretary has no implied authority to bind the corporation by a representation that the corporation will not perform a contract theretofore made by it.

Belting Co. v. Gibson, 68 O. S. 442 (1903).

Nor to take out insurance on the lives of directors.

Security, etc., Ins. Co. v. Schott, etc., Co., 11 C. C. n. s. 401 (1908); aff'd, no rep., 83 O. S. 507.

The secretary is authorized and required to sign stock certificates.

See § 8672.

Railway Co. v. Bank, 56 O. S. 351 (1897).

Bank v. Safe & Lock Co., 66 O. S. 367 (1902).

See further as to powers *executive officers* supra, and note to § 8660, *corporate contracts*.

A contract entered into by the secretary, without authority, may be ratified by the president when the latter is authorized by the by-laws to make contracts. Grabler Mfg. Co. v. Leahy, 18 C. C. n. s. 17 (1910); aff'd, no rep. 85 O. S. 442.

The secretary of a corporation who is in possession of its books, and is acting as general manager, may be punished for contempt of court for refusal to comply with an order of court directing him to submit the books to the inspection of the adverse party, although he is acting under the order of the directors, who are nonresidents.

Arbuckle v. Woolson Spice Co., 21 C. C. 356; 11 C. D. 727 (1901).

Where the duties of a secretary were to receive and deposit money, and to endorse checks for deposit only, with no authority to sign checks or pay out or withdraw money, a surety on his bond, conditioned to make good any loss occasioned by his dishonesty in connection with such duties, is not liable for the act of the secretary in inducing the corporation to make a loan on fictitious security to a fictitious person, whose name was forged to the check of the corporation by the secretary.

Trustees v. Deposit Co., 76 O. S. 253 (1907).

N. Treasurer.

Where a treasurer deposits corporate funds in a reputable bank, to his credit as treasurer or trustee, and not mingled with his personal funds, he is not liable if they are lost by a failure of the bank.

Odd Fellows, etc., Assn. v. Ferson, 3 C. C. 84; 2 C. D. 48 (1888).

It is the duty of the treasurer of a corporation to account for all moneys coming into his possession as treasurer, and the corporation may enforce such duty by action.

Muhlhauser v. Cleveland Hospital, 21 C. C. 88 (1900).

A surety on the bond of a treasurer, conditioned that he shall perform his duties according to the regulations, charter, etc., is responsible for all moneys coming into the possession of such treasurer and not accounted for.

Portage, etc., Co. v. Wetmore, 17 Ohio 330 (1848).

It is no defense to the surety on a treasurer's bond that the funds were derived from an ultra vires business.

Juegling v. Arbeiter Bund, 4 W. L. B. 463; 8 Am. L. R. 94 (Dist. Ct. 1879)

See supra *secretary*.

Term of bond.

See Fancher v. Kaneen, 5 N. P. n. s. 614 (C. P. 1907).

Where a receiver has instituted a contempt proceeding against the treasurer of a corporation for refusing to turn over the corporate funds, and the treasurer answers that there are no funds in his possession, the proceeding will be dismissed. Such an issue can not be tried in a summary proceeding.

State v. Christy, 4 O. L. R. 64; 3 O. L. R. 430; 16 L. D. 277 (C. P. 1905).

When suit may be brought against defaulting treasurer. Suit may be brought against the treasurer of a corporation as soon as he has made default. The corporation need not wait until his successor has been appointed.

Marlborough Assn. v. Peters, 179 Mass. 61; 60 N. E. 396 (1901).

O. General manager. The authority of a general manager is usually limited to transactions within the usual course of business. He has no implied authority to sign a petition for a street improvement, making the corporate property liable for an assessment. Minor v. Board of Control, 20 C. C. 4; 11 C. D. 16.

The manager of a brewing company was held not to have implied authority to order a bowling alley installed in connection with a saloon, in view of G. C. § 13396 prohibiting bowling alleys in such connection. Brewing Co. v. Brunswick, etc., Co., 18 C. C. n. s. 255 (1909).

But the authority of a manager is sometimes deemed to be wider in scope than that of a mere agent. A provision in a life insurance policy limiting the authority of "agents" of the company was held not to apply to its "manager". Life Asso. Soc. v. Statler, 17 C. C. n. s. 59; 34 C. D. 391 (1911); aff'd, no rep., 88 O. S. 549.

P. Comptroller. An officer of a street railway company, having the title of comptroller, promised a materialman, who was furnishing materials to a contractor engaged on work for the company, that the company would pay for the materials. The comptroller supervised the auditing and treasury departments of the company. The auditing department settled accounts against the company and the treasury paid them. The comptroller raised the funds to pay accounts and at times acted as vice president and at other times as treasurer.

Whether the comptroller had authority to bind the company by promising payment to the contractor was held to be a question for the jury. The promise was not unauthorized, as a matter of law. Traction Co. v. Cole, 258 Fed. 169, 179 (C. C. A. 6th Cir. 1919).

Q. Cashier of bank. A cashier can not bind his bank by an agreement, made contemporaneously with a loan by the bank on a note signed by sureties, that he would procure bonds as collateral, and exhaust the bonds before resorting to the liability of the sureties.

Martin v. First N. B., 11 C. C. n. s. 93; 20 C. D. 398 (1907).

Nor by an agreement to defend a suit for another bank and indemnify it against loss therefrom.

First N. B. v. Mansfield Sav. Bank, 10 C. C. 233; 6 C. D. 452 (1895).

Knowledge by a cashier, of matters within his authority, is imputable to the bank.

Orme v. Baker, 74 O. S. 337 (1906).

Rangan v. Donovan, 10 O. L. R. 354; 189 Fed. 138 (U. S. D. C. 1911).

The cashier of a bank which is a creditor of a decedent's estate may be appointed administrator under G. C. § 10617 although the cashier individually is not a creditor.

McCallip v. Sharp, 13 L. D. 650 (C. P. 1903).

A cashier, authorized to sell commercial paper, has authority to guarantee that the paper is collectible.

Sturges v. Bank, 11 O. S. 153 (1860).

Where a transaction with a bank properly pertains to the business of the bank, neither the abuse or disregard of his authority by its managing officer or agent, nor his fraud or bad faith, is a defense to the bank in an action against it by an innocent party, growing out of such transaction.

Bank v. Blakesley, 42 O. S. 645 (1885).

A cashier of a bank, who is also treasurer of a building association, can not bind the bank by entering on the books of the bank a fictitious credit to the building association, on the faith of which a dividend is paid.

Webb v. Stasel, 4 N. P. n. s. 587; 17 L. D. 317 (1906); s. c., 80 O. S. 122.

Section 8665. (Change in number of directors.) By a vote of a majority of its stock, at a regular meeting of an incorporated company, it may increase the number of its directors to not more than thirty. In like manner, at any time, their number can be reduced to not less than five. At a special meeting of stockholders, also, called and of which notice was given as provided for the election of directors, by vote of a majority of its stock, the increase in the number of directors may be made. Those elected shall hold their offices until the next annual election for directors, and until their successors are elected and qualified. (R. S. Sec. 3267; April 2, 1906, 98 v. 295; May 15, 1886, 83 v. 163; R. S. 1880.)

This section does not expressly apply to trustees of a corporation not for profit. But by § 8664 the number of such trustees may be fixed by the regulations. Rep. Atty. Gen. 1913, p. 89.

Decrease. A director elected at an annual meeting holds office for one year. His tenure of office can not be shortened by a decrease in the number of directors made after his election.

Lutterby v. Herancourt Brewing Co., 12 L. D. 67 (Super. Ct. Cin. 1901).

But the office of trustee of a church is not one coupled with such an interest that the members can not terminate its tenure of office.

Munsel v. Boyd, 10 C. C. n. s. 121, 127; 20 C. D. 182 (1907).

Where the number of directors is decreased, by unanimous vote of all stockholders present, at a meeting, notice of which has been waived by all stockholders, no one can complain of the action except possibly a director who does not assent and who refuses to resign. *In re Mfg. & Sales Co.*, 246 Fed. 1005; 16 O. L. R. 163 (D. C. Ohio 1917).

Increase. Stockholders may effect a change in the policy of management by increasing the number of directors at a special meeting.

Toledo Co. v. Smith, 205 Fed. 643, 660 (D. C. 1913).

Gold Bluff, etc., Corp. v. Whitlock, 75 Conn. 669 (1903).

In re Griffing Iron Co., 63 N. J. L. 168, 357 (1898).

See *Mower v. Staples*, 32 Minn. 284 (1884).

Section 8666. (Liability of trustees.) The trustees of a corporation created for a purpose other than profit, shall be personally liable for all debts of the corporation by them contracted. (R. S. Sec. 3261; April 17, 1854, 52 v. 44, § 78; S. & C. 310.)

Corporations not for profit, see note to § 8623.

Trustees of corporation having capital stock. The trustees of a chamber of commerce, not for profit, are liable for its debts contracted by them, notwithstanding a provision in its articles of incorporation for a capital stock and a declaration that it is intended to promote the prosperity of the city in which it is located.

Snyder v. Chamber of Commerce, 53 O. S. 1 (1895).

Nature of liability. The liability of trustees under § 8666 is secondary and collateral to the principal obligation of the corporation, and can be resorted to only in case of the insolvency of the corporation, or where payment can not be enforced against it by ordinary process.

Walbrecht v. Pucketat, 9 W. L. B. 335 (Dist. Ct. 1883).

After obtaining a judgment against the corporation, the creditor can not sue the trustees on his original claim. His remedy is in the nature of a creditor's bill, on the judgment, alleging the inability of the corporation to discharge the debt.

Horstman v. Rix, 4 W. L. G. 131 (Super. Ct. Cin. 1859).

Where an action brought against the trustees was decided in their favor, on the ground that no judgment had been obtained against the corporation, and thereafter a judgment was obtained against the corporation, and another action brought against the trustees, the first judgment in favor of the trustees is not a bar to the second action against them. In such case the justice, before whom the first action was tried, may testify as to the ground on which he decided the same.

Mahaffey v. Rogers, 10 C. C. 24; 6 C. D. 88 (1894); *aff'd*, no rep., 37 W. L. B. 292.

For what debts trustees are liable. Where an indebtedness was incurred on behalf of the corporation, and the creditor refused to accept the note of the corporation, but accepted the personal note of the trustees therefor, which was renewed by the note of the corporation, the trustees were held liable.

Mahaffey v. Rogers, 10 C. C. 24; 6 C. D. 88 (1894); *aff'd*, without report, 37 W. L. B. 292.

The trustees of an incorporated fraternal benefit society are not liable for its debts, although incurred for expenses. This section does not apply to fraternal benefit societies. *Paper Co. v. Chevaliers*, 18 C. C. n. s. 257 (1909).

The claim of a member of a mutual insurance corporation organized under § 9593, for a loss under his certificate of membership and insurance, is not a debt for which the trustees are liable, although they might be liable on claims for rent, supplies, salaries, etc.

Mfgs. Fire Assn. v. Lynchburg Drug Mills, 8 C. C. 112; 4 C. D. 350 (1893).

See *Kelly v. Bender*, 22 C. C. 144; 12 C. D. 181 (1901).

Strobridge v. Winchell, 7 Am. L. R. 743; 4 W. L. B. 408 (1879).

Nor does the fact that the certificate of insurance is *ultra vires* render the trustees liable if the certificate was issued in good faith.

Mfgs. Fire Assn. v. Lynchburg Drug Mills, 8 C. C. 112; 4 C. D. 350 (1893).

The liability of trustees applies to debts incurred during their term of office. *Brewing Co. v. Reverman*, 21 N. P. n. s. 193 (1917); *aff'd* by Court of Appeals; motion to certified record overruled, 15 O. L. R. 485.

A judgment and execution against the corporation is not a bar to an action against trustees based on their liability under this section. *Brewing Co. v. Reverman*, 21 N. P. n. s. 193 (1917); *aff'd* by Court of Appeals; motion to certify record overruled, 15 O. L. R. 485.

Actions. An action to subject the liability of trustees under § 8666 is governed as to procedure by G. C. § 8690. *Paper Co. v. Chevaliers*, 18 C. C. n. s. 195 (1907).

CAPITAL STOCK.

Section 8667. (Classes of stock.) If a corporation be organized for profit, it must have a capital stock, which may consist of common and preferred, or common only; but at no time shall the amount of preferred stock at par value exceed two-thirds of the actual capital paid in in cash or property. (R. S. Sec. 3235a; May 12, 1902, 95 v. 623.)

A corporation which is necessarily for profit can not be organized without a capital stock.

State v. Home Co-op. Union, 63 O. S. 547 (1900).

The stock of a corporation is not its property, and is not owned by it, but by the several stockholders. It owes the stock and does not own it. The stock is a liability of the corporation and not an asset.

Southern Gum Co. v. Laylin, 66 O. S. 578, 596 (1902).

Nat'l Bank v. Lake Shore, etc., R. Co., 21 O. S. 221, 230 (1871).

State v. Franklin Bank, 10 Ohio 91 (1840).

Statement of capital stock in articles of incorporation, see § 8625.

In an action for damages for breach of a written contract entitling the plaintiff to a certain compensation if his efforts resulted in a certain profit upon the "capital stock of the company", it was held that it could be shown by parol evidence that the words "capital stock" in the contract referred to common stock only, exclusive of preferred stock. *Miller v. Baker Co.*, 208 Fed. 190; 11 O. L. R. 557 (D. C. 1912).

Does the limit of this section apply to authorized preferred stock, or only to the issue of preferred stock? One view is that § 8625 places no limit on the amount of authorized preferred stock and that this section limits only the amount of preferred stock that may be issued and outstanding after incorporation. Opins. Atty. Gen. 1921, p. 1102; 15 Dep. Rep. 260.

Another view is that the limit applies to authorized preferred stock and that the par value of all the preferred stock may not exceed twice the par value of all the common stock. Opins. Atty. Gen. 1916, p. 1716.

This section does not apply to corporations organized under the no-par-value stock law. Opins. Atty. Gen. 1922, p. 260; 16 Dept. Rep. 35.

Under the no-par-value stock law, the number of shares of preferred stock may, at no time, exceed two-thirds of the total number of shares, common and preferred, outstanding. G. C. § 8728-1.

A foreign corporation entering the state need not adjust its capital stock to conform to this section. This section does not apply to foreign corporations. Opins. Atty. Gen. 1919, p. 590.

Section 8668. (Dividends on preferred stock.) When the capital stock is to be both common and preferred, it may be provided in the articles of incorporation that the holders of the preferred stock shall be entitled to yearly dividends of not more than eight per cent, payable quarterly, half yearly, or yearly out of the surplus profits of the company each year in preference to all other stockholders. Such dividends also may be made cumulative. (R. S. Sec. 3235a; May 12, 1902, 95 v. 623.)

Dividends on preferred stock may be paid out of surplus profits only.

G. C. § 8724.

Miller v. Ratterman, 47 O. S. 141, 158 (1890).

Painesville, etc., Ry. Co. v. King, 17 O. S. 534 (1867).

Mente v. Groff, 10 N. P. n. s. 148 (1910).

Cumulative or noncumulative. Before the enactment of this section it was held that dividends on preferred stock were cumulative, in the absence of a provision making them noncumulative.

Dayton, etc., R. Co. v. Shoemaker, 3 C. C. 473, 479; 2 C. D. 270, 273 (1888); affirming 18 W. L. B. 43.

Additional dividends. Where the articles of incorporation and stock certificates are silent as to dividends on preferred stock, the authorities are in conflict as to whether the preferred stockholders are entitled to participate in dividends declared after the stipulated dividend has been declared on the preferred and an equal dividend declared on the common. By some authorities the preferred stock does not participate in the additional dividends. Shimon v. National Screw & Tack Co., 18 N. P. n. s. 569; 26 L. D. 315 (1916).

According to older authorities, the preferred stock does participate.

Ryan v. Miami Valley R. Co., 10 Am. L. R. 263, 266 (C. P. 1881).

Fidelity Trust Co. v. Railroad, 215 Pa. St. 610 (1906).

A provision, in articles of incorporation, permitting preferred stockholders to participate in extra dividends after common stockholders have received dividends equal to the first dividend on preferred stock, is not in violation of § 8668. The limitation of this section is not violated

so long as the difference between the dividend paid on preferred and that paid on other stock does not exceed eight percent.

Rep. Atty. Gen. 1911-1912, pp. 95, 115.

Rep. Atty. Gen. 1907. p. 113.

Waiver of dividends. An agreement between all the stockholders of a corporation, whereby the preferred stockholders remitted all accumulated dividends, in consideration that the common stockholders pay an assessment of a certain amount, is valid and enforceable. *Dever v. Engineering Co.*, 5 Ohio App. 77; 24 C. C. n. s. 454 (1915); motion to certify record overruled, 13 O. L. R. 515.

Flexible divided rate when preferred stock issued in parts. The following provision in articles has been approved. (Opins. Atty. Gen. 1922, p. 918.)

"All the preferred stock herein authorized as and when issued is of equal priority and validity, and on a parity, except as to rate of dividend and redemption price, and possesses the following rights, powers, and privileges, and is subject to the limitations and restrictions as follows."

"Dividends. The holders of the preferred stock of the company shall be entitled to receive dividends out of the surplus profits of the company at the per centum per annum, and no more, which shall be fixed by the directors at the time of issue of any part of said preferred stock. The rate so fixed shall apply to such partial issue only and may be changed by the directors with reference to subsequent partial issues at the time of each issuance thereof. The dividend rate so fixed shall not be less than five percent nor more than eight percent per annum."

"Redemption. The preferred stock shall be subject to redemption in whole or in part, at the option of the board of directors, by giving _____ days' notice _____, upon payment of all accrued and unpaid dividends, and an amount, not less than par, for each share as shall have been fixed by the board of directors at the time of issue of each part of said preferred stock. The amount so fixed shall apply to such partial issue only, and may be changed by the directors with reference to subsequent partial issues at the time of issuance thereof."

Guaranty of dividends. Mortgage to secure. A guaranty of dividends on preferred stock is not a guaranty for payment in any event, but only in the event that dividends are earned.

Miller v. Ratterman, 47 O. S. 141 (1890).

A mortgage to secure dividends on preferred stock is subject to the condition that such dividends must be earned, although such condition may be apparently inconsistent with the mortgage.

Miller v. Ratterman, 47 O. S. 141 (1890).

Warren v. King, 108 U. S. 389, 398 (1883).

The verbal promise by the president of a corporation that a subscriber should receive certain dividends, is not a promise to answer for the debt, default or miscarriage of another; dividends not being a debt.

Moorehouse v. Crangle, 36 O. S. 130 (1880).

Section 8669. (Powers of corporation relative to common and preferred stock.) A corporation issuing both common and preferred stock may create designations, preferences, and

voting powers, or restrictions or qualifications thereof, in the certificate of incorporation, and if desired, preferred stock may be made subject to redemption at not less than par, at a fixed time and price, to be expressed in the stock certificates thereof.

Preferred stock may also be redeemed in whole or part by purchase thereof by the corporation or by exchanging the same for common stock, or be converted into common stock, upon such terms as from time to time may be proposed by the board of directors and accepted by the holders thereof. Preferred stock redeemed may be cancelled by the board of directors, and if so cancelled shall not be re-issued. A certificate of such cancellation shall be filed with the secretary of state, as a certificate of reduction. Thereupon the authorized capital stock of such corporation shall be reduced by the amount stated in said certificate. (107 v. 411; R. S. Sec. 3235a; 95 v. 623.)

In crease of capital by preferred stock. § 8698.

Preferred stock of railroad companies. §§ 8805, 8817.

It has been said that, in Ohio, preferred stock is substantially a liability, with rights inferior to general debts. *Miller v. Baker Co.*, 208 Fed. 190; 11 O. L. R. 557, 559 (D. C. 1912).

Articles may provide for preferred stock without "designations, preferences, and voting powers, or restrictions and qualifications thereof". In such a case, the preferred has, by § 8671, preference in assets over common stock, but in other respects it is not distinguishable from common stock. *Opins. Atty. Gen.* 1915, p. 1856.

Voting rights and restrictions. Preferred stock has equal voting rights with any other stock, unless such rights are restricted in the resolution by which the preferred stock was authorized. An agreement, understanding or belief to the contrary not expressed in such resolution is ineffective. *State v. Urschel*, 104 O. S. 172 (1922).

Preferred stock may be given exclusive voting rights. *Krell v. Piano Co.*, 14 Ohio App. 74 (1921); affirming 23 N. P. n. s. 193; motion to certify record overruled, 19 O. L. R. 125; *Opins. Atty. Gen.* 1919, p. 138.

The right to vote preferred stock may be entirely withheld.

Miller v. Ratterman, 47 O. S. 141 (1890).

Or, restricted to certain circumstances and conditions, as, when dividends are in default.

See *Ryan v. Miami, etc., Co.*, 10 Am. L. R. 263 (C. P. 1881).

Preferred stockholders may be given the exclusive right to vote for directors while the corporation is in arrears in payment of preferred dividends, or in payments into a sinking fund for the redemption of preferred stock. *Krell v. Piano Co.*, 14 Ohio App. 74 (1921); affirming 23 N. P. n. s. 193; motion to certify record overruled, 19 O. L. R. 125; *Opins. Atty. Gen.* 1919, p. 138; 17 O. L. R. 208.

Where, by the terms of the issue, preferred stockholders are given the right to choose six of the eleven directors of the corporation, a denial of such right by non-resident stockholders affects property rights in Ohio, and service by publication may be made on such non-resident stockholders. *Shinkle v. Dalton Co.*, 19 N. P. n. s. 104 (1916).

Change of unissued common stock into preferred or unissued preferred into common stock. After organization, by amendment to the articles of incorporation, unissued common stock may be changed into preferred stock, or unissued preferred stock may be changed into common stock. § 8719.

Before the amendment of § 8719 (107 v. 414) this could be accomplished only by unanimous consent of the stockholders. Opins. Atty. Gen. 1915, pp. 8, 127, 363, 1284.

Redemption. To redeem means to purchase back; to repurchase.

Miller v. Ratterman, 47 O. S. 141, 156 (1890).

Mannington v. Hocking Valley Ry. Co., 183 Fed. 133, 145; 8 O. L. R. 451, 466; 16 O. F. D. 552 (U. S. D. C. 1910).

After redemption, preferred stock can not be reissued, and no franchise (Willis) tax may be assessed thereon. Opins. Atty. Gen. 1918, p. 907.

The redemption of preferred stock, authorized by statute, is not a reduction of the corporation's capital stock by a purchase of its own shares.

Mannington v. Hocking Valley Ry. Co., 183 Fed. 133; 8 O. L. R. 451; 16 O. F. D. 552 (U. S. C. C. 1910); s. c., 9 N. P. n. s. 641; 20 L. D. 468.

The right to redeem preferred stock of a railroad company under § 8817 may be exercised by the directors.

Mannington v. Hocking Valley Ry. Co., 183 Fed. 133, 142, 146; 8 O. L. R. 451, 462, 467; 16 O. F. D. 552; (U. S. C. C. 1910); s. c., 9 N. P. n. s. 641; 20 L. D. 468 (C. P.).

The redemption of preferred stock will not be enjoined where plaintiff has no interest in the stock, although it is part of a conspiracy to oppress the plaintiff.

Gould v. C. & O. Ry., 10 N. P. n. s. 129 (1910).

For flexible redemption price when preferred stock issued in parts from time to time, see note to § 8668.

Issues of stock construed. Preferred stock or debt. Held to be preferred stock.

Miller v. Ratterman, 47 O. S. 141 (1890); reversing 22 W. L. B. 99.

Ryan v. Miami, etc., Co., 10 A. L. R. 263 (C. P. 1881).

Hamlin v. Toledo, etc., R. Co., 78 Fed. 664 (C. C. A. 1897).

Held to be a debt.

Burt v. Rattle, 31 O. S. 116 (1876).

College endowment stock, issued by corporation not for profit.

See Ohio College, etc., v. Rosenthal, 45 O. S. 183 (1887).

Bryant v. Ohio College, etc., 1 C. S. C. R. 307 (1871).

See also note to § 9927.

Distinct rights of different classes of stockholders. Parties to actions.

See Port Clinton, etc., Co. v. Cleveland, etc., Co., 13 O. S. 544

Section 8670. (Liability of holder of preferred stock.)

Upon the insolvency of the corporation no holder of preferred stock shall be liable for its debts until after the remedy against the common stockholders upon their liability, as provided by law, has been exhausted, and then only for such amount as remains unpaid. Such liability in no event shall

exceed that fixed by law for the common stock of such corporation. (R. S. Sec. 3235a; 95 v. 623.)

An action may be brought upon a subscription to preferred stock, before exhausting the liability of subscribers to common stock, where the corporation is insolvent, and the full amount of subscriptions to preferred stock will be necessary to pay the corporate debts. *Yoder v. Tubman*, 19 C. C. n. s. 225 (1911).

An agreement by the corporation to give shares of common stock free, as a bonus to a subscriber to preferred stock, does not release the subscriber from his obligation to pay for the preferred stock. *Yoder v. Tubman*, 19 C. C. n. s. 225 (1911).

Section 8671. (Rights of holders of preferred stock.)

On the insolvency or dissolution of the corporation, the holders of preferred stock shall be entitled to receive from the assets remaining after paying its liabilities, the full payment of its par value, before anything is paid to the common stock. (R. S. Sec. 3235a; 95 v. 623.)

There is no authority for inserting in articles of incorporation a statement limiting the statutory rights of preferred stockholders conferred by this section. *Opins. Atty. Gen.* 1918, p. 517.

Before the enactment of this section it was held that, where not prohibited by statute, preference might be given as to assets as well as dividends.

Hamlin v. Toledo, etc., Co., 78 Fed. 664 (C. C. A. 1897).

Continental Trust Co. v. Toledo, etc., Co., 86 Fed. 929 (C. C. 1898).

Toledo, etc., Co. v. Continental Trust Co., 95 Fed. 497 (C. C. A. 1899).

But such preference could be over other stock only; not over the rights of creditors.

Warren v. King, 108 U. S. 389 (1883).

Section 8672. (Certificate of stock.) Upon his demand therefor, of the president or secretary of the company, they shall execute and deliver to any stockholder a certificate showing the true amount of paid up stock therein, held by him. (R. S. Sec. 3254; April 14, 1884, 81 v. 196; R. S. 1880.)

A stockholder who has paid for his stock may, by a suit in equity, compel the issuance and delivery of a certificate, or he may sue for damages. But mandamus is not the proper remedy.

State v. Carpenter, 51 O. S. 83 (1894).

Freon v. Carriage Co., 42 O. S. 30 (1884).

A stockholder is only entitled to a certificate for such stock as is paid in full.

Cincinnati, etc., Co. v. Bank, 1 C. C. 199, 209; 1 C. D. 109 (1885).

State v. Davis, 85 O. S. 44 (1911).

Where all of the capital stock of a bank, organized under former statutes, was subscribed for, and only fifty percent paid thereon, the bank has no legal right to issue certificates to the stockholders. *Rep. Atty. Gen.* 1912, p. 688.

The assignee of a subscription may tender the amount due thereon and compel the corporation to issue a certificate.

Iron Railroad Co. v. Fink, 41 O. S. 321 (1884).

Certificates of stock generally, see note to § 8673.

Section 8673. (Record of certificates of stock.) The directors of such corporation, when organized, shall keep a record of all stock subscribed and transferred, and its secretary or recording officer shall register all subscriptions and transfers of stock. For that purpose a book shall be kept, and when a certificate of stock is assigned and delivered by a stockholder, the assignee thereof on demand may have it duly transferred therein by such officer, who at the same time shall enroll also the name of the assignee as a stockholder. The books and records of such corporation at all reasonable times shall be open to the inspection of every stockholder. (R. S. Sec. 3254; April 14, 1884, 81 v. 196; R. S. 1880.)

Transfers of stock on corporate books. See note to § 8673-1.

CERTIFICATES OF STOCK.

Certificates of stock are not "moneys" or "credits."

State v. Davis, 85 O. S. 44 (1911).

Distinguished from stock itself. There is a distinction between the stock and the certificate representing such stock. The certificate is not the stock itself but merely evidence of its ownership.

Bank v. Towle Mfg. Co., 67 O. S. 306, 314 (1902).

State v. Davis, 85 O. S. 44 (1911).

Person may be a stockholder without a certificate. A certificate is not necessary to constitute a person a stockholder. The person who appears on the books of a corporation as the owner of stock is entitled to vote and to receive dividends, although no certificates have been issued, or his certificates have been lost.

Simons Hardware Co. v. Stokes, 16 C. C. 145, 150; 8 C. D. 779 (1898).

Bank v. Towle Mfg. Co., 67 O. S. 306, 314 (1902).

Railroad Co. v. Robbins, 35 O. S. 483, 502 (1880).

Franklin Bank v. Commercial Bank, 36 O. S. 350, 355 (1881).

Norton v. Norton, 43 O. S. 509, 522 (1885).

National Bank v. Lake Shore, etc., R. Co., 21 O. S. 221 (1871).

Kreisser v. Ashtabula, etc., Co., 2 C. C. n. s. 597, 601; 14 C. D. 313 (1901).

Henderson v. Hogan, 1 W. L. B. 227 (Dist. Ct. 1876).

Officers authorized to execute certificates. The president and secretary are authorized and required to execute stock certificates. Such authority and duty are conferred by statute. (§ 8672).

Railway Co. v. Bank, 56 O. S. 351 (1897).

It is doubtful whether a corporation may designate another corporation to act as transfer agent of its stock. This section authorizes only the secretary or recording officer to register transfers.

Burch v. Cincinnati Trust Co., 12 N. P. n. s. 86, 91; 22 L. D. 6 (C. P. 1911); aff'd on other grounds, 14 C. C. n. s. 346.

Compare Robison v. Railroad, 13 L. D. 1.

LIABILITY OF CORPORATION ON CERTIFICATES ISSUED FRAUDULENTLY OR WITHOUT AUTHORITY.

Certificates issued to president or secretary. The liability of a corporation on certificates which have been fraudulently issued to an

officer, who is authorized to issue certificates, depends upon its negligence. Where the president of a corporation signed certificates in blank and left them with the secretary, who fraudulently issued them to himself and the directors exercised no supervision, the corporation was held liable.

Railway Co. v. Bank, 56 O. S. 351 (1897); affirming 29 W. L. B. 15.

But where a certificate was issued to the secretary of a corporation, who immediately pledged it back to the corporation to secure his indebtedness to it, and subsequently abstracted the certificate from the safe and pledged it to another person, the corporation was held not to be liable, there being no negligence.

Farmers Bank v. Diebold, etc., Co., 66 O. S. 367 (1902).

The same facts involved in Railway Co. v. Bank, 56 O. S. 351, were passed upon in the following cases:

Cincinnati, etc., Ry. Co. v. Third Nat. Bank, 1 C. C. 199; 1 C. D. 109 (1885).

Citizens' Nat. Bank v. Cincinnati, etc., Ry. Co., 11 W. L. B. 86 (1884).

First Nat. Bank v. Cincinnati, etc., Ry. Co., 16 W. L. B. 399 (1886).

Cincinnati, etc., Ry. Co. v. Rawson, 16 W. L. B. 423 (1886); affirmed, 25 W. L. B. 87.

Perin v. Cincinnati, etc., Ry. Co., 18 W. L. B. 382 (1887).

Cincinnati, etc., Ry. Co. v. Citizens' Nat. Bank, 22 W. L. B. 248 (1889); s. c., 56 O. S. 351.

Cincinnati, etc., Ry. Co. v. Citizens' Nat. Bank, 24 W. L. B. 198; s. c., 29 W. L. B. 15.

Overissued stock. Certificates of stock issued after the entire capital stock had been issued are spurious and void. An innocent purchaser or pledgee can not compel the corporation to transfer such stock to him. But the corporation is liable in damages to such purchaser or pledgee.

Railway Co. v. Bank, 56 O. S. 351 (1897).

Cook on Corporations, §§ 293, 426.

Certificates of stock of constituent company issued after consolidation. A certificate of stock of a corporation issued after its consolidation with another corporation is spurious. A stockholder in such constituent company who has had his stock transferred into that of the consolidated company is chargeable with knowledge of the facts, and can not be regarded as an innocent purchaser of such spurious stock, which he subsequently acquired.

Worthington v. C. C. Ry., 9 C. C. n. s. 433; 19 C. D. 321 (1904); aff'd, no rep., 75 O. S. 626.

Duty of purchaser or pledgee to make inquiry. As against the corporation, a prospective purchaser or pledgee of a certificate is not required to make inquiry beyond the genuineness of the certificate. Even where the certificate was issued to the secretary of the corporation no inquiry is necessary, in the absence of knowledge of fraud in its issue.

Railway Co. v. Bank, 56 O. S. 351, 379, 380 (1897).

Personal liability of president and secretary on certificates. A president signing a certificate which stated that the stock is "full paid and nonassessable," is not liable in damages to a person who purchased it in the open market, without inquiry, although the president knew that the stock was issued for property at an overvaluation.

Nutt v. Wheeler, 10 C. C. n. s. 217; 20 C. D. 86 (1907).

The president and secretary of a corporation are not personally

liable for a refusal to transfer stock. The liability is that of the corporation.

Snodgrass v. Morrison, etc., Co., 4 O. L. R. 622; 17 L. D. 497 (Super. Ct. Cin. 1907).

CORPORATE STOCK BOOKS.

Form. Sec. 8673 does not prescribe the form in which the records shall be kept.

Freon v. Carriage Co., 42 O. S. 30, 36 (1884).

It is not necessary that a book of any special kind be adopted as a stock record; but when a book is selected and used it becomes the stock book and transfers, to be valid, must be made upon it.

Harpold v. Stobart, 46 O. S. 397, 400 (1889).

Where no stock book is kept, the stubs of the certificate book may be resorted to for the purpose of ascertaining who the stockholders are. In such case the stub of the transferred certificate should show to whom the stock has been transferred.

Herrick v. Wardwell, 58 O. S. 294 (1898).

But see *State B. & T. Co. v. Mitchell Co.*, 14 N. P. n. s. 57, 63, 64 (1913).

Evidence as to who are stockholders. In an action against a corporation, by the administrator of a stockholder, to compel the transfer of stock, an entry in the stock ledger showing a prior transfer of the same stock, without the surrender of the certificate, is not admissible in evidence, unless it appears that the stockholder knew of or acquiesced in the book entry. *Russell v. Bank*, 26 O. C. n. s. 529 (1917); motion to certify record overruled, 15 O. L. R. 115; s. c., 102 O. S. 248.

Under the former double liability law, books were held admissible to show that a person who claimed to have transferred his stock and to be no longer a stockholder, was in fact still a stockholder.

Harpold v. Stewart, 46 O. S. 397 (1889).

Herrick v. Wardwell, 58 O. S. 294 (1898).

See *Kreisser v. Ashtabula, etc., Co.*, 2 C. C. n. s. 597, 601; 14 C. D. 313 (1901).

Under § 8686 where a certificate is properly tendered for transfer but the entry is not made in the corporate books, the transferrer is not liable.

State B. & T. Co. v. Mitchell, 14 N. P. n. s. 49 (C. P. 1913).

As against a transferee who denies having bought the stock or authorized the transfer, the corporate records showing the transfer are not sufficient proof of acceptance of the transfer so as to render the transferee liable for calls and assessments.

Tripp v. Appleman, 35 Fed. 19; 6 O. F. D. 71 (C. C. Ohio 1888).

Who may register transfers. It is doubtful whether a corporation can appoint another corporation as a transfer agent and require certificates to be presented to such transfer agents. Section 8673 authorizes only the secretary or recording officer to register transfers.

Burch v. Cincinnati Trust Co., 12 N. P. n. s. 86, 91; 22 L. D. 6 (1911); aff'd on other grounds, 14 C. C. n. s. 346.

See G. C. § 710-158, which authorizes trust companies to act as agent or trustee for registering, countersigning or transferring certificates of stock.

RIGHT OF STOCKHOLDERS TO INSPECT BOOKS OF CORPORATION.

A stockholder has the right to have the inspection made by a proper agent and to take copies from the books and records. More than one inspection may be made.

Cincinnati Volksblatt Co. v. Hoffmeister, 62 O. S. 189 (1900).

Blymyer v. Blymyer, etc., Co., 5 N. P. 71 (Super. Ct. Cin. 1898).

All the books may be examined.

Caldwell v. Hill, etc., Co., 2 O. L. R. 294; 17 L. D. 801 (Super Ct. Cin.).

Preferred stockholders are entitled to examine the corporate books.

Pearce v. Atkins, 13 N. P. n. s. 580 (1913).

The motive or purpose of a stockholder in demanding an inspection is immaterial.

Cincinnati Volksblatt Co. v. Hoffmeister, 62 O. S. 189 (1900).

Blymyer v. Blymyer, etc., Co., 5 N. P. 71 (Super. Ct. Cin. 1898).

The only limitation of the right is that the inspection must be at reasonable times.

Cincinnati Volksblatt Co. v. Hoffmeister, 62 O. S. 198 (1900).

A stockholder may inspect the books although the corporation is in the hands of a receiver.

Rep. Atty. Gen., 1911-1912, p. 747.

What corporations are subject to inspection by stockholders.

Trust company. The word "such" in § 8673 does not limit the right of inspection to any class of corporations. A stockholder in a trust company may inspect its books.

Kennon v. Ohio Trust Co., 4 O. L. R. 352; 16 L. D. 733 (Super. Ct. Cin. 1906); s. c., 3 O. L. R. 424; 16 L. D. 339.

In a suit to enforce such right of inspection beneficiaries of trusts administered by the trust company are not necessary or proper defendants.

Kennon v. Ohio Trust Co., 4 O. L. R. 352; 16 L. D. 733 (Super. Ct. Cin. 1906).

Corporation not for profit. Sec. 8673 does not apply to corporations not for profit.

Ohio Humane Soc. v. Biles, 11 C. C. n. s. 384 (1908).

Foreign corporation. Where a foreign corporation has complied with §§ 178 and 183, its stockholders have, by § 5508, all the rights of inspection which stockholders of an Ohio corporation have. American Co. v. Whitney, 19 C. C. n. s. 584 (1912).

Where the books of a foreign corporation were kept in an office maintained by it in Ohio, it was held that the right of stockholders to inspect its books, granted by a statute of its home state, could be enforced in Ohio.

State v. Farmer, 7 C. C. 429 (1892).

Contra, Riggs v. Whippey, etc., Co., 7 O. L. R. 446 (C. P. 1909).

Compare State v. Unida, etc., Co., 13 C. C. n. s. 100; 22 C. D. 54 (1910).

A suit to enjoin a foreign corporation from refusing a stockholder an inspection of its books can not be removed to federal court on the ground of diverse citizenship, as the right of the stockholder can not be ascertained or calculated in money.

Whitney v. American Shipbuilding Co., 10 O. L. R. 383; 197 Fed. 777 (U. S. D. C. 1911).

National bank. The common law right, for proper purposes and under reasonable regulations as to place and time, to inspect the books

of the corporation, may be exercised by a stockholder of a national bank. Such right may be enforced in state courts.

Guthrie v. Harkness, 199 U. S. 148 (1905).

Remedy and pleading. Injunction, and not mandamus, is the proper remedy.

Cincinnati Volksblatt Co. v. Hoffmeister, 62 O. S. 189 (1900).

Blymyer v. Blymyer, etc., Co., 5 N. P. 71 (Super. Ct. Cin. 1898).

Ratcliff v. Auto Co., 20 N. P. n. s. 39 (1917).

A petition which alleges that the plaintiff is a stockholder; that he has requested the corporation to allow him to inspect the books and records of the corporation, and fix a reasonable time for the same, which request has been refused, states a cause of action.

Cincinnati Volksblatt Co. v. Hoffmeister, 62 O. S. 189 (1900).

The details for the request for inspection, whether it was oral or in writing, and the time, place and person upon whom made, need not be alleged.

Kennon v. Ohio Trust Co., 3 O. L. R. 424; 16 L. D. 339 (Super. Ct. Cin. 1905).

A petition to enforce the right of inspection does not state a cause of action against the president individually, where the only allegation as to him is that he is president. Pearce v. Atkins, 13 N. P. n. s. 580 (1913).

Inspection of books under § 11552. See Arbuckle v. Woolson Spice Co., 21 C. C. 348; 11 C. D. 743 (1901); Richards v. Bunte, 15 C. C. n. s. 401 (1908).

An order under § 11552 permitting a plaintiff to inspect the books of defendant corporation is not a final order reviewable in error. Kleybolte v. Railway Co., 11 L. D. 817 (Super Ct. Cin. 1896).

Who are chargeable with notice of contents of corporate books and records.

Stockholders. A stockholder is not bound to have knowledge of the contents of the corporate records and books, although he had the right of inspection. Heintzman v. Tenacity, etc., Co., 4 O. L. R. 553; 17 L. D. 554 (Super Ct. Cin. 1906); Greenville Gas Co. v. Reis, 54 O. S. 549, 558 (1896).

Directors.. See note to § 8660. *Duties of directors.*

Section 8673-1. (Transfer of title to shares.) Title to a certificate and to the shares represented thereby can be transferred only.

(a) By delivery of the certificate indorsed either in blank or to a specified person by the person appearing by the certificate to be the owner of the shares represented thereby, or

(b) By delivery of the certificate and a separate document containing a written assignment of the certificate or a power of attorney to sell, assign, or transfer the same or the shares represented thereby signed by the person appearing by the certificate to be the owners of the shares represented thereby. Such assignment or power of attorney may be either in blank or to a specified person.

The provisions of this section shall be applicable although the charter or articles of incorporation or code of regulations or by-laws of the corporation issuing the certificate and the certificate itself, provide that the shares represented thereby shall be transferable only on the books of the corporation or shall be registered by a registrar or transferred by a transfer agent. (June 7, 1911, 102 v. 500, § 1.)

- I. Uniform Stock Transfer Act, p. 1064.
- II. Assignment of stock by separate instrument without transfer of certificate, p. 1064.
- III. Ohio decisions as to transfer of certificates, p. 1064.
- IV. Transfer or registry on the books of the corporation, p. 1064.
- V. Consequences of failure to present stock for registry, p. 1064.
- VI. Effect of § 8673-1, p. 1065.
- VII. Right of transferee to have stock registered in his name, p. 1065.
- VIII. Defalcation of transfer agent. Liability of corporation, p. 1065.
- IX. What the corporation may require before registry of transfers.
 - A. Evidence of genuineness of indorsement and identity of parties, p. 1065.
 - B. Surrender of original certificate, p. 1066.
 - C. Certified copy of order of probate court authorizing transfer by executor, p. 1066.
- X. Remedy for refusal of corporation to register transfers, p. 1066.
- XI. Measure of damages, p. 1067.
- XII. Presumptions and burden of proof as to validity of issue of stock, p. 1067.
- XIII. Joinder of parties and actions, p. 1067.
- XIV. Defenses of corporation.
 - A. Non-compliance with by-law regulating transfers, p. 1068.
 - B. Certificate issued without consideration to qualify director, p. 1068.
 - C. Lien of corporation on stock reserved in certificate, p. 1068.
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 - E. Statute of limitations, p. 1068.
 - F. Waiver of right to damages, p. 1068.
 - G. That third persons claim to own the stock, p. 1069.
- XV. To whom stock may be transferred on the corporate books.
 - A. Pledgee, p. 1069.
 - B. Trustee, p. 1069.
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 - E. Guardian, p. 1070.
- XVI. Liability of transferee for unpaid balance on stock, p. 1070.
- XVII. Rights of equitable owners, p. 1070.
- XVIII. Transfer reserving future dividends, p. 1070.

I. UNIFORM STOCK TRANSFER ACT.

The Uniform Stock Transfer Act recommended by the Commissioners of Uniform State Laws for general adoption is contained in sections 8673-1 to 8673-24 inclusive. It applies only to certificates issued after July 1, 1911. Its effect is to place certificates of stock on the basis of negotiable instruments. The act has been adopted in Louisiana, Maryland, Massachusetts, Michigan, New Jersey, New York, Ohio, Pennsylvania, Tennessee, Wisconsin and Alaska.

II. ASSIGNMENT OF STOCK BY SEPARATE INSTRUMENT WITHOUT TRANSFER OF CERTIFICATE.

It should be noted that under this section an assignment of stock by a separate instrument without a delivery of the certificate does not transfer the title. Such assignment is, in effect, merely a contract to transfer under § 8673-10. Rep. American Bar Assn. (1910), 575,576.

III. OHIO DECISIONS AS TO TRANSFER OF CERTIFICATES.

The assignment of a certificate of stock with power of attorney to have it transferred on the books of the corporation gives to the assignee the status of a legal holder of the stock. *Dueber, etc., Co. v. Dougherty*, 62 O. S. 589, 595 (1900); *Andrews v. Watson*, 12 C. D. 668 (1887); s. c., 12 C. D. 692 (1890); aff'd, 51 O. S. 617. Compare *Carll v. Little Miami R. Co.*, 13 C. C. n. s. 598 (1911).

A certificate may be assigned and an attorney appointed in blank. *Lee v. Citizens' N. B.*, 2 C. S. C. R. 298 (1872); *Cincinnati, etc., Ry. Co. v. Rawsons*, 16 W. L. B. 423 (Super Ct. Cin. 1886); aff'd, Supreme Court, without report, 25 W. L. B. 87; *Krebs v. Forbriger*, 21 W. L. B. 313 (Super Ct. Cin. 1889).

A power of attorney endorsed on a certificate by a husband in favor of his wife, on the same day on which the certificate was issued to him, was held to expire at her death. *Carll v. Railroad*, 13 C. C. n. s. 598 (1911).

Under a contract for the sale of stock, a tender of the certificates, properly endorsed by the owner, either in blank or direct to the purchaser, is sufficient. Transfer on the corporate books is unnecessary. *Laundry Co. v. Whitmore*, 92 O. S. 44 (1915); *Sprague v. Munger*, 17 C. C. n. s. 130 (1910); *Hager v. Reed*, 11 O. S. 626 (1860).

IV. TRANSFER OR REGISTRY ON THE BOOKS OF THE CORPORATION. HOW MADE.

The transfer book of the corporation should be signed by the transferer personally, or by his attorney in fact. In practice the name of the secretary or transfer agent of the corporation is usually inserted in the power of attorney on the certificate of stock. See § 8673.

V. CONSEQUENCES OF FAILURE TO PRESENT STOCK FOR REGISTRY.

As against the corporation the transferee does not become a stockholder until he presents the certificate for transfer on the corporate books. Until then he is an equitable holder merely. The registered owner is entitled to vote and to receive dividends. § 8673-3. *Railway Co. v. Bank*, 68 O. S. 582 (1903); *Railroad Co. v. Robbins*, 35 O. S. 483 (1880); *Schmuck v. Crume, etc., Co.*, 7 N. P. n. s. 24;

19 L. D. 819 (C. P. 1905); aff'd, 78 O. S. 409; *Norton v. Norton*, 43 O. S. 509, 522-23 (1885); *Haldeman v. Hillsborough, etc., R. Co.*, 2 Handy 101 (Super Ct. Cin. 1855); *Armstrong v. Herancourt Brewing Co.*, 26 W. L. B. 39 (C. P. 1891).

Notices of proposed corporate action on such matters as a proposed consolidation, or a sale of the entire corporate property, are properly sent by the corporation to the persons registered on its books as the owners. A person who holds certificates, without transfer on the corporate books, is not entitled to be notified of, or to participate in, such proceedings. *Railway Co. v. Bank*, 68 O. S. 582 (1903); *Schmuck v. Crume, etc., Co.*, 7 N. P. n. s. 24; 19 L. D. 819 (C. P. 1905); aff'd, 78 O. S. 409; *In re S. & S. Mfg. Co.*, 246 Fed. 1005; 16 O. L. R. 163 (D. C. Ohio 1917).

The lien of a corporation on stock, expressly reserved in the certificates, may be asserted against a transferee who received the certificates before, but did not present them for transfer until after the original holder become indebted to the corporation. *Stafford v. Produce Exch. Bkg. Co.*, 61 O. S. 160 (1899).

VI. EFFECT OF § 8673-1.

The intention of this section is to make the certificate the representative of the shares and to make a transfer on the corporate books like the recording of a deed of real estate. *Rep. American Bar Assn.* (1910), 574.

VII. RIGHT OF TRANSFEREE TO HAVE STOCK REGISTERED IN HIS NAME.

A purchaser or pledgee of stock, holding a certificate properly indorsed is entitled, upon presenting such certificate to the corporation, to have the stock transferred to him on the corporate books and to have a new certificate issued to him. *Cincinnati, etc., Ry. Co. v. Rawson*, 16 W. L. B. 423 (Super Ct. Cin.); aff'd by Supreme Court without report, 25 W. L. B. 87; *Railway Co. v. Bank*, 56 O. S. 351 (1897); *Dayton N. B. v. Merchants N. B.*, 37 O. S. 208, 215 (1881); § 8673.

VIII. DEFALCATION OF TRANSFER AGENT. LIABILITY OF CORPORATION.

Where a corporation made it possible for its transfer agent to mix stock held by him as trustee with treasury stock, causing loss to the owners of stock entrusted to him, the corporation is liable to the equitable owners for such of the stock as was returned to the treasury of the company. *Robison v. Railway Co.*, 24 C. C. n. s. 569 (1904).

IX. WHAT THE CORPORATION MAY REQUIRE BEFORE REGISTRY OF TRANSFERS.

A. Evidence of genuineness of indorsement and identity of parties. The corporation may require satisfactory evidence of the identity of the parties and the genuineness of the assignment and power of attorney. But when these are established it can not arbitrarily refuse to make the transfer. *Krohn v. Central, etc., Co.*, 4 N. P. n. s. 270; 6 L. D. 552 (C. P. 1897); *Oliver v. Cincinnati, etc., Co.*, 1 Hosea 457 (Super Ct. Cin.); s. c., 3 O. L. R. 53, 607; aff'd, 73 O. S. 386. See § 8673-11.

Where certificates of a deceased stockholder are presented for transfer, and the officers are informed of the existence of a will, they are chargeable with notice of the provisions of the will which affect

the title to the stock or the right to transfer it. *Allen v. Globe Ins. Co.*, 19 W. L. B. 198 (Super Ct. Cin. 1888) aff'd, Supreme Court, 32 W. L. B. 374.

B. Surrender of original certificate. Where a certificate provides that the stock is transferable "on surrender of the certificate" the corporation may refuse to transfer the stock on its books and to issue new certificates, until the original certificate evidencing the same has been surrendered. *Railroad Co. v. Robbins*, 35 O. S. 483 (1880); *Lee v. Citizens Bank*, 2 C. S. C. R. 298 (1872); § 8673-13.

A corporation is not liable to the equitable owner of stock for its value, where certificates therefor are outstanding in the hands of a third person, who claims to be the owner. *National Bank v. Lake Shore, etc., Ry. Co.*, 21 O. S. 221 (1871).

A corporation which issues a new certificate without a surrender of the original certificate, is liable to the holder of the original certificate, although the new certificate was issued under the belief that the original had been lost. The corporation must either replace the stock or account for its value. *Railroad Co. v. Robbins*, 35 O. S. 483 (1880).

The rights of the holder of the original certificate may be barred by laches. Bank stock was, without a surrender of the original certificate, transferred to another person in 1867, and R., the original holder, resided in the same county until 1889 when he removed to Oregon and died in 1895. In 1911 the original certificate was found among his papers, an administrator was appointed and suit brought against the bank. Between 1862 and 1895 dividends were declared and sometimes advertised in newspapers published in the county. R. made no claim for dividends at any time after 1867. Held, the claim was barred by laches. *Russell v. Bank*, 102 O. S. 248 (1921). See *Stoltz v. Carroll*, 99 O. S. 289 (1919).

The corporation is not liable for dividends paid to the registered owner before the certificate was presented for transfer. *Railroad Co. v. Robbins*, 35 O. S. 483 (1880).

Where certificates have been lost the corporation may require a bond of indemnity before issuing a new certificate. § 8673-17; *Hof v. Western German Bank*, 6 W. L. B. 665, 697 (Dist. Ct. 1881); *Farmers Bank v. Diebold, etc., Co.*, 66 O. S. 376 (1902).

C. Certified copy of order of probate court authorizing transfer by executor. A corporation can not require a certified copy of an order of the probate court of the county, in which the principal office of such corporation is located, authorizing an executor to make the transfer. *Bureh v. Cincinnati Trust Co.*, 12 N. P. n. s. 86 (1911); aff'd, 14 C. C. n. s. 346. *Contra. Humphries v. Loomis*, 18 C. C. n. s. 529 (1911), holding that a purchaser of stock belonging to a decedent's estate, had a right to require proof of the authority of the executor to sell and transfer the same.

X. REMEDY FOR REFUSAL OF CORPORATION TO REGISTER TRANSFERS.

Where a corporation wrongfully refuses to transfer stock on its books and to issue a new certificate to a person entitled thereto, his remedy is in equity to enforce the issue and delivery of such certificate, or an action against the corporation for damages, either of which he may pursue at his election. *State v. Carpenter*, 51 O. S. 83 (1894); *Iron R. Co. v. Fink*, 41 O. S. 321 (1884); *Krohn v. Central*,

etc., Co., 4 N. P. 270; 6 L. D. 552 (C. P. 1897); *Burch v. Cincinnati Trust Co.*, 12 N. P. n. s. 86 (C. P. 1911); *aff'd*, 14 C. C. n. s. 346.

The plaintiff may in his petition ask for relief in the alternative, for the issue and delivery of a certificate, or damages in lieu thereof. *State v. Carpenter*, 51 O. S. 83, 89 (1894). See *Railroad Co. v. Robbins*, 35 O. S. 483.

Mandamus is not the proper remedy. *State v. Carpenter*, 51 O. S. 83 (1894); *Freon v. Carriage Co.*, 42 O. S. 30 (1884); *s. c.*, 11 W. L. B. 103; *Richardson v. Grand View Min. Co.*, 1 W. L. B. 140 (Dist. Ct. 1876).

The president and secretary are not personally liable for a refusal to transfer stock. The liability is that of the corporation. *Snodgrass v. Morrison, etc., Co.*, 4 O. L. R. 622; 17 L. D. 497 (Super. Ct. Cin. 1907).

Wrongful refusal to transfer stock amounts to a conversion. *Andes Ins. Co. v. Waters*, 1 W. L. B. 172 (Super. Ct. Cin. 1876).

XI. MEASURE OF DAMAGES.

The damages are not limited to the market value of the stock, but the transferee may recover its actual value, which may be shown by the value of the property and business of the corporation, its good will and dividend earning capacity. *State v. Carpenter*, 51 O. S. 83, 88 (1894); *Freon v. Carriage Co.*, 42 O. S. 30 (1884).

XII. PRESUMPTIONS AND BURDEN OF PROOF AS TO VALIDITY OF ISSUE OF STOCK.

Where a certificate bears the genuine signatures of the president and secretary, and the corporate seal, the issue of such stock is presumed to be regular and valid. The burden of proving its invalidity rests on the corporation, although the certificate was issued to the secretary. *Cincinnati, etc., Ry. Co. v. Rawson*, 16 W. L. B. 423 (Super. Ct. Cin. 1886); *aff'd*, no rep., 25 W. L. B. 87; *Railway Co. v. Bank*, 56 O. S. 351; *Perin v. Railway Co.*, 18 W. L. B. 382 (Super. Ct. Cin. 1887); *Citizens' N. B. v. Railway Co.*, 11 W. L. B. 86 (Super Ct. Cin. 1884).

XIII. JOINDER OF PARTIES AND ACTIONS.

The transferrer of the stock is not a necessary party to a suit to compel a transfer of stock, unless he claims some interest therein. *Krohn v. Central, etc., Co.*, 4 N. P. 270; 6 L. D. 552 (C. P. 1897).

But the corporation may make all persons claiming any interest in the stock parties to the action. *Lahman v. Cincinnati, etc., Co.*, 8 N. P. 211 (Super. Ct. Cin. 1901). See *Dayton N. B. v. Merchants N. B.*, 37 O. S. 208 (1881).

The president and secretary are not proper parties defendant. *Snodgrass v. Morrison, etc., Co.*, 4 O. L. R. 622; 17 L. D. 497 (Super. Ct. Cin. 1907).

Nor a transfer agent.

Burch v. Cincinnati Trust Co., 12 N. P. n. s. 86 (1911); *aff'd*, 14 C. C. n. s. 346.

Other equitable relief may be sought in the same action, as, an order for the inspection of the corporate books by the stockholder.

Arbuckle v. Woolson Spice Co., 21 C. C. 356 (1901).

See *Iron R. Co. v. Fink*, 41 O. S. 321 (1884).

Right of corporation to join in one action all holders of certificates wrongfully issued by an officer, to remove cloud on the title of genuine certificates and to prevent a multiplicity of suits.

See *Railway Co. v. Bank*, 56 O. S. 351 (1897).

XIV. DEFENSES OF CORPORATION.

A. Noncompliance with by-law regulating transfers. A by-law prohibiting transfers of stock to persons not stockholders, until the board of directors had been notified and given a reasonable time in which to purchase the stock, is invalid. *Supply Co. v. Harvey*, 16 C. n. s. 42 (1910); *aff'd* no rep. 82 O. S. 390.

But a by-law of a Delaware corporation was held valid, which required stockholders to notify the directors before selling their stock, and give the directors thirty days in which to sell the stock to certain designated classes of persons whose occupations might render them valuable in extending the corporate business. *Nicholson v. Brewing Co.*, 82 O. S. 94 (1910).

A by-law prohibiting the transfer of stock which has been paid by note and mortgage is unreasonable and was held not to justify a refusal to transfer.

Andes Ins. Co. v. Waters, 1 W. L. B. 172 (Super. Ct. Cin. 1876).

See notes to §§ 8701 and 8702.

B. Certificate issued without consideration to qualify directors. It is no defense against a pledgee of a stock certificate, that the certificate was issued to the pledgor to qualify him as a director, without consideration, and under an agreement to surrender the certificate on ceasing to be a director, where the pledgee had no notice thereof.

Dueber, etc., Co. v. Dougherty, 62 O. S. 589 (1900).

C. Lien of corporation on stock reserved in certificate. A corporation may, by express stipulation in the certificate, reserve a lien on the stock to secure indebtedness of the original holder to it. This lien may be asserted against a purchaser who received the certificate before, but did not present it for transfer until after the original holder became indebted to the corporation.

Stafford v. Produce Exch. Bkg. Co., 61 O. S. 160 (1899).

See § 8673-15 and note.

See also *State v. Davis*, 85 O. S. 44 (1911).

But where the lien is not reserved in the certificate, although provided for by by-laws, a bona fide purchaser or pledgee takes the certificate free from such lien.

Lee v. Citizens N. B., 2 C. S. C. R. 298 (1872).

§ 8673-15.

D. Improper motive or bad faith of transferee. A corporation can not refuse to transfer stock because of the motive which prompted the transferee to acquire it.

Nicholson v. Franklin Brewing Co., 82 O. S. 94, 110 (1910).

E. Statute of limitations. The statute of limitations does not begin to run against a transferee of stock until a demand has been made on the corporation for a transfer, and has been refused.

Iron R. Co. v. Fink, 41 O. S. 321 (1884).

Railroad Co. v. Robbins, 35 O. S. 483 (1880).

Larwill v. Burke, 19 C. C. 449; 10 C. D. 579 (1900).

Where new certificates were issued without a surrender of the original certificates, the statute does not begin to run against the holder of the original certificates until a demand, or until he had notice of the transfer to the other parties.

Railroad Co. v. Robbins, 35 O. S. 483 (1880).

F. Waiver of right to damages. Where the plaintiff subsequently collected dividends, accepted a new certificate of stock and paid an assessment, the right to recover damages was held to be waived.

Andes Ins. Co. v. Waters, 1 W. L. B. 172 (Super. Ct. Cin. 1876).

G. That third persons claim to own the stock. Where more than one party claims to own the stock, the corporation, by refusing to assume the peril of deciding between the contending claimants, ought not to be held liable as a wrongdoer for the value of the stock.

National Bank v. Lake Shore, etc., Co., 21 O. S. 221, 232 (1871).

But there must be a real controversy.

See Dayton N. B. v. Merchants N. B., 37 O. S. 208, 215 (1881).

The bankruptcy of the original stockholder, and appointment of a trustee in bankruptcy, does not justify a corporation in refusing to transfer the stock to a pledgee, who had received the certificate prior to such bankruptcy.

But where the trustee in bankruptcy became a party defendant, and contested the validity of the pledge, which was decided in favor of the pledgee, and an order of sale granted, the court can not render a deficiency judgment against the corporation.

Dayton N. B. v. Merchants N. B., 37 O. S. 208 (1881).

See Oliver v. Cincinnati, etc., Co., 1 Hosea 457 (Super. Ct. Cin.); s. c., 3 O. L. R. 53, 607; aff'd, 73 O. S. 386.

The corporation may bring in, as parties defendant, all persons claiming an interest in the stock.

Lahman v. Cincinnati, etc., Co., 8 N. P. 211 (Super. Ct. Cin. 1901).

Before the passage of the Uniform Act it was held that a corporation was bound to respect the rights of equitable owners from the time it received notice thereof.

Conant v. Reed, 1 O. S. 298 (1853).

Andrews v. Watson, 12 C. D. 686 (1887); aff'd, 51 O. S. 617.

XV. TO WHOM STOCK MAY BE TRANSFERRED ON THE CORPORATE BOOKS.

A. Pledgee. A pledgee of stock, holding certificates properly indorsed, is entitled to have the stock registered in his name on the corporate books.

Railway Co. v. Bank, 68 O. S. 582, 599 (1903).

Dayton N. B. v. Merchants N. B., 37 O. S. 208, 215 (1881).

Cincinnati, etc., Ry. Co. v. Rawson, 16 W. L. B. 423 (Super. Ct. Cin. 1886); aff'd, 25 W. L. B. 87.

B. Trustee. A stockholder has the right, for a proper purpose, to transfer his stock to a trustee.

State v. Railway Co., 6 C. C. 415; 3 C. D. 518 (1892); aff'd, 49 O. S. 668.

See note to § 8647. *Voting trusts.*

C. A corporation. A corporation may, without liability, refuse to transfer stock on its books to another corporation which is not authorized by law to acquire or hold such stock.

Franklin Bank v. Commercial Bank, 36 O. S. 350 (1881).

Power of corporation to acquire and hold stock in other corporations.

See § 8683.

Power to acquire its own stock. See note to § 8627.

D. Fictitious person. A transfer to a fictitious person is void, and leaves the title in the transferor.

Krohn v. Central, etc., Co., 4 N. P. 270; 5 L. D. 113 (C. P. 1897).

Muskingum, etc., Co. v. Ward, 13 Ohio 120 (1844).

See Gaff v. Flesher, 33 O. S. 107, 112 (1877).

E. Guardian. A guardian, who has possession of a certificate of stock belonging to estate of the deceased mother of his wards, has no authority to exchange it for a certificate made out to himself.

First N. B. v. Merchants Bank, 7 N. P. 381 (C. P.).

XVI. LIABILITY OF TRANSFEREE FOR UNPAID BALANCE ON STOCK.

A purchaser of stock from another person at par is not liable for an unpaid balance unless he had knowledge thereof. He is entitled to the presumption that the stock has been full paid. A statement on the certificate that it is "full paid" is a representation by the corporation to that effect and the purchaser need not inquire further.

Roebing, etc., Co. v. Shawnee, etc., Co., 4 N. P. n. s. 113; 17 L. D. 8 (C. P. 1906); aff'd, 78 O. S. 408.

XVII. RIGHTS OF EQUITABLE OWNERS.

Prior to the passage of the Uniform Act it was held that the corporation was bound to respect the rights of equitable owners from the time it received notice thereof.

Conant v. Reed, 1 O. S. 298 (1853).

Andrews v. Watson, 12 C. D. 686 (1887); s. c., 12 C. D. 692 (1890); aff'd, 51 O. S. 617.

Prout v. Post, 12 L. D. 141 (C. P.).

See Provident, etc., Co. v. Voight, 13 C. C. n. s. 267 (1910).

One of two conflicting equitable owners may, by acquiring the legal title, secure priority over the other where he acquired his equitable interest without notice of the earlier equity, although he had such notice at the time he acquired the legal title.

Dueber, etc., Co. v. Daugherty, 62 O. S. 589 (1900).

One who takes an assignment of stock, with notice of a prior assignment which conveyed the legal title, acquires no interest therein.

Creed v. Lancaster Bank, 1 O. S. 1 (1852).

XVIII. TRANSFER RESERVING FUTURE DIVIDENDS.

It has been held that in a transfer of stock no valid reservation can be made of future dividends.

Marble v. Van Wert N. B., 3 C. C. 464; 2 C. D. 265 (1888).

Section 8673-2. (Powers of infant, trustee, executor, etc., not enlarged.) Nothing in this act shall be construed as enlarging the powers of an infant or other persons lacking full legal capacity, or of a trustee, executor or administrator, or other fiduciary, to make a valid indorsement, assignment or power of attorney. (June 7, 1911, 102 v. 501, § 2.)

The uniform stock transfer act applies to trustees, executors, administrators and other fiduciaries, where the validity of the transfer does not depend on the endorsement of the fiduciary. Stoltz v. Carroll, 99 O. S. 289 (1919).

Duty and liability of corporation in registering transfer of stock belonging to decedent's estate, under inheritance tax law. §§ 5348-2, 5348-3.

A corporation which has issued stock to one as trustee is bound to inquire into his authority to dispose of it, before registering the transfer on its books. Fuller v. Railway, 8 N. P. 605 (1901).

Power of executor to transfer stock. An executor or administrator of the estate of a deceased stockholder, when properly authorized, may execute an assignment of the stock. But an executor can not execute a power of attorney for the sale of stock delegating to the attorney discretionary powers entrusted to the executor.

Allen v. Globe Ins. Co., 19 W. L. B. 198 (Super. Ct. Cin. 1888); *aff'd*, 32 W. L. B. 374.

An exchange of stock, by an executor, not authorized by the will or an order of court, is void.

Marriot v. Railway, 16 L. D. 135 (C. P. 1905); *s. c.*, 10 C. C. n. s. 573, 575.

An order of the probate court directing an executor to sell stock "at its market value" is not a sufficient compliance with G. C. § 10704 which requires a minimum price to be fixed in the order.

Burch v. Cincinnati Trust Co., 14 C. C. n. s. 346 (1911); *contra*, *s. c.*, 12 N. P. n. s. 86; 22 L. D. 6 (C. P. 1911).

But such a defect does not impair the title of a purchaser from the executor under such order, where the sale was made in good faith, at the market value, without fraud or collusion, and the proceedings in all other respects conformed to the statute.

Burch v. Cincinnati Trust Co., 14 C. C. n. s. 346 (1911); *affirming* 12 N. P. n. s. 86; 22 L. D. 6.

A purchaser of stock belonging to a decedent's estate may refuse to accept it until furnished proof of the authority of the executor or administrator to sell and transfer the same. *Humphries v. Loomis*, 18 C. C. n. s. 529 (1911).

Compare Burch v. Trust Co., 12 N. P. n. s. 86; 22 L. D. 6; holding that a corporation had no right to require a certified copy of the order of the probate court authorizing the transfer, before making the transfer on the corporate books (affirmed on other grounds, 14 C. C. n. s. 346).

A widow, executrix of her husband's will and a life tenant of stock belonging to the estate, with power of sale, has no authority to give an option to purchase the stock at her death. *Carnes v. McAfee*, 11 N. P. n. s. 517; 24 L. D. 487 (1911).

Proxies given by executor or infant. An infant can not give a valid proxy. *State v. Voight*, 2 Ohio App. 145; 17 C. C. n. s. 447; 25 C. D. 255 (1913).

A proxy given by an executor, to be valid, must contain express directions for whom the votes shall be cast, leaving no discretion to the holder of the proxy. *State v. Voight*, 2 Ohio App. 145; 17 C. C. n. s. 447; 25 C. D. 255 (1913).

Pledge of certificate by trustee for his personal debt to corporation. Certificates of stock in a building and loan company were taken by M. C. in the name of her infant granddaughter, with a parenthetic clause after the name ("M. C. or other legal guardian may draw") and retained possession of the certificates. M. C. died leaving a will, wherein she named her lawyer R. as executor and trustee of her property for the use and benefit of the granddaughter, and declaring in the will an intention to make the executor her successor in the trust as to the stock. The executor sent the loan company a copy of the will, with notice that he held the certificates under the will, and requested that dividends be paid to him as trustee. Thereafter he borrowed money from the company for his personal use, pledging some of the certificates as security, and turned in other certificates for cash, signing the transfers and pledge contract as trustee. He squandered the money and died insolvent. Held, the company was a party to the breach of trust and conversion.

Mook v. Akron Sgs. & L. Co., 87 O. S. 273 (1913).

Section 8673-3. (Corporation not forbidden to treat registered holder as owner.) Nothing in this act shall be construed as forbidding a corporation.

(a) To recognize the exclusive right of a person registered on its books as the owner of shares to receive dividends, and to vote as such owner, or

(b) To hold liable for calls and assessments a person registered on its books as the owner of shares. (June 7, 1911, 102 v. 501, § 3.)

The person who appears on the corporate books as the owner of stock is entitled to vote and receive dividends.

Railroad Co. v. Robbins, 35 O. S. 483 (1880).

Norton v. Norton, 43 O. S. 509, 522-523 (1885).

Franklin Bank v. Commercial Bank, 36 O. S. 350, 355 (1881).

Where a certificate was endorsed in blank by the owner, and three years later it was found among the effects of P., recently deceased, who never had the stock transferred to his name on the corporate books but had knowingly permitted the endorser to vote and receive dividends, the presumption is that the ownership of P. is special and not absolute, although he might have transferred title by delivery to an innocent purchaser. Stoltz v. Carroll, 99 O. S. 289 (1919).

Notices of stockholders meetings need be given only to stockholders of record. In re Mfg. & Sales Co., 246 Fed. 1005; 16 O. L. R. 163 (D. C. Ohio 1917); Railway Co. v. Bank, 68 O. S. 582 (1903).

Section 8673-4. (Title derived from certificate extinguishes title derived from a separate document.) The title of a transferee of a certificate under a power of attorney or assignment not written upon the certificate, and the title of any person claiming under such transferee, shall cease and determine if, at any time prior to the surrender of the certificate to the corporation issuing it, another person, for value in good faith, and without notice of the prior transfer, shall purchase and obtain delivery of such certificate with the indorsement of the person appearing by the certificate to be the owner thereof, or shall purchase and obtain delivery of such certificate and the written assignment or power of attorney of such person, though contained in a separate document. (June 7, 1911, 102 v. 501, § 4.)

Section 8673-5. (Who may deliver a certificate.) The delivery of a certificate to transfer title in accordance with the provisions of section 1 [G. C. § 8673-1], is effectual, except as provided in section 7 [G. C. § 8673-7], though made by one having no right of possession and having no authority from the owner of the certificate or from the person purporting to transfer the title. (June 7, 1911, 102 v. 501, § 5.)

Negotiability of certificates. This section is intended to give full negotiability to certificates of stock.

Rep. American Bar Assn. (1910) 576.

What must be taken notice of by purchasers or pledgees of stock.

Laws of state and by-laws regulating transfers. A purchaser or pledgee of stock is chargeable with notice of the laws of the state of incorporation and valid by-laws which impose restrictions on transfers.

Nicholson v. Franklin Brewing Co., 82 O. S. 94, 109 (1910).

See Lee v. Citizens N. B., 2 C. S. C. R. 298 (1872).

But restrictions imposed under by-laws must be stated upon the certificate.

See § 8673-15.

Genuineness of certificates and endorsement. A purchaser of stock is bound to inquire as to the genuineness of the certificates.

Railway Co. v. Bank, 56 O. S. 351, 379-380 (1897).

And of the endorsement thereon.

Krohn v. Central, etc., Co., 4 N. P. 270; 6 L. D. 552 (C. P. 1897).

Authority of executor of estate of deceased owner. Where the certificates are endorsed by the executor of a deceased owner, the transferee must take notice of the authority of such representative.

See §§ 8673-2, 8673-7.

Allen v. Globe Ins. Co., 19 W. L. B. 198 (Super. Ct. Cin. 1888); aff'd, 32 W. L. B. 374.

First N. B. v. Merchants Bank, 7 N. P. 381 (C. P.).

Marriott v. Railway, 16 L. D. 135 (C. P. 1905); s. c., 10 C. C. n. s. 573, 575.

A purchaser of stock belonging to a decedent's estate may refuse to accept it until furnish proof of the authority of the executor or administrator to sell and transfer the same. Humphries v. Loomis, 18 C. C. n. s. 529 (1911).

Compare Burch v. Trust Co., 12 N. P. n. s. 86; 22 L. D. 6; holding that a corporation had no right to require a certified copy of the order of the probate court authorizing the transfer before making the transfer on the corporate books (affirmed on other grounds, 14 C. C. n. s. 346).

A widow, executrix of her husband's will and a life tenant of stock belonging to his estate, with power of sale, has no power to give an option to purchase the stock at her death. Persons dealing with her as to such stock are bound to take notice of the rights of the remaindermen. Carnes v. McAfee, 11 N. P. n. s. 517; 24 L. D. 487 (1911).

Lien of corporation reserved in certificate. See note to § 8673-15.

Liens on stock acquired by garnishment process served on corporation. Before the passage of the Uniform Act it was held that a creditor of a stockholder could acquire a lien on his stock by garnishment process served on the corporation. Such lien was superior to the rights of a subsequent purchaser or pledgee of the stock, in good faith and without notice, who relied on the certificates.

Bank v. Towle Mfg. Co., 67 O. S. 306 (1902).

This rule is effective as to certificates issued prior to July 1, 1911.

See §§ 8673-23, 8673-24.

As to certificates issued since July 1, 1911, see § 8673-13.

Whether stock has been paid up. A purchaser who pays par for stock is entitled to assume that the stock has been paid in full. A state-

ment in the certificate that it is "full paid" is a representation by the corporation to that effect and the purchaser need not inquire further.

Roebeling, etc., Co. v. Shawnee, etc., Co., 4 N. P. n. s. 113, 121; 17 L. D. 8 (C. P. 1906); *aff'd*, 78 O. S. 408.

See *Nutt v. Wheeler*, 10 C. C. n. s. 217; 20 C. D. 86 (1907).

Pending suits affecting the stock. The doctrine of *lis pendens* does not apply to certificates of stock transferable by endorsement.

Krebs v. Forbriger, 21 W. L. B. 313 (Super. Ct. Cin. 1889).

NEGOTIABILITY OF CERTIFICATES ISSUED PRIOR TO JULY 1, 1911.

Prior to the passage of the Uniform Stock Transfer Act it was held that a certificate of stock was not a promise to pay money and did not possess the essentials of a negotiable instrument.

Farmers Bank v. Diebold, etc., Co., 66 O. S. 367 (1902).

Simmons Hardware Co. v. Stokes, 16 C. C. 145, 149-150; 8 C. D. 779 (1898).

A purchaser or pledgee of a certificate, although in good faith and without notice, took it subject to any lien which a creditor of the seller or pledgor may have acquired, prior to the transfer, by attachment or aid of execution served on the corporation.

Bank v. Towle Mfg. Co., 67 O. S. 306 (1902).

Certificate as evidence of title. Estoppel of corporation and former owners of stock. Prior to the passage of the Uniform Act a certificate of stock was held to be an assurance to the world that the person named therein is the owner of the number of shares stated therein and that these shares will be transferred on the corporate books to one purchasing the same, on surrender of the certificate properly assigned.

Railway Co. v. Bank, 56 O. S. 351, 383 (1897).

Bank v. Towle Mfg. Co., 67 O. S. 306, 314 (1902).

See *Marble v. Van Wert N. B.*, 3 C. C. 464; 2 C. D. 265 (1888).

The corporation itself and former owners of the stock were, as a general rule, estopped from setting up claims to stock evidenced by certificates in the hands of an innocent purchaser for value.

Dueber, etc., Co. v. Dougherty, 62 O. S. 589, 595 (1900).

Railway Co. v. Bank, 56 O. S. 351 (1897).

Krebs v. Forbriger, 21 W. L. B. 313 (Super. Ct. Cin. 1889).

Railroad Co. v. Robbins, 35 O. S. 483 (1880).

Lee v. Citizens N. B., 2 C. S. C. R. 298 (1872).

A pledgor of certificates who had assigned the same in blank was estopped from asserting any title thereto against an innocent purchaser from the pledgee, although the pledgee had violated the contract of pledge in making the sale.

Krebs v. Forbriger, 21 W. L. B. 313 (Super. Ct. Cin. 1889).

Stolen certificates. Before the passage of the Uniform Act a purchaser of stolen certificates, endorsed in blank, acquired no title thereto, in the absence of negligence on the part of the owner, proximately contributing to the deceit.

Bank v. Safe & Lock Co., 66 O. S. 367 (1902).

Section 8673-6. (Endorsement effectual in spite of fraud, duress, mistake, revocation, death, incapacity or lack of consideration or authority.) The indorsement of a certificate by the person appearing by the certificate to be the owner of the shares represented thereby is effectual, except

as provided in section 7 (G. C. § 8673-7) though the indorser or transferer,

(a) Was induced by fraud, duress or mistake, to make the indorsement or delivery, or

(b) Has revoked the delivery of the certificate, or the authority given by the indorsement or delivery of the certificate, or

(c) Has died or become legally incapacitated after the indorsement whether before or after the delivery of the certificate, or

(d) Has received no consideration. (June 7, 1911, 102 v. 501, § 6.)

Delivery by fraud, etc. See *Dueber, etc., Co. v. Dougherty*, 62 O. S. 589, 595 (1900).

Railway Co. v. Bank, 56 O. S. 351 (1897).

Death of transferrer or of attorney. The death of the transferrer does not revoke the power of attorney.

Culp v. Mulvane, 66 Kans. 143 (1903).

Fraser v. Charleston, 11 S. C. 486 (1878).

A power of attorney to transfer stock is revoked by the death of the person named as attorney. In such case a bona fide purchaser may be protected, but a donee probably not.

Carll v. Little Miami R. Co., 13 C. C. n. s. 598 (1911).

See *Dickinson v. Central Bank*, 129 Mass. 279.

Hess v. Rau, 95 N. Y. 359.

Duty and liability of corporation in registering transfer of stock belonging to decedent's estate, under inheritance tax law. §§ 5348-2, 5348-3.

Section 8673-7. (Rescission of transfer.) If the indorsement or delivery of a certificate,

(a) Was procured by fraud or duress, or

(b) Was made under such mistake as to make the indorsement or delivery inequitable; or

If the delivery of a certificate was made.

(c) Without authority from the owner, or

(d) After the owner's death or legal incapacity, the possession of the certificate may be reclaimed and the transfer thereof rescinded, unless:

(1) The certificate has been transferred to a purchaser for value in good faith without notice of any facts making the transfer wrongful, or

(2) The injured person has elected to waive the injury, or has been guilty of laches in endeavoring to enforce his rights.

Any court of appropriate jurisdiction may enforce specifically such right to reclaim the possession of the certificate or to rescind the transfer thereof and, pending litigation,

may enjoin the further transfer of the certificate or impound it. (June 7, 1911, 102 v. 502, § 7.)

Section 8673-8. (Rescission of transfer of certificate does not invalidate subsequent transfer by transferee in possession.) Although the transfer of a certificate or of shares represented thereby has been rescinded or set aside, nevertheless, if the transferee has possession of the certificate or of a new certificate representing part or the whole of the same shares of stock, a subsequent transfer of such certificate by the transferee, mediately or immediately, to a purchaser for value in good faith, without notice of any facts making the transfer wrongful, shall give such purchaser an indefeasible right to the certificate and the shares represented thereby. (June 7, 1911, 102 v. 502, § 8.)

Section 8673-9. (Delivery of unendorsed certificate imposes obligation to endorse.) The delivery of a certificate by the person appearing by the certificate to be the owner thereof without the indorsement requisite for the transfer of the certificate and the shares represented thereby, but with intent to transfer such certificate or shares shall impose an obligation, in the absence of an agreement to the contrary, upon the person so delivering, to complete the transfer by making the necessary indorsement. The transfer shall take effect as of the time when the indorsement is actually made. This obligation may be specifically enforced. (June 7, 1911, 102 v. 502, § 9.)

The delivery of a certificate without written endorsement, but with the intention of transferring the title upon a valid consideration, operates as a transfer of the equitable title. The transferrer may be compelled by a suit in equity to assign the certificate.

Lawler v. Kell, 4 N. P. 218; 6 L. D. 311 (C. P. 1897).

Oliver v. Cincinnati, etc., Co., 1 Hosea 457 (Super. Ct. Cin.); s. c. 3 O. L. R. 53, 607; aff'd, 73 O. S. 386.

To make a proper tender under a contract to sell stock, the certificates should be endorsed or the person making the tender should offer to make the transfer. Sprague v. Munger, 17 C. C. n. s. 130 (1910); Hager v. Reed, 11 O. S. 626 (1860).

But a transfer on the corporate books is not necessary. Laundry Co. v. Whitmore, 92 O. S. 44 (1915).

Section 8673-10. (Ineffectual attempt to transfer amounts to a promise to transfer.) An attempted transfer of title to a certificate or to the shares represented thereby without delivery of the certificate shall have the effect of a promise to transfer and the obligation, if any, imposed by such promise shall be determined by the law governing the formation,

and performance of contracts. (June 7, 1911, 102 v. 502, § 10.)

See G. C. § 8385.

Bates v. Smith, 83 Mich. 347.

M. C. invested money in stock of a building and loan company, taking the certificates in the name of her infant granddaughter, with a parenthetic clause after the name ("M. C. or other legal guardian may draw") and retained possession of the certificates. This was held to be an inchoate gift in trust for the grandchild.

Mook v. Akron Sgs. & Loan Co., 87 O. S. 273 (1913).

Section 8673-11. (Warranties on sale of a certificate.) A person who for value transfers a certificate, including one who assigns for value a claim secured by a certificate, unless a contrary intention appears, warrants:

- (a) That the certificate is genuine,
- (b) That he has a legal right to transfer it, and
- (c) That he has no knowledge of any fact which would impair the validity of the certificate.

In the case of an assignment of a claim secured by a certificate, the liability of the assignor upon such warranty shall not exceed the amount of the claim. (June 7, 1911, 102 v. 503, § 11.)

For similar provisions see G. C. § 8993-34 (Bills of Lading Act) and G. C. § 8500 (Warehouse Receipts Act).

Section 8673-12. (No warranty implied from accepting payment of a debt.) A mortgagee, pledgee, or other holder for security of a certificate who in good faith demands or receives payment of the debt for which such certificate is security, whether from a party to a draft drawn for such debt, or from any other person, shall not by so doing be deemed to represent or to warrant the genuineness of such certificate, or the value of the shares represented thereby. (June 7, 1911, 102 v. 503, § 12.)

Section 8673-13. (No attachment or levy upon shares unless certificate surrendered or transfer enjoined.) No attachment or levy upon shares of stock for which a certificate is outstanding shall be valid until such certificate be actually seized by the officer making the attachment or levy, or be surrendered to the corporation which issued it, or its transfer by the holder be enjoined. Except where a certificate is lost or destroyed, such corporation shall not be compelled to issue a new certificate for the stock until the old certificate is surrendered to it. (June 7, 1911, 102 v. 503, § 13.)

FORMER LAW—APPLICABLE TO STOCK EVIDENCED BY CERTIFICATES ISSUED PRIOR TO JULY 1, 1911.

Stock in a corporation may be reached by creditors of a stockholder by garnishee process served on the corporation.

Attachment.

Norton v. Norton, 43 O. S. 509 (1885).

Prout v. Post, 12 L. D. 141 (C. P. 1900).

Proceeding in aid of execution or creditor's bill.

Bank v. Mfg. Co., 67 O. S. 306 (1902).

For the purpose of seizure and subjection to legal process the situs of stock is the domicile of the corporation.

National Bank v. Lake Shore, etc., Ry. Co., 21 O. S. 221 (1871).

Ashley v. Quintard, 90 Fed. 84; 41 W. L. B. 289; 10 O. F. D. 365 (C. Ohio 1898).

But stock can not be reached by a judgment creditor by a bill in equity, without the return of an execution nulla bona.

Schmuck v. Pearce, 3 O. L. R. 403; 16 L. D. 287 (Super. Ct. Cin. 1905).

A corporation may, by garnishee process served upon itself, reach the stock of a shareholder indebted to it.

Norton v. Norton, 43 O. S. 509 (1885).

A corporation which, for many years, acquiesced in a subscription made by a person, in the name of his children, permitting them to vote and to exercise acts of ownership over the stock, is estopped from maintaining an action to subject such stock to the payment of its claim against the person who made the subscription.

Creed v. Lancaster Bank, 1 O. S. 1 (1852).

Dividends on attached stock. Dividends declared by a corporation, and remaining in its possession after garnishment process has been served, follow the stock and are subject to the same order of distribution.

Norton v. Norton, 43 O. S. 509 (1885).

Alimony suit against nonresident stockholder. Where, in an alimony suit against a nonresident stockholder who was served by publication only, the corporation was made a defendant and was enjoined from transferring the stock, the court has jurisdiction to award such stock as alimony and to decree a transfer of the title thereto.

Cleveland, etc., Co. v. Beeman, 12 C. C. n. s. 460 (1909); aff'd, 81 O. S. 509, 510.

Stock in foreign corporation. Stock in a foreign corporation, owned by a nonresident of Ohio, can not be attached by levying the writ upon the certificate of stock in the possession of a resident of Ohio.

Simmons Hardware Co. v. Stokes, 16 C. C. 145; 8 C. D. 776 (1898).

See §§ 8673-13 and 8673-22 "Certificate" defined.

Stock in a corporation in one state, owned by a resident of another, can not be reached by garnishment in a third state in which the corporation maintains an agent and does business, in the absence of special statutory provision therefor.

Ashley v. Quintard, 90 Fed. 84; 41 W. L. B. 289; 10 O. F. D. 365 (C. C. Ohio 1898).

Defenses of stockholder. That stock has been transferred. A stockholder can not defend against a creditor's bill on the ground that he had pledged the stock prior to the bringing of the proceeding. It is for the pledgee to make such defense. But the court may make the pledgee a party to the proceeding.

Krebs v. Forbriger, 21 W. L. B. 313 (Super. Ct. Cin. 1889).

Ultior motive of creditor. That a creditor who seeks to reach the stock of his debtor in a corporation is induced to do so by other stockholders, with whom he has made plans for future management of the corporation, is no reason for denying him the remedy of a creditor's bill. *McMullen v. Ritchie*, 64 Fed. 253; 8 O. F. D. 314 (1894).

Execution. Former law; see.

Lee v. Citizens N. B., 2 C. S. C. R. 298, 311 (1872).

Priorities between creditors of stockholder and pledgees or purchasers of stock.

Creditor and subsequent pledgee. The creditor of a stockholder acquires a lien from the time of the service of the garnishee process on the corporation. A subsequent pledge of the shares is subject to the lien, although the stock certificates were transferred to the pledgee, who advanced money thereon without notice of the lien.

Bank v. Mfg. Co., 67 O. St. 306 (1903).

Creditors' rights as against existing pledge. Where stock was pledged, and the stock certificates transferred to the pledgee, prior to the time of service of the garnishee process, the lien of the pledgee is superior to the lien of the creditor, although the pledgee has not presented the stock for transfer.

Haldeman v. Hillsborough, etc., R. Co., 2 Handy 101.

Bergin v. McCabe, 91 O. S. 427 (1915).

Maue v. Krell Piano Co., 7 O. L. R. 539 (Super Ct. Cin. 1909).

Krebs v. Forbriger, 21 W. L. B. 313 (Super. Ct. Cin. 1889).

Norton v. Norton, 43 O. S. 509 (1885).

The surplus after payment of the debt to the pledgee is reached by the garnishment, and if the pledgee does not exercise his right to sell, the court may order a sale and distribution of the proceeds.

Norton v. Norton, 43 O. S. 509 (1885).

Creditor and prior purchaser. A bona fide purchaser of stock has an equity superior to a subsequent attaching creditor, although the purchaser has not presented the stock for transfer.

Prout v. Post, 12 L. D. 141 (C. P. 1900).

Section 8673-14. (Creditors' remedies to reach certificate.)

A creditor whose debtor is the owner of a certificate shall be entitled to such aid from courts of appropriate jurisdiction, by injunction and otherwise, in attaching such certificate or in satisfying the claim by means thereof as is allowed at law or in equity, in regard to property which can not readily be attached or levied upon by ordinary legal process. (June 7, 1911, 102 v. 503, § 14.)

Section 8673-15. (There shall be no lien or restriction unless indicated on certificate.) There shall be no lien in favor of a corporation upon the shares represented by a certificate issued by such corporation and there shall be no restriction upon the transfer of shares so represented by virtue of any by-law of such corporation, or otherwise, unless the right of the corporation to such lien or the restriction is stated upon the certificate. (June 7, 1911, 102 v. 503, § 15.)

This section does not apply to the lien of a free banking company under G. C. § 9683, where the certificate was issued prior to July 1, 1911. *Bank v. Hunt*, 16 N. P. n. s. 65, 68 (1914).

Lien of corporation on stock. A corporation may, by express stipulation in a certificate of stock, reserve a lien on the stock to secure indebtedness of the holder to it. Such lien may be asserted against a transferee who received the certificate before, but did not present it for transfer until after the original holder became indebted to the corporation.

Stafford v. Produce Exch. Bkg. Co., 61 O. S. 160 (1899).

See *Conant v. Reed*, 1 O. S. 298 (1853).

Tomb v. Felch, 40 W. L. B. 186 (Supreme Court without report, 1898).

Franklin Bank v. Commercial Bank, 4 Am. L. R. 705 (Super. Ct. Cin. 1876); *aff'd*, 36 O. S. 350.

Downer v. Zanesville Bank, *Wright* 477 (1833).

Where a certificate of stock was transferable "subject to all conditions and stipulations in the articles of association and by-laws," a by-law passed after the certificate was issued, creating a lien in favor of the corporation, was held binding on a person who received the certificate without consideration.

Bellevue Bank v. Higbee, 4 C. C. 222; 2 C. D. 512 (1889); *aff'd*, 28 W. L. B. 336.

Where a certificate contains no mention of a lien in favor of the corporation, the corporation can not assert a lien against a purchaser or pledgee of such certificate.

Lee v. Citizens N. B., 2 C. S. C. R. 298 (1872).

Rep. Atty. Gen. 1913, p. 817.

Where there was a custom between bankers and brokers for a banker, on application of a broker, to certify as to whether the bank had a lien on certain of its stock, an application by a broker for such a certificate will put the bank on inquiry, and charge it with notice, that a loan had been or would be made to the stockholder.

Covington, etc., Bank v. Commercial Bank, 65 Fed. 547 (C. C. Ohio 1895).

Where a corporation has a lien, by statute, on all stock owned by its debtors, and has full control over its transfer, possession of the certificates, by pledge, gives the corporation no additional rights or benefits.

State v. Davis, 85 O. S. 44 (1911).

A lien on dividends may be reserved.

Bellevue Bank v. Higbee, 4 C. C. 222; 22 C. D. 512 (1889); *aff'd*, 28 W. L. B. 336.

It is said that since the enactment of the Thomas Banking Act a bank has no power to reserve a lien on its stock, by stipulation on the certificate.

Rep. Atty. Gen. 1911-1912, p. 775.

G. C. § 710-114.

Restriction on transfers of stock. Power of corporation to make. See notes to §§ 8702 and 8704.

Section 8673-16. (Alteration of certificate does not divest title to shares.) The alteration of a certificate, whether fraudulent or not and by whomsoever made, shall not deprive the owner of his title to the certificate and the shares originally represented thereby, and the transfer of such

certificate shall convey to the transferee a good title to such certificate and to the shares originally represented thereby. (June 7, 1911, 102 v. 503, § 16.)

Section 8673-17. (Lost or destroyed certificate.) Where a certificate has been lost or destroyed, a court of competent jurisdiction may order the issue of a new certificate therefor on service of process upon the corporation and on reasonable notice by publication, and in any other way which the court may direct, to all persons interested, and upon satisfactory proof of such loss or destruction and upon the giving of a bond with sufficient surety to be approved by the court to protect the corporation or any person injured by the issue of the new certificate from any liability or expense, which it or they may incur by reason of the original certificate remaining outstanding. The court may also in its discretion order the payment of the corporation's reasonable costs and counsel fees.

The issue of a new certificate under an order of the court as provided in this section, shall not relieve the corporation from liability in damages to a person to whom the original certificate has been or shall be transferred for value without notice of the proceedings or of the issuance of the new certificate. (June 7, 1911, 102 v. 503, § 17.)

This section provides relief similar to that given by §§ 8677 to 8681, which have not been repealed. This section provides for a bond of indemnity to the corporation, which is not required under §§ 8677 to 8681.

Before the enactment of §§ 8677 to 8681, a bond was deemed proper, before a corporation was required to issue a duplicate certificate.

Hof v. Western German Bank, 6 W. L. B. 665, 697 (Dist. Ct. 1881).

See *Farmers Bank v. Diebold, etc., Co.*, 66 O. S. 376 (1902).

In an action by a national bank for reissue of a lost certificate of stock in a corporation, acquired in exchange for dishonored bonds, the corporation can not defend on the ground that the acquisition of the stock by the national bank was ultra vires. *Bank v. Urbana Co.*, 22 C. C. n. s. 529 (1915).

Section 8673-18. (Rule for cases not provided for by this act.) In any case not provided for by this act, the rules of law and equity, including the law merchant, and in particular the rules relating to the law of principal and agent, executors, administrators and trustees, and to the effect of fraud, misrepresentation, duress or coercion, mistake, bankruptcy or other invalidating cause, shall govern. (June 7, 1911, 102 v. 504, § 18.)

Section 8673-19. (Interpretation.) This act shall be so interpreted and construed as to effectuate its general pur-

pose to make uniform the law of those states which enact it. (June 7, 1911, 102 v. 504, § 19.)

Section 8673-20. ("Indorsement" defined.) A certificate is indorsed when an assignment or a power of attorney to sell, assign, or transfer the certificate or the shares represented thereby is written on the certificate and signed by the person appearing by the certificate to be the owner of the shares represented thereby, or when the signature of such person is written without more upon the back of the certificate. In any of such cases a certificate is indorsed though it has not been delivered. (June 7, 1911, 102 v. 504, § 20.)

Section 8673-21. ("Owner" defined.) The person to whom a certificate was originally issued is the person appearing by the certificate to be the owner thereof, and of the shares represented thereby, until and unless he indorses the certificate to another specified person, and thereupon such other specified person is the person appearing by the certificate to be the owner thereof until and unless he also indorses the certificate to another specified person. Subsequent special indorsements may be made with like effect. (June 7, 1911, 102 v. 504, § 21.)

Section 8673-22. (Other definitions.) (1) In this act, unless the context or subject matter otherwise requires—

"Certificate" means a certificate of stock in a corporation organized under the laws of this state or of another state whose laws are consistent with this act.

"Delivery" means voluntary transfer of possession from one person to another.

"Person" includes a corporation or partnership or two or more persons having a joint or common interest.

To "purchase" includes to take as mortgagee or as pledgee.

"Purchaser" includes mortgagee and pledgee.

"Shares" means a share or shares of stock in a corporation organized under the laws of this state or of another state whose laws are consistent with this act.

"State" includes state, territory, district and insular possession of the United States.

"Transfer" means transfer of legal title.

"Title" means legal title and does not include a merely equitable or beneficial ownership or interest.

"Value" is any consideration sufficient to support a simple contract, an antecedent or pre-existing obligation, whether for money or not, constitutes value where a certificate is taken either in satisfaction thereof or as security therefor.

(2) A thing "is done in good faith" within the meaning of this act, when it is in fact done honestly, whether it be done negligently or not. (June 7, 1911, 102 v. 504, § 22.)

Pledges of stock. Rights and remedies of pledgor and pledgee see note to § 8682.

"Value." For other definitions see

G. C. § 8295 (Negotiable Instruments Act).

G. C. § 8456 (Sales Act).

G. C. § 8508 (Warehouse Receipts Act).

G. C. § 8993-52 (Bills of Lading Act).

Where no extension of time was given, a pledgee to whom certificates were transferred to secure a pre-existing debt was held to have no greater rights therein than the pledgor.

Cleveland v. Bank, 16 O. S. 236, 269 (1865).

Section 8673-23. The provisions of this act apply only to certificates issued after the taking effect of this act. (June 7, 1911, 102 v. 504, § 23.)

Section 8673-24. This act shall take effect on the first day of July, one thousand nine hundred and eleven. (June 7, 1911, 102 v. 505, § 24.)

Section 8674. (How payment of stock enforced.) If an installment on stock is unpaid for sixty days after the time it was to be paid, whether the stock is held by the subscriber, an assignee, or transferee, it may be collected by suit, or the directors may sell such stock at public auction for the installment then due. (R. S. Sec. 3253; March 14, 1853, 51 v. 484, § 1; May 1, 1852, 50 v. 274, § 7; S. & C. 276, 319.)

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I. FORFEITURE OF SUBSCRIPTIONS.

A. Waiver of right. Until a corporation proceeds under §§ 8674 to 8676 to foreclose the interest of a subscriber, it remains the property of the subscriber. A corporation can not, without following the method authorized by these sections, forfeit the subscription and appropriate the amounts paid. Where a corporation takes no action the subscriber, or an assignee, may tender the amount due with interest, and by action compel the corporation to issue a stock certificate, and to account to him for dividends declared. The statute of limitations begins to run from the time of such tender.

Iron Railroad Co. v. Fink, 41 O. S. 321 (1884).

B. Injunction against forfeiture. A forfeiture of stock in an insolvent corporation by the directors so as to release solvent subscribers is fraudulent as to creditors and may be enjoined by them.

Upton v. Rocky River, etc., Co., 2 Cleve. L. R. 355 (C. P. 1879).

C. Irregular forfeiture. Laches of stockholder. Where there were defects in forfeiture proceedings, but the stockholder had knowledge of the assessments, and failed to pay the same for sixteen years, having knowledge of the precarious financial condition of the corporation, the stockholder is barred by laches from enforcing any rights in his stock.

Hedley v. Improvement Co., 13 N. P. n. s. 523 (C. P. 1912).

II. SUITS TO COLLECT SUBSCRIPTIONS.

A. Conditions precedent.

(a) **Calls.** An action to recover on a stock subscription can not be brought until sixty days after the time of payment designated in the call. After the first installment is paid nothing is due on a subscription until a call has been made by the directors specifying the time for payment. § 8632.

Thomas v. Kalbfus, 97 O. S. 232 (1918).

Mansfield, etc., Co. v. Hall, 26 O. S. 310 (1875).

Railroad Co. v. Fink, 41 O. S. 321, 329 (1884).

Gibson v. Columbia, etc., Co., 18 O. S. 396 (1868).

Unless the call has been waived by agreement of the parties.

See Mansfield, etc., Co. v. Pettis, 26 O. S. 259 (1875).

The making of the call should be alleged in the petition where the action is brought by the corporation, or a consolidated company, or an assignee of the subscription.

Mansfield, etc., Co. v. Hall, 26 O. S. 310 (1875).

P. & O. Canal Co. v. Webb, 9 Ohio 136 (1839).

(b) **Notice of calls.** Whether notice of a call must be given to

subscribers before suit can be brought on their subscriptions has not been judicially determined in Ohio except in *Proprietors, etc., v. Wade*, 7 W. L. J. 95 (Commercial Court of Cincinnati, 1849) in which five installments were involved and payment of the first four had been demanded. It was held that demand of the fifth installment was not necessary except perhaps as affecting costs.

In other states under statutes somewhat similar to §§ 8632 and 8674 the authorities are conflicting.

Cook on Corporations, §§ 117, 118.

Publication of notice is a condition precedent to forfeiture of stock for nonpayment of calls.

See § 8675.

(c) **Calls after insolvency.** Where the corporation is insolvent the making of a call by the directors is not a condition precedent to an action by the receiver or a creditor. In such an action the subscriptions will either be regarded as due, or the court will make the call.

Thomas v. Kalbfus, 97 O. S. 232 (1918).

Turnbull v. Pomeroy Salt Co., 24 W. L. B. 133 (C. P. 1890).

Henry v. Vermillion, etc., R. Co., 17 Ohio 187, 191 (1848).

A court of bankruptcy may make the call.

In re *Flood-Pratt Dairy Co.*, 7 O. L. R. 603; 16 O. F. D. 396 (Referee 1909).

(d) **Presentation of claim to administrator.** The claim should be presented to the administrator or executor of the estate of a deceased subscriber before suit.

Roebbing Sons Co. v. Shawnee, etc., Co., 4 N. P. n. s. 113, 115; 17 L. D. 8 (1906); aff'd, no rep., 78 O. S. 408.

But where the estate of a deceased subscriber was fully administered before a call was made by the court, after insolvency, a residuary legatee, who received from the estate property of value in excess of the amount claimed under the subscription, can not escape liability on the ground that the claim was not presented to, and suit brought against, the executor. *Thomas v. Kalbfus*, 97 O. S. 232 (1918).

(e) **Subscription of ten percent of capital stock.** Until ten percent of the capital stock has been subscribed subscribers can not be compelled by the corporation to pay beyond the first installment.

Trust Co. v. Floyd, 47 O. S. 525, 542 (1890).

It is not necessary that the entire capital stock be subscribed. Subscriptions may be enforced after ten percent has been subscribed.

See §§ 8632 to 8635.

Jewett v. Railway, 34 O. S. 601 (1878).

Subscribers may waive the statutory right to have ten percent subscribed.

Emmitt v. Springfield, etc., R. Co., 31 O. S. 23, 26 (1876).

(f) **Performance of conditions.** The petition in an action brought on a conditional subscription must allege performance of all conditions precedent.

Trott v. Sarchett, 10 O. S. 241 (1859).

Railroad Co. v. Hinsdale, 45 O. S. 556, 570 (1888).

See note to § 8630. *Conditional subscriptions.*

(g) **Tender of stock certificates** to the subscriber is not required before suit. But where by the terms of a subscription the amount was payable in installments and certificates were to be issued for the several installments paid it was held that readiness and willingness to issue and deliver the certificates should be alleged in the petition.

James v. Cincinnati, etc., R. Co., 2 Dis. 261 (Super. Ct. Cin. 1858).

B. Who may bring suit.

(a) **The corporation** may sue to enforce payment of subscriptions to its stock.

See *Iron Railroad Co. v. Fink*, 41 O. S. 321, 332 (1884).

Ashtabula, etc., R. Co. v. Smith, 15 O. S. 328 (1864).

Henry v. Vermillion, etc., R. Co., 17 Ohio 187 (1848).

But see *Traction Co. v. Burch*, 93 O. S. 498.

A subscription payable to the "president and directors" of a corporation may be enforced in the name of the corporation.

Milford, etc., Co. v. Brush, 10 Ohio 111 (1840).

(b) **A consolidated company** may recover on subscriptions to the stock of its constituent corporations, where the consolidation was effected under statutes in force at the time such subscriptions were made and which authorize the consolidated company to acquire debts due on subscriptions.

Mansfield, etc., Co. v. Brown, 26 O. S. 223, 238, 239 (1875).

Mansfield, etc., Co. v. Stout, 26 O. S. 241 (1875).

Compton v. Railway, 45 O. S. 592, 620 (1888).

See § 9038.

(c) **An assignee of subscriptions** may sue the subscriber where the calls have been made by the directors.

Dungan v. Safford, 41 O. S. 15 (1884).

Downie v. Hoover, 12 Wis. 174.

An assignee, who has purchased claims for unpaid subscriptions from the trustee in bankruptcy of the corporation, may sue thereon, although it may be doubtful whether he is entitled to recover more than the amount paid by him therefor. *Yoder v. Tubman*, 19 C. C. n. s. 225 (1911).

(d) **The assignee for creditors** of the corporation may sue, unpaid subscriptions being a part of the trust fund for creditors. The assignee and a creditor may join as plaintiffs in the action.

Saylor v. Simpson, 12 L. D. 148 (Super. Ct. Cin. 1888).

Turnbull v. Pomeroy Salt Co., 24 W. L. B. 133 (C. P. 1890).

See *Niles v. Olszak*, 87 O. S. 229 (1912).

(e) **The trustee in bankruptcy** of the corporation is vested with the legal title to unpaid subscriptions and may sue thereon.

Thrall v. Union, etc., Co., 6 O. L. R. 676; 19 L. D. 732 (C. P. 1909).

Security Trust Co. v. Ford, 75 O. S. 322 (1906).

Kiskadden v. Steinle, 203 Fed. 375 (C. C. A. 1913).

Petition of Stuart, 272 Fed. 938 (1921).

The trustee may be substituted as plaintiff in a suit, brought by a creditor before the bankruptcy, in which suit a demurrer had been filed on the ground that the creditor had not exhausted his remedy by judgment and execution. *Van Camp v. McCulley*, 89 O. S. 1 (1913).

(f) **A receiver** appointed under § 11943 et seq. to wind up the affairs of a corporation may bring suit on stock subscriptions.

G. C. § 11946.

Smith v. Johnson, 57 O. S. 486 (1898).

After judgment against a subscriber in favor of such a receiver the court appointing the receiver has power to direct the receiver to collect on such judgment only the subscriber's fair proportion of the corporate debts.

Clarke v. Thomas, 34 O. S. 46 (1877).

An action by such a receiver is a suit at law. Subscribers residing

out of the county can not be joined as defendants and served with summons issued to the county of their residence.

Smith v. Johnson, 57 O. S. 486 (1898).

The action is not appealable. Union Sav. Bank v. Traction Co., 13 Ohio App. 9, 31 O. C. A. 127, 270 (1920); motion to certify record overruled, 18 O. L. R. 112.

An allegation that the plaintiff seeks to recover only so much of unpaid subscriptions as is necessary to pay the corporate debts and to equalize the assessments on stockholders does not convert the action into a chancery case. Union Sav. Bank v. Traction Co., 13 Ohio App. 9, 31 O. C. A. 127, 270 (1920); motion to certify record overruled, 18 O. L. R. 112.

A receiver of an insolvent foreign corporation appointed in its home state with no other title to its assets and property than that derived from his appointment in a suit brought to subject its property to the payment of claims of creditors can not sue in Ohio on a subscription to its stock.

Leman v. Mac Lennan, 7 C. C. n. s. 205; 18 C. D. 137 (1905); aff'd, no rep., 75 O. S. 643.

A receiver appointed by federal court is the proper person to bring suit to collect stock subscriptions. Hartford Trust Co. v. Doherty, 286 Fed. 926 (C. C. A. Ohio 1923).

(g) **Creditors.** Where a corporation has property or assets upon which execution may be levied, a creditor can not bring suit upon its stock subscriptions. But where the corporation has no such property or assets a creditor may, by a creditor's bill or proceeding in aid of execution, subject unpaid subscriptions to his claim.

Henry v. Vermillion, etc., R. Co., 17 Ohio 187 (1848).

Van Camp v. McCulley, 89 O. S. 1 (1913).

Gilmore v. Bank of Cincinnati, 8 Ohio 62, 71 (1837).

Dunbar v. Harrison, 18 O. S. 24 (1868).

Moutray v. Connor, etc., Co., 7 O. L. R. 446 (C. P. 1909).

Ewin v. Cincinnati, etc., R. Co., 2 W. L. M. 42 (Super. Ct. Cin. 1859).

Everheart v. U. S. Investment Co., 1 Hosea 524.

By the filing of a proceeding in aid of execution, or creditor's bill, a judgment creditor acquires a lien on the fund.

Dunbar v. Harrison, 18 O. S. 24 (1868).

Miers v. Zanesville, etc., Co., 13 Ohio 197 (1844).

Kilbreath v. Gaylord, 3 W. L. B. 525 (Super. Ct. Cin. 1878); aff'd, 34 O. S. 305.

One creditor may sue on behalf of all creditors.

Turnbull v. Pomeroy Salt Co., 24 W. L. B. 133 (C. P. 1890).

But after the corporation has been adjudged a bankrupt a creditor can not sue. The trustee in bankruptcy of the corporation alone has the right to maintain the action.

Thrall v. Union, etc., Co., 6 O. L. R. 676; 19 L. D. 732 (C. P. 1909).

After the appointment of a receiver under § 11943 in a proceeding to wind up the affairs of a corporation, a creditor may intervene in the proceeding by answer and cross-petition and set up a cause of action against a subscriber.

Peter v. Farrel Foundry & Machine Co., 53 O. S. 534 (1895).

Action by creditor after assignment for creditors.

See Painesville N. B. v. King Varnish Co., 8 C. C. 563; 4 C. D. 511 (1894); reversed, without report, 56 O. S. 744.

Turnbull v. Pomeroy Salt Co., 24 W. L. B. 133 (C. P. 1890).

Subscriptions to stock in a foreign corporation may be reached in Ohio by creditor's bill.

Everheart v. U. S. Investment & Red. Co., 1 Hosea 524 (Super. Ct. Cin.).

Citing *Kulp v. Fleming*, 65 O. S. 321.

The petition in a creditor's action should, in general, allege that a judgment has been recovered on his claim against the corporation and that execution has been issued and returned nulla bona.

Dickason v. Grafton, etc., Co., 6 C. C. n. s. 329, 330, 331; 17 C. D. 357 (1905); aff'd, 76 O. S. 612.

Turnbull v. Pomeroy Salt Co., 24 W. L. B. 133 (C. P. 1890).

American, etc., Co. v. Dox, 4 N. P. n. s. 155; 16 L. D. 501 (Super. Ct. Cin. 1906).

But judgment and execution are unnecessary where the corporation has no property or assets subject to execution, or its assets are in the hands of a receiver.

Peter v. Farrell, etc., Co., 53 O. S. 534, 557 (1895).

Dickason v. Grafton, etc., Co., 6 C. C. n. s. 329, 330, 331; 17 C. D. 357 (1905); aff'd, 76 O. S. 612.

Moutray v. Connor, etc., Co., 7 O. L. R. 446 (C. P. 1909).

Turnbull v. Pomeroy Salt Co., 24 W. L. B. 133 (C. P. 1890).

A judgment against the corporation in favor of a creditor can not be collaterally impeached by a stockholder where it was not obtained by fraud or collusion, although the stockholder had no notice of the suit.

Scofield v. Excelsior Oil Co., 6 C. C. n. s. 176; 17 C. D. 318 (1905); aff'd, no rep., 74 O. S. 513.

Henry v. Vermillion, etc., R. Co., 17 Ohio 187, 191.

And although obtained during the pendency of the suit to recover on the subscription and set up in a supplemental petition.

Scofield v. Excelsior Oil Co., 6 C. C. n. s. 169, 176; 17 C. D. 347, 318 (1905); aff'd, no rep., 74 O. S. 513.

In a creditor's action directors may be enjoined from fraudulently disposing of funds realized from stock subscriptions.

Upson v. Rocky River, etc., Co., 2 Cleve. L. R. 355 (C. P. 1879).

C. Who are liable.

(a) **Original subscribers** are liable on their subscriptions unless they have been released by the corporation or by a transfer in good faith.

Gaff v. Flesher, 33 O. S. 107, 112 (1877).

See below *Defenses*. *Withdrawal and release of subscriptions*.

(b) **Transferrers**. A subscription to stock on which installments have been paid may be assigned by the subscriber.

Iron Railroad Co. v. Fink, 41 O. S. 321 (1884).

See *Peter v. Union Mfg. Co.*, 56 O. S. 181 (1897).

And it has been held that a subscriber who, acting in good faith, has transferred his subscription to another and paid all calls to the time of transfer is not further liable on his subscription, where the transfer is properly entered in the corporate books.

Gilmore v. Bank of Cincinnati, 8 Ohio 62, 71 (1837).

Porter v. Laws, 6 Am. L. R. 756; 3 W. L. B. 384 (Dist. Ct. 1878).

A transfer to an insolvent person for the purpose of avoiding liability does not release the transferrer, at least as against debts existing at the time of transfer.

Gaff v. Flesher, 33 O. S. 107, 112 (1877).

Peter v. Union Mfg. Co., 56 O. S. 181 (1897).

A transfer to a fictitious person is void and does not release the transferrer.

Muskingum, etc., Co. v. Ward, 13 Ohio 120 (1884).

Krohn v. Central, etc., Co., 4 N. P. 270; 6 L. D. 552 (C. P. 1897).

A verbal agreement made at the time of subscription between the subscriber and the president of the corporation to the effect that a third

person would assume a part of the subscription is no defense to the subscriber, where there was no transfer.

Painesville N. B. v. King Varnish Co., 8 C. C. 563; 4 C. D. 511 (1894); reversed, in part, 56 O. S. 744.

Where a transferrer has been compelled to pay calls made after the transfer, he may be subrogated to the rights of the corporation against the transferee, on clear proof of acceptance of the transfer.

Tripp v. Appleman, 35 Fed. 19 (U. S. C. C. Ohio 1888).

(c) **Transferees.** The transferee of stock which has not been fully paid impliedly assumes the obligations for the unpaid balance and is liable for calls.

Turnbull v. Pomeroy Salt Co., 24 W. L. B. 133 (C. P. 1890).

Gilmore v. Bank of Cincinnati, 8 Ohio 62, 71 (1837).

Acceptance of the transfer by the transferee must be shown.

Tripp v. Appleman, 35 Fed. 19; 6 O. F. D. 71 (U. S. C. C. Ohio 1888).

A purchaser for value of stock who has no notice that it has not been fully paid is not liable. The purchaser may rely on the representation of the corporation that it has been paid. The statement "full paid" on a stock certificate is a representation by the corporation that the stock has been paid up and the purchaser need not inquire further.

Roebling Sons Co. v. Shawnee, etc., Co., 4 N. P. n. s. 113, 121; 17 L. D. 8 (1906); aff'd, no rep., 78 O. S. 408.

(d) **Purchasers and donees of stock after organization.** Where stock is disposed of by the directors after organization, not by means of subscriptions but by means of sales, exchanges for property or stock dividends, the persons receiving the stock from the corporation may be liable to creditors where the stock is not fully paid in money or property. "The fact that they did not subscribe for it or agree to take it until receipt of the certificates is immaterial, as the acceptance of the certificates is sufficient evidence of an agreement to pay their par value."

Handley v. Stutz, 139 U. S. 417, 427 (1891).

Gates v. Tippecanoe Stone Co., 57 O. S. 60 (1897).

In re *Flood-Pratt Dairy Co.*, 7 O. L. R. 603; 16 O. F. D. 396 (Referee in Bkry. 1909).

— (1) **Stock dividends.** Where a stock dividend was declared at a time when there were no surplus profits (as required by § 8724) the stockholders who accepted the certificates are liable. They can not be relieved from liability by offering to return the stock after the corporation has become insolvent and suit brought to enforce payment.

First N. B. v. Patton Co., 13 C. C. n. s. 289 (1910).

See *Handley v. Stutz*, 139 U. S. 417 (1891).

— (2) **Sales below par.** A purchaser of stock from the corporation for less than par is liable to subsequent creditors who had no knowledge of the terms of the purchase, for the difference between the amount paid and the par value of the stock.

Rickerson, etc., Co. v. Farrell, etc., Co., 75 Fed. 554 (C. C. A. 1896).

Security Trust Co. v. Ford, 75 O. S. 322 (1906).

Handley v. Stutz, 139 U. S. 417 (1891).

In re *Flood-Pratt Dairy Co.*, 7 O. L. R. 603; 16 O. F. D. 396 (Referee in Bkry. 1909).

But under some circumstances such a purchaser is not liable to the corporation or as against other stockholders.

Peter v. Union Mfg. Co., 56 O. S. 181 (1897).

Kinsey v. Mt. Auburn Cable Co., 6 C. C. n. s. 305; 17 C. D. 633 (1905);
aff'd, no rep., 75 O. S. 602.

See Security Trust Co. v. Ford, 75 O. S. 322, 333 (1906).

Nor to creditors whose claims were incurred prior to the purchase.

Handley v. Stutz, 139 U. S. 417 (1891).

See Peter v. Union Mfg. Co., 56 O. S. 181, 203 (1897).

Nor to subsequent creditors who have knowledge of the terms of the purchase.

Rickerson, etc., Co. v. Farrell, etc., Co., 75 Fed. 554 (C. C. A. 1896).

Kinsey v. Mt. Auburn Cable Co., 6 C. C. n. s. 305, 314; 17 C. D. 633
(1905); aff'd, no rep., 75 O. S. 602.

See note to § 8630, *Sales below par*.

The United States Circuit Court of Appeals has held that stockholders who purchase stock from the corporation below par at its market price, its capital being then impaired, are not liable to creditors. Thoms v. Goodman, 254 Fed. 39; 17 O. L. R. 31 (Ohio 1918).

Where less than par is paid by a subscriber, the difference being credited to a Board of Trade as commission on the subscription, and assigned by the Board of Trade to the subscriber, he is liable to creditors for the difference. Vandeusen v. Ransom, 23 C. C. n. s. 194 (1912).

— (3) **Exchanges of stock for property.** Where stock is exchanged for property at a fraudulent overvaluation the persons receiving the stock from the corporation are liable to creditors for the difference between the actual value of the property and the par value of the stock.

Gates v. Tippecanoe Stone Co., 57 O. S. 60 (1897).

Ford v. Lamson, 17 C. C. 539; 9 C. D. 374 (1899).

Sayler v. Simpson, 12 L. D. 148 (Super. Ct. Cin. 1888).

But they are not liable to the corporation itself.

Orton v. Edson, etc., Co., 5 C. C. n. s. 540; 17 C. D. 107 (1905);
aff'd, no rep., 75 O. S. 580.

Leman v. MacLennan, 7 C. C. n. s. 205, 208; 18 C. D. 137 (1905);
aff'd, no rep., 75 O. S. 643.

See note to § 8630, *Exchange of stock for property*.

(e) **Legatees.** A residuary legatee, who has received assets of the estate exceeding the amount unpaid on a subscription made by the testator, is liable where the cause of action did not accrue on the subscription until after the estate was fully administered. Thomas v. Kalbfus, 97 O. S. 232 (1918).

Where, under a will bequeathing all the estate to a sole legatee providing she shall first pay from the moneys of the estate all debts, the legatee did not accept stock on which there was a liability for unpaid subscriptions, she was held not to be personally liable therefor.

Roebing Sons Co. v. Shawnee, etc., Co., 4 N. P. n. s. 113, 116; 17 L. D. 8 (1906); aff'd, no rep., 78 O. S. 408.

But where such a legatee purchased the stock from herself as executrix and had it transferred to her name on the corporate books, she was held, although the purchase from herself was illegal.

Biggio v. Sandheger, 8 N. P. 13 (C. P. 1900).

(f) **Unauthorized agent.** It has been held that a person who without authority signs the name of another person to a subscription, his own name not appearing on the paper, can not be held liable on the subscription.

Cincinnati Hotel Co. v. Marsh, 9 W. L. B. 176 (Dist. Ct. 1883).

(g) **The state.** No suit can be brought against the state on a subscription.

Miers v. Zanesville, etc., Co., 11 Ohio 273 (1842).

(h) **Subscribers to stock in a foreign corporation may be sued in Ohio by a creditor.**

Everheart v. U. S. Investment & Red. Co., 1 Hosea 524 (Super. Ct. Cin.)

See Kulp v. Fleming, 65 O. S. 321 (1901).

Blair v. Newbegin, 65 O. S. 425 (1901).

But not by a receiver of an insolvent foreign corporation appointed in its home state with no other title to its assets and property than that derived from his appointment in a suit brought to subject its property to the payment of creditors' claims.

Leman v. MacLennan, 7 C. C. n. s. 205; 18 C. D. 137 (1905); aff'd, no rep., 75 O. S. 643.

D. Joinder of actions. An action by a creditor on stock subscriptions may be joined with an action to enforce the statutory liability of stockholders.

Warner v. Callender, 20 O. S. 190 (1870).

Peter v. Farrell, etc., Co., 53 O. S. 534, 557 (1895).

E. Joinder of defendants. Where the suit is equitable in its nature all subscribers may be joined as defendants. Where it is merely an action at law subscribers whose liability is several can not be joined as defendants in one action.

Smith v. Johnson, 57 O. S. 486, 488 (1898).

An action by the corporation itself, or by a receiver appointed under § 11943 to wind up its affairs, is an action at law. It is not proper practice to join as defendants subscribers who reside out of the county where suit is brought and to issue summons to another county to obtain service on them.

Smith v. Johnson, 57 O. S. 486 (1898).

It has been held that such nonresident stockholders may be joined in a creditors' bill after judgment.

Ewin v. Cincinnati, etc., R. Co., 2 W. L. M. 42 (Super. Ct. Cin. 1859).

In a suit to set aside a fraudulent payment of subscriptions by property, all subscribers who participate in the fraud may be joined.

Sayler v. Simpson, 12 L. D. 148 (Super. Ct. Cin. 1888).

A stockholder, bringing suit for the benefit of the corporation to collect subscriptions, can not join a cause of action in favor of the plaintiff personally against a resident of another county for fraud in inducing plaintiff to purchase the stock. Smith v. Banking Co., 19 C. C. n. s. 417 (1912).

F. Pleading and practice.

(a) **Supplemental petition setting up judgment against corporation.** In an action by a creditor, where the original petition was defective in not alleging a judgment and execution against the corporation, a supplemental petition may be filed setting up that, during the pendency of the action, such judgment has been recovered and execution issued.

Scofield v. Excelsior Oil Co., 6 C. C. n. s. 169, 176; 17 C. D. 347, 318 (1905); aff'd, 74 O. S. 513.

(b) **Amendment of petition substituting allegation of receivership for judgment, etc.** In an action by a creditor, where the petition alleged a judgment against the corporation but it appeared that the judgment was void for lack of proper service, the creditor was per-

mitted, at the trial, to amend and allege the appointment of a receiver and the judicial determination of insolvency of the corporation.

Dickason v. Grafton, etc., Co., 6 C. C. n. s. 329, 331; 17 C. D. 357 (1905); aff'd, 76 O. S. 612.

Where suit was brought by a creditor, who failed to allege a judgment against the corporation, or insolvency of the corporation, the trustee in bankruptcy of the corporation may be substituted as plaintiff, and, by amended petition, may set up his right and title to maintain the suit. Van Camp v. McCulley, 89 O. S. 1 (1913).

(c) **Discovery of names of subscribers.** A creditor, by creditor's bill or proceeding in aid of execution, may compel a disclosure of the names of subscribers and the amounts due from each.

Miers v. Zanesville, etc., Co., 11 Ohio 273 (1842).

(d) **Evidence.** As to former judgment for installments. In an action on two subscriptions for four and ten shares respectively, which were denied by the answer, the record of a judgment against the subscriber for installments on one subscription of a different date for fourteen shares is not admissible.

Hanes v. Dayton, etc., Co., 40 O. S. 95 (1883).

(e) **Prima facie case.**

See Milford, etc., Co. v. Brush, 10 Ohio 111 (1840).

(f) **Amount of recovery.** Interest from the time when calls were due may be recovered by the corporation.

Railroad Co. v. Fink, 41 O. S. 321, 327 (1884).

National Bank v. Greenville, etc., Co., 3 C. C. n. s. 372, 381; 13 C. D. 274 (1899).

On a subscription payable in land the recovery is not the par value of the stock. If the circumstances prevent a specific performance of the agreement, the measure of damages is the value of the land.

Dayton, etc., R. Co. v. Hatch, 1 Dis. 84 (Super. Ct. Cin. 1855).

After judgment against a subscriber in favor of a receiver the court appointing the receiver has power to direct the receiver to collect on such judgment only the subscriber's fair proportion of the corporate debts.

Clarke v. Thomas, 34 O. S. 46 (1877).

(g) **Error or appeal.** An action to collect unpaid subscriptions is not a chancery case and is not appealable. Traction Co. v. Trust Co., 9 Ohio App. 414 (1918).

G. Other remedies against subscribers.

(a) **Proof of claim in bankruptcy.** An unpaid subscription is a debt provable against the estate of the bankrupt subscriber.

Roebblings Sons Co. v. Shawnee, etc., Co., 4 N. P. n. s. 113; 17 L. D. 8 (1906); aff'd, no rep., 78 O. S. 408.

(b) **Corporation may apply dividends on unpaid subscriptions.**

Rhodes v. Equitable, etc., Co., 3 C. C. 501; 2 C. D. 288 (1888); affirmed, 27 W. L. B. 160.

(c) **Unpaid subscriptions as a trust fund for creditors.**

See note to § 8684.

H. Statute of limitations.

An action to recover on a stock subscription is barred in fifteen years, a subscription being a promise in writing.

Warner v. Callender, 20 O. S. 190 (1870).

Gibson v. Columbia, etc., Bridge Co., 18 O. S. 396 (1868).

See Gilmore v. Bank of Cincinnati, 8 Ohio 62, 71 (1837).

The cause of action accrues at the time of payment specified in the call made by the directors.

Gibson v. Columbia, etc., Bridge Co., 18 O. S. 396 (1868).

Warner v. Callender, 20 O. S. 190 (1870).

Railroad Co. v. Fink, 41 O. S. 321, 329 (1884).

Kilbreath v. Gaylord, 34 O. S. 305 (1877).

Where the corporation is insolvent the statute of limitations begins to run in favor of the subscriber at the time of the appointment of a receiver or other act of insolvency.

Roebings Sons Co. v. Shawnee, etc., Co., 4 N. P. n. s. 113; 17 L. D. 8 (1906); aff'd, no rep., 78 O. S. 408.

Where, after insolvency, a call is made by the court, the statute begins to run when the call is so made. Thomas v. Kalbfus, 97 O. S. 232 (1918).

An action against the estate of a deceased subscriber may, where the corporation is insolvent, be barred in eighteen months under G. C. § 10746.

Roebling Sons Co. v. Shawnee, etc., Co., 4 N. P. n. s. 113, 115, 116; 17 L. D. 8 (1906); aff'd, no rep., 78 O. S. 408.

An action by creditors to set aside a fraudulent exchange of property for stock is barred in four years from discovery of the fraud by the creditors.

Saylor v. Simpson, 12 L. D. 148 (Cin. Super. Ct. 1888).

Where demand notes were given by subscribers to the stock of an insurance company organized under a special charter, it was held that such notes were intended to be payable on call of the directors and that the statute did not begin to run until such call was made.

Kilbreath v. Gaylord, 34 O. S. 305 (1877).

The limitation of G. C. § 8688 does not apply to an action on subscriptions. Bauman v. Kiskadden, 94 O. S. 130 (1916); Kiskadden v. Anderson, 95 O. S. 88 (1916); Yoder v. Tubman, 19 C. C. n. s. 225 (1911).

I. Defenses.

(a) **Non-compliance with the Blue Sky Law.** A subscription obtained without complying with the Blue Sky Law (§§ 6373-1 to 6373-24) is illegal and unenforceable. Edward v. Ioor, 205 Mich. 617, 172 N. W. 620; Goodyear v. Meux, 143 Tenn. 287, 228 S. W. 57.

(b) **Withdrawal and release of subscription.** A subscriber can not relieve himself from liability by attempting to withdraw or cancel his subscription.

Gaff v. Flesher, 33 O. S. 107, 112-113 (1877).

Nor can the corporation release the subscriber to the prejudice of any intervening creditor.

Gaff v. Flesher, 33 O. S. 107, 113 (1877).

Directors have no power to release a subscriber except with the unanimous consent of the other subscribers.

See Royce v. Tyler, 2 C. C. 175, 187; 1 C. D. 428 (1887).

A subscriber may be released by the unanimous consent of the other subscribers before debts are incurred. Such consent need not be express. Where a subscriber stated in open meeting that he would withdraw his subscription for five shares, but agreed to take one share, and all other subscribers had knowledge of his withdrawal and made no objection, he was held not liable to subsequent creditors. Ginn v. Sanitarium Co., 16 C. C. n. s. 90 (1909).

(c) **Compromise and release of subscription.** The directors have power to compromise with and release a subscriber, for a valuable

consideration paid by the subscriber, where there is a bona fide controversy as to his liability or where the subscriber is insolvent. When made in good faith and fully executed the compromise agreement releases the subscriber from further liability.

Warner v. Callender, 20 O. S. 190, 198 (1870).

State v. Building Assn., 35 O. S. 258, 263 (1879).

Wangerien v. Aspell, 47 O. S. 250 (1890).

Biggio v. Sandheger, 8 N. P. 13, 15 (1900).

See Morgan v. Lewis, 46 O. S. 1 (1888).

Sanderson v. Aetna Iron & Nail Co., 34 O. S. 442 (1878).

(d) **Fraud in obtaining subscription.** Fraud in inducing a subscription is a defense against its enforcement.

Jewett v. Railway, 34 O. S. 601, 609 (1878).

Armstrong v. Karshner, 47 O. S. 276, 294 (1890).

Freeman v. Muth, 3 W. L. B. 914 (Dist. Ct. 1878).

James v. Cincinnati, etc., R. Co., 2 Dis. 261, 266 (1851).

But where the subscriber takes no action for an unreasonable time after discovery of the fraud and the rights of creditors intervene, he can not defend on the ground of fraud.

Mansfield v. Woods, Jenks & Co., 29 W. L. B. 111 (C. P.).

Ryan v. Miami, etc., Ry. Co., 10 A. L. R. 263 (C. P. 1881).

See Painesville N. B. v. King Varnish Co., 8 C. C. 563; 4 C. D. 511 (1894); reversed, in part, 56 O. S. 774.

Fraud is a defense, even after bankruptcy of the corporation, where no corporate debts were contracted after the subscription. Yoder v. Hoyt, 18 C. C. n. s. 433 (1910).

After insolvency of the corporation, while a defrauded subscriber can not rescind to the prejudice of creditors, yet the liability of other stockholders must be exhausted before his liability is resorted to. Gill v. Printing Co., 16 C. C. n. c. 568 (1907); aff'd, no rep. 80 O. S. 742, 81 O. S. 515.

As to representations which constitute fraud, see note to § 8630.

(e) **Alteration of subscription.** Where a subscription has been materially altered by increasing the number of shares subscribed for, without the knowledge of the subscriber, the corporation can not recover on the original subscription without showing that the alteration was not fraudulently made by it.

Bery v. Marietta, etc., Co., 26 O. S. 673 (1875).

(f) **Alteration of decoy subscription made by another person.** Where one was induced to subscribe on the faith of a prior subscription made by another person, a subsequent alteration of the prior subscription, the number of shares being reduced, is no defense to the persons so induced to subscribe. The alteration, being an attempted fraud on other subscribers, is a nullity.

Jewett v. Railway, 34 O. S. 601 (1878).

Bates v. Lewis, 3 O. S. 459 (1854).

(g) **Decoy subscription.** That a subscription was made without any intention to pay it, but for the purpose of pretending to the public that the stock had been largely subscribed, and to prevent the predominance of certain stockholders, is no defense to the subscriber.

Bates v. Lewis, 3 O. S. 459 (1854).

Jewett v. Railway, 34 O. S. 601 (1878).

Royce v. Tyler, 2 C. C. 175, 183; 1 C. D. 428 (1887).

(h) **Irregular or incomplete incorporation.** In an action by a creditor, or for the benefit of creditors, a subscriber is estopped from

setting up as a defense that statutory requirements were not complied with in the incorporation proceedings.

Dickason v. Grafton Sav. Bank, 6 C. C. n. s. 329, 332; 17 C. D. 357 (1905); aff'd, no rep., 76 O. S. 612.

Clark v. Thomas, 34 O. S. 46, 62 (1877).

Warner v. Callender, 20 O. S. 190, 197 (1870).

Mansfield v. Woods, 29 W. L. B. 111 (C. P. 1893).

Ryan v. Miami, etc., R. Co., 10 A. L. R. 263, 273 (C. P. 1881).

See note to § 8627. *Estoppel to deny corporate existence.*

Where the corporation has a *de facto* existence the subscribers are liable to creditors regardless of defects or irregularities in its organization.

Gaff v. Flesher, 33 O. S. 107, 113 (1877).

See note to § 8627. *De facto corporations.*

Although in some cases corporate officers and others may be personally liable for carrying on business in the corporate name in violation of law, such personal liability is no defense to an action by creditors on subscriptions made by such persons.

Dickason v. Grafton Sav. Bank, 6 C. C. n. s. 329, 335; 17 C. D. 357 (1905); aff'd, no rep., 76 O. S. 612.

See note to § 8627. *Ultra vires acts. Personal liability for.*

The following irregularities or defects have been held not to release subscribers: Failure to pay the first installment of ten percent with the subscription as required by § 8632.

Henry v. Vermillion, etc., R. Co., 17 Ohio 187 (1848).

Chamberlain v. R. R. Co., 15 O. S. 225, 249 (1864).

Ashtabula, etc., R. Co. v. Smith, 15 O. S. 328, 336 (1864).

That a banking corporation commenced business before its entire capital stock was subscribed and one-half paid in, as required by statute:

That the incorporators failed to give notice of the stockholders' meeting to elect directors; or that a bare majority of the directors elected at such irregular meeting ever qualified or acted.

Dickason v. Grafton Sav. Bank Co., 6 C. C. n. s. 329, 332; 17 C. D. 357 (1905); aff'd, no rep., 76 O. S. 612.

That the subscription was made before the articles of incorporation were filed.

Royce v. Tyler, 2 C. C. 175; 1 C. D. 428 (1887).

That no notice was given of a meeting of stockholders at which an increase of the capital stock of a mining company was voted; that a part of the increased stock was declined by the stockholders without actual apportionment; or that original stockholders were given part of the increased stock without payment in money, as required by statute.

Clark v. Thomas, 34 O. S. 46 (1877).

Failure to obtain minimum amount of subscriptions is a defense against the corporation.

Trust Co. v. Floyd, 47 O. S. 525, 542 (1890).

(i) **Irregular incorporation as a defense against the corporation.**

Where an action is brought on a subscription by the corporation itself, it is doubtful whether the subscriber is estopped from setting up irregular or incomplete incorporation as a defense.

Raccoon River Nav. Co. v. Eagle, 29 O. S. 238 (1876).

Gaff v. Flesher, 33 O. S. 114-115 (1877).

Society Perun v. Cleveland, 43 O. S. 498-499 (1885).

Trust Co. v. Floyd, 47 O. S. 525, 542 (1890).

(j) **Misnomer of corporation.** An error in the corporate name in the subscription will not release the subscriber where there is no doubt as to the corporation intended.

Milford, etc., Co. v. Brush, 10 Ohio 111, 114 (1840).

Commissioners v. Perry, 5 Ohio 56 (1831).

Royce v. Tyler, 2 C. C. 175, 183; 1 C. D. 428 (1887).

See Biggio v. Sandheger, 8 N. P. 13; 10 L. D. 316 (1900).

(k) **Forfeiture of charter.** A judgment of ouster in a quo warranto proceeding against the corporation is no defense to a subscriber in an action brought by a creditor.

Rowland v. Meader Furniture Co., 38 O. S. 269 (1882).

Nor is it a defense to an action brought by the corporation that the corporation has committed an act for which its charter might be forfeited by the state.

Milford, etc., Co. v. Brush, 10 Ohio 111 (1840).

(l) **Amendments to charter.** The acceptance, by a corporation organized under a special charter, of an amendment to its charter which materially changed the business of the corporation was held to release the subscriber.

Marietta, etc., R. Co. v. Elliott, 10 O. S. 57 (1859).

(m) **Agreement to give common stock free with preferred stock.** An agreement by the corporation to give certain common stock free, to a subscriber for preferred stock, does not render the subscription illegal so as to release the subscriber from his obligation to pay for the preferred stock. Yoder v. Tubman, 19 C. C. n. s. 225 (1911).

(n) **Change in character of stock.** Where a corporation changes the nature and character of its capital stock so as to make it substantially different from the stock subscribed for, the subscriber is not liable.

James v. Cincinnati, etc., R. Co., 2 Dis. 261, 275 (Super. Ct. Cin. 1858).

Covington, etc., Co. v. Sargent, 1 C. S. C. R. 354 (1871); reversed on other grounds, 27 O. S. 233.

(o) **Delay in completion of work. Abandonment of enterprise.** It is no defense that a railroad company has not completed the road in its entirety, nor that it has abandoned a part of the enterprise, where the subscription is not made on such conditions precedent.

Armstrong v. Karshner, 47 O. S. 276, 300 (1890).

See Four Mile, etc., Co. v. Bailey, 18 O. S. 208 (1868).

Where a turnpike company did not complete its enterprise until thirteen years after the date of its charter the delay was held no defense to a subscriber where the company during the entire time continued efforts to procure subscriptions and constructed the road as soon as funds were secured.

Gibson v. Columbus, etc., Co., 18 O. S. 396 (1868).

But where there are no corporate debts abandonment of the corporate enterprise may be a defense. Traction Co. v. Burch, 93 O. S. 498, 92 O. S. 540.

(p) **Change of route of railroad.** An immaterial change of the route of a railroad or turnpike company is no defense.

Milford, etc., Turnpike Co. v. Brush, 10 Ohio 111 (1840).

Jewett v. Railway, 34 O. S. 601 (1878).

See Armstrong v. Karshner, 47 O. S. 276 (1890).

P. & O. Canal Co. v. Webb, 9 Ohio 136 (1839).

Unless the subscription was made on the faith of the original location of the road, in which case the subscriber may obtain a release by written notice.

G. C. § 8747.

(q) **Change of termini of railroad.** A change of termini of a railroad may release the subscriber.

See § 8747.

Marietta, etc., R. Co. v. Elliott, 10 O. S. 57 (1859).

See Jewett v. Railway, 34 O. S. 601 (1878).

(r) **Variance of corporate purpose from prospectus.** A subscription to stock in a foreign corporation was made, before incorporation, on the faith of a prospectus which proposed to build a hotel and possibly to furnish it. As organized, the corporate purpose was to build a hotel and operate a hotel and restaurant. Held, a variance sufficient to relieve the subscriber from liability. Ginter v. Blain, 2 Ohio App. 482; 21 C. C. n. s. 366 (1913).

(s) **Discharge in bankruptcy.** A liability on a stock subscription is not released by the discharge in bankruptcy of the subscriber where the subscriber did not schedule the liability as a debt, and the corporation had no knowledge or notice of the bankruptcy proceedings.

Roeblings Sons Co. v. Coal & Iron Co., 4 N. P. n. s. 113; 17 L. D. 8 (1906); aff'd, no rep., 78 O. S. 408.

(t) **Agreement to pay in property.** A collateral agreement between a subscriber and the corporation giving the subscriber the privilege of paying his subscription in property is no defense to an action brought by a creditor, although the collateral agreement was made contemporaneously with the subscription. Such an agreement is considered a fraud on other stockholders.

Henry v. Vermillion, etc., R. Co., 17 Ohio 187 (1848).

Noble v. Callender, 20 O. S. 199 (1870).

Gates v. Tippecanoe Stone Co., 57 O. S. 60, 75 (1897).

Stunt v. Newark, etc., Co., 22 C. C. 120, 125; 12 C. D. 175 (1901); aff'd, no rep., 67 O. S. 555.

But such an agreement should be distinguished from an executed transaction in which the directors in good faith exchanged stock for property at a fair valuation, or accepted property in payment of a stock subscription.

See Gates v. Tippecanoe Stone Co., 57 O. S. 60, 75 (1897).

Orton v. Edson, etc., Co., 5 C. C. n. s. 540; 17 C. D. 107 (1905); aff'd, 75 O. S. 580.

Dayton, etc., R. Co. v. Hatch, 1 Dis. 84, 96 (Super. Ct. Cin. 1855).

Sanderson v. Iron & Nail Co., 34 O. S. 442, 449 (1878).

(u) **Payment.** (1) **In money, but less than par.** Payment of a sum of money less than the full amount of the subscription is no defense against creditors although the stock has been issued as full paid and non-assessable.

Security Trust Co. v. Ford, 75 O. S. 322 (1906).

See Handley v. Stutz, 139 U. S. 417 (1891).

In re Flood-Pratt Dairy Co., 7 O. L. R. 603; 16 O. F. D. 396 (Referee in Bkry. 1909).

Although under some circumstances such payment may be a defense against the corporation or as against other stockholders.

Security Trust Co. v. Ford, 75 O. S. 322, 335 (1906).

See note to § 8630. *Sales below par.*

Where less than par was paid by a subscriber, the difference being credited to a Board of Trade as commission on the subscription, and assigned by the Board of Trade to the subscriber he is liable to creditors for the difference. Vandeusen v. Ransom, 23 C. C. n. s. 194 (1912).

— (2) **In property.** A stockholder who has received stock as fully paid up in exchange for property may under some circumstances be liable to creditors, but he is not liable to the corporation. The corporation can not treat the stock as only partially paid up and assess him with the difference between the actual value of the property and the par value of the stock. If the transaction was fraudulent the remedy of the corporation is to rescind the agreement.

Orton v. Edson, etc., Co., 5 C. C. n. s. 540; 17 C. D. 107 (1905); aff'd, no rep., 75 O. S. 580.

Leman v. MacLennan, 7 C. C. n. s. 205, 208; 18 C. D. 137 (1905); aff'd, no rep., 75 O. S. 643.

But where the property was fraudulently overvalued *creditors* may recover from the stockholder the difference between the actual value of the property and the par value of the stock.

Gates v. Tippecanoe Stone Co., 57 O. S. 60 (1897).

Saylor v. Simpson, 12 L. D. 148 (Super. Ct. Cin. 1888).

See note to § 8630.

A purchaser of such stock from the original stockholder is not liable unless he knew of its fraudulent character.

Roebblings Sons Co. v. Shawnee, etc., Co., 4 N. P. n. s. 113; 17 L. D. 8 (C. P. 1906); aff'd, no rep., 78 O. S. 408.

— (3) **By dividends.** A subscriber is entitled to credit for dividends, both in cash and in stock, declared after his subscription was made. If in default for payments he should be charged with interest.

Railroad Co. v. Fink, 41 O. S. 321 (1884).

See Rhodes v. Equitable Life Ins. Co., 3 C. C. 501; 2 C. D. 288 (1888); aff'd, 27 W. L. B. 160.

— (4) **By note.** See notes to § 8632.

— (5) **To unauthorized agent of corporation.** Subscriptions should be paid to the treasurer of the corporation. Payment to an unauthorized agent is no defense.

See Natl. Bank v. Greenville, etc., Co., 3 C. C. n. s. 372, 381; 13 C. D. 274 (1899).

(v) **Breach of condition subsequent or stipulation in subscription.** A breach by the corporation of a condition subsequent or stipulation in a subscription is no defense to the subscriber. His remedy is an action for damages.

Stunt v. Newark, etc., Co., 22 C. C. 120; 12 C. D. 175 (1901); aff'd, no rep., 67 O. S. 555.

Chamberlain v. Painesville, etc., R. Co., 15 O. S. 225, 247.

See note to § 8630. *Conditional subscriptions.*

(w) **Set off and counterclaim.** A subscriber may set off a bona fide debt due him from the corporation against his liability on the subscription, whether the action is brought by the corporation,

Dungan v. Safford, 41 O. S. 15 (1884).

Sims v. Street Railroad, 37 O. S. 556, 558 (1882).

or by an assignee for creditors of the corporation.

Niles v. Olszak, 87 O. S. 229 (1912).

Compare Handley v. Stutz, 139 U. S. 417 (1891).

Painesville N. B. v. King Varnish Co., 8 C. C. 563; 4 C. D. 511 (1894).

Union, etc., Co. v. Jones, 35 O. S. 351 (1880).

The provisions of the bankruptcy act, as to set off of mutual debts, do not apply to the case of the creditor of a bankrupt corporation who is also indebted to the corporation on his stock subscription.

The claim of the creditor stockholder against the corporation should not be allowed until his indebtedness to the corporation has been collected by plenary suit. If found uncollectible, it should be applied on his claim as an equitable set off.

Kiskadden v. Steinle, 203 Fed. 375 (C. C. A. 1913) (distinguishing Niles v. Olszak, 87 O. S. 229.)

In an action by an assignee of the subscription a subscriber to railroad stock may set off scrip of the railroad company owned by him when notified of the assignment of his subscription, but not scrip purchased thereafter.

Dungan v. Safford, 41 O. S. 15 (1884).

(x) **Stipulation in corporate mortgage against individual liability.** A stipulation in a corporate mortgage securing a bond issue to the effect that the bondholders should have no recourse to the individual liability of stockholders does not apply to a liability for unpaid subscriptions and is no defense thereto.

Raymond v. Spring Grove, etc., Co., 21 W. L. B. 103 (Super. Ct. Cin. 1889).

Preston v. Cincinnati, etc., Co., 36 Fed. 54 (U. S. C. C. 1888).

(y) **Irregularities in a creditor's judgment against the corporation** do not constitute a defense in favor of a subscriber, provided the judgment was not obtained by fraud or collusion.

Scofield v. Excelsior Oil Co., 6 C. C. n. s. 176; 17 C. D. 318 (1905); aff'd, no rep., 74 O. S. 513.

Henry v. Vermillion, etc., R. Co., 17 Ohio 187, 191 (1848).

Section 8675. (Notice of sale.) Before stock can so be sold, the directors shall give thirty days' notice of the time and place of sale, in some newspaper in general circulation in the county where the delinquent holder resided when he subscribed for it or became such assignee or transferee, or of his actual residence at the time of the sale. If such stockholder resides out of the state, the publication shall be made in the county where the company's principal office is located. (R. S. Sec. 3253; March 14, 1853, 51 v. 484, § 1; May 1, 1852, 50 v. 274, § 7; S. & C. 276, 319.)

Section 8676. (Distribution of proceeds of sale.) When a sale is made, if after paying from its proceeds the amount due on the stock, a balance remains, on his demand it shall be paid to the owner. But if such proceeds fail fully to pay such installment, any balance may be recovered by action against the subscriber, assignee or transferee. (R. S. Sec. 3253; March 14, 1853, 51 v. 484, § 1; May 1, 1852, 50 v. 274, § 7; S. & C. 276, 319.)

Section 8677. (Procedure when certificate of stock lost or destroyed.) In case a certificate of stock in a corporation is lost or destroyed, the owner thereof may file his petition in the probate court of the county where the principal business office of such corporation is located in this state, setting

forth a pertinent description of the certificate, and a full statement of the facts relating to its destruction or loss; that he is the owner of such certificate, and was at the time of its loss or destruction; that he had not assigned, transferred or disposed of it; and that it was not pledged to any one, or if so, stating to whom, with the facts relating thereto. (R. S. Sec. 3254-1; April 23, 1891, 88 v. 336, § 1.)

See note to § 8679.

In an action by a national bank for reissue of a lost certificate of stock in a corporation, acquired in exchange for dishonored bonds, the corporation can not defend on the ground that the acquisition of the stock by the national bank was *ultra vires*. *Bank v. Urbana Co.*, 22 C. C. n. s. 529 (1915).

Section 8678. (Parties and notice.) Such petitioner shall make the corporation and any pledgee defendants to such proceeding, and serve a certified copy of his petition on some chief officer of the corporation, and such pledgee, on which copies the probate judge over his signature shall state when the petition will be heard. Such copies shall be so served not less than twenty days before the hearing. In a newspaper published and of general circulation in the county where the proceeding is pending, and also in the county where he resides, the petitioner shall publish a notice containing the substance and prayer of his petition, for three consecutive weeks immediately before the day of hearing, and stating when and where it will be heard. (R. S. Sec. 3254-1; April 23, 1891, 88 v. 336, § 1.)

Section 8679. (Finding and order of the court.) If, upon the hearing, the probate court finds that the foregoing provisions have been complied with, that such certificate was lost or destroyed, and that at that time the petitioner was and is its owner, an order shall be made that such corporation issue and deliver a new certificate to him for the original amount and kind of stock, unless the certificate was pledged to some one at the time of its loss or destruction, and the pledgee yet has a claim against it, in which case the order shall direct that such new certificate be delivered to the pledgee on such terms as the court directs. The corporation shall comply with such orders, and it shall in no wise be prejudiced thereby, or by paying dividends on such new certificate, so long as it is not made known to it that the original certificate is in existence and owned by a person other than the petitioner. (R. S. Sec. 3254-2; April 23, 1891, 88 v. 337, § 2.)

Under § 8673-17, which provides relief similar to that given by

§§ 8677 to 8681, a bond of indemnity must be given before a reissue of certificates is ordered.

In the absence of other evidence, the fact that the lost certificate was originally issued to the plaintiff would be conclusive as to his title. But where it was shown that the real ownership was in another person or corporation and that the plaintiff had merely the naked legal title, the plaintiff was held not entitled to a reissue.

Provident, etc., Co. v. Voight, 13 C. C. n. s. 267 (1910).

The corporation may, in general, require surrender of original certificate before issuing a new one.

Lee v. Citizens Bank, 2 C. S. C. R. 298 (1872).

Railroad Co. v. Robbins, 35 O. S. 483 (1880).

G. C. § 8673-13.

A corporation is not liable to the equitable owner of stock for its value, where certificates therefor are outstanding in the hands of a third person who claims to be the owner.

National Bank v. Lake Shore, etc., Ry. Co., 21 O. S. 221 (1871).

Section 8680. (Rights and liabilities under new certificate.) All rights and liabilities attaching to the original certificate shall attach to such re-issued certificate, while in force. Upon the production of the original certificate to such corporation by the owner or pledgee, the re-issued certificate shall be cancelled, surrendered and void. (R. S. 3254-2; April 23, 1891, 88 v. 337, § 2.)

Rights of holder of original certificate not affected by a reissue. When a new certificate is, under a by-law of the corporation, issued in lieu of a certificate represented to have been lost, the rights of the holder of the original certificate are not affected thereby.

Railroad Co. v. Robbins, 35 O. S. 483 (1880).

A corporation which issues a new certificate, without a surrender of the original certificate, is liable to the holder of the original certificate, although the new certificate was issued under the belief that the original had been lost. The corporation must either replace the stock or account for its value.

Railroad Co. v. Robbins, 35 O. S. 483 (1880).

See Lee v. Citizens N. B., 2 C. S. C. R. 298 (Super. Ct. Cin. 1872).

But it is not liable for dividends paid to the registered owner before the certificate was presented for transfer.

Railroad Co. v. Robbins, 35 O. S. 483 (1880).

Where a certificate issued to an officer was pledged by him, and while it was outstanding, he transferred the same stock on the books to the corporation to secure his indebtedness to it, the transfer to the corporation was held to be void. The outstanding certificate was notice to the corporation of the rights of others.

Lee v. Citizens N. B., 2 C. S. C. R. 298 (1872).

Section 8681. (Proceedings may be had by administrators or executors.) Executors and administrators, on behalf of estates of deceased owners of such lost or destroyed certificates of stock, may proceed under the next three preceding sections, and have all the rights and benefits thereof. (R. S. Sec. 3254-2; April 23, 1891, 88 v. 337, § 2.)

Section 8682. (Paid up stock personal property.) Shares of stock in a corporation shall be personal property, and when fully paid up, be subject to levy and sale upon execution against the owner. (R. S. Sec. 3255; May 1, 1852, 50 v. 274, § 5; S. & C. 276.)

Certificates of stock, see §§ 8672 to 8673-24 and notes.

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- (d) Sale of stock without judicial proceedings, p. 1110.
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- (f) When pledgee may purchase, p. 1111.
- (g) Price specified in contract of pledge, p. 1111.
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I. NATURE OF STOCK.

A. A share of stock is a right which entitles its owner to participate in the profits of the corporation, in its assets upon liquidation, and to vote at elections for directors.

See *Jones v. Davis*, 35 O. S. 477 (1880).

Shares of stock of a railroad company are personal property and the widow of a stockholder is not entitled to dower therein.

Johns v. Johns, 1 O. S. 350 (1853).

Shares of stock belonging to a decedent's estate are not "debts due and owing."

Marriott v. Railway, 16 L. D. 135 (C. P. 1905); *aff'd*, 10 C. C. n. s. 573, 575.

B. Stock as "goods" or "property" under other statutes. Shares of stock are "goods" under the sales of goods act. Contracts for the sale of stock of the value of \$2,500 and upwards are required by G. C. § 8384(1) to be in writing and signed by the parties to be charged. *Laundry Co. v. Whitmore*, 92 O. S. 44 (1915).

Under the inheritance tax law, stock in a domestic corporation is "property", and may be subjected to an inheritance tax by the state although the owner is a non-resident. Stock in a foreign corporation held by a resident of Ohio at the time of his death is "property" and subject to the inheritance tax laws. *Opins. Atty. Gen.* 1917, pp. 1282, 2132.

II. POWER OF STOCKHOLDER TO DISPOSE OF STOCK.

A stockholder has the same power of disposition over his stock as other other species of property.

Peter v. Union Mfg. Co., 56 O. S. 181, 207 (1897).

Unless restrictions are placed on his right of transfer by statute or by a valid by-law or regulation of the corporation.

See § 8673-15.

Nicholson v. Franklin Brewing Co., 82 O. S. 94, 109 (1910).

Stafford v. Produce Exchange Bkg. Co., 61 O. S. 160 (1899).

Stock may be sold at auction.

Andrews v. Watson, 12 C. O. 686 (1887).

A widow, executrix of her husband's will and a life tenant of stock belonging to the estate, with power of sale, has no authority to give an option to purchase the stock at her death. *Carnes v. Me-Afee*, 11 N. P. n. s. 517; 24 L. D. 487 (1911).

An assignment for creditors of all the real and personal estate, effects and credits of the assignor, includes stocks.

Haldeman v. Hillsborough, etc., R. Co., 2 C. S. C. R. 101 (1855).

III. LOAN OF STOCK.

Where stock was loaned "to be returned on demand" the borrower was held not liable for its value until a demand therefor was made. Where no demand was made until after the corporation became insolvent and the stock worthless, only nominal damages can be recovered.

Under the contract the borrower had a right to discharge his obligation by a return of an equal number of shares without regard to its market value.

Fosdick v. Greene, 27 O. S. 484 (1875).

Where stock was assigned by sisters to their brother to enable him to be elected to a salaried position in the corporation he is, in effect, a trustee. The statute of limitations does not begin to run in his favor until he disclaims the trust.

Bonnell v. Brown, 11 C. C. n. s. 58; 20 C. D. 712 (1908).

Right of borrower of stock to pledge the same.

See Brown v. Bank, 41 O. S. 445, 459 (1885).

IV. GIFT.

Where a person purchases stock and places it in the name of a member of his family, the presumption is that the stock was intended as a gift or advancement, but this presumption may be rebutted.

Creed v. Lancaster Bank, 1 O. S. 1 (1852).

Bonnell v. Brown, 11 C. C. n. s. 58; 20 C. D. 712 (1908).

Mook v. Akron S. & L. Co., 87 O. S. 273 (1913)

A valid gift inter vivos may be made of stock certificates. McCoy v. Gosser, 8 Ohio App. 145, 30 O. C. A. 312; citing § 8673-6; motion to certify record overruled, 15 O. L. R. 485.

Contractual rather than testamentary capacity is required to uphold a gift of stock inter vivos. Laws v. Morley, 24 C. C. n. s. 103 (1915); motion to certify record overruled, 13 O. L. R. 22.

Completed gift of stock during life of donor. Circumstances held to constitute. Ewalt v. Ames, 6 Ohio App. 374 (1917).

V. CONTRACTS FOR SALE OF STOCK.

A. When must be in writing. A contract for the sale of stock of the value of \$2,500 and upward is required by G. C. § 8384(1) to be in writing and signed by the parties to be charged. Laundry Co. v. Whitmore, 92 O. S. 44 (1915).

B. Payment to be made out of dividends. Sales to employees of corporation. A contract which contained an express promise by one party to sell, and by the other party to purchase, shares of stock, is not invalid for want of mutuality, although the contract further provided that the seller should receive the dividends and apply them on the purchase price; and that the purchaser had the option to make payments from other sources. No time of payment being stipulated in the contract, an agreement was implied to pay, by dividends or otherwise, within a reasonable time.

Stewart v. Herron, 77 O. S. 130 (1907); reversing in part, 10 C. C. n. s. 355.

Where a contract, by a large stockholder to sell stock to a skilled employee, contained no express promise by the latter to purchase (the contract providing for payment out of the dividends with an option to the employee to make other payments), but the stock was issued to the employee and by him assigned to the seller as security for payment of the purchase price, and the employee voted the stock for four years, without objection, it was held that the contract, being executed, was not invalid for want of consideration or lack of mutuality, and could not be rescinded by one party without consent of the other party.

White v. Cooper Co., 7 C. C. n. s. 114; 17 C. D. 703 (1903); aff'd, 72 O. S. 615, 691.

C. Consideration. An agreement to sell stock in a corporation,

whether solvent or insolvent, imports that the stock is of some value. The seller may recover the contract price, whether the stock is valuable or not.

Van Arsdale v. Brown, 18 C. C. 52; 9 C. D. 488 (1899).

Mutual promises, consisting of the promise of the seller to deliver, and of the buyer to buy, certain stock, are a sufficient consideration. Laundry Co. v. Whitmore, 92 O. S. 44 (1915).

D. Time for delivery. Where no time for delivery is specified in the contract of sale, the seller has a reasonable time. Laundry Co. v. Whitmore, 92 O. S. 44 (1915).

E. Tender. A tender of certificates, properly endorsed by the owner, either in blank or to the purchaser, is sufficient. Transfer on the corporate books is unnecessary. Laundry Co. v. Whitmore, 92 O. S. 44 (1915).

A tender of stock is insufficient where the seller demands more than the agreed price. Sinks v. Green, 19 C. C. n. s. 445 (1912).

F. Breach of contract by buyer. Remedies of seller. Measure of damages. Where the buyer refuses to accept the stock the seller may resell the stock, within a reasonable time after such refusal, using reasonable care and judgment, and may recover from the buyer the difference between the contract price and the proceeds of such sale.

G. C. §§ 8440, 8444.

Ashley v. Walker, 15 C. C. 660; 8 C. D. 285 (1898).

Or, without a resale, the seller may bring suit for damages. In such case, where there is an available market price, the measure of damages is, ordinarily, the difference between the contract price and the market or current price at the time fixed for acceptance.

G. C. § 8444.

Andrews v. Watson, 12 C. D. 686, 692; aff'd, no rep., 51 O. S. 619.

Sullivan v. Frank, 13 N. P. n. s. 505 (1912).

Where, under the contract of sale, payment is to be made before delivery of the stock, or delivery and payment are to be concurrent acts, the seller may tender the stock, and, on refusal of the buyer to accept and pay, may bring an action for the purchase price.

G. C. § 8443.

Andrew v. Watson, 12 C. D. 692 (1890); aff'd, 51 O. S. 619.

Shawhan v. Van Nest, 25 O. S. 490 (1874).

When the tender is made it is not necessary that the assignment of the certificate and power of attorney should have been signed. An offer to sign and deliver, with ability to perform, is sufficient.

Hager v. Reed, 11 O. S. 626 (1860).

Where the buyer has repudiated the contract and made it certain that he does not intend to perform, actual formal tender is unnecessary. A showing of readiness and ability by the seller, to perform his part of the contract, communicated to the buyer, is sufficient.

Andrews v. Watson, 12 C. D. 692 (1890); aff'd, 51 O. S. 619.

Brewing Co. v. Maxwell, 78 O. S. 54 (1908).

VI. SALES OF STOCK.

A. Sales with option to purchaser to return the stock. Where, by a contract of sale, the purchaser has the option to return the stock after one year from the date of purchase, he may exercise such option within a reasonable time after the expiration of the year. Hartman v. Gorrel, 7 Ohio App. 318; 29 O. C. A. 201 (1917).

Where stock was sold under an agreement by the seller to repurchase the stock at par, on demand, at the end of a stipulated period,

it is the duty of the purchaser, on the day specified, to tender back the certificates and to demand payment therefor.

Jones v. Jaeger, 9 N. P. n. s. 206 (C. P. 1909).

An allegation in a petition that the plaintiff tendered the "stock" necessarily includes all things essential to the ownership. Sprague v. Munger, 17 C. C. n. s. 130 (1910).

A written proposition by the seller that he will repurchase the stock within one year if the buyer so desires, becomes a contract, upon sufficient consideration, where the buyer communicates his desire to transfer the stock to the seller, and tenders it, within the year. Sprague v. Munger, 17 C. C. n. s. 130 (1910).

B. Sale of stock "short." A sale of stock "short" is a sale of that which the seller does not possess at the time, but which he expects to acquire at a lower price, subsequently, for delivery.

Lamprecht v. State, 84 O. S. 32 (1911).

C. Authority of agent to sell. Authority to sell stock is not authority to exchange it.

Cleveland v. State Bank, 16 O. S. 236 (1865).

Smith v. Gowan, 18 C. C. n. s. 99 (1911).

D. An agent authorized to sell stock can not himself purchase. A bank official who gratuitously engages to find a purchaser for a customer of the bank thereby becomes the agent of the customer, and can not himself become the purchaser without the full knowledge and consent of his principal.

Telling v. Sullivan, 14 C. C. n. s. 1; 22 C. D. 312 (1911); reversed, no rep., 88 O. S. 525.

E. Liability of broker purchasing for undisclosed principal. A stockbroker purchasing stock for an undisclosed principal is personally liable upon default of his principal.

Sullivan v. Frank, 13 N. P. n. s. 505 (1912).

F. Sale for illegal purpose. Where the object of a purchaser of stock is to obtain control of the corporation for illegal purposes, which were known to the seller, and the sale is made for the purpose of enabling the purchaser to carry out such illegal purpose, the sale is illegal and void.

Newark v. Elliott, 5 O. S. 113 (1855).

G. Evidence as to executed sale. A witness may testify that he sold stock and delivered the certificates to a person named, without producing the certificates for inspection.

Cincinnati, etc., Ry. Co. v. Rawson, 16 W. L. B. 423 (Super. Ct. Cin. 1886); aff'd, 25 W. L. B. 87.

H. Option or contract of sale. For contract construed and held to constitute an option only, see Wadsworth v. Edwards, 21 C. C. n. s. 401 (1906).

VII. PLEDGE OR HYPOTHECATION OF STOCK.

A. Stock may be hypothecated. "Strictly speaking, stock, being of an incorporeal nature, is not capable of being pledged, as there can not be a delivery of intangible property. It may be, and frequently is, hypothecated, which is a pledge in a secondary sense. An hypothecation is defined as a right which a creditor has over a thing belonging to another, and which consists in a power to cause it to be sold, in order to be paid his claim out of the proceeds."

Dueber, etc., Co. v. Dougherty, 62 O. S. 589, 593 (1900).

See Dayton N. B. v. Merchants N. B., 37 O. S. 215 (1881).

Where a corporation has a lien, by statute, on all stock owned by its debtors, and has full control over its transfer, the possession of the certificates, by pledge, gives the corporation no additional rights or benefits.

State v. Davis, 85 O. S. 44 (1911).

B. When note renewed, collateral becomes security for new note. Where a note secured by a pledge of stock is partly paid and a renewal note given for the balance, the stock will stand as collateral security for the balance of the debt embraced in the new note, in the absence of any agreement to the contrary.

Dayton N. B. v. Merchants N. B., 37 O. S. 208 (1881).

C. Agreement for pledge. Where a person became surety on a note on the agreement of the principal debtor to transfer, as indemnity, a certificate of stock which he then held, within a short time, it was held that the surety thereby acquired an equity in the stock which he could enforce against all persons having notice.

Dueber, etc., Co. v. Daugherty, 62 O. S. 589 (1900).

D. Purchase through stock broker. Broker as pledgee. Where a broker buys stock on the order of a customer, the customer is the owner of the stock from the time of purchase, whether purchased in his name or not, and he is entitled to its possession, on demand, subject to payment to the broker of advances and commissions, as to which the customer is the debtor of the broker. The legal relation of customer and broker is that of pledgor and pledgee. Upon such demand the broker need not deliver the identical stock purchased, but may deliver an equal number of shares of the same kind and value.

Lamprecht v. State, 84 O. S. 32 (1911).

Citizens Bank v. Andrews, 24 N. P. n. s. 361 (1923).

E. Right of broker to repledge. The broker may be authorized, by contract or custom of business, to repledge securities held for a client. If the client deals on margin, the broker may repledge the client's securities. But if the securities are bought and fully paid for, or are held for safe keeping, or if the client is not indebted to the broker, there is no right to repledge. Citizens Bank v. Andrews, 24 N. P. n. s. 361, 372, 374 (1923).

F. Stolen certificates; pledge of.

See note to § 8673-5.

G. Pledge of fraudulently acquired stock. Where stock, fraudulently obtained, is pledged to secure a preexisting debt, without an extension of time or other consideration therefor, the pledgee has no greater rights therein than the pledgor had.

Cleveland v. Bank, 16 O. S. 236, 269 (1865).

See § 8673-22, "Value" defined.

H. Pledge of trust stock to secure personal debt of trustee. Where a trustee borrowed money for his own use from a building and loan company, on a pledge of certificates of its stock belonging to the trust estate, of which fact the company held notice, the company acquired no lien on such stock.

Mook v. Akron S. & L. Co., 87 O. S. 273 (1913).

I. Assignment of stock to be delivered to creditor after death of debtor. A certificate of stock, assigned in blank and witnessed, found among the papers of a decedent in an envelope on which was written in

the handwriting of the decedent the name of the creditor and the words "collateral for whatever I owe him", was held to pass the stock to the creditor.

In re Clerke, 17 W. L. B. 369 (C. P. 1887).

J. Taxation of pledged stock. Where pledged stock is taxable, and no transfer to the pledgee has been made on the corporate books, it is taxed in the name of the pledgor.

Ratterman v. Ingalls, 48 O. S. 468, 491 (1891).

See notes to §§ 5372 and 192 as to what stock is taxable.

K. Rights of pledgee.

(a) Transfer of stock on corporate books. A pledgee is entitled to have the stock transferred to his name on the corporate books.

Railway Co. v. Bank, 68 O. S. 582, 599 (1903).

Henkle v. Salem Mfg. Co., 39 O. S. 547 (1883).

Dayton N. B. v. Merchants N. B., 37 O. S. 208, 215 (1881).

Railway Co. v. Rawson, 16 W. L. B. 423 (Super. Ct. Cin. 1886);
aff'd, 25 W. L. B. 87.

The bankruptcy of the pledgor does not affect this right.

Dayton N. B. v. Merchants N. B., 37 O. S. 208, 215 (1881).

But it has been held that liquidating trustees of a corporation had no authority to acquire title to stock, held by the corporation as pledgee, so as to render the corporation liable as a stockholder under the former double liability law. Gill v. Printing Co., 16 C. C. n. s. 568 (1907); aff'd, no rep. 80 O. S. 742.

(b) Where stock not transferred to pledgee on the books of the corporation. Under the Uniform Stock Transfer Act certificates of stock are, in effect, negotiable instruments.

§§ 8673-1, 8673-5 and notes.

A bona fide pledgee, holding properly endorsed certificates, is protected against all prior holders and against third persons, without a registry of the transfer on the corporate books.

§§ 8673-1, 8673-5 ("Purchaser" includes pledgee, § 8673-22).

But as against the corporation, a pledgee is not a stockholder until he presents the certificates for transfer on the corporate books.

§ 8673-3.

Henkle v. Salem Mfg. Co., 39 O. S. 547 (1883).

He is not entitled to vote, and the dividends are prima facie payable to the registered stockholder. The corporation is protected in paying dividends to the pledgor in the absence of notice of rights of the pledgee.

Railroad Co. v. Robbins, 35 O. S. 483 (1880).

Norton v. Norton, 43 O. S. 509, 522-523 (1885).

Franklin Bank v. Commercial Bank, 36 O. S. 350, 355 (1881).

§ 8673-3.

Unless the stock is transferred to the pledgee on the corporate books, he is not entitled to participate in, nor be notified of, proceedings to effect a consolidation.

Railway Co. v. Bank, 68 O. S. 582 (1903).

Nor of proceedings to sell the entire corporate property.

Schmuck v. Crume, etc., Co., 7 N. P. n. s. 24; 19 L. D. 819 (1905);
aff'd, 78 O. S. 409.

Before the enactment of the Uniform Transfer Law, where the entire corporate property was disposed of, by a sale or consolidation, and the

proceeds distributed to the stockholders of record, unregistered pledgees were in danger of losing their security.

See *Railway Co. v. Bank*, 68 O. S. 582 (1903).

Schmuck v. Crume, etc., Co., 7 N. P. n. s. 24; 19 L. D. 819 (1905); aff'd, 78 O. S. 409.

But under § 8673-1, which makes registry of transfers unnecessary, it is doubtful whether a corporation may, without liability, distribute the proceeds except on a surrender of the certificates.

Before the enactment of the Uniform Transfer law it was held that as between the pledgor and pledgee the pledgee, without a transfer, held neither the equitable or legal title, but only a special property. But, by having executed the blank assignment and power of attorney, the pledgor was estopped from asserting any control over the legal title.

Krebs v. Forbriger, 21 W. L. B. 313 (Super. Ct. Cin. 1889).

Under the double liability of stockholders, by the former law, a pledgee who held the assigned certificates, without a transfer, was not liable.

Henkle v. Salem Mfg. Co., 39 O. S. 547 (1883).

A pledgee of stock in a national bank becomes liable as a stockholder, under the national banking act, where he has the stock registered in the name of his employee, with no beneficial interest, and afterwards indorses on the note the supposed value of the stock as a credit, and presents the note, reduced by the credit, to the administrator who allows the claim in such form.

Ohio Valley N. B. v. Hulitt, 204 U. S. 162; 15 O. F. D. 530 (1907); affirming, 137 Fed. 461.

(c) **Foreclosure by judicial proceeding.** A pledgee may bring suit to foreclose his lien and for a sale of the stock. In such case neither party is entitled by law to a jury trial.

Brigel v. Creed, 65 O. S. 40 (1901).

A pledgee may be made a party to a suit by a junior lienholder.

Healy v. Robinson, 21 L. D. 579 (1911).

(d) **Sale of stock without judicial proceedings.** A pledgee has the right to sell the pledged stock on default of payment of the debt at maturity, without judicial proceedings, although no power of sale is contained in the collateral note or other contract of pledge.

Glidden v. Mechanics N. B., 53 O. S. 588, 598 (1895).

Robinson v. Boyd, 60 Q. S. 57, 68-69 (1899).

Bates v. Wiles, 1 Handy 532 (Super. Ct. Cin. 1855).

Oliver v. Cincinnati, etc., Co., 1 Hosea 457 (Super. Ct. Cin.)

Although a receiver of the assets of the pledgor has been appointed and although the amount due is in dispute.

Harrison v. Friend, 1 N. P. 39; 1 L. D. 258 (C. P. 1893).

Where a power of sale is contained in the contract of pledge it controls the rights of the parties.

Glidden v. Mechanics N. B., 53 O. S. 588, 599 (1895).

The sale must be conducted in good faith.

Bates v. Wiles, 1 Handy 532 (Super. Ct. Cin. 1855).

The pledgee's right to sell is not affected by a suit by a creditor of the pledgor to reach the stock, to which suit the pledgee is not a party. The doctrine of *lis pendens* does not apply to certificates of stock.

Krebs v. Forbriger, 21 W. L. B. 313 (Super. Ct. Cin. 1889).

(e) **Notice of sale must be given.** Reasonable notice of the time and place of sale must be given to the pledgor, unless notice is waived in the contract of pledge, or otherwise.

Glidden v. Mechanics N. B., 53 O. S. 588, 599 (1895).

Lee v. Citizens N. B., 2 C. S. C. R. 298 (Super. Ct. Cin. 1872).

If no notice is given, or an unreasonably short notice, the sale may be declared invalid.

Bates v. Wiles, 1 Handy 532 (Super. Ct. Cin. 1855).

A notice of sale given to the pledgor is equivalent to a demand of payment.

Harrison v. Friend, 1 N. P. 39; 1 L. D. 258 (C. P. 1893).

(f) **When pledgee may purchase.** A pledgee can not become the purchaser at his own sale, either directly or indirectly, in the absence of an express agreement to that effect.

Glidden v. Mechanics N. B., 53 O. S. 588 (1895).

Moore v. Central N. B., 12 C. C. n. s. 529 (1910).

Where a collateral note authorized its "holder" to sell the pledged stock and to become the purchaser thereof, a bank holding the same for collection, merely, can not sell the stock nor become the purchaser.

Moore v. Central N. B., 12 C. C. n. s. 529 (1910).

An unauthorized purchase by a pledgee may be ratified by the pledgor, but ratification can not be presumed from silence where the pledgor had no notice of the sale.

Glidden v. Mechanics N. B., 53 O. S. 588, 600 (1895).

Moore v. Central N. B., 12 C. C. n. s. 529 (1910).

An unauthorized purchase by the pledgee is not a conversion while the pledgee holds the stock, unless the pledgor elects to treat it as a valid sale, in which event the pledgee is accountable for the net proceeds of sale.

Glidden v. Mechanics N. B., 53 O. S. 588 (1895).

But when the pledgee disposes of the stock, he will be liable for a conversion, without a demand and offer of performance by the pledgor.

Glidden v. Mechanics N. B., 53 O. S. 588 (1895).

(g) **Price specified in contract of pledge. Authority of negotiating agent to receive payment.** Where a note and contract of pledge, stipulating the price in excess of the debt for which the payee may become the absolute owner of the stock, is delivered to the payee with knowledge that he is to obtain the consideration from another person, the payee is authorized to receive the original consideration for the note, but not authorized to receive, at the maturity of the note, a tender of the stipulated balance of the purchase price.

Rumsey v. Lentz, 59 O. S. 189 (1898).

(h) **Unauthorized sale. Statute of limitations. Measure of damages.** The statute of limitations does not begin to run in favor of a pledgee, who has made an unauthorized sale, until the pledgor had notice thereof.

Moore v. Central N. B., 12 C. C. n. s. 529 (1910).

Where a pledgee, without authority, purchased stock at his own sale and subsequently disposed of it, he was held accountable for the amount received therefor, with interest, less the amount of the debt, with interest.

Moore v. Central N. B., 12 C. C. n. s. 529 (1910).

See Glidden v. Mechanics N. B., 53 O. S. 588 (1895).

Where stock was sold, without notice to the pledgor, he was held entitled to recover the highest market value at any time between the day of the sale and the commencement of the suit.

Bates v. Wiles, 1 Handy 532 (Super. Ct. Cin. 1855).

Lien of corporation on stock for indebtedness of stockholder to it.
See note to § 8673-15.

Section 8683. (May purchase stock in other companies.)
A private corporation also may purchase, or otherwise ac-

quire, and hold shares of stock in other kindred but not competing private corporations, domestic or foreign. This shall not authorize the formation of a trust or combination for the purpose of restricting trade or competition. (R. S. Sec. 3256; May 6, 1902, 95 v. 390; April 15, 1902, 95 v. 151; R. S. 1880.)

I. Common law rule, p. 1112.

II. Exceptions.

- A. To avoid loss, p. 1112.
- B. Executed transaction, p. 1113.
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- D. Stock in building and loan association, p. 1113.

III. Effect of § 8683.

- A. In general, p. 1113.
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- H. Action by stockholder to enjoin acquisition of stock. Venue and parties defendant, p. 1114.

IV. Federal restrictions on acquiring stock in other corporations, p. 1115.

For power of corporation to acquire stock in itself see note to § 8627.

I. COMMON LAW RULE.

A corporation has no power, at common law, to subscribe for or become the owner of stock of another corporation unless authority is clearly conferred by statute.

Franklin Bank v. Commercial Bank, 36 O. S. 350 (1881).

Ry. Co. v. Iron Co., 46 O. S. 44 (1888).

Columbus, etc., Ry. Co. v. Burke, 19 W. L. B. 27 (1887).

Hafer v. N. Y., etc., R. Co., 14 W. L. B. 68, 70 (1885).

Easun v. Buckeye Brewing Co., 51 Fed. 156; 7 O. F. D. 188 (1892).

State v. H. V. Ry. Co., 12 C. C. n. s. 49; 21 C. D. 175 (1909).

See comment in Mannington v. H. V. Ry. Co., 8 O. L. R. 481, 482; 183 Fed. 156, 157; 16 O. F. D. 577, 578 (C. C. Ohio 1910).

Nor have liquidating trustees of a corporation any such power. Gill v. Printing Co., 16 C. C. n. s. 568 (1907); aff'd, no rep. 80 O. S. 742.

II. EXCEPTIONS.

A. To avoid loss. To secure itself from loss, on a debt due to it or otherwise, a corporation may acquire stock in another corporation with a view to its subsequent sale and conversion into money.

Armstrong v. Herancourt Brewing Co., 26 W. L. B. 39, 40 (C. P. 1891).

See Coppin v. Greenless, 38 O. S. 275 (1882).

Where a corporation held bonds of another corporation as security for a debt due to it, and exchanged the bonds for stock in a new cor-

poration formed as a reorganization of the debtor corporation, it became the lawful owner of such stock.

Marriott v. Railway Co., 16 L. D. 135 (C. P. 1905); aff'd, 10 C. C. n. s. 573, 575.

Bank v. Water Works Co., 22 C. C. n. s. 529 (1915).

B. Executed transaction. Where a corporation has made an *ultra vires* subscription to the capital stock of another corporation, and voluntarily made payment thereon, it can not recover back such payments.

Railway Co. v. Iron Co., 46 O. S. 44 (1888).

See Norwalk, etc., Co. v. Norwalk, etc., Co., 14 C. C. 1; 7 C. D. 275 (1897).

C. Mutual insurance company. A corporation may become a member of a mutual insurance company, for the purpose of its own protection.

Stone v. Traction Co., 4 N. P. n. s. 104; 16 L. D. 645 (C. P. 1906).

D. Stock in building and loan association. A corporation may subscribe for stock in a building and loan association in order to borrow money for its business.

Norwalk, etc., Co. v. Norwalk, etc., Co., 14 C. C. 1; 7 C. D. 275 (1897).

III. EFFECT OF § 8683.

A. In general. The common law rule is modified by § 8683 so as to permit a corporation to acquire stock in corporations which are (1) kindred (2) and not competing, when (3) the result of the purchase is not the formation of a trust or combination.

Mannington v. H. V. Ry. Co., 8 O. L. R. 476; 183 Fed. 152; 16 O. F. D. 572 (U. S. C. C. 1910).

It is improper to insert, in the purpose clause of articles of incorporation, a provision authorizing the company to acquire stock in other corporations. Rep. Atty. Gen. 1912, p. 34. See also note to § 8625. **Purpose for which organized.**

B. Holding companies. Holding companies are not authorized in Ohio. Articles of incorporation which attempted to authorize the proposed corporation to own or deal generally in stocks of other companies have been rejected by the secretary of state for the reason that § 8683 authorizes only a limited dealing in stocks.

5 Opins. Attys. Gen. 969, 924 (1903).

Rep. Atty. Gen. 1911-1912, pp. 58, 61.

C. "Kindred" corporation. A railroad company and a coal mining company are not kindred corporations. A railroad company has no power to acquire stock in a coal mining corporation.

State v. H. V. Ry. Co., 12 C. C. n. s. 49, 59; 21 C. D. 175 (1909).

State v. H. V. Ry. Co., 8 Ohio App. 450; 28 O. C. A. 241 (1917).

"Kindred" may mean "a corporation of the same class", or it may be more narrowly construed as meaning "congenial" or "sympathetic". Toledo Co. v. Smith, 205 Fed. 643, 652 (D. C. 1913).

D. "Competing" corporations.

See note to § 8807.

An interurban railway company is not a competitor of a city street railway company, over whose tracks it runs cars by agreement. In re Mansfield Co., 3 Ohio App. 253; 21 C. C. n. s. 95 (1914).

E. Section 8683 applies to railroad companies. This section ap-

plies to railroad companies. Its provisions are not inconsistent with the provisions of §§ 8806 to 8809, but are cumulative.

Pollitz v. Commission, 96 O. S. 49 (1917).

Mannington v. H. V. Ry. Co., 8 O. L. R. 451; 183 Fed. 133.

State v. H. V. Ry. Co., 12 C. C. n. s. 49, 59; 21 C. D. 175 (1909).

F. Stock control of one corporation by another. Where one corporation owns a majority of the stock of another corporation, its representatives constituting a majority of the board of directors, and by means of such control it is attempted to expend large sums for equipment chiefly for the benefit of the stockholding corporation, thereby diverting profits otherwise applicable to dividends, resulting in injunction suits and controversies with the minority stockholders, the corporation may be dissolved under G. C. § 11938. *In re Mansfield Co.*, 3 Ohio App. 253; 21 C. C. n. s. 95 (1914).

It is probably competent for one corporation to cause a subsidiary company to be organized for legitimate purposes. *Kardo Co. v. Adams*, 231 Fed. 950; 14 O. L. R. 223 (O. C. A. Ohio 1916). See also page 174 of the opinion in *Cemetery Assn. v. Traction Co.*, 93 O. S. 161.

But one corporation can not organize another corporation as a mere "dummy" with no real purpose of its own. *Cemetery Assn. v. Traction Co.*, 93 O. S. 161 (1915).

Ownership, by one corporation, of all the stock in another corporation, will not make it liable for the debts of the latter, in the absence of unusual circumstances. *Pittsburg Co. v. Duncan*, 232 Fed. 584 (C. C. A. Ohio 1916); *Trust Co. v. Carpenter*, 250 Fed. 668 (C. C. A. Ohio 1918).

Where one corporation controls another corporation by stock ownership, there is not necessarily a merger of identity of the two companies. One may sue the other in federal court, if diversity of citizenship exists. *Toledo v. Rys. & Lt. Co.*, 259 Fed. 450 (1919).

G. A foreign corporation may own stock in kindred but not competing Ohio corporations, when authorized by the laws of its home state, and not prohibited by statute in Ohio.

Mannington v. H. V. Ry. Co., 8 O. L. R. 451, 481 to 484; 183 Fed. 133; 16 O. F. D. 552 (C. C. Ohio 1910).

Smith v. Newark, etc., R. Co., 8 C. C. 583, 591 (1894).

Acting as a stockholder in an Ohio corporation or giving assent to changes in its regulations is not "doing business" in Ohio within the meaning of §§ 178 or 5508.

Toledo Co. v. Smith, 205 Fed. 643 (D. C. 1913).

A foreign corporation organized for the sole purpose of holding the stock and securities of an Ohio corporation may exercise in Ohio all the incidents of such ownership, such as voting at stockholders' meetings and giving assent to change of regulations, provided the exercise of such incidents does not tend to foster monopoly or suppress competition.

Toledo Co. v. Smith, 205 Fed. 643, 651 (U. S. D. C. 1913).

A foreign corporation with corporate power to own and deal in stocks of other corporations generally can not be admitted to do business in Ohio, since under § 8683 Ohio corporations may acquire stock only in kindred and not competing corporations.

5 Opins. Attys. Gen. 924, 969 (1903).

Rep. Atty. Gen. 1910-1911, p. 246.

Rep. Atty. Gen. 1911-1912, p. 61.

Unless it expressly renounces the right to exercise such power in Ohio.

Rep. Atty. Gen. 1911-1912, p. 78.

H. Action by stockholder to enjoin acquisition of stock. Venue

and parties defendant. An action by a stockholder in a railroad company to enjoin the unlawful acquisition of stock in other corporations must be brought in a county in which jurisdiction may be acquired over the railroad company. The other corporations are not proper parties defendant.

Westfall v. Lake Shore, etc., Ry., 13 N. P. n. s. 217; 22 L. D. 75, 397 (C. P. 1910).

IV. FEDERAL RESTRICTIONS ON ACQUIRING STOCK IN OTHER CORPORATIONS.

The Clayton Act (38 U. S. Stats. 730, § 7) prohibits one corporation engaged in interstate commerce from acquiring, directly or indirectly, stock in another corporation, which is engaged in interstate commerce, where the effect of the acquisition may be to substantially lessen competition between the corporations, or to restrain such commerce in any section or community, or tend to create a monopoly in any line of commerce. The prohibition, however, does not apply to corporations acquiring such stock solely for investment, nor prevent a corporation "from causing the formation of subsidiary corporations for the actual carrying on of their immediate lawful business, or the natural and legitimate branches or extensions thereof, or from owning and holding all or a part of the stock of such subsidiary corporations, when the effect of such formation is not to substantially lessen competition. Section 7 of the Clayton Act is printed in the Appendix.

Section 8684. (Corporate property, how employed.) No corporation shall employ its stocks, means, assets, or other property, directly or indirectly, for any other purpose than to accomplish the legitimate objects of its creation. (R. S. Sec. 3266; May 1, 1852, 50 v. 274, § 73; S. & C. 309.)

Misappropriation of property and remedies.

See note to § 8660.

Corporate property as a trust fund. Corporate property is not owned by the corporation in the sense of ownership as applied to property of an individual. Corporate property is a fund set apart to be used only for corporate purposes. It is impressed with the character of a trust fund for that purpose.

A trust relation exists between the directors and stockholders. The duties of the directors are of a fiduciary nature. They are trustees for the stockholders and creditors.

Rouse v. Bank, 46 O. S. 493, 501-502 (1889).

Hardware Co. v. Castings Co., 90 O. S. 171 (1914).

Goodin v. Cincinnati, etc., Co., 18 O. S. 169 (1868).

Cheney v. Maumee Cycle Co., 64 O. S. 205, 213 (1901).

Bank v. Mfg. Co., 67 O. S. 306, 314 (1902).

Niles v. Olszak, 87 O. S. 229 (1912).

But see Hollins v. Brierfield, etc., Co., 150 U. S. 371, 381, 383 (1893).

McDonald v. Williams, 174 U. S. 397, 401 (1899).

The trust relation exists to such an extent that when brought into court by creditors for an accounting, the corporation may ask the instruction of the court as to its duties.

Everhardt v. U. S., etc., Co., 8 N. P. 525; 11 L. D. 687 (Super. Ct. Cin.)

Unpaid subscriptions to the stock of an insolvent corporation are a part of the trust fund for creditors.

Turnbull v. Pomeroy Salt Co., 24 W. L. B. 133 (C. P. 1890).

Niles v. Olszak, 87 O. S. 229 (1912).

In the opinion of the federal courts, the trust fund doctrine of Rouse v. Bank is limited to cases where the corporation has ceased to be a going concern. Bank v. Johnson, 219 Fed. 89, 94 (1915). See Thoms v. Goodman, 254 Fed. 39; 17 O. L. R. 31 (1918).

Fraudulent transfers of property. Where the property of a corporation has been fraudulently or wrongfully disposed of by directors, its creditors or stockholders may pursue it into the hands of purchasers with notice.

Goodin v. Cincinnati, etc., Co., 18 O. S. 169 (1868).

Taylor v. Miami Exporting Co., 5 Ohio 162 (1831).

It is the duty of a receiver of an insolvent or dissolved corporation to recover property fraudulently conveyed.

Monitor Furnace Co. v. Peters, 40 O. S. 575 (1884).

Sayle v. Guarantee, etc., Co., 2 C. C. n. s. 401; 15 C. D. 503 (1903).

Where it did not appear that a corporation was insolvent and that it had ceased to prosecute the objects for which it was created at a time when its funds were used to pay notes, executed by its president and endorsed by the corporation, held by a bank to cover a loss by the failure of a former corporation the funds so used are not so impressed with a trust as to be recoverable by the trustee in bankruptcy of the corporation. Haines v. Bank, 203 Fed. 225 (C. C. A. 1913).

Preferences by insolvent corporations. At a time when insolvent individuals were permitted to prefer certain of their creditors, it was held that preferences by insolvent corporations were invalid.

Rouse v. Bank, 46 O. S. 493 (1889).

Smith, etc., Co. v. McGroarty, 136 U. S. 237; 24 W. L. B. 110 (1890).

Remington v. Central, etc., Co., 3 N. P. 258; 4 L. D. 337 (1896).

Benedict v. Bank, 4 N. P. 231; 6 L. D. 320 (1897); 19 C. C. 408.

Cheney v. Maumee Cycle Co., 20 C. C. 19 (1900); aff'd, 64 O. S. 205 (1901).

Although certain mortgages and liens created or suffered by corporations, which were going concerns, were upheld as not being preferential.

Campbell, etc., Co. v. Bellman Bros. Co., 11 C. C. 360; 5 C. D. 389 (1896).

Damarin v. Huron Iron Co., 47 O. S. 581 (1890).

Ford v. Lamson, 17 C. C. 539; 9 C. D. 374 (1899).

Bosche v. Toledo, etc., Co., 14 C. C. 289; 7 C. D. 374 (1897).

In re Winchell Mfg. Co., 1 N. P. 136; 1 L. D. 310 (1894).

Preference by foreign corporation.

See Kit Carter Cattle Co. v. McGillen, 21 C. C. 210 (1900).

STOCKHOLDERS.

Section 8685. (Annual statement to stockholders.) Every corporation organized under the laws of Ohio, annually shall make a statement of its financial condition, setting forth its assets and liabilities, and furnish to each stockholder a true copy thereof, together with a list of its stockholders, and their places of residence. (R. S. Sec. 3268; R. S. 1880.)

Section 8686. (Liability of stockholders.) The stockholders of a corporation who are holders of its shares at a

time when its debts and liabilities are enforceable against them, shall be held liable, equally and ratably, but not one for another, in addition to their stock in an amount equal thereto, to the creditors of the corporation, to secure the payment of such debts and liabilities. No stockholder who transfers his stock in good faith, if such transfer is made on the books of the company or on the back of the certificate of stock properly witnessed or tendered for transfer on its books prior to the time when such debts and liabilities are so enforceable, may be held to pay any portion thereof. (R. S. Sec. 3258; April 25, 1904, 97 v. 390; April 29, 1902, 95 v. 312; May 1, 1852, 50 v. 296, §§ 78-79; March 11, 1853, 51 v. 386; April 17, 1854, 52 v. 44, § 78; April 12, 1865, 62 v. 134; March 11, 1874, 69 v. 25; R. S. 1880; S. & C. 310.)

Double liability of bank stockholders, see § 710-75.

- I. Liability of stockholders in absence of statute.
 - A. Not liable for corporate debts, p. 1118.
 - B. Not bound by corporate contracts, p. 1118.
 - C. Not subject to injunction for acts of corporation alone, p. 1118.
 - D. Assessment on stockholders by agreement, p. 1118.
 - E. On stock purchased from corporation for less than par, p. 1118.
 - F. For ultra vires or illegal acts or business, p. 1118.
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 - H. Liability on stock subscriptions, p. 1119.
- II. Double statutory liability.
 - A. No liability on debts incurred since 1903, p. 1119.
 - B. Transferrer. Liability of, p. 1119.
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 - D. Stockholders registered in the corporate books are prima facie liable, p. 1120.
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- III. Nature of statutory liability, p. 1120.
- IV. Control of corporation over liability, p. 1121.
 - V. Enforcement of liability of stockholders in foreign corporations, p. 1121.
- VI. Contribution between stockholders, p. 1121.
- VII. Liability attaches when, p. 1122.
- VIII. Bond against liability, p. 1122.
- IX. Defenses of stockholders.
 - A. Waiver of liability by creditors, p. 1122.
 - B. Discharge in bankruptcy, p. 1122.
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 - E. Objections to claims of creditors, p. 1122.
 - F. Set off, p. 1123.
 - G. Insolvency, p. 1123.
 - H. That no certificate of stock has been issued is no defense, p. 1123.

I. LIABILITY OF STOCKHOLDERS IN ABSENCE OF STATUTE.

A. Not liable for corporate debts. A stockholder, whose stock has been paid up, is not personally liable for the debts of the corporation. Carr v. Inglehart, 3 O. S. 457, 458 (1854).

Ireland v. Palestine, etc., Co., 19 O. S. 369, 372 (1869).

Robinson v. Willard, 16 C. C. n. s. 464 (1907); aff'd, no rep. 78 O. S. 441.

Stockholders in a corporation *de facto* are not individually liable as partners. Their liability is that of stockholders only.

Rowland v. Meader Furn. Co., 38 O. S. 271 (1882).

Irregular or defective incorporation does not render the stockholders personally liable for corporate debts, where the incorporation statute has been substantially complied with.

Second N. B. v. Hall, 35 O. S. 158 (1878).

See note to § 8627. Estoppel to deny corporate existence.

B. Not bound by corporate contracts. A contract made by a corporation, on a sale of its entire property and good will, that it will not re-engage in business in competition with the purchaser, is not binding upon its stockholders personally.

Hall's Safe Co. v. Herring, etc., Co., 146 Fed. 37; 15 O. F. D. 37 (C. C. A. 1906).

C. Not subject to injunction for acts of corporation alone. A stockholder is not individually liable, nor subject to injunction, because of unfair competition practiced by the corporation alone.

Hall's Safe Co. v. Herring, etc., Co., 146 Fed. 37; 15 O. F. D. 37 (C. C. A. 1906).

D. Assessment on stockholders by agreement. An agreement between all the stockholders of a corporation whereby the preferred stockholders remitted all accumulated and unpaid dividends, and the common stockholders agreed to pay an assessment of a specified amount per share, is valid and enforceable. Dever v. Engineering Co., 5 Ohio App. 77; 24 C. C. n. s. 454 (1915); motion to certify record overruled, 13 O. L. R. 515.

An agreement by solvent stockholders of an embarrassed corporation that they will severally contribute to raise a fund to pay the corporate indebtedness creates a valid obligation. If the share to be contributed by each is not expressly fixed by the agreement, each should contribute in the proportion that the number of shares of stock owned by him bears to the shares held by all the contributors.

Sterling Wrench Co. v. Amstutz, 50 O. S. 484 (1893).

Stockholders, who joined in a contract of employment made by the corporation, and agreed to transfer stock to the employee in part payment for his services, are not liable to such employee, when it appears that the contract is void under the statute of frauds, although the corporation is liable on a *quantum meruit*. Robinson v. Willard, 16 C. C. n. s. 464 (1907); aff'd, no rep. 78 O. S. 441.

E. On stock purchased from corporation for less than par.

See note to § 8630. *Disposition of stock by corporation after election of directors.*

F. For ultra vires or illegal acts or business.

See notes to § 8627. *Ultra vires acts; Corporation as a legal entity, and Promoters.*

G. On guaranty contracts. Rights and liabilities.

See Wise v. Miller, 45 O. S. 388 (1887).

H. Liability on stock subscriptions.

See notes to §§ 8630 and 8674.

II. DOUBLE STATUTORY LIABILITY.

A. No liability on debts incurred since 1903. Exception as to bank stockholders.

See § 8687.

B. Transferrer. Liability of. By the amendment of this section (95 v. 312) it was the intention of the legislature to restrict the liability of a stockholder to those debts which were incurred while the stock was held by such stockholder.

Scotfield v. Excelsior Oil Co., 6 C. C. n. s. 169; 17 C. D. 347 (1905); aff'd, 74 O. S. 513.

State B. & T. Co. v. Mitchell Co., 14 N. P. n. s. 49 (1913).

The amendment (95 v. 312) was evidently intended to avoid the consequences of *Herrick v. Wardwell*, 58 O. S. 294 (1898).

State B. & T. Co. v. Mitchell, 14 N. P. n. s. 49, 64 (1913).

The amendment (95 v. 312) exempting transferrers from liability has been held unconstitutional.

Swift & Co. v. Youngstown, etc., Co., 6 C. C. n. s. 89; 17 C. D. 253 (1905).

Little v. Aultman, etc., Co., 15 L. D. 355 (C. P. 1905).

Contra, *Scotfield v. Excelsior Oil Co.*, 6 C. C. n. s. 169, 175; 17 C. D. 347 (1905); aff'd, no rep., 74 O. S. 513.

See *Sheets Mfg. Co. v. Neer Mfg. Co.*, 4 N. P. n. s. 201; 17 L. D. 119 (C. P. 1906).

State B. & T. Co. v. Mitchell Co., 14 N. P. n. s. 49, 63 (1913).

The amendment does not affect liability for debts previously contracted. *Blackburn v. Irwine*, 205 Fed. 217, 219 (C. C. A. 1913).

Prior to the amendment (95 v. 312) a transfer, although made in good faith, did not release the transferrer for debts incurred prior to the transfer.

Brown v. Hitchcock, 36 O. S. 678 (1881).

Harpold v. Stobart, 46 O. S. 397 (1889).

Rider v. Fritchey, 49 O. S. 285, 295 (1892).

The transferee was primarily liable. If insolvent or nonresident, resort could be had to the transferrer, after the total liability of the existing solvent and resident stockholders had been exhausted, but not before.

Poston v. Hull, 75 O. S. 502 (1907).

Wick N. B. v. Union N. B., 62 O. S. 446 (1900).

Brown v. Hitchcock, 36 O. S. 667 (1881).

The transferrer is not liable for debts incurred after transfer of the stock on the corporate books, if in good faith. But if the transferrer remained the equitable owner he remained liable.

Peter v. Union Mfg. Co., 56 O. S. 181 (1897).

Muskingum, etc., Co. v. Ward, 13 Ohio 120 (1844).

Poston v. Hull, 75 O. S. 505 (1907).

A transferrer, who has been held liable to creditors, may recover against his transferee.

Harpold v. Stobart, 46 O. S. 397, 401 (1889).

Poston v. Hull, 75 O. S. 505 (1907).

The equities between a transferrer and transferee may be adjusted in the stockholders' liability suit.

Railroad Co. v. Smith, 48 O. S. 219 (1891).

Where judgment has been rendered against the transferee, the transferrer being a party to the suit, such judgment is final, and, after failure

to collect the judgment from the transferee, creditors can not hold the transferrer.

Bullock v. Kilgour, 39 O. S. 543 (1883).

The renewal of corporate notes does not release a transferrer, although after the transfer and without his knowledge.

Hauenschild v. Standard, etc., Co., 8 N. P. 124 (Super. Ct. Cin.).

Boice v. Hodge, 51 O. S. 236.

Unless the renewal note was accepted in payment of the obligation.

Wheeler v. Faurot, 37 O. S. 26 (1881).

C. Transferee. Liability to creditors follows the stock and a transferee of stock is primarily liable to creditors. The transferee is held to indemnify the transferrer on account of any statutory liability.

Poston v. Hull, 75 O. S. 502, 505 (1907).

Harpold v. Stobart, 46 O. S. 397, 401 (1889).

Wheeler v. Faurot, 37 O. S. 26, 28 (1881).

Brown v. Hitchcock, 36 O. S. 667, 680 (1881).

Bonewitz v. Bank, 41 O. S. 78 (1884).

R. R. Co. v. Smith, 48 O. S. 219 (1891).

Barrick v. Gifford, 47 O. S. 180 (1890).

The liability attaches to all who are stockholders at the time of the enforcement of the liability regardless of when they became stockholders.

Poston v. Hull, 75 O. S. 502, 507 (1907).

Umstaetter v. Newark, etc., Co., 4 N. P. n. s. 150; 17 L. D. 30 (1906).

A transferee is liable although he held the stock only long enough to transfer it again.

Schwill v. Beekel, 1 N. P. n. s. 1; 13 L. D. 699 (Super Ct. Cin. 1903).

D. Stockholders registered in the corporate books are prima facie liable.

See G. C. § 8689.

Harpold v. Stobart, 46 O. S. 397 (1889).

Herrick v. Wardwell, 58 O. S. 294 (1898).

Biles v. Looker Co., 17 C. C. 538; 9 C. D. 685 (1889).

Wehrman v. Reakirt, 1 C. S. C. R. 230 (1871).

Marriott v. Railway, 16 L. D. 135 (C. P. 1905); aff'd, 10 C. C. n. s. 573, 575.

But since the amendment of § 8686 in 1902 where a certificate properly assigned was left for transfer on the corporate books, but the transfer was not made because of omission of the officers of the corporation the transferrer is not liable.

State B. & T. Co. v. Mitchell Co., 14 N. P. n. s. 49, 64 (1913).

E. Debts of corporation assumed by new corporation. Where a corporation is reorganized and succeeded by a new corporation, which assumes the debts of the old corporation, the stockholders of the old corporation remain liable, but such liability is secondary to that of the new corporation and its stockholders.

Marriott v. Railway Co., 16 L. D. 135 (C. P. 1910); s. c., 10 C. C. n. s. 573; 20 C. D. 419.

Irvine v. Bankard, 181 Fed. 206 (1910); aff'd, no rep., 184 Fed. 986.

III. NATURE OF STATUTORY LIABILITY.

Not joint, but several.

Mason v. Alexander, 44 O. S. 318, 333 (1886).

Umsted v. Buskirk, 17 O. S. 113 (1866).

Poston v. Hull, 75 O. S. 505 (1907).

Not a primary resource for the collection of corporate debts, but a

secondary and collateral obligation, to be resorted to only in case of insolvency of corporation.

- Poston v. Hull, 75 O. S. 502, 505 (1907).
- Bronson v. Schneider, 49 O. S. 438 (1892).
- Younglove v. Lime Co., 49 O. S. 663, 666 (1892).
- Peter v. Union Mfg. Co., 56 O. S. 181, 197 (1897).
- Falkenback v. Patterson, 43 O. S. 359, 370 (1885).
- Swan v. Mansfield, etc., R. Co., 3 N. P. 225; 5 L. D. 297 (1896).

It is contractual in its nature.

- Dabney v. Pappenheimer Co., 20 C. C. 707 (1888).
- Cleveland Gas Co. v. Collins, 19 C. C. 247 (1899).
- Northern N. B. v. Maumee, etc., Co., 2 N. P. 260; 2 L. D. 67 (1894).
- See Kulp v. Fleming, 65 O. S. 321 (1901).
- Blair v. Newbegin, 65 O. S. 425 (1901).

The liability is a provable claim against the estate of a bankrupt stockholder.

- In re Rouse, 40 W. L. B. 220.

IV. CONTROL OF CORPORATION OVER LIABILITY.

The corporation has no control over the statutory liability, which is for the exclusive benefit of creditors. It can not assign the liability even for the benefit of all creditors.

- Wright v. McCormack, 17 O. S. 86 (1866).
- Umsted v. Buskirk, 17 O. S. 113 (1866).
- White v. Ingersoll, 2 Cleve. L. R. 362 (1878).

Nor can it release a stockholder therefrom.

- No. Fairmount, etc., Co. v. Ashbrook, 12 L. D. 10 (Super. Ct. Cin. 1901).

Nor counterclaim upon it against a stockholder.

- Jungkuntz v. West Lib. Assn., 6 W. L. B. 428 (1881).

V. ENFORCEMENT OF LIABILITY OF STOCKHOLDERS IN FOREIGN CORPORATIONS.

Where the liability is contractual, and not penal, it may be enforced in Ohio.

- Kulp v. Fleming, 65 O. S. 321 (1902).
- Blair v. Newbegin, 65 O. S. 425 (1902).
- Roher v. Bank, 22 C. C. n. s. 502 (1904).
- See Wyatt v. Moorehead, 4 N. P. 435; 7 L. D. 380 (1897).
- Judson v. Stewart, 7 N. P. 160 (1897).

Where the liability of stockholders of a foreign corporation is enforced in Ohio, the procedure followed is that of Ohio, and, although by the law of the home state of such corporation stockholders must be sued separately, they may in Ohio be joined in one action.

- Blair v. Newbegin, 65 O. S. 425 (1901).

VI. CONTRIBUTION BETWEEN STOCKHOLDERS.

Stockholders may require that all solvent resident stockholders be made defendants.

- Harpold v. Stobart, 46 O. S. 397, 404 (1889).
- Wheeler v. Faurot, 37 O. S. 26, 29 (1881).
- Umsted v. Buskirk, 17 O. S. 113 (1866).

But stockholders do not bear the relation of sureties to each other. One stockholder, having voluntarily paid the corporate debts, can not recover contribution from other stockholders who were solvent and resident.

- Burr v. Bates, 3 C. C. 1, 6; 2 C. D. 1 (1887).
- See Wehrman v. Reakirt, 1 C. S. C. R. 230, 234 (1871).

VII. LIABILITY ATTACHES WHEN.

The liability attaches at the time the debt or liability is incurred.

Herrick v. Wardwell, 58 O. S. 294 (1898).

Harpold v. Stobart, 46 O. S. 397, 404 (1889).

Brown v. Hitchcock, 36 O. S. 667, 678 (1881).

Cleveland Gas Co. v. Collins, 19 C. C. 247 (1899).

VIII. BOND AGAINST LIABILITY.

For rights under bond given by purchaser of property, from stockholder against liability, see

Hatry v. Painesville, etc., Co., 1 C. C. 426; 1 C. D. 238 (1886);
aff'd, 32 W. L. B. 281.

IX. DEFENSES OF STOCKHOLDERS.

A. Waiver of liability by creditors. Whether the statutory liability may be waived by creditors, as by an express stipulation in a corporate mortgage, has been differently decided.

Waiver held invalid.

Kreisser v. Ashtabula, etc., Co., 2 C. C. n. s. 597; 14 C. D. 313 (1901).
Held valid.

Hull v. Standard, etc., Co., 20 C. C. 533 (1900).

Hardman v. Cincinnati, etc., Co., 18 W. L. B. 264 (C. P. Referee 1887).

Babbitt v. Read, 236 Fed. 42 (C. C. A. N. Y. 1916).

B. Discharge in bankruptcy. A discharge in bankruptcy of the stockholder is no defense unless the claims of the plaintiff and other creditors were scheduled in the bankruptcy proceeding, or they had notice or knowledge of the proceeding.

Roebing, etc., Co. v. Shawnee, etc., Co., 4 N. P. n. s. 113; 17 L. D. 8 (C. P. 1906); aff'd, 78 O. S. 408.

C. That corporation is not insolvent. A stockholder may deny insolvency of the corporation.

Murphy v. Alma, etc., Co., 5 O. L. R. 508 (C. P. 1907).

D. Settlement. Where the stockholders settled with all but one creditor, at a discount, the one dissenting creditor can not thereafter recover more than he would have recovered had the suit been prosecuted to a final decree and the proceeds distributed pro rata.

Ryan v. Miami, etc., R. Co., 16 C. C. 530; 9 C. D. 401 (1898).

Where solvent stockholders agreed to severally contribute to raise a fund to pay the corporate debts, one stockholder agreeing to surrender and cancel a note of the corporation, the other stockholders having paid their share may set up such agreement in defense to an action on such note.

Sterling Wrench Co. v. Amstutz, 50 O. S. 484 (1893).

Note given to one creditor under an agreement that it shall be credited on statutory liability. Agreement construed.

Beebe v. Thomas, 2 W. L. B. 107 (Super. Ct. Cin. 1877).

Compromise and payment of a certain sum is a defense in a suit by a receiver against a non-resident stockholder, at least to the extent of the actual payment. *Mottinger v. Hendricks*, 208 Fed. 824 (D. C. 1913).

E. Objections to claims of creditors. Where the claim of a creditor is not in judgment, stockholders may interpose only such defenses thereto as the corporation might have pleaded.

Railroad Co. v. Smith, 48 O. S. 219 (1891).

Where the claim has been reduced to judgment it is conclusive on the stockholders, although rendered by default.

Gaw v. Glassboro, etc., Co., 20 C. C. 416 (1900).

Scofield v. Excelsior Oil Co., 6 C. C. n. s. 176; 17 C. D. 318 (1905); aff'd, 74 O. S. 513.

That the creditor has settled his claim against the corporation, or filed his claim and asserted a lien in another case is no defense, where it is not alleged that the claim has been paid.

Hardman v. Cincinnati, etc., Ry. Co., 15 W. L. B. 164 (1886).

Where one creditor is also a stockholder, and has purchased and set up certain claims against the corporation, another stockholder who has agreed with him to pay debts equally may, by cross petition, have an accounting. Jones v. Turney Co., 91 O. S. 122 (1914).

F. Set off. A stockholder can not set off against his liability an indebtedness of the corporation to him.

Hardman v. Cincinnati, etc., Co., 15 W. L. B. 164 (1886).

Marriott v. Railway, 16 L. D. 135; s. c., 10 C. C. n. s. 573; 20 C. D. 419.

Painesville N. B. v. King Varnish Co., 8 C. C. 563; 4 C. D. 54 (1894); reversed, in part, 56 O. S. 744.

But see Niles v. Olszak, 87 O. S. 229 (1912).

Except to the extent of his dividend or distributive share from the fund realized for creditors.

King v. Armstrong, 50 O. S. 222 (1893).

Barber v. Leader, etc., Co., 7 C. C. 411; 4 C. D. 658 (1893).

Marriott v. Railway, 16 L. D. 135; s. c., 10 C. C. n. s. 573; 20 C. D. 419.

But a stockholder may in one pleading allege a proper defense, and also set up his claim against the corporation.

Murphy v. Alma, etc., Co., 5 O. L. R. 508 (C. P. 1907).

And where a claim is founded upon a note of the corporation, acquired by the claimant after maturity, from a payee who was indebted to the corporation, the indebtedness of the payee may be set off against the note. Gill v. Printing Co., 16 C. C. n. s. 568 (1907); modified and aff'd, no rep. 80 O. S. 742; 81 O. S. 515.

G. Insolvency of a stockholder is not a defense available to him.

Marriott v. Railway, 16 L. D. 135 (C. P. 1905); aff'd, 10 C. C. n. s. 573, 575.

H. That no certificate of stock has been issued is no defense.

Royce v. Tyler, 2 C. C. 175; 1 C. D. 428 (1887).

Kreisser v. Ashtabula, etc., Co., 2 C. C. n. s. 597, 601; 14 C. D. 313 (1910).

Section 8687. (Corporations created subsequent to November 23, 1903.) The next preceding section shall not apply to stockholders in a corporation created after the twenty-third of November, 1903, nor to debts or liabilities of a corporation incurred after such date. As to all debts and liabilities of corporations for profit incurred after such date, the stockholders thereof shall be under no liabilities other than those stated in article XIII, section three, of the constitution of Ohio. (R. S. Sec. 3258; April 25, 1904; 97 v. 390; April 29, 1902, 95 v. 312; May 1, 1852, 50 v. 296, §§ 78-79; March 11, 1853, 51 v. 386; April 17, 1854, 52 v. 44;

April 12, 1865, 62 v. 134; March 11, 1874, 69 v. 25; R. S. 1880; S. & C. 310.)

Bank stockholders are subject to double liability. See Constitution, Art. XIII, Sec. 3, as amended in 1912, in effect, January 1, 1913.

Lang v. Bank, 100 O. S. 51 (1919).

The amendment of Sec. 3, Art. XIII of 1903 of the constitution is self executing. Stockholders are not subject to double liability for debts incurred by the corporation after November 23, 1903.

Sheets Mfg. Co. v. Neer Mfg. Co., 4 N. P. n. s. 201; 17 L. D. 119 (C. P. 1906).

Emerich v. Coal Co., 21 C. C. n. s. 83 (1907).

Middletown N. B. v. Railway Co., 197 U. S. 394 (1905).

Barnes v. Wheaton, 80 Hun (N. Y.) 8 (1894).

But the amendment does not affect stockholders' liability for debts incurred prior to that date.

Poston v. Hull, 75 O. S. 502, 508 (1907).

Little v. Aultman, etc., Co., 15 L. D. 355 (1905).

Irvine v. Elliott, 203 Fed. 82, 93 (D. C. 1913).

Kuerze v. Bank, 12 Ohio App. 412; 31 O. C. A. 296 (1919); aff'd, no rep. 100 O. S. 547.

Where a note was given after the amendment of the constitution in 1903, for an indebtedness incurred prior to the amendment, the liability of stockholders depends upon whether the note was accepted as payment of the original obligation.

First N. B. v. Patton Co., 13 C. C. n. s. 289 (1910).

See Boice v. Hodge, 51 O. S. 236 (1894).

Hauenschild v. Standard, etc., Co., 8 N. P. 124 (Super. Ct. Cin.).

Wheeler v. Faurot, 37 O. S. 26 (1881).

The presumption is that a renewal note is in conditional, and not absolute, payment. Where several notes were renewed from time to time, some by exchanging for new notes, and some by going through the form of a new loan, the proceeds being credited to the bank account of the corporation and its check being drawn for the amount due on the old note, and the referee and court of common pleas found that the intention was to continue the original obligation, the reviewing court refused to disturb the finding. Kuerze v. Bank, 12 Ohio App. 412; 31 O. C. A. 296 (1919); aff'd, no rep. 100 O. S. 547.

Where a note of the corporation was transferred after the amendment to the constitution, and was subsequently renewed by and in the name of the transferee, this was held to be a novation extinguishing the original debt. Gill v. Printing Co., 16 C. C. n. s. 568 (1907); modified and aff'd, no rep. 80 O. S. 742.

Section 8688. (Limitation of action to enforce liability.)

An action upon the liability of stockholders under the two next preceding sections can only be brought within eighteen months after the debt or obligation shall become enforceable against stockholders. (R. S. Sec. 3258a; April 25, 1904, 97 v. 390; April 29, 1902, 95 v. 313.)

The limitation of this section does not apply to an action to collect unpaid stock subscriptions. Bauman v. Kiskadden, 94 O. S. 130 (1916); Kiskadden v. Anderson, 95 O. S. 88 (1916); Yoder v. Tubman, 19 C. C. n. s. 225 (1911).

When right of action accrues. A right of action accrues when a

judgment has been recovered against the corporation and an execution rendered unsatisfied in whole or in part.

Or where the corporation has done, or suffered, any act which renders judgment and process nugatory, as where it has made an assignment for creditors, or been adjudged a bankrupt, or, by the appointment of a receiver, or otherwise, its property has been put in process of application to the payment of its debts.

Younglove v. Lime Co., 49 O. S. 663 (1892).

Bronson v. Schneider, 49 O. S. 438 (1892).

Barrick v. Gifford, 47 O. S. 180 (1890).

King v. Armstrong, 50 O. S. 222, 238 (1893).

Peter v. Farrell, etc., Co., 53 O. S. 534, 557 (1895).

Morgan v. Lewis, 46 O. S. 1 (1888).

Kuerze v. Bank, 12 Ohio App. 412; 31 O. C. A. 296 (1919); aff'd, no rep. 100 O. S. 547.

Creditors need not wait for final distribution or settlement by the assignee, etc., before commencing action.

Younglove v. Lime Co., 49 O. S. 663.

But a right of action does not accrue on the appointment of a receiver, not because of insolvency, but to carry on the business, or to subserve some other purpose of the directors or stockholders.

Nor does a right of action accrue on the mere insolvency of the corporation in the sense that its debts exceed its assets.

Younglove v. Lime Co., 49 O. S. 663 (1892).

Bronson v. Schneider, 49 O. S. 438 (1892).

Barrick v. Gilford, 47 O. S. 180 (1890).

Statute of limitations. Where a corporation, because of insolvency, was placed in the hands of a receiver on a certain date, the statute of limitations begins to run from such date.

Marriott v. Columbus, etc., R. Co., 2 N. P. n. s. 231; 15 L. D. 100 (C. P. 1904); s. c., 16 L. D. 135; aff'd, 10 C. C. n. s. 573, 575.

Roebing Sons Co. v. Shawnee, etc., Co., 4 N. P. n. s. 113; 17 L. D. 8 (C. P. 1906); aff'd, 78 O. S. 408.

Irvine v. Blackburn, 198 Fed. 360 (D. C. 1912).

The statute does not begin to run against a creditor until his claim is due.

Hardman v. Cincinnati, etc., Ry. Co., 15 W. L. B. 164, 165 (C. P. 1886).

Harris v. Railway Co., 4 N. P. n. s. 31; 16 L. D. 653 (Super. Ct. Cin. 1906).

Where a claim is disputed, the statute does not run until it is liquidated as to amount.

Hardman v. Cincinnati, etc., Ry. Co., 15 W. L. B. 164, 165 (C. P. 1886).

Voluntary dissolution under G. C. § 8740 et seq., does not cause the statute to begin to run. Nevin v. Engineering Co., 18 C. C. n. s. 237 (1908); aff'd, no rep. 84 O. S. 498.

A suit by one creditor on behalf of all creditors saves the running of the statute as against all creditors who assert their claims in the suit before its final determination.

Barrick v. Gifford, 47 O. S. 180 (1890).

Each creditor's claim is distinct, and a bar to one is no bar to others.

Hardman v. Cincinnati, etc., Ry. Co., 15 W. L. B. 164 (C. P. 1886).

Where creditors negligently fail to bring in resident, solvent stockholders, as defendants, until the statute has run against them, the other stockholders' assessments can not be increased because of such neglect.

Smith v. Newark, etc., Co., 8 C. C. 583; 4 C. D. 356 (1894).

A stipulation in a contract with the corporation, limiting the time

for bringing suit thereon, does not apply to the statutory liability of its stockholders.

Davis v. Stewart, 26 O. S. 643 (1875).

Stewart v. Triumph Ins. Co., 1 W. L. B. 103 (1876).

This section does not apply to a suit by a receiver appointed to collect an assessment made in an action under § 8691 et seq., brought before the enactment of this section. Irvine v. McCoy, 16 N. P. n. s. 481; 25 L. D. 83 (C. P. 1914). See Irvine v. Baker, 225 Fed. 834.

Limitation of action against estate of deceased stockholder.

See Roeblings Sons Co. v. Shawnee, etc., Co., 4 N. P. n. s. 113; 17 L. D. 8 (C. P. 1906); aff'd, 78 O. S. 408.

Bevitt v. Diehl, 12 L. D. 383, 315 (1901).

Limitation of actions against nonresidents. The limitation does not begin to run against an action brought in another jurisdiction against a nonresident stockholder, until a decree is entered making an assessment and appointing a receiver for its collection.

Irvine v. Putnam, 167 Fed. 174 (C. C. 1909).

Irvine v. Putnam, 190 Fed. 321 (C. C. 1911).

Irvine v. Bankard, 181 Fed. 206 (C. C. 1910); aff'd, no rep., 184 Fed. 986.

Goss v. Carter, 156 Fed. 746 (C. C. A. 1907).

Blackburn v. Irvine, 205 Fed. 217 (C. C. A. 1913).

Where an appeal is taken from the decree, the running of the statute is suspended during its pendency, even though the appeal is taken by creditors.

Irvine v. Bankard, 181 Fed. 206 (C. C. 1910); aff'd, no rep., 184 Fed. 986.

A receiver is not estopped from asserting that the pendency of an appeal from the decree suspended the running of the limitation because during such pendency he settled and received payment of claims against other stockholders.

Irvine v. Bankard, 181 Fed. 206 (1910).

Section 8689. ("Stockholder" defined.) The term "stockholder" as used in the three next preceding sections, shall apply not only to persons who appear by the books of the corporation to be such, but also to an equitable owner of stock, although on the books it appears in the name of another. (R. S. Sec. 3259; R. S. 1880.)

This section should be construed in connection with §§ 8672 and 8673.

State B. & T. Co. v. Mitchell Co., 14 N. P. n. s. 49, 57 (1913).

What stockholders are liable.

Generally. The following have been held liable—Stockholders in de facto corporations.

Rowland v. Meader Furn. Co., 38 O. S. 269 (1882).

Gaff v. Flesher, 33 O. S. 107 (1877).

Royce v. Tyler, 2 C. C. 175, 182; 1 C. D. 428 (1887).

Corporation holding stock.

Smith v. Newark, etc., R. Co., 8 C. C. 583; 4 C. D. 356 (1894).

Marriott v. Columbus, etc., Co., 16 L. D. 135 (C. P. 1905); aff'd, 10 C. C. n. s. 573, 575.

See Gill v. Printing Co., 16 C. C. n. s. 568 (1907); modified and aff'd, no rep. 80 O. S. 742.

Infant holding stock after becoming of age.

Hardman v. Cincinnati, 15 W. L. B. 164 (1886).

Preferred stockholders.

R. R. Co. v. Smith, 48 O. S. 219 (1891).

Holders of stock distributed as a stock dividend.

Aultman's Appeal, 98 Pa. St. 505 (1881).

Transferrer and Transferee.

See § 8686.

Equitable owner. The purpose of § 8689 is to give creditors a cumulative remedy and, where the legal owner is insolvent, to permit them to pursue the equitable owner.

Holcomb v. Gibson, 39 W. L. B. 380 (1898).

Under § 8689 the legal and equitable owners may be treated as co-owners.

Biggio v. Sandheger, 3 O. L. R. 470; 16 L. D. 285 (1905); s. c., 8 N. P. 13 (1900).

Where a person transfers his stock for the purpose of divesting himself of apparent ownership to escape possible liability, but really remains the beneficial owner, he is liable.

Peter v. Union Mfg. Co., 56 O. S. 181, 208 (1897).

An action may be brought against both the legal and the equitable owner and a judgment rendered against both.

Irvine v. Blackburn, 198 Fed. 360 (D. C. 1912).

Trustee. The person in whose name the stock is registered on the books of the corporation is liable. It is no defense that he is a trustee only, although he is entitled to be reimbursed by the beneficiary.

Holcomb v. Gibson, 39 W. L. B. 380 (Super. Ct. Cin. 1898).

Schwill v. Beckel, 1 N. P. n. s. 1, 104; 13 L. D. 699 (Super. Ct. Cin. 1903).

Marriott v. Columbus, etc., Co., 16 L. D. 135 (C. P. 1905); s. c., 10 C. C. n. s. 573; 20 C. D. 419.

Blackburn v. Irvine, 205 Fed. 217 (C. C. A. 1913); affirming, 198 Fed. 360.

Stewart v. Triumph Ins. Co., 1 W. L. B. 103 (1876).

But in one case where the stock books of the corporation disclosed the trust capacity in which the stock was held, the trustee was held not liable.

Biggio v. Sandheger, 8 N. P. 13 (Super. Ct. Cin. 1900); compare s. c., 3 O. L. R. 470; 16 L. D. 285 (1905).

Pledgee. A pledgee who does not have the stock transferred to his name on the corporate books is not liable.

Henkel v. Salem Mfg. Co., 39 O. S. 547 (1883).

But where it is so transferred the pledgee is liable, although as against the pledgor he is entitled to reimbursement.

Biggio v. Sandheger, 3 O. L. R. 470; 16 L. D. 285 (Super. Ct. Cin. 1905); see s. c., 8 N. P. 13.

Liquidating trustees of a corporation have no authority to acquire the general title to stock, held by the corporation as pledgee, and by attempting to acquire such title the trustees do not render the corporation liable. Gill v. Printing Co., 16 C. C. n. s. 568 (1907); modified and aff'd, no rep. 80 O. S. 742.

Where a judgment is rendered against both the pledgor and pledgee it is a judgment against co-owners. A compromise by the receiver with the pledgor does not release the pledgee.

Biggio v. Sandheger, 3 O. L. R. 470; 16 L. D. 285 (Super. Ct. Cin. 1905).

A pledgee of stock in a national bank becomes liable as a stockholder, under the national banking act, where he has the stock registered in the name of his employee, with no beneficial interest, and afterwards indorses on the note the supposed value of the stock as a credit, and presents the note, reduced by the credit, to the administrator who allows the claim in such form.

Ohio Valley N. B. v. Hulitt, 204 U. S. 162; 15 O. F. D. 530 (1907); affirming 137 Fed. 461.

Legatee of stock. A person to whom stock is bequeathed by will, but the stock is not transferred on the corporate books and there is no evidence of acceptance of the bequest, is not liable. The estate of the testator is liable.

Roebblings Sons Co. v. Shawnee, etc., Co., 4 N. P. n. s. 113; 17 L. D. 8 (C. P. 1906); aff'd, 78 O. S. 408.

De Camp v. Levoy, 19 C. C. 335 (1900).

But where the legatee causes the stock to be transferred he becomes liable.

Biggio v. Sandheger, 8 N. P. 13 (Super. Ct. Cin. 1900).

Where a widow, who was executrix and residuary legatee under her husband's will, caused a part of his stock to be transferred to her name, and accepted a dividend payable in property, it was held that she was liable to the extent of the shares so transferred, but not liable as the owner of shares not so transferred. Kuerze v. Bank, 12 Ohio App. 412; 31 O. C. A. 296 (1919); aff'd, no rep. 100 O. S. 547.

Estate of deceased stockholder. The estate of a deceased stockholder is liable. In such case it is not necessary to present the claim to the administrator before suit.

Roebblings Sons Co. v. Shawnee, etc., Co., 4 N. P. n. s. 113; 17 L. D. 8; aff'd, 78 O. S. 408.

Hall v. Standard Coal Co., 7 N. P. 157 (1897).

Wanz v. Park Hotel Co., 1 C. C. 105; 1 C. D. 63 (1885).

Where, in the parent suit, the plaintiff sought to charge certain stockholders as executors only, he can not thereafter maintain a suit against them as individuals. Irvine v. Johnson, 19 N. P. n. s. 333 (1916).

A demurrer will lie to an answer of an executor, alleging that he has settled up the estate, but not setting up the statute of limitations.

Umstaetter v. Newark, etc., Co., 4 N. P. n. s. 150; 17 L. D. 30 (C. P. 1906).

Broker. A stock broker who purchases stock for another, on a stock exchange, and delivers the certificate to his principal, is not a "stockholder" either legal or equitable under § 8689, although he paid therefor with his own check and did not disclose the name of his principal, and although the transfer was never made on the corporate books.

Joecken v. Cuyahoga, etc., Co., 1 C. C. n. s. 342; 14 C. D. 605 (1903); affirming, 13 L. D. 652; aff'd, no rep. 72 O. S. 643.

Stockholder or creditor. See note to § 8669. *Issues of stock construed; preferred stock or debt.*

Section 8690. (Where complaint for enforcement of liability filed.) When a creditor of a corporation seeks to charge its directors, trustees, or other superintending officers, or the stockholders thereof, on account of a liability created by law, he may file his complaint for that purpose in any

common pleas court which possesses jurisdiction to enforce such liability. (R. S. Sec. 3260; April 16, 1900, 94 v. 359; 91 v. 88; R. S. 1880.)

Action to enforce liability of bank stockholders, see § 710-75.

An action to subject the liability of trustees of a corporation not for profit under § 8666, is governed by this section as to matters of procedure. *Paper Co. v. Chevaliers*, 18 C. C. n. s. 195 (1907).

Nature of action. The action is equitable. The liabilities and equities of the parties as between themselves may be marshalled and adjusted in the final judgment.

Younglove v. Lime Co., 49 O. S. 663, 667 (1892).

R. R. Co. v. Smith, 48 O. S. 219 (1891).

Bullock v. Kilgour, 39 O. S. 543, 546 (1883).

Wheeler v. Faurot, 37 O. S. 26, 29 (1881).

Brown v. Hitchcock, 36 O. S. 667, 681 (1881).

Griffin v. Rowley, 3 Ohio App. 481; 23 C. C. n. s. 209.

It is for the benefit of all creditors. One creditor can not acquire priority.

Wright v. McCormack, 17 O. S. 86 (1866).

Umsted v. Buskirk, 17 O. S. 113 (1866).

Venue of action. Summons to other counties. The action may be brought in any county in which any defendant may be sued and served. Summons may be issued to other counties for other defendants, including the corporation.

Blair v. Newbegin, 65 O. S. 425 (1901).

Swan v. Railroad Co., 4 L. D. 71 (1895).

Hull v. Standard Coal Co., 7 N. P. 157 (1897).

See *Reece v. West, etc., Co.*, 12 C. D. 728.

The action can not be brought in a county where a defendant does not reside and may not be summoned.

Lamont v. Home Ins. Co., 10 W. L. B. 413 (1883).

Except by consent of the parties. Such consent may be evidenced by answer and trial on the merits without objection. Objection can not be made, for the first time, on appeal.

Reece v. West, etc., Co., 12 C. D. 728.

Mason v. Alexander, 44 O. S. 318 (1886).

Suit against bank stockholders. The superintendent of banks is a proper party to enforce the individual liability of stockholders of a state bank which he has taken possession of for liquidation. *Lang v. Osborn Bank*, 100 O. S. 51 (1919).

Parties, joinder of actions, pleading, practice, etc.

See *Bates Pleading*.

Consolidation of actions.

See *Newberry v. Alexander*, 44 O. S. 346 (1886).

Schaus v. Newark, etc., Co., 5 O. L. R. 388 (1907).

Actions in other jurisdictions.

This section contemplates an action in Ohio courts alone. An original action can not be brought in another jurisdiction for the enforcement of liability generally.

Middletown N. B. v. Railway, 197 U. S. 394 (1905).

Actions in other jurisdictions against nonresident stockholders, by receiver, see §§ 8693, 8695 and notes.

Section 8691. (Procedure by court; receiver.) The court shall proceed thereon, as in other cases, and, when necessary, cause an account to be taken of the property and obligations due to and from such corporation, and may appoint one or more receivers. (R. S. Sec. 3260a; April 16, 1900, 94 v. 360.)

Sections 8691 to 8697 inclusive were enacted to provide an efficient remedy for the enforcement of the liability against nonresident stockholders.

Irvine v. Elliott, 203 Fed. 82 (D. C. 1913).

Section 8692. (Enforcement of liability.) On the filing of an answer, or the taking of such account, if it appears that such corporation is insolvent, and has not sufficient property or effects to satisfy such creditor, the court may proceed to ascertain the respective liabilities of the directors, officers and stockholders, and enforce them by its judgment, as in other cases. (R. S. Sec. 3260b; April 16, 1900, 94 v. 360.)

Practice as to creditors. The names of the creditors and the amount due to each from the corporation are usually ascertained by a reference to a master or referee, notice being published by order of the court for creditors to present their claims (§ 8696). In case of a contested claim, an issue should be ordered to be made up and tried to ascertain and fix the amount due to the creditor from the corporation. While the issue and trial as to such contested claim is a proceeding in the case, it is distinct from the proceedings against the stockholders, the one being to establish the validity of a creditor's claim against the company, and the other to collect a fund from the stockholders for the common benefit of all the creditors.

Herrick v. Wardwell, 58 O. S. 294, 307 (1898).

Burden of proof as to stockholders is on the plaintiff.

Henkle v. Salem Mfg. Co., 39 O. S. 547, 552 (1883).

Judgment. There can be but one final judgment assessing the liability.

Bullock v. Kilgour, 39 O. S. 543 (1883).

Marriott v. Railway, 16 L. D. 135; s. c., 10 C. C. n. s. 573; 20 C. D. 419.

But the court may enter an interlocutory judgment as to a part of the issues, and reserve other issues for future determination, all to be included in the final judgment.

Mason v. Alexander, 44 O. S. 318 (1886).

Marriott v. Railroad Co., 8 C. C. n. s. 495 (1906); s. c., 10 C. C. n. s. 573 (1907).

Younglove v. Lime Co., 49 O. S. 663, 667 (1892).

A final judgment is a bar to other actions against the stockholders who were parties.

Bullock v. Kilgour, 39 O. S. 543 (1883).

Herrick v. Wardwell, 58 O. S. 294, 306 (1898).

Swan v. Mansfield, etc., Co., 3 N. P. 225; 5 L. D. 297.

See Hamilton v. Home Ins. Co., 1 N. P. 329; 3 L. D. 389 (1895).

B. & O. R. Co. v. Smith, 54 O. S. 562 (1896).

Smith v. Newark, etc., R. Co., 8 C. C. 583; 4 C. D. 356 (1894).

Judgment may be rendered against the stockholders before the court

for their pro rata share of the indebtedness, taking into account the liability of all solvent stockholders.

Burr v. Bates, 3 C. C. 1, 4; 2 C. D. 1 (1887).

Marriott v. Railway, 16 L. D. 135; s. c., 10 C. C. n. s. 573; 20 C. D. 419.

The equities as between the parties may be adjusted and included in the judgment.

See R. R. Co. v. Smith, 48 O. S. 219 (1891).

Bullock v. Kilgour, 39 O. S. 543, 546 (1883).

Biggio v. Sandheger, 3 O. L. R. 470; 16 L. D. 285 (1905); s. c., 8 N. P. 13.

Interest from the beginning of the suit may be included in the judgment, although it exceeds the liability, when it is apparent at the beginning of the suit that stockholders must be assessed to the full amount of their liability.

Mason v. Alexander, 44 O. S. 318 (1886).

Taylor v. West, etc., Co., 9 Am. L. R. 28 (1880).

Wehrman v. Reakirt, 1 C. S. C. R. 230 (1871).

But if the amount is not so apparent, interest should be charged only from the confirmation of the referee's report.

Berger v. Commercial Bank, 5 N. P. 176; 5 L. D. 277.

Appeal. Where a transferrer and transferee of stock are both parties, and an issue is between the two, an appeal by one carries up the case as to the other.

Harpold v. Stobart, 46 O. S. 397 (1889).

An order of the common pleas court which determines the liability of some but not all of the defendant stockholders is interlocutory and not appealable.

Marriott v. Railroad Co., 8 C. C. n. s. 495 (1906); affirmed, no rep., 76 O. S. 599, 605, 609; s. c., 10 C. C. n. s. 573 (1907).

Section 8693. (Notice to non-resident stockholders.)

When the directors or other officers of a corporation, or the stockholders thereof, are made parties to an action in which a judgment is rendered, if its property is insufficient to discharge its debts, the court shall give notice to non-resident stockholders as provided by law for service upon non-resident defendants in other actions, and then first proceed to compel each stockholder to pay in the amount due and unpaid on the stock held by him, or so much thereof as is necessary to satisfy the debts of the company. (R. S. Sec. 3260c; April 16, 1900, 94 v. 360.)

A proceeding under § 8690 et seq. is a proceeding in which service by publication is sufficient.

Shipman v. Treadwell, 200 N. Y. 472; 93 N. E. 1104 (1911).

Irvine v. Elliott, 203 Fed. 82, 101-102 (D. C. 1913).

Where the stockholders were not all before the court, and it did not appear that those not served with process could not have been served, it was held error to assess the entire corporate indebtedness upon the stockholders served.

Bonevitz v. Van Wert County Bank, 41 O. S. 78 (1884).

In the parent suit, a stockholder was falsely alleged to be a non-resident and was not served with summons, but an assessment was made on him by the court. In a suit against him by the receiver it

was held that he was bound by the assessment, but was entitled to make "personal defenses", such as, that he was not a stockholder, or, payment, or set off. *Griffin v. Rowley*, 3 Ohio App. 481; 23 C. C. n. s. 209 (1914); affirming, 14 N. P. n. s. 625; 23 L. D. 555.

Nonresident stockholders. Nonresident stockholders are represented by the corporation, in the proceeding, and are bound by the finding and decree therein, although not served with process.

Irvine v. Putnam, 167 Fed. 174 (1909).

Irvine v. Baker, 225 Fed. 834 (1915).

Francis v. Hazlett, 192 Mass. 137, 142 (1906).

Childs v. Cleaves, 95 Me. 498; 50 Atl. 114 (1901).

The decree ordering the assessment, while not binding them as a judgment or decree in personam after personal service, yet is conclusive as to the amount of the indebtedness of the corporation, and the necessity of making an assessment to the extent and in the amount specified.

Irvine v. Elliott, 203 Fed. 82, 102 (D. C. 1913).

Irvine v. Blackburn, 198 Fed. 360 (D. C. 1912).

Irvine v. Blackburn, 198 Fed. 360; aff'd, 205 Fed. 217.

Attachment against nonresident stockholders. An action to enforce statutory liability is upon a demand arising upon contract, and attachment will lie against nonresident stockholders.

Dabney v. Pappenheimer Co., 20 C. C. 707; 41 W. L. B. 329 (1888).

Cleveland Gas Company v. Collins, 19 C. C. 247 (1899).

Northern N. B. v. Maumee, etc., Co., 2 N. P. 260; 2 L. D. 67 (C. P. 1894).

Actions against nonresidents in other jurisdictions.

See § 8695.

Application of assets to reduce or reimburse liability.

See *Morris v. Collamer*, 2 Cleve. L. R. 347 (1878).

Younglove v. Lime Co., 49 O. S. 663 (1892).

Turnbull v. Pomeroy Salt Co., 24 W. L. B. 133 (1890).

Cowles v. Bartell, 3 W. L. M. 41 (1860).

Taylor v. West Liberty Wheel Co., 9 Am. L. R. 28 (1880).

An action to enforce stockholders' liability is not demurrable because brought prior to ascertainment, by the receiver, of the corporate assets.

Umsteatter v. Newark, etc., Co., 4 N. P. n. s. 150; 17 L. D. 30 (C. P. 1906).

Section 8694. (Court to ascertain and adjudge liabilities.)

If its debts remain unsatisfied, the court shall proceed to ascertain the respective liabilities of the directors or other officers and of the stockholders, and to adjudge the amount payable by each, and enforce the judgment, as in other cases. (R. S. 3260d; April 16, 1900, 94 v. 360.)

No action can be maintained against nonresident stockholders in other jurisdictions until a proceeding has been brought in Ohio under § 8694 et seq. and a finding made under this section.

Middletown N. B. v. Railway Co., 197 U. S. 394 (1905).

Bank v. Sayward, 91 Fed. 443 (C. C. A. 1899).

Nimick v. Iron Works, 25 W. Va. 184 (1884).

Clark v. Knowles, 187 Mass. 35 (1904).

Rice v. Hoisery Co., 56 N. H. 114 (1875).

Barnes v. Wheaton, 80 Hun 8 (N. Y. 1894).

Cleveland, etc., Ry. v. Kent, 87 Hun 329 (N. Y. 1895).

Where only a part of the stockholders were before the court, and it did not appear that the remaining stockholders could not have been served, it was held to be error to assess upon those served the whole amount of the corporate indebtedness. Bonewitz v. Bank, 41 O. S. 78 (1884).

Section 8695. (Actions by receiver.) If a receiver is appointed, the court also may authorize and direct him to prosecute such actions in his own name as receiver, in other jurisdictions as become necessary to collect the amount found due from an officer or stockholder. (R. S. Sec. 3260d; April 16, 1900, 94 v. 360.)

A receiver, directed to prosecute actions under this section, is in the position of a quasi assignee representing all of the creditors, and may maintain an action in a federal court in another state, and his own citizenship, not that of the creditors, affords the test of jurisdiction.

Irvine v. Bankard, 181 Fed. 206 (C. C. 1910); *aff'd*, no *rep.*, 184 Fed. 986.

Irvine v. Putnam, 190 Fed. 321 (C. C. 1911).

Bernheimer v. Converse, 206 U. S. 516 (1907).

Converse v. Hamilton, 224 U. S. 243 (1912).

Irvine v. Elliott, 203 Fed. 82 (D. C. 1913).

A nonresident stockholder is bound by the constitution and laws of the state, under which the corporation is organized, and an assessment on stockholders, properly made by a court in the home state of such corporation, may be enforced by the receiver of the corporation in the courts of other states.

Appeal of Aultman, 98 Pa. St. 505 (1881).

Cushing v. Perot, 175 Pa. St. 66 (1896).

Howorth v. Lombard, 175 Mass. 570; 49 L. R. A. 301 (1900).

Bank v. Baker, 176 Mass. 294 (1900).

Post v. Toledo, etc., Railroad, 144 Mass. 341 (1887).

Childs v. Cleaves, 95 Me. 498; 50 Atl. 714 (1901).

Howorth v. Angle, 162 N. Y. 179; 47 L. R. A. 725.

Shipman v. Treadwell, 200 N. Y. 472; 93 N. E. 1104 (1911).

Nonresident stockholders are represented by the corporation in the proceeding under § 8690 et seq., and are bound by the finding and decree therein although not served with process.

Irvine v. Putnam, 167 Fed. 174 (1909).

Spargo v. Converse, 191 Fed. 823 (C. C. A. 1911).

Francis v. Hazlett, 192 Mass. 137, 142 (1906).

Childs v. Cleaves, 95 Me. 498; 50 Atl. 714 (1901).

Suit against a nonresident can not be founded on the finding and order of assessment as on a personal judgment, where the nonresident was not served with process in the proceeding under § 8690 et seq.

Shipman v. Willard, 194 Fed. 575 (1912).

But the decree is conclusive as to the amount of the indebtedness of the corporation and the necessity of making an assessment to the extent and in the amount specified.

Irvine v. Elliott, 203 Fed. 82, 102 (D. C. 1913).

Irvine v. Blackburn, 198 Fed. 360 (D. C. 1912).

When not personally served in the original proceeding, a nonresident defendant may show in defense (1) that he was not a stockholder; (2) a set off or (3) any other defense personal to himself.

Selig v. Hamilton, 234 U. S. 652 (1914); Mottinger v. Hendricks, 208 Fed. 824 (1913); Griffin v. Rowley, 3 Ohio App. 481; 23 C. C. n. s. 209 (1914).

An action against nonresident stockholders can not be brought in other states or federal courts until a proceeding has been brought in Ohio under § 8690 et seq.

Middletown N. B. v. Ry. Co., 197 U. S. 394 (1905).

Bank v. Sayward, 91 Fed. 443 (C. C. A. 1899).

Nimick v. Iron Works, 25 W. Va. 184 (1884).

Clark v. Knowles, 187 Mass. 35 (1904).

Rice v. Hoisery Co., 56 N. H. 114 (1875).

Barnes v. Wheaton, 80 Hun 8 (N. Y. 1894).

Cleve., etc., Ry. v. Kent, 87 Hun 329 (N. Y. 1895).

Limitation of actions against nonresidents. The limitation does not begin to run against an action brought in another jurisdiction against a nonresident stockholder, until a decree is entered making an assessment and appointing a receiver for its collection.

Irvine v. Putnam, 167 Fed. 174 (C. C. 1909).

Irvine v. Putnam, 190 Fed. 321 (C. C. 1911).

Irvine v. Bankard, 181 Fed. 206 (C. C. 1910); aff'd, no rep., 184 Fed. 986.

Goss v. Carter, 156 Fed. 746 (C. C. A. 1907).

Irvine v. Elliott, 203 Fed. 82, 108-110 (D. C. 1913).

Irvine v. Blackburn, 198 Fed. 360 (D. C. 1912).

Where an appeal is taken from the decree, the running of the statute is suspended during its pendency, even though the appeal is taken by creditors.

Irvine v. Bankard, 181 Fed. 206 (C. C. 1910); aff'd, no rep., 184 Fed. 986.

A receiver is not estopped from asserting that the pendency of an appeal from the decree suspended the running of the limitation because during such pendency he settled and received payment of claims against other stockholders.

Irvine v. Bankard, 181 Fed. 206 (1910).

Section 8696. (Notice to creditors.) If an action is brought against a corporation, its directors or other superintending officers, or stockholders, according to the foregoing provisions, when it appears proper, the court may order notice to be published, in such manner as it directs, requiring all the creditors of such corporation to exhibit their claims and become parties to the action, within a reasonable time, not less than six months from the first publication of such order, and, in default thereof, to be precluded from any benefit of the judgment rendered therein, and from any distribution made under such judgment. (R. S. Sec. 3260e; April 16, 1900, 94 v. 360.)

This section does not deprive the court of discretionary power to permit creditors to present claims after expiration of the time specified in the order, if no prejudice results.

Marriott v. Railway Co., 16 L. D. 135 (C. P. 1905).

One creditor may object to the allowance of improper claims of other creditors.

Hardman v. Cincinnati, etc., Co., 15 W. L. B. 164 (1887).

Right of creditors to reinstate action dismissed by plaintiff. An action to enforce statutory liability is for the benefit of all creditors, and where such action is dismissed by the plaintiff, other creditors may have the same reinstated.

Johnson v. Carpenter, 21 C. C. 168; 11 C. D. 457 (1900); aff'd, 66 O. S. 638.

See Dreidame v. Germania Inv. Co., 8 N. P. 405 (1901).

Section 8697. (Distribution of assets.) Upon a final judgment in such an action against an insolvent corporation, the court shall cause a just distribution of its property and assets, or the proceeds thereof, to be made among its creditors. (R. S. Sec. 3260f; April 16, 1900, 94 v. 360.)

Attorney's fees. The court may award a reasonable attorney's fee, out of the fund realized, to the plaintiff's attorney, although some creditors have employed other attorneys.

Mason v. Alexander, 44 O. S. 318, 337 (1886).

Hessler v. Cleveland, etc., Co., 61 O. S. 620 (1899).

But such attorney's fee can not be taxed as a part of the costs.

Rider v. Fritchey, 49 O. S. 285, 296 (1892).

Marriott v. Railway, 16 L. D. 135 (C. P. 1905); s. c., 10 C. C. n. s. 573; 20 C. D. 419.

Power of court to make an order in the parent suit fixing fees in receiver's subsequent suits. Bahmann v. Druggan, 26 C. C. n. s. 303.

Equitable setoff. Where an insolvent stockholder is also a creditor, his distributive share, as a creditor, may be set off against his liability.

King v. Armstrong, 50 O. S. 222 (1893).

Barber v. Leader, etc., Co., 7 C. C. 411; 4 C. D. 658 (1893).

Niles v. Olszak, 87 O. S. 229 (1912).

Kiskadden v. Steinle, 203 Fed. 375 (C. C. A. 1913).

Application of proceeds. A creditor having both a secured and an unsecured claim can not apply his dividend on the unsecured claim. It should be applied pro rata.

Nat. Bank v. Carn, 13 C. D. 447, 457; 3 C. C. n. s. 428, 439 (1902).

CHANGES IN CAPITAL STOCK.

Section 8698. (Increase of capital stock; procedure.) The authorized capital stock of a corporation having capital stock, consisting of both common and preferred stock or common stock only, may be increased, by increasing both common and preferred or common only, prior to organization, if its authorized capital stock is fully subscribed for and an installment of ten per cent. on each share of stock has been paid thereon, by all of the original subscribers consenting in writing to such increase, and authorizing the incorporators or a majority of them to file a certificate setting forth such action and the amount of the increase, showing the proportion of common and preferred stock when both are increased, with the secretary of state. The corporation shall

not issue or dispose of such increased stock until such certificate is filed.

After the organization of the corporation, if its authorized common stock is fully subscribed for and an installment of ten per cent. on each share of stock has been paid thereon, the common stock may be increased by a vote of the holders of a majority of all its stock, at a stockholders meeting called by a majority of its directors, at least thirty days' notice of the time, place and object of which has been given by publication in some newspaper of general circulation and by letter addressed to each stockholder whose place of residence is known.

After the organization of the corporation, the authorized capital stock may be increased at any time by issuing preferred stock, within the limits permitted by law, upon the written consent of three-fourths of all of its stockholders, representing at least three-fourths of both its subscribed and issued capital stock.

After the organization of the corporation, if its authorized common stock is fully subscribed for and an installment of ten per cent. on each share of such stock has been paid thereon, the authorized capital stock may also be increased by both common and preferred stock or common only, at a meeting of the stockholders at which all are present in person or by proxy and waive in writing notice of such meeting and also agree in writing to such increase, naming the amount thereof and the proportion of common and preferred stock when both are increased. In increasing the authorized capital stock at any time by both common and preferred, the total authorized preferred stock of such corporation after such increase shall not exceed the limits provided by law.

Whenever after organization a corporation increases its capital stock, the president and secretary thereof shall file a certificate setting forth the action taken and the amount of the increase, showing the proportion of common and preferred stock when both are increased, with the secretary of state, and no corporation shall issue or dispose of such increased stock until such certificate is filed. If the original article of incorporation do not provide for preferred stock a certificate of increase providing for preferred stock shall not be filed unless accompanied by a certificate of amendment to the articles of incorporation providing for the preferred stock, which shall be filed and recorded in the manner provided by law.

For the purposes of this section restrictions or limita-

tions on the voting power of any of the authorized capital stock shall not apply; and no increase of the authorized capital stock shall be made by increasing the par value of the shares. (107 v. 414; R. S. Sec. 3262; 69 v. 24; 70 v. 37; R. S. 1880; 80 v. 23; 83 v. 134; 90 v. 141.)

The notice need not be published for thirty consecutive days. One notice, published at least thirty days before the day set, is sufficient.

Muskingum, etc., Co. v. Ward, 13 Ohio 120 (1844).

Craig v. Fox, 16 Ohio 563, 566 (1847).

Newport News v. Potter, 122 Fed. 321, 332 (C. C. A. 1903).

The par value of shares can not be increased under this section. Rep. Atty. Gen. 1911-1912, p. 99; Opins. Atty. Gen. 1917, p. 76.

But may be increased or reduced under § 8719. Opins. Atty. Gen. 1919, p. 1564; 17 O. L. R. 430; 11 Dept. Rep. 580. *Contra*, Rep. Atty. Gen. 1911-1912, pp. 99, 126.

Authorized stock must be fully subscribed. The authorized stock must be fully subscribed and ten percent paid on each subscription. Opins. Atty. Gen. 1915, p. 1144.

Except where the increase is by preferred stock alone. *State v. Urschel*, 104 O. S. 172 (1922); Opins. Atty. Gen. 1915, p. 1646; Rep. Atty. Gen. 1914, p. 305.

Before the amendment of 107 v. 414 the attorney general ruled that where the "original" capital stock had been fully subscribed and the required payment made, a corporation could increase its capital stock, although stock authorized by a previous increase had not been fully subscribed. Opins. Atty. Gen. 1916, p. 1392.

It should be noted that the amendment of 107 v. 414 requires the "authorized" capital stock to be fully subscribed, instead of the "original" capital stock.

When amendment of articles necessary on increase by preferred stock. When the original articles of incorporation did not authorize the issue of preferred stock, this section expressly requires that the articles be amended so as to show the preferences, etc. Where the original articles did provide for preferred stock, no amendment is necessary if the increased stock is to have the same preferences. But where the increased preferred stock is to have a different preferred dividend, or other preferences or restrictions, an amendment is necessary. Opins. Atty. Gen. 1918, p. 33.

Before §§ 8698 and 8699 were amended in 1917 (107 v. 414) it was unnecessary to amend the articles of incorporation. *State v. Urschel*, 104 O. S. 172 (1922). Compare Opins. Atty. Gen. 1917, p. 108; Rep. Atty. Gen. 1911-1912, p. 102.

Increase by preferred stock. Where the increase is by preferred stock alone, the authorized capital stock need not be fully subscribed. *State v. Urschel*, 104 O. S. 172 (1922); Opins. Atty. Gen. 1915, p. 1646; Rep. Atty. Gen. 1914, p. 305.

Conversion of unissued common into preferred stock. Unissued common stock may be converted into preferred stock by amendment to the articles of incorporation, without increasing the capital stock. § 8719; *In re Mansfield Co.*, 3 Ohio App. 253; 21 C. C. n. s. 95 (1914); Rep. Atty. Gen. 1904-1905, p. 81.

Franchise tax on increased stock. Where its capital stock is increased within six months prior to the time for filing the annual fran-

chise tax report under § 5495, a corporation is required to pay the tax on the increased stock which has been subscribed or issued or outstanding. § 5519; Opins. Atty. Gen. 1918, p. 227; Opins. Atty. Gen. 1916, p. 1606; 4 Dept. Rep. 985. *Contra*, 5 Opins. Atty. Gen. 865 (1903).

Section cited.

Snyder v. Chamber of Commerce, 53 O. S. 1 (1895).

Miller v. Ratterman, 47 O. S. 157 (1890).

Mannington v. Railway Co., 9 N. P. n. s. 684 (1910).

Increases under former acts.

See Turnbull v. Pomeroy Salt Co., 24 W. L. B. 133 (1890).

Clarke v. Thomas, 34 O. S. 46 (1877) (Mining Company).

Under the former law the original capital stock was required to be full paid before it could be increased.

Peter v. Union Mfg. Co., 56 O. S. 181, 200 (1897).

Section 8699. (Right of stockholders to subscribe for new issues or increase.) The holders of record of the common stock of a corporation shall have the right, when and as issued, to subscribe for the increase stock or for new issues of stock of such corporation in such proportion as their respective common shares bear to the whole number of common shares already issued, at such price as the board of directors may fix. If any holder fails to avail himself of such right within the time fixed by the board of directors, the stock so unsubscribed may be disposed of in such manner as the board of directors prescribe. The right of any stockholders to subscribe for such stock shall not apply to any authorized and unissued stock appropriated by the board of directors, either for the purpose of retiring preferred stock or for any other purpose. (March 31, 1917, 107 v. 415; R. S. Sec. 3263; May 12, 1902, 95 v. 624; March 6, 1874, 71 v. 19, §§ 1, 2.)

Decisions prior to amendment of 107 v. 415. Each stockholder is entitled to subscribe for and take new stock in proportion to his holdings of the old stock.

State v. Franklin Bank, 10 Ohio 91 (1840).

Sutton v. Mfg. Co., 17 N. P. n. s. 497.

See 7 O. L. R. 345, article by Frank M. Coppock.

But this right may be waived by a stockholder. Where a stockholder fails to subscribe within a reasonable time, after opportunity is given him, he is deemed to have waived his right and the directors may dispose of the stock to others.

Hall v. Hall, 11 C. C. n. s. 335; 20 C. D. 826 (1908); *aff'd*, 79 O. S. 456.

7 O. L. R. 369 *ib*.

The right to take new stock may be sold by a stockholder.

See 7 O. L. R. 373 *ib*.

State v. Franklin Bank, 10 Ohio 91 (1840).

It is doubtful whether existing stockholders can be required to pay more than par for the new stock.

See 7 O. L. R. 365 *ib*.

But new stock, not taken by existing stockholders, may be sold to the public at a premium.

See *State v. Franklin Bank*, 10 Ohio 91, 99, 100 (1840).

Subscriptions to increased stock. Rights and liabilities of subscribers generally, see notes to §§ 8630 and 8674.

See also *Clarke v. Thomas*, 34 O. S. 46 (1877).

Tillinghast v. Bailey, 86 Fed. 46 (C. C. 1897).

Latham v. Union, etc., Ins. Co., 1 W. L. B. 127 (Dist. Ct. 1876).

Necessity for. There are no express statutory provisions relating to subscriptions to increased stock. The opinion has been expressed that, before corporate action is taken on the faith of the increase, at least ten percent of the entire capital stock, including the increase, must be subscribed for: but that subscriptions to the original stock may be counted.

Rep. Atty. Gen. 1906-1907, p. 52.

No certificate of subscription to the increased stock need be filed with the secretary of state.

Rep. Atty. Gen. 1911-1912, p. 66.

Liability for acting as if increased stock had been subscribed. Where an increase of stock was authorized by the stockholders, a certificate of increase filed with the secretary of state, a bond issue put forth on the faith of such increase, and no effort was made to sell the new stock, it was held that an intention was thereby shown on the part of existing stockholders to take new stock in proportion to their original holdings, and a judgment was rendered against the stockholders accordingly.

Kreisser v. Ashtabula, etc., Co., 2 C. C. n. s. 597; 14 C. D. 313 (1901).

Unissued original stock is not increased stock. The original stock which remains unsubscribed after the first election of directors is not increased stock.

Sims v. Street Railroad Co., 37 O. S. 556, 564 (1882).

Painesville N. B. v. King Varnish Co., 8 C. C. 563; 4 C. D. 511 (1894); reversed, in part, 56 O. S. 744.

Stock dividends.

See notes to § 8724.

Section 8700. (Reduction of capital stock.) With the written consent of the persons in whose names a majority of the shares of the capital stock thereof stands on its books, the board of directors of such a corporation may reduce the amount of its capital stock and the nominal value of all the shares thereof, and issue certificates therefor. The rights of creditors shall not be affected thereby; and a certificate of such action shall be filed with the secretary of state. (R. S. Sec. 3264; May 11, 1886, 83 v. 134; R. S. 1880; April 3, 1868, 65 v. 51, §§ 1, 2, 3, 4, 5 [S. & C. 309; S. & S. 242]; May 1, 1852, 50 v. 274, § 74.)

Preferred stock, when issued subject to redemption, may be redeemed and retired without filing a certificate. But common stock can be reduced only in the manner authorized by this section.

Rep. Atty. Gen. 1906-1907, p. 46.

When preferred stock is cancelled after redemption, a certificate of cancellation must be filed. § 8669.

The redemption of preferred stock, when authorized by statute, is not a reduction of the capital stock by a purchase of its own shares.

Mannington v. H. V. Ry. Co., 8 O. L. R. 451; 183 Fed. 133; 16 O. F. D. 552 (C. C. Ohio 1910); s. c., 9 N. P. n. s. 641; 20 L. D. 468 (C. P. 1910).

It is not a reduction of its capital stock for a corporation to acquire shares of its own stock, by the rescission of an exchange of stock for property or to secure a debt, although the certificates are marked "cancelled."

Morgan v. Lewis, 46 O. S. 1, 7 (1888).

See note to § 8627. *Power of corporation to acquire its own stock.* Redemption of preferred stock. See note to § 8669.

A corporation can not reduce its capital stock by a purchase of stock from stockholders.

Rep. Atty. Gen. 1906-1907, p. 58.

A regulation providing for the expulsion of stockholders, and for payment, by the corporation to expelled stockholders, of the par value of their stock, is invalid as an unauthorized reduction of capital stock. *Paxson v. Cleveland, etc., Co.*, 17 C. C. n. s. 55 (1909).

Legal reserve life and fire insurance companies can not reduce their capital stock under this section.

Rep. Atty. Gen. 1911-1912, pp. 80, 110.

The number of shares may be decreased. Opins. Atty. Gen. 1916, p. 357; *Contra*, Rep. Atty. Gen. 1911-1912, p. 99; Rep. Atty. Gen. 1914, p. 253.

The number of shares may be decreased by amendment of the articles under § 8719.

The par value of shares may be reduced under this section. Opins. Atty. Gen. 1919, p. 1564.

For franchise tax purposes a reduction of capital stock is not effective until the certificate of reduction is filed. Opins. Atty. Gen. 1919, p. 1585; *Contra*, Opins. Atty. Gen. 1916, p. 1912.

REGULATIONS AND BY-LAWS.

Section 8701. (Corporation may adopt regulations.)

Every corporation may adopt a code of regulations for its government, consistent with the constitution and laws of the state. (R. S. Sec. 3249; R. S. 1880.)

Regulations of banks, § 710-50.

Regulations and by-laws distinguished. Regulations constitute the fundamental law of a corporation subordinate to the constitution and laws of the state and must be adopted by the stockholders or members. By-laws are adopted by directors or trustees for their own government.

State v. Kreutzer, 100 O. S. 246 (1919).

State v. Burial Assn., 8 C. C. n. s. 233, 248; 18 C. D. 397 (1906); dismissed by supreme court for want of jurisdiction, 4 O. L. R. 708.

Chevaliers v. Shearer, 6 C. C. n. s. 587; 17 C. D. 509 (1905).

Corporations not required to adopt regulations. This section is directory merely and not mandatory.

Proprietors v. Wade, 7 W. L. J. 95 (Com. Ct. Cincinnati 1849).

Regulations must be reasonable and consistent with laws of Ohio.

Regulations, to be valid, must be reasonable.

Hagerman v. Ohio, etc., Assn., 25 O. S. 186, 202 (1874).

Forest City, etc., Assn. v. Gallagher, 25 O. S. 208, 216 (1874).

They must be consistent with the statutes of the state.

Nicholson v. Franklin Brewing Co., 82 O. S. 94, 110 (1910).

And with the constitution.

State v. Cincinnati, 23 O. S. 445 (1872).

The validity of a regulation or by-law is a question of law for the court.

Holmes v. Pickering, 3 W. L. J. 222 (1845).

Knowledge of regulations imputed to stockholders. A stockholder is chargeable with knowledge of the regulations of the corporation.

Nicholson v. Franklin Brewing Co., 82 O. S. 94, 109 (1910).

Kroger Co. v. Butchers, etc., Assn., 8 N. P. n. s. 222; 20 L. D. 33 (C. P. 1909).

Where an officer of a corporation, which held stock in another corporation, was familiar with the business methods of such other corporation operating under one of its regulations, the stockholder corporation is chargeable with actual knowledge of the regulation.

Kroger Co. v. Butchers, etc., Assn., 8 N. P. n. s. 222; 20 L. D. 33 (C. P. 1909).

Estoppel to deny regulations. A member of a corporation not for profit who acquires membership under a provision of the regulations is estopped from claiming that the regulations were not legally adopted.

Cheney v. Ketcham, 5 N. P. 139; 7 L. D. 183 (C. P. 1897).

See State v. Cincinnati, etc., Exch., 4 N. P. 244; 6 L. D. 363 (1897).

Construction of regulations and by-laws. Regulations and by-laws are governed by the rules of construction which apply to statutes.

Burke v. Home Bldg. Assn., 7 W. L. B. 114 (Dist. Ct. 1882).

Practical construction by stockholders and officers will be regarded.

Kroger Co. v. Butchers, etc., Assn., 8 N. P. n. s. 222; 20 L. D. 33 (C. P. 1909).

Regulations as contracts. Regulations made pursuant to § 8704 and not in contravention of other statutory provisions have all the force of contracts between the corporation and its members and between the members themselves. State ex rel. v. Shaw, 103 O. S. 660 (1921). See also

Nicholson v. Franklin Brewing Co., 82 O. S. 94, 110-111 (1910).

Kroger Co. v. Butchers, etc., Assn., 8 N. P. n. s. 222; 20 L. D. 33 (C. P. 1909).

Stafford v. Produce Exch. Bkg. Co., 61 O. S. 160 (1899); aff'g, 16 C. C. 50; 8 C. D. 483.

Compare Cronin v. Potters Co-op. Co., 29 W. L. B. 52 (C. P. 1892).

Section 8702. (Trustees or directors may adopt by-laws.)

The trustees or directors of a corporation may adopt a code of by-laws for their government, consistent with the regulations of the corporation, and the constitution and laws of the state, and change it at pleasure. (R. S. Sec. 3250; R. S. 1880.)

By-laws distinguished from regulations. By-laws are adopted by directors or trustees for their own government. Regulations must be adopted by the stockholders or members.

State v. Kreutzer, 100 O. S. 246 (1919).

State v. Burial Assn., 8 C. C. n. s. 233, 248; 18 C. D. 397 (1906); dismissed by supreme court for want of jurisdiction, 4 O. L. R. 708.

By-laws relating to the business of the corporation are within the powers of directors.

Chevaliers v. Shearer, 6 C. C. n. s. 587; 17 C. D. 509 (1905).

Adoption. The adoption of by-laws is sufficiently proved by showing that they appear upon the corporate records and have been uniformly acted upon and enforced as the by-laws of the corporation. The corporation may enforce rights under such by-laws, although the corporate records fail to show that they were adopted by a formal vote of its directors.

Hagerman v. Association, 25 O. S. 186, 204 (1874).

By-laws may be adopted by custom, where such custom is a uniform rule of action and is acquiesced in by all stockholders.

Stafford v. Produce Exchange Bkg. Co., 16 C. C. 50, 55; 8 C. D. 483 (1898); aff'd, 61 O. S. 160.

Regulating transfers of stock. A corporation has power to regulate the mode and manner of transferring the title of stock.

National Bank v. Lake Shore, etc., R. Co., 21 O. S. 221, 232 (1871).

Railroad Co. v. Robbins, 35 O. S. 483 (1880).

Tomb v. Feleh, 40 W. L. B. 186 (Sup. Ct. without opinion).

Stafford v. Produce Exchange Banking Co., 61 O. S. 160 (1899); affirming, 16 C. C. 50; 8 C. D. 483.

See note to § 8704.

But restrictions on transfers must be stated upon the certificates.

See § 8673-15.

A by-law prohibiting the transfer of stock which has been paid with notes and mortgages is unreasonable and will not justify a refusal to transfer.

Andes Ins. Co. v. Waters, 1 W. L. B. 172 (Super. Ct. Cin. 1876).

Special act requiring by-laws of a hospital to be approved by city council. A special act requiring the rules and regulations of the trustees of a hospital to be approved by the city council is unconstitutional as a special law assuming to confer corporate power.

State v. Cincinnati, 23 O. S. 445 (1872).

Section 8703. (How regulations adopted or changed.)

Regulations may be adopted or changed by the assent thereto, in writing, of two-thirds of the stockholders, or, if there is no capital stock, of the members, or by a majority of the stockholders or members, at a meeting held for that purpose, notice of which has been given by the acting president personally to each member or stockholder, or by publication in some newspaper of general circulation in the county in which the corporation is located, or in the counties through which its improvement does or will pass. (R. S. Sec. 3251; R. S. 1880.)

"Two-thirds of the stockholders" means "two-thirds of the stockholders in interest" and not two-thirds in number, except in the case of corporations chartered under G. C. § 8638.

Toledo T. L. & P. Co. v. Smith, 205 Fed. 643 (D. C. 1913).

Directors or trustees can not adopt or amend regulations. Regulations must be adopted by the stockholders, or, where the corporation is not for profit, by the members. Directors or trustees have no power to adopt or amend regulations.

State v. Kreutzer, 100 O. S. 246 (1919).

State v. Burial Assn., 8 C. C. n. s. 233, 248; 18 C. D. 397 (1906); dismissed by supreme court for want of jurisdiction, 4 O. L. R. 708.

Farmers, etc., Co. v. Bachman, 39 W. L. B. 324 (Sup. Ct. without report 1898).

Amendments. Regulations may be amended by a majority of stockholders or members, although such regulations were originally adopted unanimously and signed by all stockholders or members.

Wangerien v. Aspell, 47 O. S. 250, 260 (1890).

Cronin v. Potters Co-op. Co., 29 W. L. B. 52 (C. P. 1892).

But a vested right acquired under a regulation or by-law can not be affected by its repeal or amendment.

Windhorst v. Germania Bldg. Assn., 7 W. L. B. 29 (Super. Ct. Cin. 1882).

A written assent to an amendment to corporate regulations, signed by the attorney in fact for another corporation which holds a majority of the stock of the corporation, and filed with the secretary, is a substantial compliance with § 8703. Toledo Co. v. Smith, 205 Fed. 643, 659 (D. C. 1913).

An amendment shortening the time of notice of special stockholders' meetings from ten to five days is valid. Toledo Co. v. Smith, 205 Fed. 643, 660 (D. C. 1913).

A corporation may provide in its regulations that they shall not be amended without unanimous consent of all the stockholders or members. Such a provision is valid. No amendment is binding unless consent of the stipulated number is given.

Wangerien v. Aspell, 47 O. S. 250, 260 (1890).

McKeown v. Irish Bldg. Assn., 5 W. L. B. 52 (Super. Ct. Cin. 1880).

Where the regulations contain no provision as to their amendment, they are amendable under § 8703.

Wangerien v. Aspell, 47 O. S. 250, 260 (1890).

Proof of adoption. The adoption of by-laws is sufficiently proved by showing that they appear upon the records of the corporation, and have been uniformly acted upon and enforced as the by-laws of the corporation, although the corporate records do not show, and it is not otherwise proved, that they were adopted by a formal vote.

Hagerman v. Association, 25 O. S. 186, 204 (1874).

Stafford v. Banking Co., 16 C. C. 50, 55; 8 C. D. 483 (1898); aff'd, 61 O. S. 160.

Notice of stockholders' meeting. It has been held that this section requires notice to be served personally and that notice given to stockholders by mail is insufficient.

Cheney v. Ketcham, 5 N. P. 139, 142; 7 L. D. 183 (C. P. 1897).

Section 8704. (What may be provided for by regulations.) When no other provision is specially made in this title, a corporation by its regulations may provide—

1. The time, place and manner of calling and conducting its meetings.

2. The number of stockholders or members constituting a quorum.

3. The time of the annual election for trustees or directors, and the manner of giving notice thereof.

4. The duties and compensation of officers.

5. The manner of election, or appointment, and the tenure of office, of all officers other than the trustees or directors.

6. The qualifications of members, when the corporation is not for profit. (R. S. Sec. 3252; R. S. 1880.)

I. Place of meeting, p. 1144.

II. Quorum of stockholders or members; p. 1144.

III. Time and notice of annual election, p. 1145.

IV. Duties and compensation of officers, p. 1145.

V. Election of officers and tenure of office, p. 1145.

VI. Qualification of members, p. 1146.

VII. Regulations on other subjects, p. 1146.

A. Transfer of stock, p. 1146.

B. Number of trustees or directors, p. 1147.

C. Limiting corporate existence, p. 1147.

D. Prohibiting recourse to courts, p. 1147.

E. Change of place of business, p. 1147.

F. Removal of directors, officers or employees, p. 1147.

G. Expulsion of stockholders, p. 1147.

VIII. Regulations as contracts, p. 1147.

I. PLACE OF MEETING.

A regulation specifying the place for holding meetings is valid. *State v. Shaw*, 103 O. S. 660 (1921).

Manner of calling meetings. Where officers refuse to call a stockholders' meeting, pursuant to the regulations, the remedy of a stockholder is injunction, not mandamus.

State v. Unida, etc., Co., 13 C. C. n. s. 100; 22 C. D. 54 (1910).

See note to § 8647.

II. QUORUM OF STOCKHOLDERS OR MEMBERS.

Where no regulation has been adopted on the subject, the stockholders present at a meeting, in person or by proxy, may elect officers and transact business, although a majority of the stock is not represented.

Lutterby v. Herancourt Brewing Co., 12 L. D. 67, 72, 73 (Super. Ct. Cin. 1901).

See *Kalb v. American N. B.*, 21 C. C. 1, 7; 11 C. D. 437 (1900); aff'd, 65 O. S. 566.

But where the regulations prescribe the number necessary to constitute a quorum, a less number can not hold a legal meeting or take any valid action except to adjourn. *State v. Shaw*, 103 O. S. 660, 668 (1921).

The "number of stockholders constituting a quorum" means number of shares of stock represented, not the number of stockholders. *Toledo Co. v. Smith*, 205 Fed. 643, 658 (D. C. 1913).

III. TIME AND NOTICE OF ANNUAL ELECTION.

Where the regulations provide for an "annual meeting" at a time other than the first Monday in January, as provided in § 8647, the time for the "annual election" is thereby changed and the election should be held at such annual meeting.

State v. Burial Assn., 8 C. C. n. s. 233, 250; 18 C. D. 397 (1906); dismissed by supreme court for want of jurisdiction, 4 O. L. R. 708.

But regulations which have not been properly adopted are not effective to change the time of the annual election of directors from the first Monday in January.

State v. Burial Assn., 8 C. C. n. s. 233, 249; 18 C. D. 397 (1906).

A provision for five days' notice by mail of special stockholders' meetings, is valid. Toledo Co. v. Smith, 205 Fed. 643, 660 (D. C. 1913).

The term of office of a director can not be shortened by an amendment to the regulations, to go into immediate effect, advancing the date of the annual election.

Toledo Co. v. Smith, 205 Fed. 643 (1913).

No notice need be given to stockholders of the annual meeting, where its place, day and hour are specified in the regulations, and no requirement as to other notice is provided therein. State v. Kreutzer, 100 O. S. 246 (1919).

Directors have no power to postpone an annual meeting, the time and place of which are specified in the regulations. State v. Kreutzer, 100 O. S. 246 (1919).

IV. DUTIES AND COMPENSATION OF OFFICERS.

See also note to § 8664. *Executive officers* and note to § 8660. *Delegation of duties to executive committee.*

A corporation may by its regulations so define the duties of its officers as to make them *alter ego* within the assigned limits.

Bradford Belting Co. v. Gibson, 68 O. S. 442, 449 (1903).

Dickason v. Grafton, etc., Co., 6 C. C. n. s. 333; 17 C. D. 357; aff'd, 76 O. S. 612.

See Morris v. Griffith, 34 W. L. B. 191 (U. S. C. C. 1895).

The regulations may lawfully provide that directors shall hold a meeting immediately after every regular or special meeting of stockholders. Toledo Co. v. Smith, 205 Fed. 643, 660 (D. C. 1913).

Where the regulations authorize the president to make contracts, he may bind the corporation by ratification of a contract entered into by the secretary, without authority. Grabler Mfg. Co. v. Leahy, 18 C. C. n. s. 17 (1910); aff'd, no rep. 85 O. S. 442.

Where regulations authorize the directors to fix the compensation of the president and other executive officers, the action of directors in voting on their own salaries is not void in the absence of fraud or unfair dealing toward other stockholders. Kirn v. Pbg. Co., 12 Ohio App. 55; 31 O. C. A. 47 (1919); motion to certify record overruled, 17 O. L. R. 392.

Regulations of corporation chartered by special act under former constitution (treasurer).

See Portage, etc., Co. v. Wetmore, 17 Ohio 330 (1848).

V. ELECTION OF OFFICERS AND TENURE OF OFFICE.

A regulation requiring proxies to be deposited with the secretary at least one day before the meeting is said to be valid. Rep. Atty. Gen. 1913, p. 798.

The president must be elected by the directors. His election can not be otherwise provided for in the regulations.

§ 8664.

Walsenberg Water Co. v. Moore, 5 Colo. App. 144; 38 Pac. 60.

The stockholders may determine the number of directors. §§ 8635, 8665. This is frequently done by a provision in the regulations. But the tenure of office of a director can not be shortened by a decrease in the number under § 8665.

Lutterby v. Herancourt Brewing Co., 12 L. D. 67, 76 (Super. Ct. Cin. 1901).

The manner of filling vacancies in the board of directors may be provided for in the regulations. G. C. § 8662; Toledo Co. v. Smith, 205 Fed. 643, 647 (D. C. 1913).

Neither the incorporators of a corporation not for profit nor the trustees first elected are authorized to adopt a regulation or by-law providing that they shall hold office for life, and in case of vacancy to fill the same by appointment.

State v. Standard Life Assn., 38 O. S. 281 (1882).

VI. QUALIFICATION OF MEMBERS.

A corporation not for profit may provide in its regulations for the expulsion of members, and may delegate the power to try and expel to a committee or board.

Cheney v. Ketcham, 5 N. P. 139; 7 L. D. 183 (C. P. 1897).

Blumenthal v. Chamber of Commerce, 9 W. L. B. 76 (Super. Ct. Cin.); affirming 7 W. L. B. 327.

See note to § 8653.

A corporation for profit, however, can not legally provide in its regulations that only persons engaged in a particular business shall be eligible to hold stock, nor can it provide for the expulsion of ineligible stockholders. Paxson v. Cleveland Co., 17 C. C. n. s. 55 (1909).

VII. REGULATIONS ON OTHER SUBJECTS.

Where statutes under which a corporation is formed authorize by-laws upon specifically named subjects there is an implied denial of authority to make by-laws upon subjects not named.

But restrictive regulations upon the transfer of stock have been sustained as contracts.

Nicholson v. Franklin Brewing Co., 82 O. S. 94, 110, 111 (1911).

(a) **Transfers of stock.** Specific authority is not given in § 8704 to adopt regulations as to the transfer of stock. Such regulations have been sustained as contracts in some states, although they may have been technically invalid as regulations.

Nicholson v. Franklin Brewing Co., 82 O. S. 94, 110-111 (1910).

See Stafford v. Produce Exchange Brewing Co., 61 O. S. 160 (1899); affirming 16 C. C. 50; 8 C. D. 483.

Rep. Atty. Gen. 1911-1912, p. 88.

Restrictions on transfers of stock must be stated in the certificates of stock.

§ 8673-15.

Power to regulate transfers of stock is not power to prohibit transfers.

Nicholson v. Franklin Brewing Co., 82 O. S. 94, 112 (1910).

Under a Delaware statute authorizing corporations to adopt by-laws regulating the issuance and transference of stock, a by-law was held valid which required a stockholder who desired to sell his stock, before doing so, to notify the directors and give them thirty days in which

to sell the stock to certain designated classes of persons whose occupations might render them valuable in extending the corporate business.

Nicholson v. Franklin Brewing Co., 82 O. S. 94 (1910).

A regulation or by-law prohibiting transfers of stock to persons not already stockholders, until the board of directors had been notified and given a reasonable time in which to purchase the stock was held to be invalid. *Pattison Supply Co. v. Harvey*, 16 C. C. n. s. 42 (1910); *aff'd*, no rep. 82 O. S. 390.

(b) **Number of trustees or directors.** The number of trustees of a corporation not for profit may be fixed in the regulations. Rep. Atty. Gen. 1913, p. 89; G. C. § 8644.

(c) **Limiting corporate existence.** A regulation unanimously adopted, in writing, by the stockholders limiting the life of the corporation to ten years may be amended by a majority of the stockholders. And where the majority continued business beyond such period, without expressly amending such regulation, the court refused to decree a dissolution at the suit of one stockholder.

Cronin v. Potters Co-op. Co., 29 W. L. B. 52 (C. P. 1892).

(d) **Prohibiting recourse to courts.** A regulation of a corporation not for profit which prohibits a member from resort to courts to assert a right, but requiring him to submit to the tribunals of the corporation, is void.

Myers v. Jenkins, 63 O. S. 101; reversing 16 C. C. 545; 8 C. D. 431.

(e) **Change of place of business.**

See G. C. § 8625.

Mercantile Trust Co. v. Aetna Iron Works, 4 C. C. 579, 588; 2 C. D. 718 (1890).

(f) **Removal of directors, officers or employees.** This section does not authorize regulations providing for the removal, at stockholders' meetings, of officers or employees chosen or appointed by the directors nor arbitrarily removing directors. Directors are entitled to hold office for the term for which they are elected, unless removed for cause upon notice and hearing. *Toledo Co. v. Smith*, 205 Fed. 643, 646 (D. C. 1913).

(g) **Expulsion of stockholders.** A regulation of a corporation for profit providing for the expulsion and suspension of stockholders is unauthorized and invalid.

Rep. Atty. Gen. 1911-1912, p. 88.

A regulation providing that only persons engaged in a particular business should be eligible to hold stock, and providing for the trial and expulsion of ineligible stockholders, and for the payment by the corporation to expelled stockholders of the par value of their stock, is invalid. *Paxson v. Cleveland, etc., Co.*, 17 C. C. n. s. 55 (1909).

VIII. REGULATIONS AS CONTRACTS. Regulations made pursuant to § 8704 and not in contravention of other statutory provisions have all the force of contracts between the corporation and its members and between the members themselves. *State ex rel. v. Shaw*, 103 O. S. 660 (1921); *Nicholson v. Brewing Co.*, 82 O. S. 94, 110-111 (1910); *Stafford v. Banking Co.*, 61 O. S. 160 (1899).

Section 8705. (Power to borrow money upon mortgage; real estate companies. Certain limitations not applicable.)

A corporation may borrow money in any sum not exceeding the amount of its capital stock, issue its notes or coupons or registered bonds therefor, at such rate of interest as may be provided in such issue, and secure their payment by a mortgage of its property, real or personal, or both; provided, however, that a corporation formed to buy and sell real estate may borrow money, issue its notes or bonds secured by mortgage of its real estate in an amount not to exceed sixty-five per cent of the market value thereof without regard to the amount of its capital stock.

The limitations of section 8303 of the General Code shall not apply to any such borrowing maturing and payable one year or more after the date thereof, and no corporation, wherever organized, nor anyone in its behalf, shall interpose the defense or make the claim of usury in any suit or proceeding upon or with reference to any such corporate borrowing. (109 v. 231; 106 v. 553; R. S. Sec. 3256; May 6, 1902, 95 v. 390; April 15, 1902, 95 v. 151; R. S. 1880.)

Bonds of public utility or railroad; when authority of public utilities commission required. § 614-53 et seq.

Railroad mortgages. See § 8793 et seq.

Street and interurban railway mortgages. See § 9121-1.

Power of corporations to borrow money, in general. When not prohibited by statute, a corporation may borrow money for its corporate purposes and may evidence and secure the loan by customary instruments.

Larwell v. Hanover, etc., Society, 40 O. S. 274, 282 (1883).

Hays v. Galion Gas Co., 29 O. S. 330 (1876).

Raymond v. Spring Grove, etc., Ry. Co., 21 W. L. B. 103 (1889).

Burt v. Rattle, 31 O. S. 116 (1876).

Straus v. Eagle Ins. Co., 5 O. S. 59 (1855).

Where a corporation has obtained a loan, under its apparent power to borrow, it can not escape liability therefor by setting up the defense of ultra vires.

Hays v. Galion, etc., Co., 29 O. S. 330, 340 (1876).

See Picard v. Hughey, 58 O. S. 577, 594-595 (1898).

Conant v. Reed, 1 O. S. 298 (1853).

Limitation on amount borrowed. Loans in excess of capital stock.

Section 8705 does not expressly limit loans to the amount of paid-up stock.

Kreisser v. Ashtabula, etc., Co., 2 C. C. n. s. 597, 599; 14 C. D. 313 (1901).

But, in the opinion of the attorney general, the limit is the amount of the paid in capital stock, and not the authorized capital stock. Rep. Atty. Gen. 1913, p. 813.

A mortgage by a corporation to secure a debt in excess of its capital stock is not void as to a subsequent mortgagee with notice, if upheld by the corporation and its stockholders.

Central Trust Co. v. Columbus, etc., Co., 87 Fed. 815; 10 O. F. D. 328 (C. C. 1898).

Stockholders and directors who caused an issue of bonds in excess of the amount allowed by law are not personally liable on such bonds.

Raymond v. Spring Grove, etc., Co., 21 W. L. B. 103 (Super. Ct. Cin. 1889).

Where the capital stock of a corporation was increased, and bonds issued on the faith of such increase, the stockholders and directors are estopped from questioning the validity of the mortgage on the ground that the increased stock was not subscribed for.

Kreisser v. Ashtabula, etc., Co., 2 C. C. n. s. 597; 14 C. D. 313 (1901).

Farmers Trust Co. v. Railway Co., 67 Fed. 49; 9 O. F. D. 230 (1895).

Power of a public utility or railroad to borrow in excess of capital stock when authorized by public utilities commission, see § 614-53.

Duty of lender to inquire as to authorization of loan. It has been held that a lender should know that the corporation has power to make the loan and execute the mortgage, but that he is not bound to inquire whether all the formalities have been observed, as whether the directors have had a meeting and passed a formal resolution authorizing the loan and mortgage.

Bosche v. Toledo, etc., Co., 14 C. C. 289; 7 C. D. 374 (1897).

Fritsch Mfg. Co. v. Elmont, etc., Co., 11 C. C. n. s. 356; 21 C. D. 47 (1908).

See also note to § 8660, *Corporate Contracts*.

CORPORATE MORTGAGES OR DEEDS OF TRUST.

Authorized by directors. When assent of stockholders necessary. A mortgage on the property of a corporation must be authorized by the directors.

East Cleveland R. Co. v. Everett, 19 C. C. 205; 10 C. D. 493 (1900).

And by a yea and nay vote entered in the record.

See § 8709.

Assent of the stockholders is not necessary;

Bundy v. Iron Co., 38 O. S. 300, 312 (1882).

G. C. § 8660.

except when specially required by statute. Mortgages by certain building companies must be assented to by a vote of the holders of two-thirds of the stock (§ 10210). Bonds or notes convertible into stock require the written assent of three-fourths of the stockholders representing three-fourths of the paid up stock (§ 8709).

Where a stockholders' meeting is held, and a mortgage authorized, the stockholders voting favorably are estopped from questioning the validity of such mortgage.

Kreisser v. Ashtabula, etc., Co., 2 C. C. n. s. 597; 14 C. D. 313 (1901).

Where, through mistake, a mortgage was executed by stockholders in their own names, it was held good as an equitable mortgage against the corporation and against a second mortgage expressly made subject to it.

Bundy v. Iron Co., 38 O. S. 300 (1882).

Where, by statute of the home state of a foreign corporation, written assent of two-thirds of the capital stock is required to be filed in the office of the "clerk," such consent may be filed with the recorder, when a mortgage is executed on property in Ohio. A guaranty of payment signed by holders of two thirds of the stock is a sufficient consent.

West v. Klotz, 37 O. S. 420, 428 (1881).

Waiver of stockholders' liability in mortgage. Validity.

See note to § 8686.

Mortgage by college incorporated under special charter. Provision in charter for permanent occupation of property.

See President, etc., v. Zeigler, 17 O. S. 52 (1866).

Execution of bonds, notes and mortgages. Authority of officers.

See notes to §§ 8627, 8660 and 8664.

An Ohio corporation which has removed its plant and business to another state, may, in such state, execute a valid mortgage on its property in Ohio. Although a majority of the directors are not residents of Ohio they are *de facto* directors and their acts valid.

Lattimer v. Mosaic Glass Co., 13 C. C. 163; 7 C. D. 430 (1896).

Negotiability of bonds and mortgage. The affixing of the corporate seal does not render a bond nonnegotiable.

Railway Co. v. Lynde, 55 O. S. 23 (1896); *aff'd*, 172 U. S. 493.

The bona fide purchaser of a bond, complete in form, and payable to bearer, acquires a valid title, although the president of the corporation, who was entrusted with its custody, negotiated it wrongfully and for his own benefit. Such purchaser is entitled to a lien under the mortgage securing the bond issue.

Railway Co. v. Lynde, 55 O. S. 23 (1896); *aff'd*, 172 U. S. 493.

Where a mortgage provides that a default for six months in payment of interest shall render the bonds immediately due and payable, it is doubtful whether a default alone, without steps being taken by any holder to enforce the provision, is such a dishonor as to destroy their negotiability. But where the interest is afterwards paid in full the negotiability of the bonds is restored.

Railway Co. v. Lynde, 55 O. S. 23 (1896); *aff'd*, 172 U. S. 493.

See G. C. § 8157.

The doctrine of *lis pendens* does not apply to negotiable bonds, transferred before due, in due course of business for value.

Railway Co. v. Lynde, 55 O. S. 23 (1896); *s. c.*, 172 U. S. 493.

What bonds are secured by mortgage.

See note to § 8707.

After-acquired property clause in mortgage. A railroad or public utility company may mortgage property to be acquired in the future. But, "there is a clear distinction between the obligations of a mortgagor under a mortgage in which the property described as mortgaged, though definitely described, is yet to be bought and constructed, and the obligations of one under a mortgage in which the property described as mortgaged is in existence as a completed thing, and the after-acquired property clause is inserted only to increase the original security. In the former class of cases, the mortgagor is impliedly bound to buy and complete the thing mortgaged as described, and bring it under the lien of the mortgage, without burden or incumbrance, * * *. In the latter class of cases the mortgagor is bound neither to make additions, nor, if he does make them, to free them from prior liens arising in and out of the act of acquisition." Harris v. Bridge Co., 90 Fed. 322 (C. C. A. 6th Cir. 1898); Trust Co. v. Traction Co., 106 O. S. 577, 592 (1922).

Estoppel to question validity of mortgage. Stockholders and directors are estopped from denying the validity of a mortgage authorized by them.

Kreisser v. Ashtabula, etc., Co., 2 C. C. n. s. 597; 14 C. D. 313 (1901).
Farmers Trust Co. v. Toledo, etc., Ry. Co., 67 Fed. 49; 9 O. F. D. 230 (1895).

A subsequent mortgagee is estopped from questioning the validity of a prior mortgage to which his mortgage is expressly subject.

Bundy v. Iron Co., 38 O. S. 303 (1882).

Central Trust Co. v. Columbus, etc., R. Co., 87 Fed. 815 (1898).

A person who advanced money on the mortgage bonds of a corporation, and afterwards sold the same to other persons, is estopped from asserting a mechanic's lien as against the mortgage.

West v. Klotz, 37 O. S. 420 (1881).

See note to § 8793.

Consideration. A mortgage given by a corporation to secure endorser's of its notes is based on a present consideration under Bankruptcy Act, § 67d. The mortgagees became creditors of the corporation contingently at and from the time of endorsement.

In re Farmers Supply Co., 170 Fed. 502 (D. C. 1909).

Sale of bonds. The president of a corporation has no power to sell bonds without authority from the directors, nor to employ a broker to sell them.

East Cleveland R. Co. v. Everett, 19 C. C. 205, 209; 10 C. D. 493 (1900).

But where bonds, complete in form and negotiable by delivery, are placed in the custody of the president, he thereby becomes clothed with apparent authority of disposition, and a bona fide purchaser acquires a valid title although the president negotiates them wrongfully and for his own benefit.

Railway Co. v. Lynde, 55 O. S. 23 (1896); aff'd, 172 U. S. 493.

See Railway Co. v. Bank, 56 O. S. 351 (1897).

The president of a corporation, having possession of a bond for sale, has no right to appropriate the bond to the payment of a debt due to him from the corporation, without the consent of the directors.

Greenville Gas Co. v. Reis, 54 O. S. 549 (1896).

Where a broker is in possession of bonds of a railroad company under an agreement providing that his right to retain the same should accrue contemporaneously with actual payment therefor, an indictment for embezzlement lies for the pledging of the bonds by the broker and the conversion of the proceeds of the loan prior to a call for funds by the company.

Hayes v. State, 14 C. C. n. s. 497 (1910); aff'd, no rep., 83 O. S. 490.

Sale below par. A selling committee of directors, when not authorized to sell for less than par, can not authorize a broker to sell for less than par.

East Cleveland R. Co. v. Everett, 15 C. C. 181; 8 C. D. 210 (1897); s. c., 19 C. C. 205, 209; 10 C. D. 493 (1900).

Sale below par by railroad company, see § 8797.

Pledge of bonds by corporation. The power to "issue" bonds, conferred by this section, includes the power to pledge its mortgage bonds to secure other obligations, and the delivery of such bonds in pledge to a trustee is an issue of them and renders the mortgage a present incumbrance.

Transportation Co. v. Insurance Co., 170 Fed. 279 (C. C. A. 1909).

Character of transaction, sale or loan. See note to § 8797.

Bonds given to stockholders as a bonus. Other creditors of the corporation have priority over stockholders to whom bonds were issued as a bonus. But where such bonus bonds are issued for the purpose of protecting minority stockholders, they have priority over other stockholders, including holders of preferred and common stock subsequently sold. Williamson v. Collins, 243 Fed. 835 (C. C. A. Ohio 1917).

Trustee under mortgage. A statement in a bond that it shall not become obligatory until authenticated by the trustee is equivalent to a

declaration that when so authenticated its obligatory character shall become complete.

Railway Co. v. Lynde, 55 O. S. 23, 41 (1896).

Failure of the trustee to record the mortgage for some time after its execution was held not to estop the bondholders from asserting the lien after it was recorded. *Davis v. Hanover Soc.*, 210 Fed. 768 (C. C. A. 1913).

The trustee represents the bondholders only in matters affecting the enforcement of the security and administration of the trust property under the terms of the trust. *Baker v. Trust Co.*, 235 Fed. 17 (C. C. A. Ohio 1916).

Provision in mortgage authorizing trustee to bid in property at foreclosure sale.

See *Cincinnati Trust Co. v. Miami, etc., Co.*, 5 O. L. R. 514 (C. P. 1907).

The trustee of a mortgage executed by a consolidated company, to secure a bond issue, is a necessary party to an action, by mortgage creditors of one of its constituent companies, seeking to set aside the consolidation on the ground that they were induced by fraud to surrender their lien.

Union, etc., Co. v. Hess, 159 Fed. 889; 6 O. L. R. 372; 16 O. F. D. 73 (C. C. A. 1908).

Liability of trustee for certifying bonds with knowledge that the corporation did not own the property included in the mortgage.

See *Dreifus v. Union, etc., Co.*, 13 C. C. n. s. 441; 23 C. D. 46 (1910); reversed, without report, 87 O. S. 525.

Davidge v. Trust Co., 203 N. Y. 331; 96 N. E. 751 (1911).

Trust company as trustee. When mortgage void for failure of trust company to comply with law, see § 710-154.

Foreclosure. Where corporate property was sold under foreclosure to a director for less than its actual value, the sale was set aside on motion of a bondholder upon the giving of security that a larger sum would be bid on a resale.

Secor v. Maumee, etc., Co., 1 N. P. 100; 1 L. D. 80 (C. P. 1894).

Where mortgaged property is bid in by the bondholders, who, as authorized by the mortgage and the order of sale, paid therefor by surrendering the bonds, the sheriff is not entitled to poundage on the amount of bonds surrendered.

Major v. International Coal Co., 76 O. S. 200 (1907).

Where a provision in a mortgage required the trustee to bid in the property on foreclosure and to organize a new corporation, paying the purchase price in stock of such new company, which should be distributed among the bondholders in full satisfaction of their bonds, the court refused to carry such provision into the decree of foreclosure, where it appeared that an action was pending to require stockholders to pay up their stock, which action might be prejudiced by such decree.

Cincinnati Trust Co. v. Miami, etc., Co., 5 O. L. R. 514 (C. P. 1907).

The consent of all bondholders is not necessary to authorize the trustee to bid in the mortgaged property on their behalf. But non-consenting bondholders may compel the trustee to account to them for their pro rata share of the price bid, as if the same had been received by him in money. *Beckman v. Supply Co.*, 9 Ohio App. 275 (1918).

Deficiency judgment. Where the bonds are payable to the trustee or bearer, the trustee, in a suit to foreclose the mortgage, may plead a separate cause of action for a personal judgment. A court of appeals hearing the case on appeal is authorized to render only a defi-

ciency judgment. *Trust Co. v. Traction Co.*, 106 O. S. 577, 625 (1922). Compare, *Connor v. Bramble*, 6 N. P. 195 (1895).

See *Raymond v. Spring Grove, etc., Ry. Co.*, 21 W. L. B. 103 (1889).

A corporation is not liable for a deficiency judgment where the loan was obtained and note and mortgage given by an individual, although for the benefit of the corporation.

De Camp v. Levoy, 19 C. C. 335 (1900).

Reorganization agreements. Creditors' claims. See *Keetch v. Stowe Co.*, 205 Fed. 887 (C. C. A. Ohio 1913). Powers of committee. See *Sharpe v. Oil Co.*, 232 Fed. 703 (C. C. A. Ohio 1917).

Rights of minority stockholders where majority stockholders obtain corporate property through unfair reorganization proceedings. See *So. Pac. Co. v. Bogert*, 250 U. S. 483 (1919).

Reorganization of railroad companies. § 9079 et seq.

Section 8706. (When mortgage deemed to be duly recorded.) A mortgage of real and personal property heretofore or hereafter made by a company organized to operate a line or lines of telegraph, telephone, district telegraph messenger service, or for the purpose of supplying gas or electricity or hot water, for lighting, fuel or other purposes, or hot water, or steam, for heating or fuel purposes, shall be duly recorded in the office of the recorder of deeds in each of the counties in which the real or personal property mortgaged is situated or employed. (R. S. Sec. 3256a; May 6, 1902, 95 v. 366.)

This section is constitutional. *Thompson v. Electric Co.*, 21 C. C. n. s. 291 (1906).

Section 8707. (When lien effective.) A mortgage so recorded shall be a good and sufficient lien from the date of its filing for record in each county where it is recorded as well upon the personal as the real property of such a company. (R. S. Sec. 3256a; May 6, 1902, 95 v. 366.)

The lien of all bonds, in the hands of bona fide holders, secured by one mortgage but issued at different times, dates from the recording of the mortgage.

Railway Co. v. Lynde, 55 O. S. 23 (1896); aff'd, 172 U. S. 493.

See *Bank v. Brotherton*, 78 O. S. 173 (1908).

A mortgage recorded prior to the enactment of this section was held to be a valid lien from the date this section became effective. *Thompson v. Electric Co.*, 21 C. C. n. s. 291 (1906).

Section 8708. (Change of bonds authorized.) A corporation which lawfully has issued registered or coupon bonds, upon the request of a holder thereof, may change such registered into coupon bonds, or coupon into registered bonds, either by substitution or proper indorsement thereon. All liens, securities, and rights which existed on or accrued to such original bonds shall be and continue on and to such

substituted or indorsed bonds. (R. S. Sec. 3265; April 7, 1876, 73 v. 123, §§ 1, 2.)

Section 8709. (Obligations may be converted into stock.)

Upon the written assent of not less than three-fourths of the stockholders, representing at least three-fourths of its capital stock actually paid, a company may borrow money not exceeding one-half of the capital stock so paid in, on such security, by way of mortgage, or otherwise, as is agreed upon, at a lawful rate of interest, and in the instrument evidencing the contract may stipulate that the holders of such instruments shall have the right to convert the amount borrowed, or a part thereof, into either common or preferred stock, this having been provided for by the proper action and certificate of the company. Any action of the directors for borrowing money, issuing bonds, or involving an expenditure of money shall be by yea and nay votes, and record thereof be made showing the vote of each director voting upon the question. (R. S. Sec. 3257; March 25, 1870, 67 v. 26, §§ 1, 2, 3, 4.)

Right to convert not severable from bond. A stipulation for conversion is inseparably connected with the bond on which it is endorsed, and is only available to the holder of the bond so long as he continues to be such holder. The holder of a bond can not assign to another the right of action for a breach of the stipulation for conversion and yet retain the bond for the benefit of himself and future assigns.

Denney v. Cleveland, etc., R. Co., 28 O. S. 108 (1875).

In an action for a refusal to convert bonds, the petition is fatally defective in not averring that the plaintiffs were, and at the commencement of the action continued to be, the holders of the bonds for the non-conversion of which they bring suit.

Denny v. Cleveland, etc., R. Co., 28 O. S. 108 (1875).

When stock deemed a debt. A corporation issued certificates of preferred stock, so called, certifying that the corporation guaranteed to holders the payment of four percent semi-annual dividends, and the final payment of the entire amount at a specified time, with the right to convert the preferred stock into common stock, and the company at the same time executed and delivered to a trustee its bond and mortgage to secure the holders of such certificates. Held, that the holders of the certificates did not thereby become stockholders of the corporation, but its creditors, and that, as such, they had a lien upon the mortgaged property superior to that of the general creditors of the corporation or of its assignees.

Burt v. Rattle, 31 O. S. 116 (1876).

See note to § 8669. *Issues of stock construed—preferred stock or debt.*

Contracts of consolidation limiting right to issue bonds. A contract of consolidation which prohibits the issuing of bonds without the consent of the majority in interest of preferred stockholders probably violates this section:

Burke v. Cleveland, etc., Co., 22 W. L. B. 11, 16 (C. P. 1889).

SALE OF ENTIRE PROPERTY.

Section 8710. (Sale of entire property and assets.) No corporation organized under the laws of this state shall sell its entire property and assets to any person, persons or association, or to another corporation, whether organized for the same or similar purposes or otherwise, under the laws of this or any other state, unless three-fourths of the directors of such corporation authorize the execution of an agreement therefor prescribing the terms, considerations and conditions thereof. The considerations may be money, stocks, bonds, or other instruments for the payment of money, or any valuable consideration. (R. S. Sec. 3256b; April 2, 1906, 98 v. 229.)

Power to sell corporate property generally, see note to § 8627.

Sale of stocks of merchandise in bulk, see G. C. §§ 11102 to 11103-1.

An Ohio corporation has no authority to sell its entire property and assets except in the manner provided in § 8710 et seq. *Cyclone Drill Co. v. Ziegler*, 99 O. S. 151 (1918).

Where all the stockholders and directors were present at a meeting, at which a sale of all assets was authorized, the corporation cannot thereafter set aside the executed transaction on the ground that §§ 8710 to 8718 were not complied with. *Harrison Co. v. Blacker*, 15 N. P. n. s. 377 (1914).

Directors may authorize the filing of a voluntary bankruptcy petition on behalf of the corporation, although a charter provision requires the consent of stockholders to a disposition of its entire assets. *In re De Camp Co.*, 272 Fed. 558 (C. C. A. 6th Cir. 1921).

Sale of entire property—what constitutes. When corporate property is sold, but the corporation retains its cash, notes and accounts receivable and real estate, the transaction is not a sale of "entire property". *Krell v. Piano Co.*, 23 N. P. n. s. 193 (1920); *aff'd*, 14 Ohio App. 74; motion to certify record overruled, 19 O. L. R. 125.

Duty of purchaser. It is the duty of a purchaser of the entire property of a corporation, before making the purchase, to ascertain whether the corporation has given notice to its stockholders under § 8711 and complied with the other statutory requirements. Otherwise the purchaser takes the property subject to the rights of dissenting stockholders. *Cyclone Drill Co. v. Ziegler*, 99 O. S. 151 (1918).

Rights of creditors of vendor corporation. Where one corporation purchases all the assets of another corporation, and pays therefor with stock in the vendee corporation, the vendee may, under some circumstances, be liable for the debts of the vendor company. *Bruce Co. v. Eustis Co.*, 8 Ohio App. 341; 30 O. C. A. 177 (1917); motion to certify record overruled, 15 O. L. R. 485.

A person having a claim for personal injuries, upon which he brought suit after sale and conveyance of the assets of the corporation, is a subsequent creditor, and the sale will be set aside only upon proof of the vendor company's actual intent to defraud its creditors. *Pfisterer v. Traction Co.*, 89 O. S. 172 (1913).

For rights of creditors of constituent railroad company, after consolidation, see note to § 9038.

For other rights of creditors, see *Andres v. Morgan*, 62 O. S. 236 (1900); *Bank v. Trebein*, 59 O. S. 316 (1898); *In re Reiger, Kapner & Altmark*, 8 O. L. R. 498; 187 Fed. 609.

Corporation paying in stock for assets of another corporation. Where a corporation acquires all the assets of another corporation, paying therefor in stock of the vendee corporation, the transaction is, in substance, a merger or successorship in interest. The purchaser may rescind a contract which the selling corporation had, by fraud, been induced to make. *Shipbuilding Co. v. Steamship Co.*, 215 Fed. 304; 12 O. L. R. 455; affirming, 10 O. L. R. 395; 197 Fed. 780, 797.

But the purchaser may be liable for debts of the selling corporation. *Bruce Co. v. Eustis Co.*, 8 Ohio App. 341; 30 O. C. A. 177 (1917); motion to certify record overruled, 15 O. L. R. 485; *Andres v. Morgan*, 62 O. S. 236 (1900).

Creditors of the vendor corporation may reach stock of the new corporation issued in payment for assets of the vendor, although such stock was issued to stockholders of the vendor corporation. *Hewett v. Fenton Co.*, 21 N. P. n. s. 537 (1919).

The vendee corporation may be bound by an injunction in force against the vendor corporation at the time of sale. *Fertilizer Co. v. Ruh*, 7 Ohio App. 430; 29 O. C. A. 165 (1917).

Agreement of vendor corporation and stockholders not to re-engage in business. An agreement by a corporation, on a sale of its entire property and good will, not to re-engage in business is not binding on a stockholder individually although he was an officer of the corporation and acted in the transaction.

Hall's Safe Co. v. Herring, etc., Co., 146 Fed. 37; 15 O. F. D. 37 (C. C. A. 1906).

But where the stockholders expressly agree, as individuals, not to re-engage in business, within certain limitations, they are bound.

Davis v. Booth, 2 O. L. R. 309; 131 Fed. 31 (C. C. A. 1904).

Employment contracts of corporation; when binding on purchaser. Novation.

See *Paul v. Caldwell Furnace Co.*, 7 C. C. n. s. 272; 17 C. D. 768 (1905).

Jarmusch v. Otis, etc., Co., 3 C. C. n. s. 1; 13 C. D. 122 (1901); aff'd, 68 O. S. 720.

Rescission. Before the enactment of §§8710 to 8718 it was held that where several corporations combined by organizing a new corporation, to which the constituent companies conveyed their property in exchange for stock, one of the constituent companies could not sue for a rescission, on the ground that it was an arrangement in restraint of trade, without tendering back all the stock received by it.

Sportsman Shot Co. v. American, etc., Co., 30 W. L. B. 87 (Super. Ct. Cin. 1893).

Power of corporation to sell its entire property, independently of statute. Former law.

See *Schmuck v. Crume, etc., Co.*, 7 N. P. n. s. 24, 32; 19 L. D. 819 (1905); aff'd, 78 O. S. 409.

Keystone Bank v. Union Oil Co., 2 C. C. n. s. 427; 15 C. D. 464 (1903).

Easum v. Buckeye Brewing Co., 51 Fed. 156 (C. C. 1892).

Donner v. Dayton, etc., Co., 1 C. S. C. R. 130, 140 (1871).

Section 8711. (Submission of agreement.) Such agreement shall be submitted to the stockholders of the corporation at a meeting called for the purpose of taking it into consideration, ten days' notice of the time and place of holding which, and the object thereof, shall be given by registered letter containing a written or printed notice addressed to each of the persons in whose names the stock of the corporation stands on its books; and also by like notice published in some newspaper in the city or village where the corporation has its principal office or place of business. But when all the stockholders are present at such meeting in person or by proxy, notice may be waived in writing. (R. S. Sec. 3256c; April 2, 1906, 98 v. 230.)

The provision of this section requiring notice to stockholders is mandatory. *Cyclone Drill Co. v. Ziegler*, 99 O. S. 151 (1918).

Section 8712. (Adoption of agreement.) At such meeting of stockholders the agreement of the directors shall be considered and a vote by ballot taken for its adoption or rejection. For each share of stock on which all the installments called for by the board of directors are paid, the holder thereof shall be entitled to one vote. The ballots must be cast in person or by proxy, and if three-fourths of all the votes cast at the meeting be for the adoption of the agreement, it shall be valid and binding on such corporation. Upon its adoption, the officers of the company shall execute and deliver to the purchaser good and sufficient deeds and transfers of all the property and assets of the corporation, upon the terms and conditions in the agreement provided. (R. S. Sec. 3256c; April 2, 1906, 98 v. 230.)

Where the assets of a corporation are purchased by another corporation under §§ 8710 to 8713, the purchaser may rescind a contract of the selling corporation, entered into through the fraud of its promoter, by which a portion of the assets were acquired.

Shipbuilding Co. v. Steamship Co., 215 Fed. 304; 12 O. L. R. 467 (C. C. A. 6th Cir. 1914).

When a preferred stock issue gives the preferred stockholders exclusive voting rights, a sale may be approved by three-fourths of the preferred stockholders. The common stockholders of such a corporation are not entitled to vote. *Krell v. Piano Co.*, 14 Ohio App. 74 (1921); affirming, 23 N. P. n. s. 195; motion to certify record overruled, 19 O. L. R. 125.

Section 8713. (Dissatisfied stockholder.) If a stockholder be dissatisfied with such sale and refuses to participate in the proceeds thereof, within thirty days after the adoption of such agreement, he shall state his objections thereto in writing and file them with such corporation, and

in writing demand from it payment for his stock. Within sixty days thereafter such corporation shall pay to him the value thereof at the time such agreement was adopted. In case of a disagreement as to the value of the stock, it shall be ascertained by three disinterested persons, one of whom to be chosen by the stockholder, one by the directors of the corporation, and the other by the two so selected who shall conduct such arbitration as provided by the law regulating arbitrations. (R. S. Sec. 3256d; April 2, 1906, 98 v. 230.)

See § 9034.

An award under this section is a common law award requiring the concurrence of all the arbitrators, and not a statutory award under G. C. § 12149 et seq. *Shoe Co. v. Hoffard*, 27 O. C. A. 513 (1916); *aff'd*, 95 O. S. 376.

By submitting to arbitration, dissatisfied stockholders waive their right to question the constitutionality of the statute. *Wall v. Parrot Co.*, 244 U. S. 407 (1917).

In the absence of a statute, a minority stockholder may recover the proportionate value of his stock where the majority stockholders sell the entire corporate property to another corporation for less than its value, the majority stockholders receiving stock in the vendee corporation, and the minority stockholder receiving none. *Stebbins v. Michigan Co.*, 212 Fed. 19 (1914).

Section 8714. (How award collected.) If the award is not paid within sixty days from its making, and notice thereof given to the stockholder and the corporation, its amount shall be evidence of the amount due from the corporation and may be collected as other debts against it. On receiving payment of the award, the stockholder shall surrender his stock to such corporation. (R. S. Sec. 3256d; April 2, 1906, 98 v. 230.)

In an action to recover the amount of the award, the defense of legal defect appearing on the face of the award is available to the defendant corporation. *Hoffard v. Shoe Co.*, 95 O. S. 376 (1917); *affirming*, 27 O. C. A. 513.

Section 8715. (Procedure when stockholder refuses to submit question.) If such stockholder refuses to submit such question to arbitration, upon the application of a director of the company, the judge of the common pleas court shall appoint arbitrators, who shall ascertain the value of the stock as if the question had been submitted by consent of both parties. (R. S. Sec. 3256e; April 2, 1906, 98 v. 230.)

Section 8716. (Notice.) In all cases of such arbitration, the party desiring it, shall give the opposite party at least ten days' notice of his intention to apply to the judge for the appointment or arbitrators, which notice shall be served

in the manner provided for the service of summons and specify the time and place of the hearing of the application. In cases of non-residents the notice shall be by publication for four consecutive weeks in some newspaper printed in the county. (R. S. Sec. 3256e; April 2, 1906, 98 v. 231.)

Section 8717. (Deposit of award.) If the party owning the stock refuses to receive the amount awarded, the company may deposit it with the clerk of the common pleas court of the county in which the arbitration was held, which deposit shall operate as if payment were made to the owner of the stock, and also as a cancellation of such stock upon the books of the company. (R. S. Sec. 3256e; April 2, 1906, 98 v. 231.)

Section 8718. (Sale to a trust prohibited.) A sale of its entire property by a corporation, as hereinbefore authorized, shall not be made for the formation of or to a trust or combination for the purpose of restricting trade or preventing competition. (R. S. Sec. 3256b; April 2, 1906, 98 v. 229.)

See *Sportsman Shot Co. v. American, etc., Co.*, 30 W. L. B. 87 (Super. Ct. Cin. 1893).

AMENDMENTS.

Section 8719. (Power to amend articles.) A corporation organized under the general corporation laws of the state may amend its articles of incorporation as follows:

1. So as to change its corporate name—but not to one already appropriated, or to one likely to mislead the public.
2. So as to change the place where it is to be located, or its principal business transacted.
3. So as to modify, enlarge or diminish the objects or purposes for which it was formed; but not substantially to change the purpose of its original organization.
4. So as to increase or decrease the number of shares into which its capital stock is divided; to provide for preferred stock, or dispense with unissued preferred stock; to change unissued common stock to preferred stock, within the limits permitted by law; to change unissued preferred stock to common stock; to add any or all of the provisions permitted by sections 8668 and 8669 of the General Code, or to make new provisions of such nature with respect to newly authorized preferred stock; or to amend or eliminate such

provisions as to unissued preferred stock; or to add to the articles anything omitted from, or which lawfully might have been provided for originally, or to take out of the articles any unnecessary provisions or provisions which might lawfully have been omitted from them originally. But the authorized capital stock of a corporation shall not be increased or diminished by such amendment. (107 v. 414; R. S. Sec. 3238a; May 18, 1886, 83 v. 193.)

A fire insurance company organized under G. C. § 9510 et seq. may amend its articles under this section.

Rep. Atty. Gen. 1911-1912, p. 98.

A legal reserve life insurance company organized under § 9340 may amend its articles under this section. Rep. Atty. Gen. 1912, p. 24.

Change of name. Corporate name generally, see note to § 8628.

A corporation having changed its name, the former name was adopted by a new corporation, but most of the mail addressed to the former name was intended for the older company. Held that all mail should be opened by the former company in the presence of a representative of the new company.

Clark Carriage Co. v. Smith Eggers Co., 1 N. P. 391; 3 L. D. 77 (Cin. Super. Ct. 1894).

A casualty company may change its name under this section.

Rep. Atty. Gen. 1908-1909, p. 88.

A change of the corporate name does not release a subscriber to stock.

Royce & Pulling v. Tyler, 2 C. C. 175, 183; 1 C. D. 428 (1887).

Whether a statute, authorizing a change of name of a railroad company on certain conditions, has been complied with must be proved. Judicial notice will not be taken of a statement in a report of the commissioner of railroads, that such statute has been complied with.

Railroad Co. v. Hoffhines, 46 O. S. 643 (1889).

Capital stock. Prior to the amendment of 107 v. 414, unissued common stock could be changed into preferred stock only by the unanimous consent of the stockholders. Opins. Atty. Gen. 1915, pp. 8, 127, 363 and 1284.

The par value of shares may be increased or reduced, by amendment of the articles, if the authorized capital stock is not increased or decreased. 17 O. L. R. 430; Opins. Atty. Gen. 1919, p. 1564; 11 Dept. Rep. 580. *Contra*, Rep. Atty. Gen. 1911-1912, pp. 99, 126.

A corporation not for profit having no capital stock may, by amendment, provide for a capital stock. The fee for such amendment is governed by G. C. § 176, par. 9. Opins. Atty. Gen. 1915, p. 440; Opins. Atty. Gen. 1918, p. 206.

A corporation not for profit, but having a capital stock, may not eliminate its capital stock by amendment, where a portion of the stock is owned by nonmembers.

Rep. Atty. Gen. 1904-1905, p. 63.

Prior to the amendment of 107 v. 414, preferred stock could not be authorized by amendment to the articles under this section. *State v. Urschel*, 104 O. S. 172 (1922).

Preferred stock can not be retired by an amendment providing for an issue of common stock which would exceed the authorized amount of common stock. Opins. Atty. Gen. 1915, p. 504.

Substantial change of purpose. While the purpose may be modified, enlarged or diminished, it can not be substantially changed. A corporation organized to furnish gas and electricity can not by amendment be authorized to operate a street railway.

State ex rel. v. Taylor, 55 O. S. 61 (1896).

Where a corporation amends its articles so as to substantially change its original purpose, bonds issued in carrying out such unauthorized purposes will, in the absence of estoppel, be void in the hands of holders with notice.

Picard v. Hughey, 58 O. S. 577, 595 (1898).

A corporation organized to furnish gas for lighting purposes may, by amendment, be authorized to furnish electricity for the same purpose.

Picard v. Hughey, 58 O. S. 577 (1898).

A corporation formed to manufacture electric fixtures can not, by amendment, be authorized to furnish electric light and steam heat.

4 Opins. Attys. Gen. 580.

A company formed to conduct a farming and nursery business can not, by amendment, be authorized to deal in real estate, or to manufacture cotton and cotton paper.

Rep. Atty. Gen. 1909-1910, p. 135.

An amendment authorizing a railway company to engage in transportation by water is a fundamental change.

Marietta, etc., R. Co. v. Elliott, 10 O. S. 57 (1859).

Association for care of crippled children. A certificate from the board of state charities is required before filing a certificate of amendment of articles of association for care of dependent, etc., children. G. C. § 1352-2.

Special charters under former constitution. Amendment of.

See note to § 8736.

Fundamental changes in special charters require the assent of all stockholders.

Chapman v. Mad River, etc., Co., 6 O. S. 119 (1856).

Marietta, etc., R. Co. v. Elliott, 10 O. S. 57 (1859).

See Dayton, etc., R. Co. v. Hatch, 1 Disn. 84 (1855).

But the rights of such stockholders may be lost by laches.

Chapman v. Mad River, etc., Co., 6 O. S. 119 (1856).

Owen v. Purdy, 12 O. S. 73 (1861).

Section 8720. (Proceedings.) Amendments to articles of incorporation may be made at any meeting of the members or stockholders thereof, of which, and of the business to come before it, thirty days' notice has been given by a majority of the directors or trustees, in a newspaper published and of general circulation in the county where the company's principal place of business is located, and by a vote of the owners of at least three-fifths of its capital stock then subscribed, if it has a capital stock, or if not, by a vote of at least three-fifths of its members. (R. S. Sec. 3238a; May 18, 1886, 83 v. 193.)

The notice need not be published for thirty consecutive days. One notice, published at least thirty days before the day set, is sufficient.

Muskingum, etc., Co. v. Ward, 13 Ohio 120 (1844).

Craig v. Fox, 16 Ohio 563, 566 (1847).

Newport News v. Potter, 122 Fed. 321, 332 (C. C. A. 1903).

Notice by mail is probably not a compliance with this section. Opins. Atty. Gen. 1915, p. 164.

Section 8721. (Copy to be filed with secretary of state.)

When thus adopted, a copy of such amendment, with a certificate thereto affixed, stating the fact and date of its adoption, that such copy is a true copy thereof, signed by the president and secretary of the corporation, and if one there be, sealed with its seal, shall be recorded in the office of the secretary of state, who shall note on the margin of the record of the original articles filed by such corporation, and on the margin of the index thereto, the volume and page where such amendment is recorded. (R. S. Sec. 3238a; May 18, 1886, 83 v. 193.)

Section 8722. (When amendments take effect.) Amendments to articles of incorporation shall not take effect until filed for record with the secretary of state, nor, unless it be waived, until the corporation gives notice of them in some newspaper of general circulation in the county where its principal office is located, for three consecutive weeks. (R. S. Sec. 3238a; May 18, 1886, 83 v. 193.)

Publication of the notice once a week for three consecutive weeks is sufficient, but publication is not complete until the lapse of three full weeks from the date of the first publication. The better practice is to copy in full the resolution amending the articles. Opins. Atty. Gen. 1917, p. 1987.

Section 8723. (How notices waived.) All the notices hereinbefore required in such proceedings to amend, may be waived when the holders of all the capital stock of a corporation, or all the members of one having no stock, consent thereto in writing. (R. S. Sec. 3238a; May 18, 1886, 83 v. 193.)

DIVIDENDS.

Section 8724. (Dividends to be paid from surplus profits only.) Directors of a corporation organized under the laws of this state shall not make dividends except from surplus profits arising from its business. (R. S. Sec. 3269-1; April 11, 1888, 85 v. 182, § 1.)

Dividends.

On preferred stock, see §§ 8668 to 8669.

Defined. Dividends consist of that portion of the profits which the directors separate from the general property and apply to the benefit of the stockholders.

State v. Farmers Bank, 11 Ohio 94 (1841).

Where the property of a corporation is divided among the stockholders, on the winding up of its affairs, the term "dividend" may be applied, although usually applied to the distribution of profits.

Larwill v. Burke, 19 C. C. 450, 513; 10 C. D. 579, 605 (1900).

Under some circumstances an informal division of profits may be treated as a dividend, although there were no book entries crediting the dividend to the stockholders. *Kramer v. Foundry Co.*, 23 N. P. n. s. 81 (1918).

Discretionary power of directors to declare dividends. In the absence of bad faith, or an arbitrary and unjustifiable withholding of the profits by the directors, the discretionary power of directors as to dividends will not be interfered with by the courts.

De La Croix v. Eid, etc., Co., 8 N. P. n. s. 489; 19 L. D. 767 (C. P. 1909).

Smith v. Aultman Co., 25 C. C. n. s. 461 (1916).

See *In re Mansfield Co.*, 3 Ohio App. 253; 21 C. C. n. s. 95 (1914).

A corporation may borrow money to pay dividends when the earnings are represented by credits or merchandise readily reducible to cash. But where a corporation is already so heavily in debt that it can not borrow money on its own credit, the directors are not justified in declaring a dividend. *Thomas v. Matthews*, 94 O. S. 32, 56 (1916).

Can not be declared or paid out of capital. A corporation has no power to declare or pay dividends out of its capital stock. A contract to pay dividends otherwise than out of profits is invalid and can not be enforced. Dividends can only be paid out of surplus profits.

Painesville, etc., R. Co. v. King, 17 O. S. 534 (1867).

Ohio College v. Rosenthal, 45 O. S. 183, 194 (1887).

De La Croix v. Eid, etc., Co., 8 N. P. n. s. 489; 19 L. D. 767 (C. P. 1909).

Wood v. Pearce, 2 Dis. 411 (Super. Ct. Cin. 1859).

Ryan v. Miami, etc., Ry. Co., 10 Am. L. R. 263 (1881).

Dividends on preferred stock can be paid out of surplus profits only.

Miller v. Ratterman, 47 O. S. 141, 158 (1890).

Mente v. Graff, 10 N. P. n. s. 148 (C. P. 1910).

Dividends paid out of capital, and not out of surplus profits, may be recovered from the stockholders by a trustee in bankruptcy of the corporation, although paid to preferred stockholders and received by them in good faith.

Mente v. Groff, 10 N. P. n. s. 148 (C. P. 1910).

See *First N. B. v. Patton Co.*, 13 C. C. n. s. 289 (1910).

Railway Co. v. Burke, 19 W. L. B. 27 (C. P. 1887).

In an action against a stockholder, it is no defense that the stockholder, in receiving the dividends, acted in good faith and believed that the dividends were paid out of earnings; nor is it a defense that the corporation was not actually insolvent when the dividend was paid and that no existing creditors were injured, where the effect of the dividend was to hinder, delay or defraud creditors. *Rheinstrom v. Seasongood*, 19 N. P. n. s. 394 (1917).

Agreement of director with third person that corporation will pay dividends. A contract by a director with a third person, obligating the director to vote in favor of dividends, regardless of the requirements of the company as working capital or as to equipment, is against public policy. *Thomas v. Matthews*, 94 O. S. 32, 55-59 (1916).

Guaranty of dividends. (a) **By corporation.** A general guaranty

by a railroad company, of dividends on its preferred stock, was construed to be a guaranty of dividends only in the event that dividends were earned.
Miller v. Ratterman, 47 O. S. 141 (1890).

(b) **Personal guaranty by officer of corporation.** Where a person subscribed and paid for stock, relying on the verbal promise of the president of the corporation that the subscriber should receive fifteen percent on the amount invested, within one year, the agreement was held not to be within the statute of frauds.

Moorehouse v. Crangle, 36 O. S. 130 (1880).

Title to profits before declaration of dividend. The net earnings are the property of the corporation until a dividend is declared.

Adams v. Shields, 17 C. C. 129; 9 C. D. 558 (1898); *aff'd*, 61 O. S. 643.

Marble v. Van Wert N. B., 3 C. C. 464; 2 C. D. 265 (1888).

Dividend, when declared by directors, becomes a debt due to stockholders. When a dividend has been declared by the directors, it becomes a debt of the corporation to its stockholders. When declared out of profits, it can not be rescinded or revoked by the directors or by a majority of the stockholders.

Mitchell v. Bookwalter Wheel Co., 4 N. P. n. s. 609; 17 L. D. 483 (1905); *aff'd*, no rep., 75 O. S. 639.

See *Cleveland Trust Co. v. Lander*, 19 C. C. 271; 10 C. D. 452 (1900); *aff'd*, 62 O. S. 266.

To whom dividends payable. In general. Dividends are *prima facie* payable to the persons appearing on the corporate books as stockholders. The corporation is protected in paying to the registered stockholder in the absence of notice of the rights of other parties.

§ 8673-3.

Railroad Co. v. Robbins, 35 O. S. 483, 502 (1880).

Bank v. Mfg. Co., 67 O. S. 306, 314 (1902).

Norton v. Norton, 43 O. S. 509, 522 (1885).

A corporation is bound to respect the rights of equitable owners from the time it receives notice thereof.

Conant v. Seneca Co. Bank, 1 O. S. 298 (1853).

Where a corporation has paid dividends to one not entitled thereto, and has been compelled to pay the dividends a second time, it may recover the amount from the person who wrongfully obtained it.

Marble v. Van Wert N. B., 3 C. C. 464; 2 C. D. 265 (1888).

Where stock transferred. Future dividends follow the stock and are payable to the purchaser. It has been held that, on a sale of stock, no valid reservation of future dividends can be made.

Marble v. Van Wert N. B., 3 C. C. 464; 2 C. D. 265 (1888).

Dividends declared after the sale belong to the purchaser although earned prior to that time.

Dissette v. Lawrence Pub. Co., 9 C. C. n. s. 118; 19 C. D. 168 (1906).

Zinn v. Baxter, 65 O. S. 341, 366 (1901).

Where dividends have been declared by the directors and carried to the credit of the stockholder on the corporate books, the transferrer, and not the transferee, is entitled thereto.

City of Ohio v. Cleveland, etc., R. Co., 6 O. S. 489 (1856).

But where the dividends have not been declared, although earned, prior to the transfer, the transferrer has no interest in them.

See *Dissette v. Lawrence Pbg. Co.*, 9 C. C. n. s. 118; 19 C. D. 168 (1906).

Where a creditor garnishees the interest of a stockholder in a corporation unpaid dividends follow the stock.

Norton v. Norton, 43 O. S. 509 (1885).

Application of dividends to payment of debt due from stockholder.

Where a stockholder is indebted to the corporation, on a subscription to its stock, or on a valid assessment on his stock, the corporation may credit the dividends on such indebtedness.

Rhodes v. Equitable, etc., Co., 3 C. C. 501; 2 C. D. 288 (1888); aff'd, 27 W. L. B. 160.

A subscriber to stock is entitled to credit for the dividends declared thereon.

Iron Railroad Co. v. Fink, 41 O. S. 321, 326, 327 (1884).

The corporation may reserve a lien on dividends, by express stipulation in the certificate of stock.

§ 8673-15.

Bellevue Bank v. Higbee, 4 C. C. 222; 22 C. D. 512 (1889); aff'd, 28 W. L. B. 336.

Sale of stock to be paid for out of dividends.

See note to § 8682.

Stewart v. Herron, 77 O. S. 130.

White v. Cooper, 7 C. C. n. s. 114; 17 C. D. 703; aff'd, no rep., 72 O. S. 615, 691.

Stock dividends. When surplus profits exist they may be applied toward the payment of increased stock or unissued stock, and distributed among the stockholders as a stock dividend.

State v. Insurance Co., 13 C. C. n. s. 49; 22 C. D. 262 (1910); aff'd, 84 O. S. 459.

See 7 O. L. R. 352 (article by Frank M. Coppock).

Stearns v. Hibben, etc., Co., 11 C. C. n. s. 553 (1909).

Railway Co. v. Furnace Co., 49 O. S. 102 (1892).

A stock dividend, like a cash dividend, may be declared only when surplus profits exist. Where a stock dividend was declared at a time when there were no surplus profits, the stockholders who accepted the certificates may be compelled by creditors to pay for such stock.

Handley v. Stutz, 139 U. S. 417 (1891).

See note to § 8674. *Who are liable.*

An offer by stockholders to return the stock is too late after insolvency of the corporation and a suit begun to enforce liability.

First N. B. v. Patton Co., 13 C. C. n. s. 289 (1910).

Stock dividends as capital or income. Whether stock dividends are capital or income, as between a life tenant and remainderman, was discussed but no fixed rule adopted in Wilberding v. Miller, 90 O. S. 28, 44 (1914). See Worthington v. McAlpin, 18 N. P. n. s. 436 (1915); Raymond v. Perkins, 23 C. C. n. s. 385; Bank v. Clark, 7 Ohio App. 6, 28 O. C. A. 1; motion to certify record overruled, 61 Bull. 191.

Under the federal income tax law stock dividends are merely additional evidence of the stockholders interest and not taxable income. Towne v. Eisner, 245 U. S. 418 (1918); Eisner v. Macomber, 252 U. S. 189.

Scrip certificates. The issuing to stockholders of scrip certificates, redeemable in the future in the stock of the corporation, is not the declaring of a dividend, nor a promise to pay money. It is merely a promise to make a future stock dividend.

Adams v. Shields, 17 C. C. 129; 9 C. D. 558 (1898); aff'd, no rep., 61 O. S. 643.

Actions to recover dividends.**Action is at law.**

Larwill v. Burke, 19 C. C. 450, 513 (1900).

Moore v. Lima N. B., 8 C. C. 287, 297; 4 C. D. 529 (1894).

Before the enactment of the uniform transfer act (§ 8673-1 et seq.) it was held that an equitable owner of stock might sue for dividends.

Larwill v. Burke, 19 C. C. 449, 513; 10 C. D. 579, 605 (1900).

Conant v. Seneca County Bank, 1 O. S. 298 (1853).

Demand before suit and statute of limitations. A demand must be made on the corporation for the dividend before suit.

Stearns v. Hibben, etc., Co., 11 C. C. n. s. 553 (1908).

Larwill v. Burke, 19 C. C. 449, 513, 526, 532; 10 C. D. 579, 605 (1900).

An action to recover a dividend is barred in six years from the time when it is due and payable.

Stearns v. Hibben, etc., Co., 11 C. C. n. s. 553, 560; 21 C. D. 270 (1908).

Where no time is fixed by the directors for payment, a dividend is due and payable within a reasonable time.

Mitchell v. Bookwalter Wheel Co., 4 N. P. n. s. 609; 17 L. D. 483 (C. P. 1905); aff'd, 75 O. S. 639.

Although a demand is necessary before bringing an action to recover dividends, failure to make such demand does not suspend the operation of the statute of limitations.

Stearns v. Hibben, etc., Co., 11 C. C. n. s. 553, 560; 21 C. D. 270 (1908).

Except under circumstances where the dividends are held under a continuing trust.

Larwill v. Burke, 19 C. C. 449, 513, 526, 532; 10 C. D. 579, 605 (1900).

Officers not liable. When declared by the directors, a dividend becomes the debt of the corporation. The officers of the corporation are not personally liable therefor.

Snodgrass v. Morrison, etc., Co., 4 O. L. R. 622; 17 L. D. 497 (Super. Ct. Cin. 1907).

Evidence. Where the minutes are silent as to the declaration of a dividend, action of the directors may be shown by parol. Kramer v. Foundry Co., 23 N. P. n. s. 81 (1918).

Unanimous consent by stockholders to an informal division of profits, other than pro rata, may estop the corporation from setting up informalities, or the inequality of the distribution as a defense against the payment of the dividend. Kramer v. Foundry Co., 23 N. P. n. s. 81 (1918).

Miscellaneous. A bequest of dividends, without limitation as to time or other qualification, is a bequest of the stock itself.

Collier v. Collier, 3 O. S. 369 (1854).

A by-law of an incorporated co-operative sales company, making the right to certain dividends dependent on the stockholder marketing his entire product through the corporation, has been held valid.

Kroger, etc., Co. v. Butchers Hide Ass., 8 N. P. n. s. 222 (C. P. 1909).

Upon attaining their majority the daughters of R, who was their guardian and held stock inherited by them from their mother, appeared in probate court, receipted for balances shown to be due them on account of dividends collected, and in writing asked that the accounts of their father

as guardian be approved. For some years thereafter they permitted him to draw and use the dividends, and then by a written agreement authorized him to draw and use the dividends during his life. After another long interval suits were filed by the daughters for a rescission of the agreement and for a judgment for the dividends drawn. Held, the action was not maintainable.

Lamkin v. Robinson, 15 C. C. n. s. 126; 34 C. D. 91; aff'd, no rep., 88 O. S. 603; reversing 10 N. P. n. s. 1; 21 L. D. 13.

Section 8725. (Unpaid interest not profits.) In calculating its profits, prior to a dividend, interest then unpaid, although due, on debts owing to it, shall not be included. (R. S. Sec. 3269-2; April 11, 1888, 85 v. 182, § 2.)

Section 8726. (How profits ascertained.) In order to ascertain the surplus profits from which a dividend may be made, in the account of profit and loss there shall be charged and deducted from the actual profits—

1. All ordinary and extraordinary expenses, paid or incurred, in managing the affairs and transacting the business of the corporation.

2. Interest paid, or then due or accrued, on debts it owes.

3. All losses of the corporation. In computing its losses, debts owing to it which have been due without prosecution, or interest paid thereon, for more than one year, or upon which judgment was recovered, but has been more than two years unsatisfied, and on which also for that period, no interest was paid, shall be included. (April 10, 1889, 86 v. 228, § 3; April 11, 1888, 85 v. 182, 183.)

The profits need not have been earned during the current year. If undivided profits have been accumulated and carried over, a dividend may be declared therefrom, although no profits were earned during the current year.

Mente v. Groff, 10 N. P. n. s. 148, 157 (C. P. 1910).

Section 8727. (What advertisements prohibited.) No such corporation shall advertise a larger amount of capital stock than actually has been subscribed and paid in, nor advertise a greater dividend than actually has been earned and credited or paid to its stockholders or members. (R. S. Sec. 3269-4; April 10, 1889, 86 v. 228; April 11, 1888, 85 v. 182, 183.)

Issuing fraudulent prospectus of financial condition, penalty, see § 13175.

Section 8728. (Liability for violation.) Every director of such a corporation, who violates or is concerned in violating any provision of the next four preceding sections shall

be personally liable to its creditors and stockholders for any loss which thereby they respectively sustain. (R. S. Sec. 3269-4; April 11, 1888, 85 v. 183, § 4.)

See notes to § 8660.

Wrongful payment of dividends.

See *Excelsior Water, etc., Co. v. Pierce*, 90 Cal. 131 (1891).

Braun v. Riggle, 7 Ky. Law Rep. 519 (1886).

Cornell v. Seddinger, 237 Pa. St. 389.

Where directors of a corporation caused a notice to be published that they and the stockholders were personally responsible for the debts of the company, when the charter did not make them so responsible, a creditor of the corporation who extended credit to it on the faith of such notice may maintain an action against the directors for deceit.

Westervelt v. Demorest, 46 N. J. Law, 37 (1884).

See *Cross v. Sackett*, 16 How. Pr. (N. Y.) 62 (1858).

Cazeaux v. Mali, 25 Barb. (N. Y.) (1857).

Morse v. Swits, 19 How. Pr. (N. Y.) 275 (1859).

Salmon v. Richardson, 30 Conn. 360 (1862).

Fenn v. Curtis, 23 Hun 384 (1881).

Dividends illegally paid by directors may, in an action by stockholders for mismanagement, be deducted from the stockholders' losses and may be adjudicated in the action.

Glass v. Courtright, 14 N. P. n. s. 273; 23 L. D. 253 (C. P. 1913).

COMMON STOCK WITHOUT PAR VALUE.

Section 8728-1. (Corporations may issue shares of common stock without nominal value; exceptions. Statements required in articles. Filing fee. What each certificate should show. Opening books of subscription; sale of shares; payment of dividends in stock or cash.) The articles of incorporation of any corporation for profit under the laws of this state, except banking, safe deposit, trust and insurance companies, may provide for the issuance of shares of common stock without any nominal or par value, by stating in such articles:

(a) The total number of authorized shares which may be issued by the corporation, and the classes, if any, into which such shares are divided, the number of shares of each class and, if any such shares be preferred stock, the terms and provisions thereof and the amount of each share thereof, which shall be five dollars or some multiple of five dollars, but not more than one hundred dollars.

(b) The amount of common capital with which the corporation will begin to carry on business, which shall not be less than \$500.00.

Such statements in the articles of incorporation shall be in lieu of any statements required by law to be stated in the articles of incorporation as to the amount of capital

stock, and the number of shares into which the same shall be divided, and the par value of such shares.

The secretary of state shall charge and collect for filing such articles of incorporation a fee of five cents on each share of common stock authorized in the articles to be issued without any nominal or par value, and in addition thereto a fee of one-tenth of one per cent of the par value of the preferred stock authorized in the articles, but in no case shall the aggregate amount to be paid to the secretary of state be less than \$25.00 and upon any increase of authorized capital stock, either common or preferred, or both, such fees shall be charged and collected by the secretary of state.

At no time shall the number of shares of preferred stock outstanding be more than two-thirds of the total number of shares, common and preferred, outstanding.

Each share of common stock, without nominal or par value, shall be equal to every other share of such stock, except that the articles of incorporation may provide that such stock shall be divided into different classes, with such designation and voting powers or restrictions or qualifications thereof as shall be stated therein, but all such stock shall be subject to the preference given to the preferred stock, if any, authorized to be issued. Every certificate for such shares without nominal or par value shall have plainly written or printed upon its face the number of such shares which it represents and the number of such shares which the corporation is authorized to issue, and no such certificate shall express any nominal or par value of such shares.

Such corporation may receive subscription for, and issue and sell its preferred shares, as authorized by law. At the time of opening books of subscription to the capital stock, as required by law, subscriptions may be received for the common shares, without nominal or par value, for such consideration as may be decided upon by a majority of the incorporators at the time of ordering books to be opened for subscription; thereafter, subject to the provisions of section 8699, the corporation may issue and sell its said common shares, from time to time, for such consideration as shall be the fair value of such shares, as fixed by its board of directors, or for such consideration as shall be consented to in writing by the holders of all the outstanding shares of common stock, or for such consideration as shall be fixed by the vote of a majority in number of the outstanding common shares at a meeting called for that purpose in such manner as shall be prescribed by the code of regulations. Nothing herein shall prevent a cor-

poration from paying dividends, subject to the limitations of this act, payable in common stock of the company at a price fixed by the board of directors instead of in cash or property. Any and all shares issued as permitted by this section shall be deemed fully paid and non-assessible and the holder of such shares shall not be liable to the corporation or to its creditors in respect thereof. (110 v. 114; 109 v. 273; 108 (Pt. 2) v. 1287; 108 (Pt. 1) v. 507.)

The no-par-value stock act is contained in sections 8728-1 to 8728-11 inclusive.

Under this act a corporation may, but is not required to, provide for preferred stock. Opins. Atty. Gen. 1919, p. 1085.

Section 8728-2. (When corporation may begin business. Rights of creditors and others; limitation of actions. Payment of dividends. When preferred stock may be redeemed. Not subject to certain limitations on borrowing capacity.)

When not less than five persons have subscribed for at least one share each of the capital stock, and paid ten per cent on each share subscribed for, the incorporators or a majority of them shall in lieu of the provisions of section 8633 at once so certify in writing to the secretary of state. As soon as such certificate is filed, the signers thereto and the stockholders shall proceed as provided in sections 8635 and 8636.

No corporation formed pursuant to this act shall begin to carry on business or shall incur any debts until the amount of common capital stated in its articles of incorporation, shall have been fully paid to the corporation in money or in property taken at its actual value; and a certificate to that effect signed and acknowledged by at least a majority of the directors, before an officer authorized to administer oaths, shall be filed with the secretary of state, who shall charge and collect therefor a fee of \$5.00. The rights of creditors and persons dealing with such corporation, without knowledge of the failure of the corporation to have complied with the foregoing provisions, shall not be affected thereby, but the directors of the corporation assenting to the creation of any debt in violation of this action shall be liable jointly and severally for such debt; but no action shall be brought under the foregoing provisions of this section unless, within one year after the debt shall have been incurred, the creditor shall have served upon the assenting director or directors written notice of intention to hold him or them personally liable for such debts. Any director who, because of any such liability under this section, shall pay any debt of the corporation, shall be subrogated to all rights of the creditor in re-

spect thereof against the corporation and its property, and also shall be entitled to contribution from all other directors of the corporation similarly liable for the same debt, and the personal representative of any such director who shall have died before making such contribution.

No such corporation shall declare or pay any dividends except from surplus profits arising from its business. In case any dividend shall be declared or paid in violation hereof, the directors in whose administration the same shall have been declared or paid, except those who may have caused their dissent therefrom to be entered upon the minutes of such directors at the time, or who were not present when such action was taken shall be liable jointly and severally to such corporation or a creditor thereof, to the full amount of any loss sustained by such corporation or creditors respectively by reason of such dividend.

The preferred stock, if any be issued, shall not be redeemed by the corporation if thereby the property and assets of the corporation will be reduced below the amount stated in the articles of incorporation or any amendment thereof, as the common capital with which the corporation will begin to carry on business; nor shall such preferred stock be redeemed, if thereby the property and assets of the corporation will be reduced below the amount of its outstanding debts and liabilities.

Corporations formed or reorganized pursuant to this act shall not be subject to the limitations on borrowing capacity provided for by section 8705. (109 v. 275; 108 (Pt. 2) v. 1289; 108 (Pt. 1) v. 508.)

Section 8728-3. (How par value of shares shall be stated.)

In any case in which the law requires that the par value of the shares of stock of a corporation be stated in any certificate or paper, it shall be stated in respect to shares without par value that such shares are without par value, and wherever the amount of stock authorized or issued is required to be stated, the number of shares authorized or issued shall be stated, and it shall also be stated that such shares are without par value. (108 (Pt. 2) v. 1290; 108 (Pt. 1) v. 510.)

Section 8728-4. (Increase or reduction of stock; fee. When and how amendment can be made.)

Any corporation formed or re-organized so as to have common stock without par value may increase the amount of its stated common capital, or may reduce the same to not less than five hun-

dred dollars, or may reduce the number of its authorized common shares, or may provide for preferred stock, or may amend its articles of incorporation or certificate of reorganization so as to accomplish any of the purposes authorized by section 8719 that are not inconsistent with any of the other provisions of this act, in the manner and in accordance with sections 8719 and -8723, inclusive, of the General Code, or may reduce the number of its authorized preferred shares as provided in section 8700 of the General Code and a charge of five dollars shall be made for such amendment or reduction. The secretary of state shall charge and collect for filing a certificate of amendment changing unissued common stock to preferred stock, a fee of one-tenth of one per cent of the par value of said preferred stock, less the fees theretofore paid upon the shares of common stock so changed, but not less than five dollars to be charged in any such case, and for filing every other certificate of amendment the fees provided by law for filing certificates of amendments.

Corporations formed or re-organized pursuant to this act may increase the total number of authorized shares in the manner provided by sections 8698 and 8699 of the General Code.

An amendment cannot be made under this section unless as so amended the articles of incorporation could lawfully have been originally filed under this act. In case of a reduction of the amount of common capital of a corporation, a certificate setting forth the whole amount of the ascertained debts and liabilities of the corporation shall be made, signed and verified by the president or vice president, and by the secretary or treasurer of the corporation, and filed with the certificate of amendment; and such certificate of debts and liabilities shall have endorsed thereon the certificate of the commissioner of securities that he has received satisfactory proof that the reduced amount of capital is sufficient for the proper purpose of the corporation and that said corporation has tangible assets equal to or in excess of its ascertained debts and liabilities and the amount of said common capital as reduced, and also the par value of its preferred stock, if any, then outstanding. (109 v. 276; 108 (Pt. 2) v. 1290; 108 (Pt. 1) v. 510.)

Section 8728-5. (Certificate of reorganization; statements required.) Any corporation for profit heretofore or hereafter organized under the general incorporation laws of this state, other than corporations belonging to one of the

classes specifically excepted by section 8728-1, may be reorganized so that such corporation, its officers, directors and stockholders, shall acquire and enjoy all the rights, privileges, powers and exemptions, and become subject to all of the liabilities and obligations imposed by this act, upon the filing and recording in the office of the secretary of state, a certificate of reorganization of the company, pursuant to this act, stating:

First: The name under which the corporation was originally organized, and if it has been changed, the present corporate title.

Second: The date of its articles of incorporation, and all amendments thereof, and volume and page wherein recorded in the office of the secretary of state.

Third: The place where it is located or its principle business transacted.

Fourth: The amount of its capital stock, and the number of shares into which it has been divided, and, if classified, the number and par value of the shares included in each class, and the terms and provisions of the preferred stock, if any.

Fifth: The number of shares of each class issued and outstanding.

Sixth: The number of shares that may henceforth be issued by the corporation, which may be either less than, or equal to, or in excess of the number of shares into which the capital stock was previously divided, and all of the matters and things required to be stated in an original certificate of incorporation by subdivision "a" of section 8728-1.

Seventh: The amount of common capital with which the reorganized corporation will begin to carry on business, which shall be in all respects as required by subdivision "b" of section 8728-1.

Eighth: The terms upon which new shares of the reorganized corporation shall be issued in place of such of the outstanding shares of stock as are changed or affected by the provisions of the certificate of reorganization.

Ninth: It may also, if desired, prescribe the minimum consideration for which the reorganized corporation may issue and sell its authorized common shares. If such consideration be not so prescribed, said common shares shall be disposed of as provided by section 8728-1.

Nothing shall be included in such certificate other than as authorized by this section, and it shall be either:

(a) Signed by every stockholder of record of the corporation, having voting power, or his duly authorized proxy,

and shall have annexed an affidavit of the secretary of the company to the effect the persons who have executed the certificate, in person or by proxy, constitute the holders of record of all the shares of stock of the corporation, issued and outstanding, entitled to vote, or:

(b) Signed by the president or a vice-president and the secretary or treasurer of the corporation, who shall make and annex an affidavit stating that they have been authorized and directed to execute and file the certificate by the votes, cast in person or by proxy, of the holders of record of two-thirds or more of each class of the outstanding shares of stock entitled to vote at a meeting called and held upon written notice mailed to each stockholder of record, entitled to vote, at least two weeks before the date set for the meeting, and published once a week for at least two successive weeks in a newspaper published and of general circulation in the county wherein the principal office of the corporation is located; and that such notice did expressly state the purpose of the meeting to be that of reorganizing the corporation pursuant to this act, so as to permit the issuance of shares without par value, and did state the terms upon which the outstanding shares of stock were to be exchanged for the new shares; provided, however, that if it is proposed in the certificate of reorganization to change the terms or provisions, or to increase the number of shares, or the par value of shares of any class of stock which is denied full voting power, or of any class of stock senior thereto, then such stock shall, for the purposes of this section, have voting power. (108 (Pt. 2) v. 1291; 108 (Pt. 1) v. 510.)

Section 8728-6. (When affidavit as to debts and liabilities required; endorsement of commissioner.) If the amount of common capital, stated in the certificate of re-organization as that with which the re-organized corporation will begin to carry on business, be less than the total amount of the par value of the previously issued and outstanding common capital stock, there shall be annexed to such certificate an affidavit of the president or vice president and the secretary or treasurer of the corporation, setting forth the whole amount of the ascertained debts and liabilities of the corporation; and, in such case, the certificate of reorganization shall have endorsed thereon the approval of the commissioner of securities to the effect that he has received proof satisfactory to him that the amount of common capital stated in the certificate of reorganization as that with which the reorganized

corporation will begin to carry on business is sufficient for the proper purposes of the corporation, and that said corporation has tangible assets equal to or in excess of its ascertained debts and liabilities and the amount of said common capital as stated in the certificate of reorganization, and also, the par value of its preferred stock, if any, then outstanding, or to be issued in exchange for outstanding stock as provided in said certificate. (109 v. 277; 108 (Pt. 2) v. 1292; 108 (Pt. 1) v. 512.)

Section 8728-7. (Statement by president and treasurer before incurring debts; filing fee; rights of creditors.) No corporation reorganized under this act shall incur any debts subsequent to the filing of the certificate of reorganization until it shall have assets of an actual value at least equal to the amount of its common capital stated in its certificate of reorganization as that with which it will begin to carry on business, and shall have first filed with the secretary of state the sworn statement of its president or vice-president and treasurer of such facts, for the filing of which the secretary of state shall charge and collect a fee of \$5.00. The rights of creditors and persons dealing with such corporation without knowledge of the failure of the corporation to have complied with the foregoing provisions shall not be affected thereby, but the directors of a corporation assenting to the creation of a debt in violation of this section shall be jointly and severally liable for such debt in like manner as provided and subject to the conditions and limitations imposed by section 8728-2 of this act. (108 (Pt. 2) v. 1293; 108 (Pt. 1) v. 512.)

Section 8728-8. (Liability unaffected by reorganization.) The liability of the corporation, its officers, directors and stockholders for corporate debts contracted or obligations incurred prior to the filing of the certificate of reorganization pursuant to this act shall be unaffected thereby, but for the purpose of enforcing and recovering upon such claims creditors shall have the same right of recourse against the corporation, or against its officers, directors and stockholders individually that they would have had if the corporation had not been reorganized. Except as provided by this section the new shares issued by the reorganized corporation shall be deemed fully paid and non-assessable and the holder of such shares shall not be liable to the corporation or to its creditors in respect thereof. (108 (Pt. 1) v. 513.)

Section 8728-9. (Proceedings shall not work a dissolution or create new corporation.) No proceedings taken under section six of this act (G. C. 8728-6) shall be deemed to work a dissolution, or to create a new corporation or to interrupt in any way the continuity of existence of the corporation affected. (108 (Pt. 1) v. 513.)

Section 8728-10. (Fees to be paid secretary of state.) Every corporation reorganized pursuant to this act, and every such reorganized corporation increasing its authorized capital stock, shall pay to the secretary of state the same fees provided in section 8728-1, as therein computed; provided, however, that the secretary of state shall charge and collect for the filing of the certificate of reorganization referred to in section 8728-5 a fee of not less than \$25.00.

Any corporation which has heretofore been organized or reorganized under the provisions of sections 8728-1 to 8728-12, inclusive, of the General Code, shall be entitled to the benefits of this amendatory act upon filing with the secretary of state a certified copy of a resolution adopted by its board of directors signifying its election to avail itself hereof and upon payment of a filing fee of twenty-five dollars. (108 (Pt. 2) v. 1293; 108 (Pt. 1) v. 513.)

A corporation reorganized under the act is not entitled to credit for fees theretofore paid to the secretary of state. Opins. Atty. Gen. 1919, p. 1085.

The fee payable by a corporation reorganized under the act is five cents for each authorized share of no-par common stock, whether the shares are new stock, or shares changed from par value to no-par value. Opins. Atty. Gen. 1919, p. 1085.

Section 8728-11. (Amount of fees payable.) The amount of fees payable under section 5498 by a corporation formed or re-organized so as to have common stock without par value shall be three-twentieths of one percent upon its subscribed or issued and outstanding preferred stock, plus five cents for each share of common stock, without par value, subscribed or issued and outstanding, but not less than ten dollars in any case.

The amount of fees payable by a foreign corporation having common stock without par value under section 180 shall be the fees therein provided as to the authorized preferred stock, and five cents per share for the authorized common stock without par value, but such fees shall not be less than fifteen dollars nor more than fifty dollars. The amount of fees payable by such a foreign corporation under section 184 shall be one-tenth of one percent upon the pro-

ANNUAL FRANCHISE TAX ON FOREIGN CORPORATIONS UNCONSTITUTIONAL

The United States Supreme Court on October 20, 1924, held Sec. 8728-11, General Code of Ohio, to be unconstitutional. *Air-Way Electric Appliance Corporation v. Day*, Treasurer, U. S., 69 Law Ed. (Advance Sheets November 1, 1924); reversing 279 Fed. 878.

G. C. Sec. 8728-11 imposes an annual franchise tax on foreign corporations based on the number of **authorized** shares of no-par stock. The reasoning of the decision seems also to affect G. C. Sec. 5502, which imposes an annual franchise tax on foreign corporations (having a par value capital stock) based on the **authorized** capital stock. It may also affect G. C. Sec. 184, basing the initial franchise tax of a foreign corporation on its authorized capital stock.

Action on this subject may be expected from the next session of the Ohio Legislature.

THE W. H. ANDERSON COMPANY

November 12, 1924.

portion of authorized preferred stock represented by property owned and used and business transacted in this state, and five cents per share upon the proportion of the number of shares of authorized common stock, represented by property owned and used and business transacted in this state, but not less than ten dollars in any case; and the fee payable under section 185 by such corporations shall be determined in the same manner, but not less than ten dollars in any case; and under section 5503 shall be three-twentieths of one per cent upon the proportion of the authorized preferred stock represented by property owned and used and business transacted in this state and five cents per share upon the proportion of the number of shares of authorized common stock, represented by property owned and used and business transacted in this state, but not less than ten dollars in any case. (109 v. 277; 108 (Pt. 2) v. 1293; 108 (Pt. 1) v. 513.)

The amendment of 109 v. 277 is constitutional. *Air-way Corporation v. Archer*, 279 Fed. 878 (D. C. Ohio 1922).

The minimum and maximum fee under § 180 applies to the capital stock as a whole, and not to common and preferred separately. *Opins. Atty. Gen.* 1920, p. 886.

Being a general revenue measure, the amendment of 109 v. 277 became effective May 17, 1921. *Air-way Corporation v. Archer*, 279 Fed. 878.

Fees of foreign corporation under original act. *Opins. Atty. Gen.* 1919, pp. 1085, 1117.

Section 8728-12. (Jurisdiction of commissioner not superseded; expenses paid by corporation under investigation.) Nothing in this act shall modify or supersede the jurisdiction of the commissioner of securities over the sale of bonds, stocks and other securities by corporations formed or organized pursuant to this act, under all laws enacted to regulate the sale of bonds, stocks and other securities and to prevent fraud in such sales. Any expenses incurred by the commissioner of securities in the performance of the duties required of him under sections 4 and 6 of this act (G. C. §§ 8728-4, 8728-6), shall be paid by the corporation involved in the investigation. (108 (Pt. 1) v. 513.)

MISCELLANEOUS.

Section 8729. (Affidavit as to campaign contributions.) Every corporation for profit doing business in this state, except corporations required by law to file annual report with the auditor of state or the superintendent of insurance,

annually during the month of May, if it be a domestic corporation, and during the month of September, if it be a foreign corporation, shall file with the secretary of state in such form as he prescribes, an affidavit subscribed and sworn to by an officer having knowledge of the facts therein set forth, setting forth that such corporation has not during the preceding year directly or indirectly paid, used or offered, consented or agreed to pay or use, any of its money or property for, or in aid, of any political party, committee or organization, or for, or in aid of, any candidate for political office or for nomination for any such office, or in any manner used any of its money or property for any political purpose whatever, or for the reimbursement or indemnification of any person or persons for moneys or property so used. Such forms of affidavits as the secretary prescribes shall be attached to or made part of the report required to be made of such corporation under the law, requiring corporations to file annual reports with the secretary of state and to pay annual fee therefor. (February 26, 1908, 99 v. 23, § 2.)

See §§ 5522, 13320.

This section does not apply to partisan newspapers.

Rep. Atty. Gen. (1908-1909) 76.

A corporation may pay for the insertion of an advertisement in the program of a convention of a political party.

Rep. Atty. Gen. (1908-1909) 86.

Section 8730. (Affidavit in annual reports to auditor and superintendent of insurance.) Corporations required by law to file annual reports with the auditor of state or the superintendent of insurance, shall file with such officers similar affidavits in such form as the auditor of state or the superintendent of insurance prescribes. The form of affidavit presented by such officer shall be attached to or made a part of the report required to be made of such corporation under existing laws. The affidavit shall be made at the time when such reports are required to be made. (February 26, 1908, 99 v. 23, § 2.)

Section 8730-1. (Corporations authorized to create and maintain instrumentalities for public welfare; co-operation of such. Report to secretary of state.) That any corporation organized under the laws of this state may co-operate with other corporations and with natural persons in the creation and maintenance of community funds or of charitable, philanthropic or benevolent instrumentalities conducive to public welfare, and its directors or trustees may appropriate and expend for such purposes such sum or sums as

they may deem expedient and as, in their judgment, will contribute to the protection of the corporate interests, provided that whenever the expenditures for such purposes in any calendar year shall in the aggregate amount to one per centum on the capital stock outstanding, then, before any further expenditure is made during such year for such purposes by the corporation, ten days' notice shall be given to the stockholders in such manner as the directors or trustees may direct of the intention to make such further expenditure, specifying the amount thereof, and if written objection be made by stockholders holding twenty-five per centum or more of the stock of the corporation, such further expenditure shall not be made until it shall have been authorized at a stockholders' meeting.

All such corporations making appropriations and expenditures under the provisions of this act shall report annually to the secretary of state the sums so appropriated or expended and the name or names of the community funds or philanthropic, charitable or benevolent instrumentalities in whose behalf such sums are appropriated or expended. (108 (Pt. 2) v. 1245.)

Except as authorized by this section, donations for public and charitable purposes are *ultra vires*, and officers who make the same may be liable for the amount thereof. But if the primary object is to promote the corporate purposes, either directly or indirectly, a contribution or donation may be within the corporate powers. Such donations should be authorized by the directors. Opins. Atty. Gen. 1915, p. 1492.

Section 8731. (By what laws corporations shall be governed.) Corporations created before the adoption of the present constitution, which have not, by election or some other act, come to be governed by laws since passed, shall be governed and controlled by the laws then in force, and the valid modifications thereof since or herein enacted. Other corporations now existing or hereafter created shall be governed and controlled by the provisions of this title. (R. S. Sec. 3232; R. S. 1880.)

A general law of the state will affect companies incorporated under special acts, as to which there was a reserved power of amendment or repeal.

State v. Cincinnati Gas, etc., Co., 18 O. S. 262.

Although the special charter is not subject to amendment or repeal, the corporation is subject to general police regulation and control.

State v. Columbus, etc., Co., 34 O. S. 572 (1878).

State v. Eagle Ins. Co., 50 O. S. 252 (1893).

Gas companies incorporated under special charters are subject to § 3982 authorizing municipalities to regulate the price of gas, where the right to fix their own rates is not expressly granted in the charters.

Zanesville v. Gas Light Co., 47 O. S. 1, 35 (1889).

A corporation organized under a special act, for a certain specified time, may be treated as a corporation where it continues to exercise its corporate powers after the expiration of the time for which it was chartered.

Myers v. Lucas, 16 C. C. 545; 8 C. D. 431 (1898); reversed on other grounds, 63 O. S. 101.

The Association of the Tobacco Trade of Cincinnati, a corporation formed under the act of April 3, 1866 (S. & S. 182), since the repeal of that act, is under this section governed by the provisions of title IX of the General Code.

State v. Casey, 38 O. S. 555 (1883).

Railroad companies organized under the act of 1848, before the adoption of the present constitution, and which have not relinquished their right to be governed by said act, are not bound by later acts reducing the rates of freight.

Iron R. R. Co. v. Lawrence Furnace Co., 29 O. S. 208 (1876).

Section 8732. (What corporations may accept the provisions of this title.) A corporation created before the adoption of the present constitution, and now actually doing business, may accept any of the provisions of this title. When a certified copy of such acceptance is filed with the secretary of state, so much of its charter as is inconsistent with the provisions of this title is hereby repealed. (R. S. Sec. 3233; May 1, 1852, 50 v. 274, § 71; S. & C. 309.)

A certificate of acceptance is merely evidence of the fact of acceptance, and is not indispensable. Acceptance may be implied from the use of privileges granted by the present law. A railroad company by taking or making leases authorized by the present law was held to thereby accept the present law and to relinquish all rights inconsistent therewith.

C. H. & D. R. Co. v. Cole, 29 O. S. 126 (1876).

Owen v. Purdy, 12 O. S. 73 (1861).

Dayton, etc., R. Co. v. Hatch, 1 Disney 84 (1855).

Zabriskie v. Cleveland, etc., R. Co., 23 How. (U. S.) 381, 396, 397 (1860).

See also, G. C. § 8736 and note.

An amendment of a charter can not be accepted in part. It must be accepted or rejected in toto.

Marietta, etc., R. Co. v. Elliott, 10 O. S. 57, 60 (1859).

Baldwin v. Hillsborough R. Co., 10 W. L. J. 337 (1853).

By adopting the provisions of this title a corporation can not acquire powers or rights inconsistent with its original charter.

Rep. Atty. Gen. 1911-1912, p. 798.

A corporation organized under special charter, which desires to change its name and at the same time preserve its corporate powers intact, should apply to the legislature for a special act changing the name.

Rep. Atty. Gen. 1911-1912, p. 1679.

Before a corporation not for profit, organized under special charter, may change the number of its trustees it should formally accept the general corporation law. Rep. Atty. Gen. 1913, p. 89.

Special privileges conferred by private charter under the constitution of 1802 do not so inhere in the railroad constructed under the charter as necessarily to pass to any corporation which, by subsequent legislation, may acquire the right to operate the road.

Pittsburg, etc., Ry. Co. v. Moore, 33 O. S. 384 (1878).

Section 8733. (Special charters not accepted or acted upon.) All special acts of incorporation in force in this state, which have not been accepted, or acted upon, be and the same are hereby repealed. (R. S. Sec. 3233-1; February 12, 1861, 58 v. 12.)

A special charter, being deemed merely an offer on the part of the state until acceptance, may be revoked and repealed at any time before acceptance.

State v. Damson, 16 Ind. 40 (1861).

Effect of constitution of 1851 on unaccepted charters.

See State v. Roosa, 11 O. S. 16 (1860).

Citizens Bank v. Wright, 6 O. S. 318 (1856).

Judicial notice of special charters. Held not judicially noticed; must be pleaded under G. C. § 11340 (R. S. 5092).

Pittsburg, etc., Co. v. Moore, 33 O. S. 384 (1878).

Contra, Brown v. State, 11 Ohio 276 (1842).

Jones v. Scudder, 2 C. S. C. R. 178 (1872).

See Railroad Co. v. Hoffhines, 46 O. S. 643, 650 (1889).

State v. Granville Society, 11 Ohio 1, 9 (1841).

Beaty v. Knowler, 4 Pet. 152.

Section 8734. (Duty of secretary of state; effect of charter.) When it is made to appear to the satisfaction of the secretary of state that any religious society or corporation heretofore organized or incorporated under the laws of this state has lost its charter or certificate of incorporation, or that it has been destroyed, he shall issue a new certificate of incorporation of such religious society or corporation of the date of issuing such lost or destroyed certificate as near as shall be made to appear to him. Thereupon all deeds, mortgages, or other instruments of writing for the conveyance of land, as well as all acts done by such religious society or corporation by virtue of such lost certificate or charter, shall be binding and of full force in law and in equity. But nothing herein shall be construed to make valid any act not authorized under the laws of this state which heretofore have been in force. (R. S. Sec. 3233-2; March 25, 1878, 75 v. 77.)

Section 8735. (Prima facie evidence of incorporation.) The fact that a religious society for not less than thirty years, claiming to have been duly and legally incorporated as such, and performing during such time duties and exercising rights as such, shall be prima facie evidence of the original issue of such charter or certificate of incorporation as claimed by such society. (R. S. Sec. 3233-3; March 25, 1878, 75 v. 77.)

See Congregational Church v. Webber, 54 Mich. 571.

Section 8736. (Corporations created prior to 1851.) Corporations created before the adoption of the present constitution, which take any action under or in pursuance of this title, shall thereby and thereafter be deemed to have consented, and be held to be a corporation, and to have and exercise all its franchises under the present constitution and the laws passed in pursuance thereof, and not otherwise. But any fire insurance company so created, filing annual reports with the superintendent of insurance, as provided by law, or complying with any police regulation contained in chapter one of subdivision two of division three of this title, or in chapter two of division two of title three, part first, shall not be deemed to have consented, nor be affected by the provisions of this section by reason of such compliance. (R. S. Sec. 3234; March 8, 1892, 89 v. 73; May 18, 1886, 83 v. 201; R. S. 1880.)

See note to § 8732.

Corporate acts constituting acceptance. Railroad company taking or making leases.

C. H. & D. R. Co. v. Cole, 29 O. S. 126 (1876).

Consolidation of railroad companies.

Shields v. State, 26 O. S. 86 (1875); affirmed, 95 U. S. 319.

Receiving real estate in payment of subscriptions to stock of railroad company.

Goodin v. Evans, 18 O. S. 150 (1868).

Dayton, etc., R. Co. v. Hatch, 1 Disney 84 (1855).

General course of business transacted by a bank.

Owen v. Purdy, 12 O. S. 73, 80 (1861).

Change of time of election and terms of directors.

State v. Lakamp, 4 C. C. 257; 2 C. D. 533 (1889).

Fire insurance company issuing policies authorized by general laws, and not authorized by its charter.

Knox County Mutual Ins. Co. v. Bowersox, 6 C. C. 275; 3 C. D. 451 (1892).

5 Opins. Attys. Gen. 853, 935 (1900).

Continuing to act as a corporation after the time limited in the special charter for its expiration.

Myers v. Lucas, 16 C. C. 545; 8 C. D. 431 (1898); reversed, on other grounds, 63 O. S. 101.

Acceptance by directors. Where the special charter conferred such authority on the directors, acceptance by the directors is binding upon the corporation.

Goodin v. Evans, 18 O. S. 150, 167 (1868).

Dayton, etc., R. Co. v. Hatch, 1 Disney 84, 92 (1855).

Estoppel of stockholders to deny acceptance.

Goodin v. Evans, 18 O. S. 150, 168 (1868).

Owen v. Purdy, 12 O. S. 73, 78 (1861).

Statute imposing new liability on stockholders. A statute imposing upon stockholders, without their consent, a liability not imposed by the charter, is unconstitutional. The assent of a stockholder to such a liability is not presumed, but must be proved.

Ireland v. Palestine, etc., Turnpike Co., 19 O. S. 369 (1869).

See *Owen v. Purdy*, 12 O. S. 73, 79 (1861).

Fire insurance companies. A fire insurance company is not exempt from G. C. §§ 9590 to 9592 unless such exemption was clearly granted by its charter.

State v. Eagle Insurance Co., 50 O. S. 252 (1893); affirmed, 153 U. S. 446.

Section 8737. (When provisions do not apply.) This chapter does not apply when special provision is made in subsequent chapters of this title, but the special provision shall govern, unless it clearly appears that the provision is cumulative. (R. S. Sec. 3269; R. S. 1880.)

The general corporation law (§§ 8623 to 8743 inclusive) does not apply to the organization of insurance companies, which are governed by § 9339 et seq.

State v. Pioneer Live Stock Co., 38 O. S. 347 (1882).

Rep. Atty. Gen. 1914, pp. 229, 233.

The provisions of § 8683 authorizing a corporation to acquire stock in certain other companies apply to railroad companies and are not inconsistent with §§ 8806 to 8809, but are cumulative.

Mannington v. H. V. Ry. Co., 8 O. L. R. 451, 477; 183 Fed. 133; 16 O. F. D. 552 (C. C. 1910).

The articles of a corporation formed under a special statutory provision for a certain class of corporations should not contain a statement that it is formed under the general corporation law. The reference, if any, should be to the special provision. Opins. Atty. Gen. 1919, pp. 18, 36.

"Unless it clearly appears that the provision is cumulative." "Clearly" means "in a clear manner; without obscurity; without entanglement or confusion; without uncertainty."

"Cumulative" means "additional; that which is superadded to another thing of the same character and not substituted for it."

Mannington v. H. V. Ry. Co., 8 O. L. R. 451, 477; 183 Fed. 133; 16 O. F. D. 552 (1910).

DISSOLUTION.

Section 8738. (Dissolution by abandonment of objects.) When a majority of the directors, trustees, or other officers of a corporation not for profit desire to abandon its corporate existence and it has no debts, or in case of a corporation for profit when a majority of such officers become satisfied that the objects of the corporation cannot be accomplished, that no installment of its capital stock has been paid, no investments made, and that it has no debts, they, or the president of the board of directors, trustees, or other officers, may call a meeting of the members or stockholders of the corporation at such time and place as he or they designate by at least two weeks' publication in a newspaper

published and of general circulation in the county wherein the principal office is located. (R. S. Sec. 5674; April 18, 1902, 95 v. 208; May 4, 1869, 66 v. 94, § 1.)

Dissolution by judicial proceedings see §§ 11938 to 11973.

Forfeiture of charter § 12304 et seq.

Where no stock has been subscribed for and the incorporators desire to abandon the proposed corporation, they may file a certificate to that effect with the secretary of state. Opins. Atty. Gen. 1915, p. 137.

Section 8739. (Filing of certificate.) If a majority of the members of such corporation not for profit present at such meeting desire such abandonment, or a majority in amount of the stockholders of such corporation for profit present in person or by proxy decide that the objects of such corporation cannot be accomplished then such corporation shall be abandoned or dissolved upon the filing of a certificate of such abandonment or dissolution with the secretary of state in the manner provided by law. (R. S. Sec. 5674; April 18, 1902, 95 v. 208; May 4, 1869, 66 v. 94, § 1.)

See § 5521.

Section 8740. (Dissolution by corporation whose business is closed.) When a majority of the directors or other officers having the management of the concerns of a corporation for profit, which has completely closed its business, and paid all the debts and liabilities incurred by it, desire to surrender its corporate authority and franchises, they, or the president of such board of directors, may call a meeting of the stockholders at such time or place as he or they designate by publication for four weeks in some newspaper published and of general circulation in the county wherein the principal office of the corporation is located and by written notices addressed to each of the stockholders whose residence is known, of the object, time and place of the meeting. (R. S. Sec. 5674a; April 18, 1902, 95 v. 208.)

A waiver of the notice required by this section is not authorized. Opins. Atty. Gen. 1915, p. 162.

Publication of the notice once a week for four weeks is sufficient. Opins. Atty. Gen. 1917, p. 1987.

"Liabilities" include claims for unliquidated damages which have not been reduced to judgment, such as a claim in tort. *Roberts v. Krug*, 24 N. P. n. s. 490 (1922); aff'd by Court of Appeals.

The notice required by this section is for the benefit of stockholders, and not of creditors, and publication of the notice imposes no duty on a creditor to file a claim before dissolution. *Roberts v. Krug*, 24 N. P. n. s. 490 (1922); aff'd by Court of Appeals.

Dissolution under this section does not cause the statute of limitations (§ 8689) to begin to run against stockholder's liability, the

right of voluntary dissolution being conferred only upon corporations whose debts are paid. *Nevin v. Engineering Co.*, 18 C. C. n. s. 237 (1908); *aff'd*, no rep. 84 O. S. 498.

Section 8741. (Filing of certificate.) If all the stockholders present at such meeting in person or by proxy decide to surrender and abandon its corporate authority the corporation shall be abandoned and dissolved upon the filing of a certificate of the abandonment or dissolution with the secretary of state in the manner provided by law. (R. S. Sec. 5674a; April 18, 1902, 95 v. 208.)

A certificate from tax commission that the corporation has made all reports and paid all taxes is required as a condition precedent to filing a certificate of dissolution. § 5521.

The certificate should show that notice was given as required by § 8740. *Opins. Atty. Gen.* 1915, p. 162.

: After articles have been cancelled, under § 5509, for failure to make franchise tax reports or payments, reinstatement under § 5511 is necessary before a certificate of voluntary dissolution may be filed. *Opins. Atty. Gen.* 1923, p. —; 1 Ohio Law Abst. 586.

Section 8742. (Trustees to settle affairs of corporation.) Upon the dissolution of a corporation by the expiration of the term of its charter, or otherwise, and unless other persons be appointed by the legislature, or by the stockholders, directors, or trustees of the corporation, or by a court of competent authority, the directors, trustees, or managers of the affairs of such corporation, acting last before the time of its dissolution by whatever name known in law, and their survivors, shall be the trustees of the creditors and stockholders of the dissolved corporation, and have full power to settle its affairs, collect and pay outstanding debts, and divide among the stockholders the money and other property remaining, in proportion to the stock of each stockholder paid up, after payment of debts and necessary expenses. (R. S. Sec. 5675; March 21, 1850, 48 v. 90, § 5; March 7, 1842, 40 v. 67, § 14; S. & C. 363.)

Where a corporation, organized for the purpose of disposing of land, completed its business and adjourned *sine die* in 1809 it is presumed that the corporation was dissolved and that neither its stockholders nor their successors retained any interest in a strip of land which had been dedicated as a street.

Cleveland v. Railways, 8 N. P. n. s. 457 (C. P. 1909; *aff'd*, 15 C. C. n. s. 193; 87 O. S. 469).

This section applies to Ohio corporations only. *Weiser v. Julian*, 15 Ohio App. 171 (1921).

Where assets are distributed to stockholders, a creditor holding an unliquidated claim may, after obtaining judgment against the corporation, require the stockholders to account for the value of the assets to the extent necessary to pay the judgment. *Roberts v. Krug*, 24 N. P. n. s. 490 (1922); *aff'd* by Court of Appeals.

Taxes. Claims for, and defenses. See Rep. Atty. Gen. 1913, p. 604.

Section 8743. (Powers and duties of such trustees.) The persons so constituted trustees may sue for and recover the debts and property of the dissolved corporation, by the name of trustees of the corporation, describing it by its corporate name, and jointly and severally they shall be responsible to the creditors and stockholders of the corporation, to the extent of its property and effects coming into their hands. Such trustees may be made or become parties to any action, by or against the corporation. All liens of judgments existing at the time of the dissolution either in favor of or against the corporation, shall continue in force as if the dissolution had not taken place. (R. S. Sec. 5675; March 21, 1850, 48 v. 90, § 5; March 7, 1842, 40 v. 67, § 14; S. & C. 363, 366.)

The trustees may sue in their collective names, not in their individual names.

Martin v. Trustees of Belmont Bank, 13 Ohio 250 (1844).

The trustees may have judgment entered on a cognovit note owned by the corporation at the time of its dissolution.

Martin v. Trustees of Belmont Bank, 13 Ohio 250 (1844).

Directors who distribute assets to stockholders before the payment of corporate creditors are personally liable to the creditors to the extent of such assets. *Macneale v. Mfg. Co.*, 276 Fed. 491 (C. C. A. 6th Cir. 1921.)

It has been held that the trustees had no authority to acquire the title to stock, held by the corporations as pledgee, so as to render the corporation liable as a stockholder under the former double liability law. *Gill v. Printing Co.*, 16 C. C. n. s. 568 (1907); *aff'd*, no rep. 80 O. S. 742.

A creditors committee authorized to dispose of corporate assets "by sale, liquidation or otherwise" has no authority to exchange the assets for stock in another corporation. But the stockholders may be barred by estoppel from questioning the transaction. *Smith v. Gowan*, 18 C. C. n. s. 99 (1911).

Where a corporation went into voluntary liquidation after the death of a stockholder, it was held that, in a suit by his administrator for a share of the assets, the liquidating trustees were not entitled to set off a claim of the corporation against the stockholder which accrued during his life. *Downer v. Loan Co.*, 16 C. C. n. s. 378 (1905).

Suits against defunct corporation.

See *Renick v. Bank of West Union*, 13 Ohio 298 (1844).

Service of process upon the members of its last acting board of directors is sufficient, under the statute, to give the court jurisdiction.

Warner v. Callender, 20 O. S. 190 (1876).

Vallette v. Kentucky Trust Co., 2 Handy 1 (1855).

Directors of a dissolved corporation may voluntarily enter their appearance in an action against the corporation.

In re *Columbus Bicycle Co.*, 1 N. P. n. s. 461; 14 L. D. 407 (C. P. 1908).

THE LAW
OF
PRIVATE CORPORATIONS
IN OHIO

TOGETHER WITH
DECISIONS, COMMENTARIES,
FORMS AND PRECEDENTS

BY
HOWARD A. COUSE
OF THE CLEVELAND BAR
AUTHOR OF THE OHIO FORM BOOK

SECOND EDITION

VOLUME II.

TWO-VOLUMES-IN-ONE EDITION

CINCINNATI
THE W. H. ANDERSON CO.

1924

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OHIO PRIVATE CORPORATIONS

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CHAPTER 1.

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| § 8755. Damages by change after completion. | § 8774. Construction of bridges; use as toll bridges. |
| § 8756. Extension of road into other states. | § 8775. Bridging of canals or navigable rivers. |
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| § 8758. Electricity as motive power. | § 8777. Certain established bridges not affected. |
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Increase of Capital Stock.

- § 8815. Purposes for which stock may be increased.
- § 8816. Proceedings to increase capital stock.
- § 8817. Common or preferred stock may be issued; sale thereof.
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Miscellaneous.

- § 8819. Dissolution of certain companies.
- § 8820. Owner of land leased for right of way not to be taxed therefor.
- § 8821. Taxation of land used as right of way.
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Section 8744. (Office of company in state.) As soon as convenient after its organization, each railway company shall establish a principal or general office at some point on the line of its road, or the line of a road within this state with which it connects or has running arrangements, but its location may be changed at pleasure. The company shall give notice of the establishment or change of such office in some newspaper published on its line in this state. The offices of its president, secretary and treasurer shall be at such general office, or some other point on its line of road in this state, and a record there kept of all the company's proceedings, to be open at reasonable hours for the inspection of any stockholder. (R. S. Sec. 3311; April 9, 1880, 77 v. 153; R. S. 1880; May 1, 1852, 50 v. 274, § 17.)

A mining company having built a railroad under § 10141 may change the office of its railroad under this section, but not its principal office, which can only be changed under § 8719.

State v. Coal Co., 4 N. P. 115; 6 L. D. 178 (C. P. 1897).

Snow Fork, etc., Co. v. Railroad Co., 7 N. P. 191; 6 L. D. 178 (C. P. 1897).

Forfeiture of franchise for failure to maintain office.

See Simmons v. Norfolk, etc., Co., 113 N. C. 147 (1893).

State v. Milwaukee, etc., R. R. Co., 45 Wis. 579 (1878).

People v. Kingston Co., 23 Wend. (N. Y.) 193 (1840).

State v. South Pac. Co., 24 Tex. 80 (1859).

CONSTRUCTION.

Section 8745. Any railroad company may maintain and operate, or construct, maintain and operate a railroad, with such main tracks, not exceeding six and such side tracks, turnouts, offices, depots, round-houses, machine shops, water tanks, telegraph lines, and other necessary appliances, as it deems necessary, between the points named in its articles of incorporation, commencing at or within, and extending to or into any city, village, or place named as a terminus of its road. (May 10, 1910, 101 v. 323; April 7, 1908, 99 v. 71; R. S. Sec. 3270; April 29, 1872, 69 v. 203, § 4.)

Articles of incorporation.

See note to § 8625.

Nature of railroad companies. Private or public corporations. Railroad companies are not private corporations in the strict sense of the ordinary business corporation, because they are charged with duties of a public nature which distinguish them from the purely and strictly private corporation, but in many respects they are private corporations in all that the term implies. They can not be treated as public corporations, such as cities, counties, townships, etc. Their foundation is private. They are organized for gain, and their strictly private rights are as much beyond legislative control as are the rights of the purely private corporation.

Mannington v. Railway Co., 8 O. L. R. 451, 479; 183 Fed. 133; 16 O. F. D. 552 (C. C. 1910).

Where a railroad company organized under the laws of Ohio, with authority to exercise the sovereign power of the state, has constructed and operated as a common carrier a line of railroad, portions of which are along and across public highways or other railroads, such railroad becomes impressed with a public interest. A purchaser thereof, either at judicial sale or otherwise, has no right to operate it for his own private purpose or the purposes of those with whom he may privately contract, to the exclusion of the public. State v. Black Diamond Co., 97 O. S. 24 (1917); Railroad v. Commission, 101 O. S. 29 (1920).

And where the railroad of such a company is leased to another company organized as a common carrier, it is the duty of the lessee to furnish reasonably adequate shipping facilities without discrimination. Barlotti v. Commission, 103 O. S. 647 (1921).

The franchises, rights and privileges of a railroad company are granted because of the public nature of the business carried on by it; the resulting benefits to the public constitute the consideration for the grant, and, while exercising such rights and franchises, the company is subject, as to its state business, to state regulation. *Railway v. Commission*, 92 O. S. 9 (1915).

A railroad company, incorporated under the general laws of the state, for the purpose of "building, acquiring, owning, leasing and maintaining a railroad to be operated by steam or other motive power", is amenable to the control of the public utilities commission, so far as its property or traffic is intrastate; and, as a common carrier, may be required to provide reasonably adequate passenger service. *Railroad Co. v. Commission*, 92 O. S. 1 (1915).

Interurban railway when a "railroad."

See note to § 9117.

Constitutionality of statutes applying to railroad companies. A statute applying to railroad companies and not to other corporations is valid where reasonable grounds exist for its application to railroad companies which do not exist as to other corporations.

Froelich v. Railway Co., 5 C. C. n. s. 6; 14 C. D. 359 (1903).

Termini. A railroad company is authorized by this section to construct and operate a railroad having both of its terminal points wholly within the same city.

State v. Railroad, 72 O. S. 455 (1905).

Cincinnati, etc., R. Co. v. Murray, 1 N. P. n. s. 301; 51 Bull. 623 (Ct. of Ins. 1903).

There is nothing in this section which requires the termini to be in towns or cities.

Long Branch Com'rs v. West Line R. R. Co., 29 N. J. Eq. 566 (1878).

Attorney-General v. Delaware, etc., R. R. Co., 12 C. E. Green (N. J.) 645 (1876).

When a charter empowered a company to build a road from a town a location sixty rods outside the town is not in compliance with the charter, and the company may be compelled to extend the road.

Comm. v. Erie, etc., R. Co., 27 Pa. St. 339-352 (1856).

Where a company is empowered to build to a certain city, it is not barred from reaching such point by the fact that it made a point outside such city a temporary terminus.

Colorado, etc., Ry. Co. v. Union Pac. Ry. Co., 41 Fed. Rep. 293 (1890).

Childs v. Railroad Co., 33 N. J. L. 323 (1869).

Statements in articles of incorporation as to route and termini, see § 8625 and notes.

Change of terminus within municipality, see note to § 8747.

POWERS OF RAILROAD COMPANIES.

General powers.

See notes to §§ 8627 and 12304.

To cross streets and highways. By its articles of incorporation a railroad company is empowered to locate its tracks across streets and highways.

Commissioners v. Penna Co., 6 N. P. n. s. 141; 18 L. D. 348 (C. P. 1907); *aff'd*, Cir. Ct., no rep.

State v. Montclair Ry. Co., 35 N. J. L. 328 (1872).

Lewis v. Germantown, etc., R. Co., 16 Phila. (Pa.) 608 (1881).

See §§ 8763 to 8766, 8773, 8857.

To maintain side tracks. A side track constructed by a railroad company to a manufactory at the expense and over the land of the latter, solely for its advantage, under an agreement silent as to time, may not be maintained by the railroad company over the objection of the owner of the manufactory.

Rodefer v. Railroad, 72 O. S. 272 (1905).

To build and maintain bridges. Power to build a railroad between certain points implies power to bridge streams when necessary.

Fall River Iron Works Co. v. Old Colony, etc., R. Co., 5 Allen (Mass.) 221 (1862).

Hamilton v. Vicksburg, etc., R. Co., 34 La. Ann. 970 (1882); s. c., 119 U. S. 280.

Miller v. Prairie du Chien Ry. Co., 34 Wis. 533 (1874).

Works v. Junction R. Co., McLean (U. S.) 425 (1853); 3 O. F. D. 101.

Power to build includes power to repair bridges.

Hamilton v. Vicksburg, etc., R. R. Co., 119 U. S. 280.

Central Trust Co. v. Wabash, etc., Ry. Co., 32 Fed. 566.

A railroad company will not be restrained from rebuilding a bridge across a stream when it will cause no greater obstruction than the old bridge.

Board of Com'rs v. Pierce, 90 Fed. 764 (1898).

A railroad bridge is a part of its line. Land may be appropriated for an approach thereto.

L. & N. Ry. v. Taylor, 50 Bull. 20 (Ct. of Insolv. 1904).

Care required in constructing bridge. Liability. In the construction, repair and maintenance of its bridges a railroad company is bound to use reasonable care.

N. Y., etc., R. Co. v. Ellis, 13 C. C. 704; 6 C. D. 304 (1895).

But in the absence of a statute, or of evidence showing that it is usual, a railroad bridge need not be constructed so as to permit a person to stand thereon while a train is passing.

Erie R. Co. v. McCormick, 69 O. S. 45 (1903).

Recovery for damages to land by flood waters can not be had from a railroad company where the flood was unprecedented, and other causes to produce the injury intervened.

B. & O. R. Co. v. Simpson, 12 C. C. n. s. 185 (1906).

To make construction contracts. A railroad company may enter into a contract with another person for the construction of its road without retaining control over the mode and manner of doing the work, and may under proper circumstances be exempt from liability for the wrongful act of its contractors.

Hughes v. Cincinnati, etc., Ry. Co., 39 O. S. 461 (1883).

Cincinnati, etc., R. Co. v. Iliff, 13 O. S. 235, 247 (1862).

Carman v. Steubenville, etc., R. Co., 4 O. S. 399 (1854).

Interpretation of construction contract.

See Cleveland, etc., R. Co. v. Kelley, 5 O. S. 180 (1855).

Mansfield, etc., R. R. Co. v. Veeder, 17 Ohio 385 (1848).

To run along and upon highways. Only in cases of necessity has a railroad power to build its road along and upon a highway.

Springfield v. Connecticut River R. R. Co., 4 Cush. (Mass.) 63 (1849).

Kenton County Bank v. Bank Lick Turnpike Co., 10 Bush. (Ky.) 529 (1874).

G. C. § 8766.

To purchase land to procure materials. A railroad company may, if necessary and convenient, purchase land for the purpose of obtaining gravel, timber, etc., for construction purposes.

Overmeyer v. Williams, 15 Ohio 26.

Power and obligation to operate. Power to purchase implies authority to operate.

Campbell v. Marietta, etc., R. Co., 23 O. S. 168 (1872).

When company compelled to operate.

See Port Clinton R. Co. v. Cleveland, etc., R. Co., 13 O. S. 544 (1862).

Chapman v. Mad River, etc., R. Co., 6 O. S. 120 (1856).

To acquire stock in other corporations.

See §§ 8806, 8683 and notes.

To purchase other railroads. Power to locate and construct branch roads does not by implication confer authority to purchase the railroad of another company.

Campbell v. Marietta, etc., R. Co., 23 O. S. 168 (1872).

See § 8807.

Eminent domain.

See §§ 8759, 8760.

Sleeping car contracts.

See Stanley v. Cleveland, etc., R. R. Co., 18 O. S. 552 (1869).

To accept donations.

See Elder v. Bellaire, etc., Ry. Co., 1 C. C. 256; 1 C. D. 140 (1885).

Sperry v. Johnson, 11 Ohio 452 (1842).

To engage in mining, telegraph, etc., business, either directly or through stock control. A railroad company may build and operate a telegraph line, and may operate coal mines, for its own use, but can not engage in the general telegraph, mining or other outside business.

State v. Railway Co., 12 C. C. n. s. 49, 62; 21 C. D. 175 (1909).

Railroad Co. v. Telegraph Co., 38 O. S. 24 (1882).

Telegraph Co. v. Railroad Co., 1 W. L. B. 201, 309 (1876).

To guarantee bonds of mining company. A railroad company can not lawfully indorse and guarantee the bonds of a coal mining company. Such an obligation may be valid in favor of the bondholders, but not as against the state.

State v. H. V. Ry. Co., 12 C. C. n. s. 49, 66; 21 C. D. 175 (1909).

To guarantee bonds of another railroad company. A railroad company which has purchased stock in another company, as authorized by § 8683, and has in good faith, for protection of its own interests, acquired bonds issued by such other company, may, in order to sell the bonds for an adequate price, guarantee their payment. But it has no power to enter into a joint contract, with other guarantors, to guarantee an entire bond issue of which it owns only a part. Pollitz v. Commission, 96 O. S. 49 (1917).

To operate street railway. A railroad company has no power to engage in the street railway business.

Rogers v. Railway Co., 12 L. D. 136 (Super. Ct. Cin. 1901).

To locate road. All charters must be taken to allow the exercise of a discretion in the location of the route as is incident to an ordinary practical survey of the same, made with reference to the nature of the

country to be passed over and the obstacles to be encountered or avoided. The courts will interfere only in cases of abuse of such discretion.

Walker v. Mad River R. R. Co., 8 Ohio 38 (1837).

Callender v. Painesville, etc., R. Co., 11 O. S. 524 (1860).

Southern, etc., R. Co. v. Stoddard, 6 Minn. 150 (1861).

Fall River Co. v. Old Colony, etc., R. Co., 5 Allen (Mass.) 221 (1862).

Auspach v. Maganoy, etc., R. Co., 5 Phila. (Pa.) 491 (1864).

See Baldwin v. Hillsborough, etc., R. Co., 10 W. L. J. 337 (1853).

If the location is not in substantial compliance with the articles, the company may be dissolved.

State v. Railway, 40 O. S. 504 (1884).

When road is located. A road is said to be located when a survey is completed and accepted. The supreme court of Pennsylvania, in Williamsport R. Co. v. Railroad Co., 141 Pa. St. 407 (1891), said:

"The successive steps contemplated as necessary to vest a title to the railway in the corporation are these:

"1. A preliminary entry on the lands of private owners for the purpose of exploration. This is made by engineers or surveyors, who run or work one or more experimental lines, and who report their work, with such maps and profiles as may be necessary to represent it properly to the company that employs them.

"2. A selection and adoption of a line, or one of the lines so run, as and for the location of the proposed railroad. This is done by the corporation, and it requires the action in some form of the board of directors. This makes what was before experimental and open, a fixed and definite location. It fastens a servitude upon the property affected thereby, and so takes from the owner and appropriates to the use of the corporation.

"3. Payment to the owner for what is taken and the consequences of the taking, or security that it shall be made when the amount due him is legally ascertained. The title of the owner is not divested until the last of these steps has been taken. As against him the corporation can acquire only a conditional title by its act of location, which ripens into an absolute one upon making compensation.

"As to third persons and rival corporations, however, the action of the company adopting a definite location is enough to give title.

* * * * *

"In many states provision is made by law for recording the action of the company and the line adopted by it, so as to give notice to the public and to settle questions of priority of location. We have no such statute, and the action of the company must be proved by other competent evidence, but when proved it has the same effect upon all interested as though it had been recorded. It settles the date of actual appropriation, and shows the exact location of the line of the road proposed."

See Baldwin v. Hillsborough R. R. Co., 10 W. L. J. 356 (1853).

Agreement for location of road. An agreement for the location of the route of a railroad at a particular intermediate place is not per se void as against public policy.

Railroad Co. v. Ralston, 41 O. S. 573 (1885).

See Pittsburg, etc., Ry. Co. v. Rose, 24 O. S. 119 (1856).

Surveying and staking do not constitute a location. A line of road is not so "located" by surveying and staking without condemnation or purchase as to give the company a right to the land exclusive of another railroad company that subsequently surveys and stakes the same line, and begins appropriation proceedings. Such first company can not enjoin the second company from entering on such land. Its remedy is at law.

Columbus Terminal, etc., v. Toledo Ry. Co., 32 W. L. B. 186 (1894).

Section 8746. (Terminus on state line or boundary.)

When a terminus named in the articles of incorporation is a county upon the line or boundary of the state, the president and directors of the company, upon the location of the road in that county, shall make and acknowledge a certificate definitely fixing the location in such county, and file it with the secretary of state. (R. S. Sec. 3271; 69 v. 163, § 1.)

Section 8747. (Changes of line or termini.) By a resolution adopted by a majority of its board of directors, at a meeting thereof duly called for the purpose, with the written consent of three-fourths in interest of its stockholders, a company may change the line, or any part thereof, and either of the proposed termini, of its road. No change shall be made which will involve the abandonment of any part of the road, either partly or completely constructed. Any subscription of stock made upon the faith of the location of the road, or a part thereof, upon a line abandoned by the change, shall be canceled at the written request of a subscriber who has not consented thereto, filed with the secretary or other chief officer of the company, within six months after such change. (R. S. Sec. 3272; April 7, 1876, 73 v. 115, § 1.)

Abandonment of line, main tracks or depots must be authorized by the public utilities' commission. §§ 504-2, 504-3.

History of legislation. Prior to 1848 there was no general law providing for a change of location, route, or terminus of a railroad. In that year the first statute was passed, the latest form of which is G. C. § 8753.

See Acts of Feb. 11, 1848, 46 v. 44, § 10; Acts of May 1, 1852, 50 v. 276, § 11; Acts of April 5, 1866, 63 v. 141, § 11; Acts of March 8, 1865, 62 v. 36.

In 1871 an act was passed to facilitate location of good roads by minor changes, which act, with the changes, is found in G. C. § 8750.

See Acts of May 2, 1871, 68 v. 129; Acts of March 30, 1874, 71 v. 54. The act to provide for change in route was passed in 1876, and is found in G. C. § 8747.

See *Bickerstaff v. Traction Co.*, 5 O. L. R. 547.

Previous to 1848 roads without special provisions in their charters were unable to adopt any changes in route or location.

Moorehead v. Little Miami R. R. Co., 17 Ohio 340 (1848).

Little Miami v. Naylor, 2 O. S. 235 (1853).

Atkinson v. Marietta, etc., R. R. Co., 15 O. S. 21 (1864).

Works v. Junction R. R. Co., 5 McLean (U. S.) 425; 3 O. F. D. 101.

Interurban railroad. An interurban railroad, in amending its articles so as to change its route or a terminus, must comply with §§ 8747 and 8748. Opins. Atty. Gen. 1915, p. 1282.

Exhaustion of power to locate. In the absence of authority the completion of a location of a road exhausts the power of the company,

and this principle applies whether it is attempted to relocate on private property or on a street or highway.

Moorehead v. Little Miami R. R. Co., 17 Ohio 340 (1848).

Little Miami R. R. Co. v. Naylor, 2 O. S. 235 (1853).

Construction of §§ 8747, 8750 and 8753.

These sections provide for changes in the route and location of railways in different forms and under different circumstances.

Section 8747 covers any change in the line, route or termini before the part affected is partially or completely constructed.

Section 8750 covers minor changes or divergences in the line before it is located, so as to avoid dangerous and expensive operation and construction, saving from such changes the main point of the road, the general route and located parts.

Section 8753 covers changes in a located or completed road so as to avoid dangerous operation.

Laws of this nature, being in derogation of private right, must be strictly construed, but it should not be that narrow and niggardly strictness which utterly disregards the admitted policy of the law, and gives strained and secondary meaning to its language, in order to defeat that policy. In other words, these statutes are not to be viewed with the liberality extended to enactments purely remedial, but, on the other hand, the rules applicable to penal statutes are not to be applied to them.

Jewett v. Railway, 34 O. S. 601 (1878).

Toledo, etc., Ry. Co. v. Daniels, 16 O. S. 390 (1865).

The right to change location is withheld except so far as it has been granted by these sections.

Bickerstaff v. Traction Co., 5 O. L. R. 548 (R. R. Com. 1907).

Cause of change. Before a change can be made the cause set forth must be shown to be fairly within the terms of the statute.

In re New York, etc., R. Co., 88 N. Y. 279.

Works v. Junction R. R. Co., 5 McLean (U. S.) 425; 3 O. F. D. 101.

Remedy for illegal change. Where a railroad company has received from private parties donations of lands, subscriptions of stock, and payments of money in consideration that it should locate its road at a particular place, and allow private side track and warehouse privileges in connection therewith, the company will not be permitted to effectuate a change in fact (though not in name) of the line of its road away from such a place, by getting up a new corporation and constructing a new road parallel with its old one, under a different charter, permitting its old line to go to decay, without compensating the parties with whom it has contracted as aforesaid.

Chapman v. Mad River, etc., R. Co., 6 O. S. 119 (1856).

Indirect change of route. Whether a railroad company may construct another road entirely parallel with its own, which if owned and managed by an interest distinct from itself, must necessarily be a competing road, for the purpose and with the effect to bring about a change in its own line, rather than to create a feeder or an extension of its own line, is within the limits of such connections as are authorized by § 8806, *quaere*.

Chapman v. Mad River, etc., R. R. Co., 6 O. S. 119 (1856).

See Atlantic, etc., R. Co. v. St. Louis, 66 Mo. 228 (1890).

Injunction against change.

See Stewart v. Little Miami R. Co., 14 Ohio 353 (1846).

Extensions of line. Authority to extend a line of railroad will not authorize a company in departing from the named terminus.

Works v. Junction R. R. Co., 5 McLean (U. S.) 425; 3 O. F. D. 101; 10 W. L. J. 370 (1853).

See § 8772.

Resolution of directors. The vote of the directors need not show the particular route to be occupied in the new counties or places selected. There is a new power to locate according to the statute when the directors have by proper vote so determined.

In re New York, etc., Ry. Co. 88 N. Y. 279 (1882).

Remedy of conditional subscribers. This section adds a remedy for conditional subscribers to stock, but in no way affects the terms of their contracts. It is not necessary, therefore, for a conditional subscriber to request the cancellation of his subscription in writing. He may rely on the terms of his subscription.

Railway Co. v. Fisher, 39 O. S. 330 (1883).

A subscriber is not released unless he subscribed on the faith of the location of the road, and within six months after the change requested in writing the cancellation of his subscription.

Armstrong v. Karshner, 47 O. S. 276, 302 (1890).

Defenses of subscribers to stock.

See note to § 8674.

Change by necessity. A change of the line of a railway by necessity to adjacent property for a short distance is not such a change as is contemplated by this section.

Devou v. Cincinnati, etc., R. Co., 4 O. L. R. 313; 19 C. D. 113 (1906).

Change of terminus within municipality. Where a certain municipal corporation of the state is designated as a terminus, the point not being marked by any survey, the railroad company may extend its terminus within the municipality to procure terminal facilities, without proceeding under the statutes regulating the extension of railroads.

L. & N. Ry. v. Taylor, 50 Bull 20 (Insolv. Ct. 1904).

Abandonment or removal of switch or spur track. A railroad company may abandon a spur or switch track in the absence of express contract. This section does not cover such track.

Mercantile Trust Co. v. Columbus, etc., R. R. Co., 90 Fed. 148; 12 O. F. D. 157 (C. C. Ohio 1898).

Side tracks placed on the leasehold estate of a coal company, at its request, may be removed by the railroad company upon abandonment of the premises by the lessee, over the objection of the lessor, the lease providing that the lessee may remove the mining appliances.

Ambler v. Erie R. Co., 9 C. C. n. s. 81; 19 C. D. 89 (1906).

A switch constructed on the land of a manufactory, at its expense and solely for its benefit, under an agreement silent as to the length of time it is to remain, can not be maintained by the railroad company against the objection of the owner of the manufactory.

Rodefer v. Railroad, 72 O. S. 272 (1905).

Where a track was extended about one mile beyond the terminal station, that part of the track beyond the station was regarded as a switch.

Mercantile Trust Co. v. Columbus, etc., Co., 90 Fed 148; 12 O. F. D. 157 (1898).

As between lessee and lessor, spur railway tracks and a track scale, easily removable from the land, are trade fixtures which may be removed by the lessee.

Market N. B. v. Iron Co., 13 N. P. n. s. 27; 22 L. D. 633 (1912).

Section 8748. (Change to be certified to secretary of state.) When such change is made it shall be described in such resolution, a duly authenticated copy of which, under the seal of the company, shall be filed with the secretary of state, and by him recorded, with proper reference, on the record of the articles of incorporation of the company. When so filed, such change shall be considered as made, and be as valid and binding as if the changed line had been the line originally described in the articles. (R. S. Sec. 3273; April 7, 1876, 73 v. 115, § 2.)

Section 8749. (Mortgage on line so changed.) When such company has issued its mortgage bonds for the construction of its road, the record of the mortgage securing them, in each county through or into which the changed line of the road passes, shall be as effectual to create a lien upon the changed line of road, and upon the property of the company, as if the mortgage contained a complete description of the changed line and of such property. (R. S. Sec. 3274; April 7, 1876, 73 v. 115, § 3.)

In *Ewell v. Grand Street, etc., R. R. Co.*, 67 Barb. (N. Y.) 83 (1874), it is said:

"To hold that by deviating from the route laid down by the road could be pro tanto freed from the lien, would be to announce a very dangerous doctrine.

"Good faith forbids that a security should be invalidated after one party has received the full benefit, and can no longer place the other party in as good position as it originally occupied. The bondholders therefore acquired a full right to have the road, as built, sold to pay their bonds."

Meyer v. Johnston, 53 Ala. 237 (1875).

Meyer v. Stewart, 64 Ala. 603 (1879).

Section 8750. (When and how route may be changed.) When a company, the line of whose road has not been finally located in whole or in part, finds it necessary, in order to avoid dangerous or difficult curves, grades, or dangerous or unsubstantial grounds, or foundations, or for other reasonable cause, to pass through a county not named in the articles of incorporation, or to avoid passing into or through a county named therein, other than a county in which a terminus of the road has been fixed by its articles of incorporation, or in which is located a town or place by or through which the line of such road is to pass, its president and directors, or a majority of them, under their hands and seals, may make a certificate declaring such necessity, the cause thereof, and name therein the county, or counties, through which it is necessary to pass, or to avoid, which certificate shall be acknowledged and certified, as provided

in chapter one of this title, and forwarded to the secretary of state. A copy of the certificate, duly certified by him shall be evidence of the facts therein stated. Nothing herein is to be construed to authorize the abandonment of any part of the company's line which is finally located, or a change of the general route of the line of such road, or the terminal points named in the articles of incorporation. (R. S. Sec. 3275; March 30, 1874, 71 v. 54, § 1.)

Cited, *Bickerstaff v. Traction Co.*, 5 O. L. R. 547.

A railroad company can not change its location because of the failure of a town to contribute to the road.

Works v. Junction, etc., R. R. Co., 5 McLean (U. S.) 425; 3 O. F. D. 101; 10 W. L. J. 370 (1853).

As to change of location by directors.

See *Baldwin v. Hillsborough, etc., R. R. Co.*, 10 W. L. J. 356 (1853).

Section 8751. (Damages for diversion.) When, under the preceding section, a company's line of road is diverted from a county named in the articles of incorporation, it shall be liable to any person owning land in the county for damages caused by the change or diversion. All subscribers to the capital stock of the company, on the line of that part of its road so changed, shall be released from all obligation to pay their subscriptions. (R. S. Sec. 3276; March 30, 1874, 71 v. 54, § 2.)

Cited, *Bickerstaff v. Traction Co.*, 5 O. L. R. 547.

Damages to landowners.

See *Leisse v. St. Louis, etc., R. R. Co.*, 2 Mo. App. 105 (1876); s. c., 72 Mo. 561.

A defense under this section to an action on a stock subscription must show that the road was diverted from a county named in the articles of incorporation, and that the subscriber was on the line diverted.

Armstrong v. Karshner, 47 O. S. 276, 301 (1890).

Section 8752. (Limitations on actions for damages.) Saving the rights of infants, lunatics, and persons imprisoned, for six months after their disability is removed, no action shall be brought for damages caused by such change or diversion, unless it is begun within six months from the filing of the certificate therefor with the secretary of state, and the publication of notice thereof by the company, for four consecutive weeks, in some newspaper printed in such county. (R. S. Sec. 3276; 71 v. 54, § 2.)

Section 8753. (Change of location or grade.) For the purpose of avoiding annoyance to public travel, or dangerous or difficult curves or grades, or unsafe or unsubstantial grounds or foundations, or when the roadbed has been injured or destroyed by the current of a river, water-course,

or other unavoidable or reasonable cause, a company may change the location or grade, of any portion of its road, but shall not depart from the general route prescribed in the articles of incorporation. (R. S. Sec. 3277; April 5, 1866, 63 v. 141, § 11; March 8, 1865, 62 v. 36, § 1.)

Section cited. *Bickerstaff v. Traction Co.*, 5 O. L. R. 547 (R. R. Com. 1907).

This section makes no provision for the crossing of a street within a municipal corporation.

Railway Co. v. Elyria, 69 O. S. 414, 428 (1904).

No judicial determination is necessary, under this section, as to the necessity for the change, the presumption being that a railroad company would not undertake an expensive improvement unless the change is necessary. But where an appropriation of land is required to make the change, proof should be made as to the necessity of the change.

Lorain County v. Railway, 11 C. C. n. s. 419; 12 C. D. 805.

See *Railway Co. v. South*, 78 O. S. 10, 13 (1908).

Reusch v. Traction Co., 19 C. C. n. s. 1 (1912); aff'd, no rep. 89 O. S. 456.

A change under this section is valid if the general route is not departed from, and if sufficient cause exists.

Piedmont, etc., Ry. Co. v. Speelman, 67 Md. 260 (1887).

Construction of section. See note to § 8747.

Section 8754. (Appropriation of land to make such change.) For the purpose of making any such change, the company shall have all rights, powers, and privileges to enter upon and appropriate lands, and make surveys necessary to effect it, upon the terms, and subject to the obligations, rules, and regulations prescribed by law, except that, when it is necessary to appropriate property for such change, the appropriation may be had, if the probate court, in the proceedings instituted therefor, finds that it will conduce to the interests of the company and the public, and that the property and rights of those owning real estate along the portion of the road to be affected by the change will not be unreasonably injured thereby. (R. S. Sec. 3278; April 5, 1866, 63 v. 141, § 11; March 8, 1865, 62 v. 36, § 1.)

See note to § 8753.

This section and §§ 8747, 8750 and 8753 indicate that the policy of the law is against any change of location, even where the right of way may be obtained by purchase, and that the rights of residents along the line must be considered.

Bickerstaff v. Traction Co., 5 O. L. R. 548 (R. R. Com. 1907).

A finding by the probate court "that the property rights of said defendants will not be unreasonably injured by such change" is sufficient under this section. *Reusch v. Traction Co.*, 19 C. C. n. s. 1 (1912); aff'd, no rep. 89 O. S. 456.

Section 8755. (Damages by change after completion.) When the location is changed after the road has been used for transportation of persons and property, the company

shall be liable for all damages occasioned by the change to the owner of the land upon which the road was first constructed. (R. S. Sec. 3278; April 5, 1866, 63 v. 141, § 11; March 8, 1865, 62 v. 36, § 1.)

See *Leisse v. St. Louis, etc., R. R. Co.*, 2 Mo. App. 105 (1876); s. c., 72 Mo. 561.

Chapman v. Mad River, etc., R. R. Co., 6 O. S. 119 (1856).

Section 8756. (Extension of road into other states.) A company organized for the purpose of constructing a railroad to the boundary line of this state, may extend its road into and through an adjoining state under the regulations which may be prescribed by such state. The rights, powers, and privileges of the company over the extension, in the construction and use of its road, and in controlling the property and applying the money and assets thereon, shall be the same as if the road were built wholly within this state. (R. S. Sec. 3279; April 10, 1856, 53 v. 143, § 9.)

A railroad company, by extending its lines into another state, does not cease to be a citizen of the state of Ohio, and thereby entitled to remove cases brought against it in such other state to the federal courts.

Baltimore, etc., R. R. Co. v. Cary, 28 O. S. 208 (1876).

Railway v. Stringer, 32 O. S. 463 (1877).

Railway Assurance Co. v. Pierce, 27 O. S. 155 (1875).

Section 8757. (Construction of branch road; certificate under oath filed with Secretary of State.) A company may construct branches from the main line to towns or places within the limits of a county through or into which its road passes, or to a connection with any railroad within this state, or to any coal or other mine, stone-quarry, plastic-clay, pottery-clay and fire clay pits or banks, marl beds, sand or gravel pits or banks, asphalt deposits, slag banks, ore or shale banks, if, at a meeting of the stockholders called for that purpose, the holders of a majority of the capital stock of the company, by a vote, in person or by proxy, so determine. Upon such determination, the president and directors shall make and acknowledge a certificate setting forth the facts, and file it with the secretary of state. (109 v. 236; R. S. Sec. 3280; 91 v. 87; R. S. 1880; 69 v. 203, § 4.)

The filing of the certificate required by this section is a condition precedent to the right to appropriate property for a branch railroad.

Railroad v. Tod, 72 O. S. 156 (1905).

After the steps required by this section have been taken, the railroad company has the same power to construct a branch road that it had to construct its main line. It may appropriate property for such branch.

State v. Toledo, etc., Co., 1 C. C. n. s. 513, 525; 14 C. D. 321; aff'd, no report, 69 O. S. 550.

An "industrial" track branching from a belt railway, and leading to a large plant about one mile distant, for use in the ordinary course of business, is not a branch road under this section but is a side track.

State v. Toledo, etc., Co., 1 C. C. n. s. 513, 536; 14 C. D. 321; aff'd, no rep., 69 O. S. 550.

Branches to factories, mines, etc.

See § 8902.

Power to purchase branch roads. Power to construct branches to a main road does not include authority to purchase a branch road.

Campbell v. Marietta, etc., R. R. Co., 23 O. S. 168 (1872).

Location and length of branch roads. Where a special charter of an Ohio railroad granted it power to locate and construct branched roads from the main line to other towns or places in the several counties through which said road may pass, it was held that the branches must proceed from the main line and terminate at towns or places in the same county.

Works v. Junction R. R. Co., 5 McLean (U. S.) 425 (1853); 3 O. F. D. 101.

Section 8758. (Electricity as motive power.) Upon any railroad in this state, electricity may be used as a motive power in the propulsion of cars. But before a line of poles and wires may be constructed through or along the streets, alleys, or public grounds of a municipal corporation, plans of the construction must be submitted to and approved by its council. (91 v. 397, § 1; May 21, 1894; R. S. Sec. 3310-1.)

The motive power of a railroad company should be specified in the articles of incorporation.

Rep. Atty. Gen. 1908, p. 75.

A steam railroad company may amend its articles of incorporation so as to authorize the use of electricity as motive power; but may not amend so as to authorize the sale of electric light and power.

Report of Atty. Gen. 1906, p. 67.

A commercial railroad does not become an interurban railway under § 5416 by installing electric passenger cars and operating with frequent stops, when train service is no more frequent than it was prior to electrification. Opins. Atty. Gen. 1915, p. 865.

Under the former municipal code the trustees of a hamlet were held to be included in the word "council" in this section.

In re Newburgh, 15 C. C. 78; 8 C. D. 24 (1897).

Interurban railway, when a railroad.

See note to § 9117.

Section 8759. (Appropriation of land; entry upon for examination and survey.) A company, domestic or foreign, or municipal corporation which owns or operates a railroad may enter upon any land for the purpose of examining and surveying its railroad line, and appropriate so much thereof as is deemed necessary for its railroad including necessary side-tracks, depots, workshops, round-houses, and water-stations, material for construction, except timber, a right of way over adjacent lands sufficient to enable it to construct

and repair its road and the right to conduct water by aqueducts and to make proper drains. (106 v. 347; R. S. Sec. 3281; May 18, 1894, 91 v. 294; R. S. 1880; May 1, 1852, 50 v. 274, § 10.)

Appropriation proceedings. See § 11038 et seq.

Appropriation of use of streets. See § 8764.

A belt or terminal railway may exercise the right of eminent domain. Realty Co. v. Railway, 18 C. C. n. s. 86 (1910); aff'd, no rep. 86 O. S. 364.

Statute strictly construed. Statutes granting power to condemn land for railroad purposes must be strictly construed.

Cemetery Assn. v. Traction Co., 93 O. S. 161 (1915).

Railway Co. v. South, 78 O. S. 10 (1908).

Platt v. Pennsylvania Co., 43 O. S. 228, 244 (1885).

Currier v. Marietta, etc., R. Co., 11 O. S. 228 (1860).

Miami Coal Co. v. Wigton, 19 O. S. 560, 566 (1860).

Foreign corporation. A foreign corporation is expressly authorized by § 8759 to appropriate property. Railway Co. v. Barger, 10 Ohio App. 443; 30 O. C. A. 65 (1919) (s. c., 28 O. C. A. 92); affirming, 21 N. P. n. s. 97. See also, § 9090.

Dummy corporation. This section does not authorize a railroad company to appropriate property in which it will have no real or beneficial interest or use, but which it intends to transfer to another company. Cemetery Assn. v. Traction Co., 93 O. S. 161 (1915).

But officers or employes of one corporation may organize another corporation for the benefit of the former if they, acting for themselves as individuals, subscribe and pay for their stock, elect directors and complete the organization. Railway Co. v. Barger, 10 Ohio App. 443; 30 O. C. A. 65 (1919).

Right to enter to survey. The legislature may properly and constitutionally confer the right to enter upon the lands of an individual without compensation, in order to survey and make examinations for its line of road, and the company may exercise the right, doing no unnecessary damage.

Ward v. Toledo, etc., R. Co., 10 W. L. J. 365 (1853).

Meaning of "land." The word "land" as used in this section includes all the rights and interests which may be had in lands which it may be necessary to take for railway purposes. It, therefore, includes the rights of an owner of abutting property in the street taken for the right of way, even if the fee is in the city.

Valley Ry. Co. v. Pouchet, 4 C. C. 187 (1889); 2 C. D. 492; aff'd, 51 O. S. 571.

See Ohio Southern R. Co. v. Hinkle, 1 N. P. 63 (1894); 1 L. D. 682. See § 11042.

It also includes an estate in remainder subject to a life estate.

Gorrill v. Toledo, etc., Ry., 4 C. C. 398, 403; 2 C. D. 617 (1890).

See Webster v. Railroad Co., 78 O. S. 87 (1908).

Quantity of land necessary. Route. Discretion of railroad company. The railroad company has primary discretion to determine how much land is necessary. But the probate judge under § 11046 may prevent abuse in the exercise of such discretion.

Railroad v. Railroad, 72 O. S. 368 (1905).

Ohio, etc., R. Co. v. Hinkle, 1 N. P. 63; 1 L. D. 682 (1894).

Where two or more ways are equally available it is not for the court to select the way. Such selection is within the discretion of the railroad company.

C. & P. Ry. v. East Liverpool, 51 Bull. 599 (Prob. Ct. 1906).

Cincinnati, etc., Co. v. Murray, 1 N. P. n. s. 301; 48 Bull. 877 (Ins. Ct. 1906).

Only so much land as is necessary can be taken.

See notes to §§ 11042 and 11046.

Interest acquired by appropriation. Rights remaining in land-owner. The estate acquired by a railroad company for right of way purposes is a permanent and not a temporary interest.

Garlick v. Railway Co., 67 O. S. 223, 234 (1902).

Gorrell v. Toledo, etc., Ry., 4 C. C. 398, 403; 2 C. D. 617.

See *Platt v. Penna. Co.*, 43 O. S. 228, 244 (1885).

A judgment lien attaches to the interest of the railroad company in land acquired by appropriation.

Stewart v. Railway Co., 53 O. S. 151, 172 (1895).

The possession of a right of way by a railroad company for railroad purposes is not adverse to the rights remaining in the owner of the fee.

Railway v. Wachter, 70 O. S. 113 (1904).

The owner of the fee retains, where the interest of the railroad is an easement only, all rights not inconsistent with those of the railroad company to build, repair and operate its road, and to use materials condemned.

Platt v. Penna. Co., 43 O. S. 228, 244 (1885).

Railway v. Wachter, 70 O. S. 113 (1904).

Vought v. Railroad Co., 58 O. S. 123 (1898); aff'd, 176 U. S. 469.

The owner of the fee may erect a building necessary to the use and enjoyment of his land and which does not unreasonably interfere with the maintenance and operation of the railway. *Railway v. Baum*, 15 C. C. n. s. 383; aff'd, no rep. 78 O. S. 427.

Where additional burdens are thereafter imposed, the owner is entitled to compensation therefor.

Vought v. Railroad Co., 58 O. S. 123 (1898).

Hatch v. Railway Co., 18 O. S. 92 (1868).

Hawkins v. Buckeye, etc., Co., 6 N. P. n. s. 553, 556; 16 L. D. 333 (C. P. 1905).

Newton v. Railway Co., 115 Fed. 781 (C. C. A. 1902).

Dower barred by appropriation. Where full compensation is made a widow is not entitled to dower in land appropriated pursuant to statute. *Little Miami R. Co. v. Jones*, 5 W. L. G. 5 (1860).

Sale or abandonment of land acquired by appropriation. A railroad company, having acquired title to lands for railroad purposes by grant or proceedings in appropriation, may sell to another corporation for like railroad purposes all or a part of the same. Such sale is not an abandonment of the premises unless such was the intention.

Garlick v. Railway Co., 67 O. S. 223 (1902).

Compare *Platt v. Penn. Co.*, 43 O. S. 228 (1885).

Penna. Co. v. Platt, 47 O. S. 366 (1890).

The question of abandonment is one of intention and is to be determined from the nature of the conveyance itself and the attending facts and circumstances.

Garlick v. Railway Co., 67 O. S. 223 (1902); affirming, 20 C. C. 501.

Hatch v. Railway Co., 18 O. S. 92, 121 (1868).

See *Wagner v. Cleveland, etc., R. Co.*, 22 O. S. 563 (1872).

Nonuser for twenty-one years works an abandonment.

Platt v. Penna. Co., 43 O. S. 228, 240 (1885).

Penna. Co. v. Platt, 47 O. S. 366 (1890).

Wagner v. Cleveland, etc., R. Co., 22 O. S. 563 (1872).

See § 9059.

Non-user for three years does not prove an intention to abandon.
Railway v. Ward, 23 C. C. n. s. 465 (1912).

The ownership of a hundred foot right of way for fifty years, with only a single track in the center, does not create a presumption that the unused portion has been abandoned. Nor does the grant of a license to maintain a pipe line on the unused portion for five years establish an abandonment where the right is reserved to annul the license should the space be needed for railroad purposes.

Hawkins v. Buckeye Pipe Line Co., 6 N. P. n. s. 553; 16 L. D. 333 (C. P. 1905).

The lease of a railroad is not an abandonment.

Cincinnati, etc., Co. v. Murray, 1 N. P. n. s. 301; 48 Bull. 877 (1903).

Upon an abandonment the interest of the railroad company reverts to the landowner.

Platt v. Penna. Co., 43 O. S. 228, 240 (1885).

Vought v. Railroad Co., 58 O. S. 123 (1898).

Moving main tracks from right of way, but using it for railway purposes in storing cars and for access to stock pens, is not an abandonment. Schenck v. Railway, 11 Ohio App. 164; 30 O. C. A. 580 (1919).

For circumstances held to constitute an abandonment of unnecessary land, see Knepfle v. Railway, 26 C. C. n. s. 68 (1916).

Defenses against appropriation.

See note to § 11046.

A municipality can not appropriate for the use of a railroad.

Morehouse v. Norwalk, 6 W. L. B. 267 (1881).

See White v. Cleveland, 12 N. P. n. s. 25 (1911); aff'd, 14 C. C. n. s. 369.

G. C. § 3677.

For what purposes land may be appropriated.

Side tracks. Land may be appropriated for side tracks leading from the main tracks to depot buildings.

Toledo, etc., R. Co. v. Daniels, 16 O. S. 390 (1865).

Cincinnati, etc., R. Co. v. Spring Grove Ave. Co., 15 W. L. B. 384 (1886).

See Union Line v. Railway, 233 U. S. 211 (1914).

An "industrial" track branching from a belt railway and leading to one or more manufacturing plants one mile distant, to be used for usual railroad purposes is a side track within the meaning of this section.

State v. Toledo, etc., Co., 1 C. C. n. s. 513; 14 C. D. 321 (1903); aff'd, 69 O. S. 550.

Realty Co. v. Railway, 18 C. C. n. s. 86 (1910); aff'd, no rep. 86 O. S. 364.

Expert testimony is competent in determining whether a proposed track is a side track, or one to be used for a private purpose.

State v. Toledo, etc., Co., 1 C. C. n. s. 513; 14 C. D. 321 (1903); aff'd, 69 O. S. 550.

Side track defined.

State v. Toledo, etc., Co., 1 C. C. n. s. 513, 519; 14 C. D. 321.

Depots. The legislature has constitutional power to confer upon a corporation authorized to construct a railroad, the right to appropriate grounds necessary for its use as a depot.

Giesy v. Cincinnati, etc., R. Co., 4 O. S. 308 (1854).

And for a depot platform.

Railway v. Devine, 15 N. P. n. s. 56 (1913).

Crossings. Land occupied by a railway may be condemned, if necessary, to furnish a crossing for another road.

Lake Shore, etc., Ry. Co. v. Cincinnati, etc., Ry. Co., 30 O. S. 604 (1876).

See *Railway Co. v. Traction Co.*, 4 C. C. n. s. 329; 16 C. D. 1 (1903); reversed, on other grounds, 72 O. S. 429.

Appropriation for street over railroad tracks.

See § 3677 and note.

Bridges. Land may be appropriated for an approach to a railroad bridge.

L. & N. Ry. v. Taylor, 50 Bull. 20 (Ins. Ct. 1904).

Embankments. Land may be appropriated to form a basis for embankments.

Ohio, etc., R. Co. v. Henkle, 1 N. P. 63; 1 L. D. 682 (1894).

Wharves. Under this section a railroad company is not authorized to condemn private property solely for wharf purposes.

Iron R. Co. v. Ironton, 19 O. S. 299 (1869).

Temporary right of way. A railroad company has no power to appropriate a temporary right of way to be used until its main line is ready for use.

Currier v. Marietta, etc., Co., 11 O. S. 228 (1890).

Branch roads.

See note to § 8757.

Appropriation of property of other railroad companies. Property of one railroad company may be appropriated by another railroad company to furnish a crossing over such road.

Railway v. Railway, 30 O. S. 604.

See §§ 8834-8836.

But a company seeking to appropriate land of another company, longitudinally, must establish urgent necessity for the land. Where such necessity is shown, and the other company does not require it for immediate use, and can arrange its tracks so as to avoid using it for a long period, the right to appropriate exists.

Railway Co. v. Railway Co., 2 N. P. n. s. 45; 49 O. L. B. 240 (Prob. Ct. 1903).

Unfinished road bed of another company.

See §§ 11076 to 11083.

Appropriation by telegraph company of right of way of railway company.

See §§ 9175 and 9196.

Property subject to appropriation.

See note to § 11042.

Appropriation of canal lands—rights of owner of fee. Where a railroad company appropriates the lands of a canal company, the owner of the fee is entitled to recover the full value of the lands, if any, taken by the railroad company, and not covered by the former appropriation by

the canal company, and, also, a full and fair compensation for such additional burdens and inconveniences, not common to the general public, as accrue to him and his entire tract on which the easement is imposed, by reason of the change of uses to which the lands appropriated have been subjected.

Hatch v. Cincinnati, etc., R. Co., 18 O. S. 92 (1868).

Vought v. Columbus, etc., R. R. Co., 58 O. S. 123 (1898).

Sale of canal lands to railways.

See Hatch v. Cincinnati, etc., Ry. Co., 18 O. S. 92 (1868).

Goodin v. Cincinnati, etc., Canal Co., 18 O. S. 180 (1868).

Cincinnati, etc., R. Co. v. Zinn, 18 O. S. 417 (1868).

Vought v. Columbus, etc., R. Co., 58 O. S. 123 (1898).

Section 8760. (Compensation for property appropriated.)

The appropriation of private property provided for in the next preceding section, shall not be made until full compensation therefor, irrespective of any benefit from any improvement proposed by such company or municipal corporation, is made in money, or secured to the owner by deposit of money for him. (R. S. Sec. 3281; May 18, 1894, 91 v. 294; R. S. 1880; May 1, 1852, 50 v. 274, § 10.)

See note to § 11053.

Failure to make compensation. Remedies of landowner. A landowner may enjoin a railroad company from entering his land for the purpose of constructing a road, until compensation is made.

Gorrill v. Toledo, etc., Ry., 4 C. C. 398; 2 C. D. 617 (1890).

Where land has been occupied, tracks constructed and cars operated, without compensation having been made, the owner may recover possession of such land, unless barred by laches or acquiescence.

Bothe v. Dayton, etc., R. Co., 37 O. S. 147 (1881).

Platt v. Penna. Co., 47 O. S. 366 (1890).

Where a land owner is estopped from reclaiming the land he may recover compensation.

Penna. Co. v. Platt, 47 O. S. 366 (1890).

Goodin v. Canal Co., 18 O. S. 169.

"Owner" includes remainderman. The owner of an estate in remainder, subject to a life estate, may enjoin the construction of a railroad until compensation is made, although the owner of the life estate has granted a right of way.

Gorrill v. Toledo, etc., Ry., 4 C. C. 398, 406; 2 C. D. 617 (1890).

— Includes owner of neighboring lots having rights under restrictive covenants as to use of property.

Kuebler v. Cleveland, etc., Ry., 10 N. P. n. s. 385; 20 L. D. 525 (1910); (aff'd, by Cir. Ct.; reversed by Supreme Court on ground of laches, 84 O. S. 463).

See note to § 111042.

Compensation.

Speculative and contingent remuneration can not be recovered. A compensatory and not a speculative remuneration is guaranteed for land taken and for the damages occasioned thereby to the rest of the property. The difference in value of the property with the appropriation and that

without it is the rule of compensation. The difference must be ascertained with reference to the value of the property in view of its present character, situation, and surroundings. It can not be enhanced by proving facts of a contingent and prospective character, such as the probable rents that may be derived from the property, or its special value as a prospective monopoly of a railway to the adjoining lands of other persons.

Powers v. Hazelton, etc., R. Co., 33 O. S. 429 (1878).

Danger from fire to buildings, fences, timber or crops upon the remainder, in so far as it depreciates the value of the property is a proper element of compensation, although the railroad company is liable for all losses by fire which originate from the operation of the road.

Hayes v. Toledo, etc., Co., 6 C. C. n. s. 281; 16 C. D. 395 (1903); aff'd, 70 O. S. 425.

But the proximity of the buildings to the railway must be such as to render the danger imminent and appreciable.

Hatch v. Cincinnati, etc., R. Co., 18 O. S. 92 (1868).

Must be based on present conditions. In an appropriation proceeding preparatory to a change of grade through farm lands, the assessment of damages to the residue of the tract must be based on present conditions; not on conditions existing prior to the original location of the railway years before.

Railway Co. v. Cordry, 10 C. C. n. s. 87; 20 C. D. 830 (1907).

Railroad intersecting tract of land. Where the railroad cuts asunder an entire tract of land, the owner is entitled to compensation for the inconvenience and danger of access between the two parts of the tract when the inconvenience and danger are peculiar to the owner in the use of his property, and not common to the public at large.

See Hatch v. Cincinnati, etc., R. Co., 18 O. S. 92 (1868).

Platt v. Pennsylvania Co., 43 O. S. 244 (1885).

Lorain St. Ry. Co. v. Sinning, 17 C. C. 649; 6 C. D. 753 (1895).

Cleveland, etc., R. Co. v. Ball, 5 O. S. 568 (1856).

Schaible v. L. S., etc., Ry., 10 C. C. 334 (1895).

Damage done in making appropriation. A petition stating only that a railroad company, in locating and constructing its road on and through the plaintiff's land, appropriated about two acres of the land to its own use, and located its road through the land in a diagonal manner so as to greatly injure the same and committed other acts and trespasses upon the land to the plaintiff's damage, fails to state a cause of action, there being no allegation that unnecessary damage was done or failure to make compensation.

Cleveland, etc., R. Co. v. Stackhouse, 10 O. S. 567 (1860).

Damage of turnpike company. Where a railroad is constructed along land covered by the easement of a turnpike company, the latter is entitled to compensation to the extent of the damage accruing to it in the diminution of the productive value of its property, excepting, however, diminution caused by competition between the turnpike company and the railroad as means of transportation.

Cincinnati, etc., R. Co. v. Zinn, 18 O. S. 417 (1868).

Appropriation under constitution of 1802. Under the constitution of 1802, which was, unlike the present constitution in that respect, where lands were appropriated by a railroad company for its track, supposed benefits might be set off against the value of the land taken, and hence the land might be appropriated without the payment of any money whatever.

Platt v. Pennsylvania Co., 43 O. S. 228 (1885).

Additional burdens imposed after appropriation. Where property appropriated for one public use is subsequently appropriated for, or devoted to, another public use, and the second use imposes additional burdens on the land, the owner is entitled to compensation therefor.

Vought v. Railroad Co., 58 O. S. 123 (1898); aff'd, 176 U. S. 469.

Hatch v. Railway, 18 O. S. 92 (1868).

Hawkins v. Buckeye, etc., Co., 6 N. P. n. s. 553, 556; 16 L. D. 333 (C. P. 1905).

Newton v. Railway Co., 115 Fed. 781; 14 O. F. D. 156 (C. C. A. 1902).

Section 8761. (Company may acquire lands.) Such a company may acquire by purchase or gift lands in the vicinity of the line of its road, or through which it passes, so far as is deemed convenient or necessary by the company to secure a right of way, and such as are granted to aid in the construction of its road, and hold or convey them, as the directors prescribe. Conveyance made by the company shall be signed by the president under the corporate seal. (R. S. Sec. 3282; May 1, 1852, 50 v. 274, § 15.)

Right to acquire and hold land.

See also note to § 8627.

A railroad company has power to acquire real estate only when such power is granted to it by statute or by its charter.

Walsh v. Barton, 24 O. S. 28, 42 (1873).

The purpose of §§ 8761 and 8762 is to clothe the railway corporation with capacity to acquire by purchase or gift lands that are convenient or necessary to secure the right of way, or any lands granted to aid in the construction of the road.

State v. Cincinnati, etc., Ry. Co., 37 O. S. 157, 170 (1881).

The right of a railroad corporation to hold land is not an unqualified right, but it is limited to the uses and purposes of the corporation, and is to be held for the purposes of the grant for the public uses. The title which it has in its right of way is a qualified title, subject to the equal right of another railroad corporation to cross the same with its track, provided compensation be made as required in the case of individuals for the property appropriated, or the interest therein which is so appropriated.

Lake Shore, etc., Ry. Co. v. Cincinnati, etc., Ry. Co., 30 O. S. 604 (1876).

Property of a railroad company is held subject to the right of the state to adopt police regulations for public welfare and safety.

Lake Shore, etc., Ry. Co. v. Cincinnati, etc., Ry. Co., 30 O. S. 604 (1876).

Land of railroads is subject to street assessments.

Railroad Co. v. Connolly, 10 O. S. 159 (1859).

Railroad Co. v. Commissioners, 19 O. S. 589 (1869).

Purposes for which land may be purchased. Land may be purchased for the right of way.

Walsh v. Barton, 24 O. S. 28, 42 (1873).

And to obtain timber or materials.

Lessee of Overmeyer v. Williams, 15 Ohio 26 (1846).

See note to § 8759; *Purposes for which land may be appropriated.*

Where a railroad company purchases unnecessary land, a title thereto

derived from such company is valid. The property would not escheat, and estoppel would operate against the parties directly concerned.

Walsh v. Barton, 24 O. S. 28, 42 (1873).

Methods of acquiring property.

Gift. §§ 8761, 8762.

Appropriation. §§ 8759, 8760.

Dedication is not a means by which property may be acquired by a railroad company. The recording of a town plat with a lot reserved for a depot is not a dedication of the lot.

Todd v. Railroad Co., 19 O. S. 514 (1869):

Property may be acquired by adverse possession for twenty-one years. But the statute of limitations does not begin to run against a remainderman until the termination of the life estate.

Webster v. Railroad Co., 78 O. S. 87 (1908).

The possession of a right of way by a railroad company for railroad purposes is not adverse to the rights remaining in the owner of the fee.

Railway v. Wachter, 70 O. S. 113 (1904).

Land granted by the state to a municipality, upon a valuable consideration, to be used for street and other purposes, may be leased by the municipality to a railroad company for its general purposes. The lease is valid where the municipality reserves the right to use the leased premises for street purposes, without compensation.

Cleveland T. & V. R. Co. v. State, 85 O. S. 251 (1912).

Subscriptions to stock payable in real estate.

See Goodin v. Evans, 18 O. S. 150 (1868).

A deed of a right of way may be held in escrow by an agent of the railroad company.

Railroad Co. v. Iliff, 13 O. S. 235 (1862).

License for side track. A written agreement, silent as to time, for the construction of a side track on the land of another, at his expense and for his advantage, is a revocable license, and the railroad company can not maintain the side track against the objection of the land owner.

Rodefer v. Railroad, 72 O. S. 272 (1905).

Right of railroad company to remove side track.

Ambler v. Erie R. Co., 9 C. C. n. s. 81; 19 C. D. 89 (1906).

Purchase by land contract.

Equitable lien of vendor. An owner agreed in writing with the railroad company to release the right of way and the right to enter upon and construct the road through his lands in consideration that the company agreed to pay a certain sum of money at a future day, and construct certain road crossings and cattle-guards. The company took possession and constructed its road before receiving a deed for the right of way, and before payment of the money or constructing the crossings or guards. Held, the owner is entitled to make an equitable lien upon the property sold as well for the damages for not constructing the road in the proper manner, as for the unpaid purchase money.

Dayton, etc., R. Co. v. Lewton, 20 O. S. 401 (1870).

Ames v. Wheeling, etc., Ry. Co., 17 C. C. 684; 9 C. D. 443 (1899).

Notice to subsequent purchasers and mortgagees. Where the owner sells the right of way to the company on contract, and retains the legal title, the fact is sufficient to put subsequent mortgagees and purchasers of the road upon inquiry as to the rights of the owner.

Dayton, etc., R. Co. v. Lewton, 20 O. S. 401 (1870).

Seasongood v. Miami Valley Ry. Co., 9 W. L. B. 256 (1883).

See Day v. Railroad Co., 41 O. S. 392 (1884).

The construction and operation of a railroad on land is constructive notice to purchasers of the rights of the railroad company.

Day v. Railroad Co., 41 O. S. 392 (1884).

Remedies of vendor. The vendor may compel specific performance of the contract or may enforce his vendor's lien.

Dayton, etc., R. Co. v. Lewton, 20 O. S. 401 (1870).

Foreclosure of lien. Sale of entire road. Where public interests preclude the sale of the portion of the road covered by the lien, a sale of the entire road may be decreed.

Dayton, etc., R. Co. v. Lewton, 20 O. S. 401 (1870).

Ames v. Wheeling, etc., Ry. Co., 17 C. C. 684; 9 C. D. 443 (1899).

Stewart v. Railway, 53 O. S. 151 (1895).

Seasongood v. Miami, etc., Ry. Co., 9 W. L. B. 256 (1883).

RIGHT OF WAY.

A grant to a railroad company of a right of way, without limit as to time, is perpetual, unless terminated by release or abandonment.

Junction R. Co. v. Ruggles, 7 O. S. 1 (1857).

Garlick v. Railway Co., 67 O. S. 223, 234 (1902).

See Bosworth v. Pittsburg, etc., Ry. Co., 1 C. C. 69, 70; 1 C. D. 42 (1885).

Where the grant is of an easement only, the grantor retains all rights not inconsistent with those of the railroad to build, repair and operate its road.

Railway Co. v. Wachter, 70 O. S. 113 (1904).

Platt v. Penna. Co., 43 O. S. 228, 244 (1885).

The grantor may construct a building on his remaining land, near to the railroad, where it will not unreasonably interfere with the operation of the road, although it may cause some inconvenience to the railroad company.

Railway v. Baum, 15 C. C. n. s. 383 (1906); aff'd, no rep., 78 O. S. 427.

Where a track is constructed and maintained near the center of a right of way of definite width, such possession includes land on each side of the track reasonably necessary for its use and maintenance, and is constructive notice to subsequent purchasers.

Day v. Railroad Co., 41 O. S. 392 (1884).

See Happ v. Railroad Co., 1 N. P. n. s. 337; 14 L. D. 173 (C. P. 1903).

Where the terms of a right of way grant are general and indefinite, its location and use by the grantee, acquiesced in by the grantor, will have the same legal effect as if it had been fully described by the terms of the grant.

Warner v. Railroad Co., 39 O. S. 70 (1883).

A lease to drill for oil and gas does not prevent the owner of the fee from conveying a valid right of way.

Ohio Oil Co. v. Railroad Co., 4 C. C. 210; 2 C. D. 505 (1889).

Where the description of the right of way is indefinite, the grantor by accepting the agreed compensation after construction of the railroad thereon, with full knowledge of the facts, is estopped to deny that the actual location is the agreed location.

Railway Co. v. Williams, 53 O. S. 268 (1895).

Cleveland, etc., Ry. Co. v. Reid, 4 N. P. 127 (1896).

Where the owner of land granted to a company the right to select a strip thereof for its right of way, and from the terms of the grant and the circumstances it is clear that both parties understood that the right granted was to be exercised at the time of the final location and construction of the railroad, and not afterward, a court of equity will, by

injunction, restrain such railroad company from taking possession of any additional part of said land after its railroad has been located.

Warner v. Railroad Co., 39 O. S. 70 (1883).

Where property owners agreed with a railroad company to convey land for its track, and to submit to arbitration the question of compensation to be paid them by the company for the land and damages, such arbitration does not involve the question of possession and title to real estate within the meaning of G. C. § 12148.

C. P. & V. R. R. Co. v. Duckwall (Sup. Ct.), 46 W. L. B. 92 (1901).
Construction of deed for right of way.

Belmer v. Railroad Co., 10 W. L. B. 232 (Super. Ct. Cin. 1883).

Grant with restrictive agreement as to use of the property. A railroad company, having built a spur track on land of another under an agreement limiting its use to certain specified business, may be enjoined from carrying other and increased traffic without compensation to the owner.

Collins v. Craig Shipbuilding Co., 7 C. C. n. s. 350; 17 C. D. 802 (1905).

A restrictive agreement in a deed, binding the railroad company, grantee, not to construct additional tracks within a certain distance from a dwelling, may be enforced by injunction. Miller v. Railway, 88 O. S. 499 (1913).

A condition subsequent in a deed, requiring the road to be completed within two years, does not operate of itself, and the right of forfeiture may be lost by waiver or estoppel.

Field v. Railway Co., 3 C. C. n. s. 130; 13 C. D. 1 (1897); aff'd, 62 O. S. 633.

Sale and conveyance of land by railway. A railroad company having acquired title to land for railroad purposes, by grant or appropriation, may sell all or a part of the same to another corporation for like railroad purposes.

Garlick v. Railway Co., 67 O. S. 223 (1902).

See note to § 8759.

A deed executed in the name of the corporation, by the president, under the corporate seal, is presumed to have been authorized by the directors and is prima facie valid.

Railroad Co. v. Harter, 26 O. S. 426 (1875).

But such deed is not admissible in evidence without proof of its execution.

Walsh v. Barton, 24 O. S. 28 (1873).

See note to § 8627.

A license to take gravel from the right of way need not be executed by the president.

Greene v. Trustees, 8 N. P. 491; 11 L. D. 771; aff'd, 64 O. S. 609.

Adverse possession against railroads of part of right of way. To acquire title to a right of way by adverse possession, an abutting owner must occupy and use the land in a manner inconsistent with the paramount rights of the railroad. Possession and use of part of the easement not in use and not needed for immediate railroad purposes, and consistent with its rights to reclaim it when needed, is presumed to be permissive only.

Smith v. Railway Co., 5 C. C. n. s. 194; 16 C. D. 44 (1904); aff'd, 73 O. S. 391.

Railroad v. Roseville, 76 O. S. 108 (1907).

Day v. Railroad Co., 41 O. S. 392 (1884).

Possession of a strip for more than twenty-one years does not become adverse to the railroad company by the raising of vegetables, or repair

of the fence, where the original use of the land and construction of the fence were permissive on the part of the railroad company.

Happ v. Railroad Co., 1 N. P. n. s. 337; 14 L. D. 173 (C. P. 1903).
But see Knepfle v. Railway, 26 C. C. n. s. 68 (1916).

Where a railroad company maintains a way or street over its tracks and unenclosed land for forty years, for the use of its patrons, and incidentally it is used also by the public, the presumption is that the user was permissive. Such use does not establish the dedication of the way as a street, in the absence of an acceptance by proper public officials.

Railroad v. Roseville, 76 O. S. 108 (1907).

Whether exclusive occupancy is required by the necessities of the railroad, and what use by an abutting owner is an interference therewith are questions of fact.

Smith v. Railway Co., 5 C. C. n. s. 194; 16 C. D. 44 (1904); aff'd, 73 O. S. 391.

The act of an abutter in accepting and recording a deed and taking possession of disputed land is adverse.

Smith v. Railway Co., 5 C. C. n. s. 194; 16 C. D. 44 (1904); aff'd, 73 O. S. 391.

Abandonment of right of way.

See note to § 8759.

A provision in a deed that the premises shall be used for railroad purposes only, to revert to the grantor, his heirs or assigns, if they cease to be so used, is a condition subsequent. Title vests upon delivery of the deed, and a breach of the condition does not ipso facto produce a reverter. The right of forfeiture is not alienable. Reiter v. Penna. Co., 21 N. P. n. s. 58 (1917).

Removal of fixtures, tracks, etc., on abandonment. Stone piers built as a part of a railroad, on land acquired for its right of way, may be removed by the railroad company on abandonment.

Wagner v. Railroad Company, 22 O. S. 563 (1872).

Side tracks built on the leasehold estate of a coal mining company, at its request, may be removed by the railroad company, against the objection of the lessor on abandonment of the premises by the lessee, where the lease provided that mining appliances might be removed.

Ambler v. Erie R. Co., 9 C. C. n. s. 81; 19 C. D. 89 (1906).

Taxation of right of way. See also §§ 8820, 8821.

A strip of land owned in fee, and used as a right of way, by a railroad, located parallel to a municipal street, it is "land" subject to assessment under G. C. § 3812. Opins. Atty. Gen. 1919, p. 501.

Section 8762. (When conveyance to company void.) Conveyances to such companies, acquired by gift, shall be null and void, unless the company to which they are made, completes its road on the right of way so conveyed, within five years from the time of a conveyance for that purpose. (R. S. Sec. 3282; May 1, 1852, 50 v. 274, § 15.)

Where land is given to a railroad company on condition that it should be occupied for depot grounds a substantial compliance with the terms of the deed will prevent a recovery of the land for failure to perform the conditional agreement.

Pittsburg, etc., Ry. Co. v. Rose, 24 O. S. 219 (1873).

Where a railroad company has received from private parties donations

of land in consideration that it should locate its road at a particular place, the company will not be permitted to effectuate a change in fact (though not in name) of the line of its road away from such place, by organizing a new corporation and constructing a new road parallel with the old one, under a different charter, and permitting its old line to go to decay, without compensating the parties with whom it has contracted as aforesaid.

Chapman v. Mad River R. Co., 6 O. S. 119 (1856).

Section 8763. (Elevated track; use of public way.) If in the location of any part of a railroad owned or operated by a domestic or foreign corporation, it be necessary to occupy with a surface or elevated track, with the necessary supports therefor, any public road, street, alley, way or ground, of any kind, or part thereof, the municipal or other corporation or public officers or authorities, owning or having charge thereof, and the company, may agree upon the manner, terms and conditions upon which it can be used or occupied. In the event of the occupancy of such ground with an elevated track, the agreement shall specify the number, character and location of all supports for the track, any part of which will be upon such public ground, and the vertical and longitudinal clearances between such supports. (R. S. Sec. 3283; May 9, 1908, 99 v. 589; April 15, 1857, 54 v. 133, § 12.)

Opening or extension of street over railroad tracks. Appropriation. § 3677 and note.

Maintenance of tracks at highway crossings. See § 6956.

This section applies to crossings. Ritter v. Railway, 17 C. C. n. s. 4 (1908); reversing, 6 N. P. n. s. 161; 18 L. D. 846; aff'd, no rep. 83 O. S. 515.

In re Avon Beach, etc., Ry., 3 N. P. n. s. 561, 564, 565; 16 L. D. 87, 90 (C. P. 1905).

Railroad v. Cincinnati, 8 W. L. B. 334 (Dist. Ct. 1882).

An agreement with an existing railroad for repair or alteration of a crossing or bridge is not within this section.

Railroad Co. v. Defiance, 52 O. S. 262, 313 (1895).

The grant of the right to use a street for railroad purposes does not authorize its use for other purposes.

Rogers v. Railway, 12 L. D. 136 (Super. Ct. Cin. 1901).

Exclusive occupancy of street by railroad not authorized. A municipal corporation can not by agreement permit a railroad company to occupy a street so as to exclude the public from any portion thereof, unless the municipality is authorized by statute, in express terms or by clear implication, to make such contract. General legislation authorizing the occupation of streets for railroad purposes does not authorize exclusive and permanent use.

Railway Co. v. Elyria, 69 O. S. 415 (1903); affirming, 3 C. C. n. s. 250.

Ravenna v. Penna. Co., 45 O. S. 118.

Cincinnati v. Railway, 24 C. C. n. s. 305 (1915).

Ry. v. Hartford, 15 Ohio App. 305 (1921).

See C. & P. Ry. v. Liverpool, 51 O. L. B. 599 (Probate Ct. 1906).

Railroad Co. v. Cincinnati, 76 O. S. 481 (1907).

Change in judicial interpretation of section as to extent of use authorized, see

Railroad Co. v. Cleveland, 15 C. C. n. s. 193, 208 (1910); affirming 8 N. P. n. s. 457; 19 L. D. 372; aff'd, no rep., 87 O. S. 469.

This section contemplates a joint or common use of a street by the railroad company and public.

Railway Co. v. Elyria, 69 O. S. 415, 429 (1903); s. c., 3 C. C. n. s. 250; 14 C. C. 48; 7 C. D. 312 (1897).

And the right of the municipality to regulate the use of the street continues.

Railway Co. v. Cincinnati, 16 W. L. B. 367.

Railroad Co. v. Defiance, 52 O. S. 262, 308 (1895); s. c., 167 U. S. 88 (1897).

Ganz v. Ohio, etc., Co., 140 Fed. 692, 695 (C. C. A. 1905).

An abandonment or surrender of the street is not authorized.

Railroad Co. v. Defiance, 52 O. S. 262, 308 (1895); affirmed, 167 U. S. 88 (1897).

Railway Co. v. Elyria, 69 O. S. 415 (1903).

A person injured upon a track in a street is not a trespasser.

Smith v. Railway Co., 90 Fed. 783 (C. C. 1898).

Railroad Co. v. Anderson, 85 Fed. 413 (C. C. A. 1898).

What amounts to exclusive occupation. Two railway tracks in a street from thirty-six to forty feet wide do not amount to an exclusive occupancy.

Cincinnati, etc., Co. v. Railway Co., 14 C. C. n. s. 195; 23 C. D. 192 (1911); aff'd, no rep., 86 O. S. 343.

Before the amendment of this section and the enactment of §§ 8767 to 8771 (99 v. 589) it was held that this section did not authorize a municipality to permit permanent abutments, supporting an overhead crossing, in a street, where the public was excluded from any portion thereof.

Railway Co. v. Elyria, 69 O. S. 414 (1903); affirming 3 C. C. n. s. 250; s. c., 14 C. C. 48; 13 C. D. 482; 7 C. D. 312; 12 L. D. 609 (1897).

Railway Co. v. Steubenville (unreported), 83 O. S. 443 (1910).

Telephone Co. v. Cincinnati, 73 O. S. 81 (1905).

Crossing a street with five tracks connecting with a railway yard and really becoming a part of the yard is an unreasonable occupation. Cincinnati v. Railway, 24 C. C. n. s. 305 (1915).

Control over streets not surrendered by municipality. This section does not authorize a municipality to surrender or abridge its control over a street. A city, having given a railroad company permission to cross a street below grade and to build a bridge over the railroad, is not prevented by such agreement from thereafter lowering the street so as to cross the railroad at grade.

Railroad Co. v. Defiance, 52 O. S. 262, 308 (1895).

Affirmed, Wabash R. Co. v. Defiance, 167 U. S. 88 (1897).

Ganz v. Ohio, etc., Co., 140 Fed. 692, 695 (C. C. A. 1905).

After constructing its track in a street at an agreed grade, the railroad company can not subsequently raise the grade of the street.

Railroad Co. v. Hambleton, 40 O. S. 496 (1884).

"Public road, street, alley, way or ground." A highway, outside of a municipal corporation, is a public road, and can not be occupied without agreement or appropriation under §§ 8763 or 8764.

Commissioners v. Penna. Co., 6 N. P. n. s. 141; 18 L. D. 348 (C. P. 1907); (aff'd, by Cir. Ct., without rep.).

Youngstown v. Railroad Co., 3 C. C. 214; 2 C. D. 121 (1888).

The word "way" or "public ground" does not include the public

navigable canals of the state in express terms, nor by necessary implication. A way, in the connection in which it stands in this section, must be regarded as something of the same nature and kind as a road or street.

State v. Cincinnati, etc., Ry. Co., 37 O. S. 157 (1881).

Land acquired by a municipality for park purposes, but occupied by a railroad under an agreement for many years, and declared by municipal authorities to be unnecessary for park or municipal purposes, and never used therefor, is not park property and may be appropriated for a permanent right of way.

Railway Co. v. Cincinnati, 6 N. P. n. s. 325 (Ct. of Ins. 1908).

Likewise land dedicated for street purposes, but unsuited therefor, and having remained unimproved for many years, *ib.*

A city street can not be crossed or occupied by a railroad under § 8773; but authority must be obtained under § 8763 or § 8764.

Youngstown v. Railroad Co., 3 C. C. 214; 2 C. D. 121 (1888).

Cincinnati, etc., R. Co. v. Cincinnati, 8 W. L. B. 334 (Dist. Ct. 1882).

Where land has been granted by the state to a municipality, for a valuable consideration, to be used for street and other purposes, the municipality, reserving the right to use the property for street purposes without compensation, may make a valid lease of such land to a railroad company for its general purposes.

Cleveland T. & V. R. R. Co. v. State, 85 O. S. 251 (1912).

Prior to the amendment of this section and § 8767 (99 v. 589) a public common or landing could not be occupied with an elevated structure, by an agreement under this section.

Railroad Co. v. Cincinnati, 76 O. S. 481 (1907).

See *Cincinnati v. Railway*, 9 N. P. n. s. 433; 20 L. D. 440 (1910); *aff'd*, 82 O. S. 466.

Railway v. Cincinnati, 10 N. P. n. s. 649; 56 Bull. 317; *aff'd*, 88 O. S. 283; 12 N. P. n. s. 65; 22 L. D. 363.

Power of municipality to lease dock to railroad company.

See G. C. § 3699-1.

White v. Cleveland, 14 C. C. n. s. 369; *aff'd*, no rep., 87 O. S. 482.

Agreement for occupancy of street.

By whom made. "Public officers or authorities." County commissioners are "public authorities" having charge of roads outside of municipalities.

Trust Co. v. Railway, 7 N. P. n. s. 497, 511 (Ct. of Ins. 1908).

Megrue v. Commissioners, 15 C. C. 242; 8 C. D. 262 (1897).

County commissioners are not precluded by G. C. § 8896 from making an agreement permitting a railroad to cross highways above or below grade. *Ritter v. Railway*, 17 C. C. n. s. 4 (1908); *aff'd*, no rep. 83 O. S. 515.

To be valid under G. C. § 2445 the contract should be entered on the minutes of the commissioners. But where such a contract has been fully performed on the part of the county the other party can not evade performance on the ground that such entry was not made.

Commissioners v. Baltimore, etc., R. Co., 37 O. S. 205 (1881).

The council of a municipality has authority to agree as to the use of its streets.

Rockport v. Railway, 85 O. S. 73 (1911).

Validity. A misnomer of the street in the ordinance will not invalidate the contract where it is clear what street is intended.

Gunning v. Railway, 2 N. P. n. s. 411; 14 L. D. 660 (1904).

Provisions, terms and conditions. A restriction prohibiting the use of tracks during certain hours is valid and reasonable.

Pittsburg, etc., Ry. Co. v. Hood, 94 Fed. 618 (C. C. A. 1899).

Louisville Trust Co. v. Cincinnati, 76 Fed. 296; 10 O. F. D. 112 (C. C. A. 1896).

A municipality has no power to prescribe the rates to be charged by a belt line for hauls over its entire line, less than 30 miles long, as a condition to granting a right of way over its streets for a part of its line. Such a provision in an ordinance is ultra vires and void. In an action by an individual claiming the benefit of such provision, the railroad company is not estopped from setting up its ultra vires character as a defense.

Brick Co. v. Trust Co., 187 Fed. 63 (C. C. A. 1911).

Where permission to cross streets is granted on condition that the municipality may thereafter extend any streets across the tracks, free of damage and expense and without appropriation proceedings, the railroad company is estopped from denying the right of the municipality to extend streets.

Chicago, etc., R. Co. v. Hamilton, 3 C. C. 455; 2 C. D. 259 (1888).

In granting permission the public authorities may require a bond securing the repair and restoration of the street or highway.

Megrue v. Commissioners, 15 C. C. 242; 8 C. D. 262 (1897).

Permission to lay one track in a street does not authorize an additional track or switch.

Railroad Co. v. Hambleton, 40 O. S. 496 (1884).

Varwig v. Railroad Co., 54 O. S. 455 (1896).

Chambers v. Railway, 5 C. C. n. s. 298; 17 C. D. 193; aff'd, 73 O. S. 348.

Cleveland, etc., Co. v. Reeder, 6 C. C. 354; 3 C. D. 489 (1892).

Where the grade is specified in the agreement the railroad company can not subsequently change the grade.

Railroad Co. v. Hambleton, 40 O. S. 496 (1884).

Construction. Where a branch track was laid on an unfinished street, under an ambiguous ordinance, capable of two constructions, one that the track was laid to assist in making the street, and the other that the track was for general railroad use, the ordinance is not necessarily to be construed strictly as against the grant of a franchise. Where later ordinances recognized the track as for general use, the rule of construction by conduct may be applied.

Railway Co. v. Cincinnati, 16 W. L. B. 367 (Super. Ct. Cin. 1886; aff'd by Supreme Court without opinion).

Breach of agreement. Liability. A railroad company is liable for failure to perform an agreement to grade and gravel streets, within a reasonable time, without special notice or demand.

Railway Co. v. Carthage, 36 O. S. 631 (1881).

Revocation or rescission. The agreement authorized by this section, when fairly made, is valid and binding.

Megrue v. Commissioners, 15 C. C. 242; 8 C. D. 262 (1897).

The grant, by a municipality, of permission to use a street does not create a mere revocable license. The railroad has the same rights as if the use had been acquired by appropriation.

Pittsburg, etc., R. Co. v. Cincinnati, 16 W. L. B. 367 (Super. Ct. Cin. 1886; aff'd, Supreme Ct. no opinion).

An agreement which required the railroad company to grade and gravel the streets is not abrogated by an inoperative ordinance rescinding the original permission.

Railway Co. v. Carthage, 36 O. S. 631 (1881).

Occupation of streets without agreement or appropriation. A railroad company has no power to occupy a street until it has obtained consent or appropriated the right to do so.

In re Avon Beach, etc., Ry., 3 N. P. n. s. 561, 564; 16 L. D. 87 (C. P. 1905).

Cincinnati, etc., Ry. v. Cincinnati, 8 W. L. B. 334 (Dist. Ct.).

Youngstown v. Railroad Co., 3 C. C. 214; 2 C. D. 121 (1888).

Commissioners v. Penna. Co., 6 N. P. n. s. 141; 18 L. D. 348 (C. P. 1907); (aff'd, by Cir. Ct., without rep.).

The unauthorized occupation of a street with a permanent incumbrance is a public nuisance.

Pittsburg, etc., Ry. Co. v. Hood, 94 Fed. 618 (C. C. A. 1899).

Railroad Co. v. Railway Co., 3 N. P. n. s. 109; 16 L. D. 777 (Cin. Super. Ct. 1904).

Zanesville v. Fannan, 53 O. S. 605, 614 (1895).

Railway Co. v. Elyria, 69 O. S. 415, 433 (1903).

Such unauthorized occupation renders a railroad company a trespasser and liable for damages proximately resulting to persons or property.

Pittsburg, etc., Ry. Co. v. Hood, 94 Fed. 618 (C. C. A. 1899).

Adverse possession of street by railroad. The title of a municipality to its streets being in trust for the public, the statute of limitations does not run against a municipality, at least where the adverse possession is by structures which are unauthorized by statute.

Railroad Co. v. Cleveland, 15 C. C. n. s. 193, 205; 23 C. D. 482 (1910); affirming, 8 N. P. n. s. 457; 19 L. D. 372; aff'd, no rep., 87 O. S. 469.

Compare, Railroad Co. v. Hambleton, 40 O. S. 496 (1884).

Trust Co. v. Railway, 7 N. P. n. s. 497, 513 (1908).

Adverse possession against turnpike company, see Railway Co. v. Commissioners, 92 O. S. 513 (1915); reversing, 21 C. C. n. s. 46; 12 N. P. n. s. 129.

Remedies for unlawful occupation. A railroad company may be enjoined from crossing or occupying a street until it has obtained authority under this section or § 8764. Such occupation may be enjoined by the municipality or county commissioners;

Commissioners v. Penna. Co., 6 N. P. n. s. 141; 18 L. D. 348; aff'd, by Cir. Ct., without rep.).

or by an abutting owner.

Railroad Co. v. Railway Co., 3 N. P. n. s. 109; 16 L. D. 777 (1904).

Where a railroad company has occupied a street, under an invalid agreement, with a structure which excludes the public from a portion thereof, it may be compelled by mandatory injunction to remove the structure without compensation for the expense.

Railway Co. v. Elyria, 69 O. S. 414 (1903).

An action in ejectment under § 11903 may be maintained by a municipality to recover possession of land of which the municipality has the paramount title and a railway an easement for certain purposes.

Railroad v. Cleveland, 15 C. C. n. s. 193 (1910); affirming, 8 N. P. n. s. 457; 19 L. D. 372; aff'd, no rep., 87 O. S. 469.

Cleveland v. Railway, 93 Fed. 113 (1899).

See Cleveland v. Railway, 147 Fed. 171.

The municipality or public authorities may maintain an action for damages.

Lawrence R. Co. v. Commissioners, 35 O. S. 1 (1878).

Where, after a spur track was constructed across a turnpike and maintained for five years, with full knowledge of the turnpike company,

the turnpike company tore up the track, an injunction against relaying the track was refused, the turnpike company, having acquiesced in laying the track and having a remedy at law.

Batavia, etc., Co. v. Railroad Co., 12 C. D. 723; aff'd, 62 O. S. 635.

Spur or switch track distinguished from general tracks. A spur or switch track placed in a street for convenience of shippers differs from a track for general traffic. Such a spur track could not, in many instances, accomplish its purposes elsewhere than in a street.

Railway Co. v. Cincinnati, 16 W. L. B. 367 (Super. Ct. Cin. 1886; aff'd by Supreme Ct.).

Gunning v. Railway Co., 2 N. P. n. s. 411, 414; 14 L. D. 660 (C. P. 1904).

Cincinnati v. Railway, 30 W. L. B. 137 (1893).

Cleveland Lake Front cases.

Railroad Co. v. Cleveland, 15 C. C. n. s. 193; 23 C. D. 482 (1910); affirming 8 N. P. n. s. 457; 19 L. D. 372; aff'd, no rep., 87 O. S. 469.

Holmes v. Railroad, 93 Fed. 100 (1861).

Cleveland v. Railroad, 93 Fed. 113 (1899).

Section 8764. (Appropriation of property for elevated track.) If the parties are unable to agree thereon, and it be necessary in the judgment of the directors of such company, to use or occupy such road, street, alley, way or ground, or a part thereof, for surface tracks, or for crossing with an elevated structure when no piers, supports or obstructions are to be placed therein, the company may appropriate so much thereof as is necessary for the purposes of its road, in the manner and upon the terms provided for the appropriation of the property of individuals. (R. S. Sec. 3283; May 9, 1908, 99 v. 589; April 15, 1857, 54 v. 133, § 12.)

Appropriation of private property by railroads, §§ 8759, 8760.

Appropriation proceedings, § 11038 et seq.

No greater use can be obtained by appropriation than by agreement under § 8763.

Railroad Co. v. Defiance, 52 O. S. 262, 308 (1895); affirmed, 167 U. S. 88 (1897).

This section does not authorize appropriation for a railroad yard.

Rockport v. Railway Co., 85 O. S. 73 (1911).

Nor does it give a railroad company the right to appropriate streets for an unlimited number of tracks. The court is required to determine the reasonableness of the appropriation.

Rockport v. Railway Co., 85 O. S. 73 (1911).

Order under § 8898 et seq. as a condition precedent. An order of the court of common pleas under §§ 8898 and 8899 must be obtained before a proceeding will lie to appropriate the use of a street at grade. A petition for appropriation which does not allege such an order is subject to a motion to make definite and certain.

Railway v. East Liverpool, 10 N. P. n. s. 157; 55 Bull. 173 (Probate Ct. 1909); (aff'd, Cir. Ct., no report).

See Toledo v. Railway Co., 9 C. C. n. s. 399; 19 C. D. 658; 78 O. S. 429.

In re Avon Beach, etc., Ry., 3 N. P. n. s. 561; 16 L. D. 87 (C. P. 1905).

Public "road, street, etc."

See note to § 8763.

Necessity for use. The necessity must be expressly determined by the directors. A failure to do so is a jurisdictional defect which can not be cured.

C. & P. Ry. v. E. Liverpool, 51 O. L. B. 599 (Prob. Ct. 1906).

The directors have primary discretion to determine the necessity for the appropriation but under § 11046 the court has the final authority to determine such necessity.

Cincinnati v. Railroad Co., 88 O. S. 283 (1913); affirming, 12 N. P. n. s. 65; 22 L. D. 363; 10 N. P. n. s. 749; 56 Bull. 317; reversing 15 C. C. n. s. 62; 23 C. D. 464.

Railroad v. Railroad, 72 O. S. 368 (1905).

Necessity to use a street for railroad yard purposes is not a necessity within the meaning of this section.

Rockport v. Railway, 85 O. S. 73 (1911).

Inability to agree must be shown, and a finding of inability to agree made by the court.

Rockport v. Railway, 85 O. S. 73 (1911).

Section 8765. (Limitation as to action for damages.)

Every company which lays a track upon or over any such street, alley, road or ground, or part thereof, shall be responsible for injuries done thereby to private or public property lying upon or near to such ground, which may be recovered by civil action brought by the owner before the proper court, at any time within two years from the completion of the track. (R. S. Sec. 3283; May 9, 1908, 99 v. 589; April 15, 1857, 54 v. 133, § 12.)

Easements or rights of abutting owners. An abutting owner has rights or easements of access, light and air.

Railway v. Lake Erie Provision Co., 9 N. P. n. s. 572 (1909).

These are property rights. (*Railway v. Cumminsville*, 14 O. S. 523, 524) which are not abrogated or affected in any way by an agreement between public authorities and a railroad company.

Railroad Co. v. O'Harra, 48 O. S. 343 (1891).

Lumber Co. v. Railway, 11 N. P. n. s. 289 (1911).

Railroad Co. v. Cincinnati, 76 O. S. 481 (1907).

Where land abuts upon a *cul de sac* the easement of ingress and egress extends to all that part of the street lying between such lands and the first connecting thoroughfare.

Cleveland Furnace Co. v. Ry. Co., 9 N. P. n. s. 426; 20 L. D. 188 (1909).

Lumber Co. v. Railway, 11 N. P. n. s. 289; aff'd, no rep., 86 O. S., 354 (1911).

See *Railroad Co. v. Railway Co.*, 3 N. P. n. s. 109; 16 L. D. 777 (1904).

Furniture Co. v. Railroad, 7 N. P. 640; aff'd, no report, 65 O. S. 571.

See also below, *What property is "near to" the street.*

What constitutes an interference with access. The right of an abutting owner extends to the entire width of the street or highway. A change

or obstruction which requires him to travel beyond his lot lines in order to reach the traveled way is an interference with his easement of access.

English v. Trustees, 8 W. L. B. 15 (Dist. Ct. 1882).

Madden v. Penna. Ry., 21 C. C. 73; 11 C. D. 571; aff'd, 66 O. S. 649.

Schimmelmann v. Railway Co., 83 O. S. 356 (1911).

Compare, Smedes v. Cincinnati, etc., Co., 4 O. L. R. 44; 16 L. D. 743 (Super. Ct. Cin. 1906).

Remedies of abutting owners.

Injunction. An abutting owner may enjoin the construction of tracks in a street, which will substantially interfere with his rights and easements, until he has been compensated. It is immaterial whether the fee of the street is in the municipality or in the abutting owners, so long as it is held upon the same defined uses.

Hall v. Railway, 85 O. S. 148 (1911).

Railway Co. v. Lawrence, 38 O. S. 41 (1882).

Cleveland Furnace Co. v. Ry. Co., 9 N. P. n. s. 426; 20 L. D. 188; aff'd, no rep., 86 O. S. 354.

Toledo Bending Co. v. Manufacturers Ry. Co., 2 N. P. 317; 3 L. D. 430.

Taphorn v. Marietta, etc., R. Co., 4 W. L. B. 988; 11 W. L. B. 92.

Dyer v. Cincinnati, etc., Ry. Co., 7 C. C. 255; 4 C. D. 584 (1893).

Sargent v. Ohio, etc., R. Co., 1 Handy 52 (1854).

Varwig v. Railroad Co., 54 O. S. 455 (1896).

A mandatory injunction to restore the street to its former condition will be granted, where the railroad company proceeds to tear up the street without having first obtained the consent of abutting owners.

Toledo Bending Co. v. Manufacturers Ry. Co., 2 N. P. 317; 3 L. D. 430 (C. P. 1895).

See Railway Co. v. Cincinnati, 8 W. L. B. 334 (1882).

Varwig v. Railway Co., 54 O. S. 455 (1896).

Tracks in the street within twenty-six feet of the entrance to a factory, where wagons are loaded and unloaded, constitute a material interference which may be enjoined.

Cleveland, etc., Co. v. Erie Ry., 4 C. C. n. s. 365; 14 C. D. 107 (1902).

See note to § 9105.

Where the mode of construction causes the drains and gutters to fill up and turn the surface water into the middle of the street, where gullies have formed interfering with access, injunction will lie.

Hall v. Railway Co., 11 C. C. n. s. 97; 20 C. D. 718 (1908); reversed in part, 85 O. S. 148.

A spur track across the sidewalk on the opposite side of the street from plaintiff's property, and the building of an overhead track above it, is not a material interference.

Smedes v. Cincinnati, etc., Co., 4 O. L. R. 44; 16 L. D. 743 (Super. Ct. Cin. 1906).

Where the property is not opposite the track, and the outlet to other streets are unobstructed, a track laid even with the surface of the street is not a material interference.

Herzog v. Railway Co., 6 C. C. n. s. 527; 15 C. D. 702; aff'd, 74 O. S. 440.

Railroad Co. v. Railway Co., 3 N. P. n. s. 109; 16 L. D. 777 (1904).

Furniture Co. v. Railroad, 7 N. P. 640; 10 L. D. 218; aff'd, 65 O. S. 571.

But the property need not abut upon the immediate portion of the street occupied by the railroad. The obstruction of a street near enough to the property to materially affect its value may be enjoined.

Hall v. P. C. C. & St. L. Ry., 85 O. S. 148; modifying, 11 C. C. n. s. 97.

Madden v. Penna. Ry. Co., 21 C. C. 73; 11 C. D. 571 (1900); aff'd, 66 O. S. 649.

Cleveland Furnace Co. v. Ry. Co., 9 N. P. n. s. 426; 20 L. D. 188 (C. P. 1909); aff'd, no rep., 86 O. S. 354.

Raising the grade of the highway four or six feet in front of the entrance to improved property constitutes a material interference which may be enjoined, in the absence of laches. Ritter v. Railway, 17 C. C. n. s. 4 (1908); reversing, 6 N. P. n. s. 161, 18 L. D. 846; aff'd, no rep. 83 O. S. 515; McNulta v. Ralston, 5 C. C. 330.

A track across a street, with gates, so near the property of an abutting owner as to materially affect it or depreciate its value, may be enjoined. Sommer v. Penna. Co., 4 Ohio App. 340; 23 C. C. n. s. 33 (1915).

An injunction will not be granted where the damages complained of by the property owner are remote and are of the same kind though different in degree than are suffered by the general public.

Herzog v. Railway Co., 6 C. C. n. s. 527; 15 C. D. 702 (1904); affirming, 2 N. P. n. s. 17; 14 L. D. 529; affirmed, 74 O. S. 440.

Furniture Co. v. Railroad, 7 N. P. 639, 640; 10 L. D. 218; aff'd, without report, 65 O. S. 571.

See Hall v. Railway Co., 85 O. S. 148 (1911).

Nor where the abutting owner is guilty of laches.

Gunning v. Railway Co., 2 N. P. n. s. 411; 14 L. D. 660 (1904).

Railway v. Duncan, 84 O. S. 463 (reversing 10 N. P. n. s. 385; 20 L. D. 525).

Ritter v. Railway, 17 C. C. n. s. 4 (1908); aff'd, no rep. 83 O. S. 515.

Nor where the abutting owner fails to show material interference with his property rights.

Railway v. Railway, 2 N. P. n. s. 237; 15 L. D. 112 (1904); aff'd, 72 O. S. 598.

Gunning v. Railway, 2 N. P. n. s. 411; 14 L. D. 660 (1904).

Nor where the abutting owner has granted a right of way over other property for a track connecting with the proposed street track.

Railway v. Railway, 2 N. P. n. s. 237; 15 L. D. 112; aff'd, 72 O. S. 598.

Nor where appropriation proceedings are pending and the proposed tracks do not constitute an exclusive occupancy of the street.

Cincinnati, etc., Co. v. Railway Co., 14 C. C. n. s. 195 (1911).

Nor where the evidence is conflicting as to whether or not the proposed track will enhance the value of the abutting property.

Lumber Co. v. Railway, 11 N. P. n. s. 289 (1911).

Action to compel appropriation. An abutting owner may bring an action under §§ 11084, 11085 to compel appropriation of his property rights.

Lawrence R. Co. v. Williams, 35 O. S. 168 (1878).

Kramer v. Toledo, etc., R. Co., 53 O. S. 436 (1895).

Railway v. Pouchot, 4 C. C. 187; 2 C. D. 492; aff'd, 51 O. S. 571.

The remedy under § 8765 does not include the relief provided by the appropriation statutes. The damages recoverable under § 8765 are personal and do not pass to a grantee on a conveyance of the property. While in the case of an easement appurtenant to abutting lands the right of action passes to the grantee.

Railroad Co. v. Lersch, 58 O. S. 652 (1898).

Railroad Co. v. Campbell, 51 O. S. 328 (1894).

Railroad Co. v. O'Harra, 50 O. S. 667 (1893).

Hall v. Ry. Co., 11 C. C. n. s. 97; 20 C. D. 718 (1908); reversed in part, 85 O. S. 148.

An action to compel appropriation is not barred in two years under this section.

Railroad Co. v. O'Harra, 48 O. S. 343 (1891).

Action for damages. Sections 8765 and 11084 are consistent. An abutting owner may pursue either at his option. Traction Co. v. Hart, 2 Ohio App. 1; 19 C. C. n. s. 71 (1913); Grafton v. Railroad, 12 W. L. B. 214; 21 Fed. 209; 5 O. F. D. 318 (1884).

Right of action prior to enactment of § 8765.

Parrot v. Cincinnati, etc., R. Co., 3 O. S. 330 (1854).

Little Miami R. Co. v. Naylor, 2 O. S. 235 (1853).

Columbus, etc., R. Co. v. Mowatt, 35 O. S. 284, 287 (1880).

Action under § 8765. An action under this section may be maintained against a railroad company which built an embankment along the property of an abutting owner, interfering with the access, and destroyed fruit trees and a fence. Traction Co. v. Hart, 19 C. C. n. s. 385; 2 Ohio App. 1 (1913).

Limitation of two years. The track is completed when it is in a condition fit for permanent use for traffic.

Railway Co. v. Gardner, 45 O. S. 309, 325 (1887).

The limitation is waived by failure to raise it by demurrer or answer.

Baltimore, etc., R. Co. v. Lersch, 58 O. S. 639 (1898).

Where a street is occupied without consent of the public authorities the two year limitation does not apply.

Lawrence R. Co. v. Cobb, 35 O. S. 94 (1878).

The two year limitation applies to an action based upon the common law remedy independent of § 8765.

Railroad Co. v. Mowatt, 35 O. S. 284 (1880).

But does not apply to an action to compel appropriation under § 11084 et seq.

Railroad Co. v. O'Harra, 48 O. S. 343 (1891).

Where a main track occupied a street for thirty years or more and subsequently a branch track was laid in another street, it was held that damages were recoverable only for the branch track.

Cleveland, etc., Co. v. Reeder, 6 C. C. 354; 3 C. D. 489 (1892).

Joinder of causes of action for injunction and damages. An action for injunction can not be joined with one for damages. Offenbacher v. Columbus, 17 N. P. n. s. 74 (1914).

By whom action may be brought. An administrator can not sue for compensation and damages for wrongfully taking land during the life of the decedent. The right of action is in the heirs. But the administrator may sue for damages accruing from wrongful use of the lands, interruption of easement, etc., for which the decedent could have maintained a personal action.

Railroad Co. v. O'Harra, 50 O. S. 667 (1893).

The right of action for damages under § 8765 remains in the grantor, on a conveyance of the property injured. Such damages are personal in their nature.

Railroad Co. v. Campbell, 51 O. S. 328 (1894).

Railroad Co. v. Lersch, 58 O. S. 652 (1898).

A mortgagee may bring an action for injury to the mortgage security.

Cameron v. Cincinnati, 17 W. L. B. 153 (C. P. 1886).

Against whom action brought. The lessor and lessee of a railroad are jointly liable where the lessor raised the grade and laid an additional track, and the lessee took possession and continued the permanent use.

Railroad Co. v. Hambleton, 40 O. S. 496 (1884).

Defenses. Unrecorded consent of plaintiff's vendor. A purchaser of abutting property is not affected by an unrecorded consent given by his vendor, of which he had no knowledge.

Varwig v. Railroad Co., 54 O. S. 455 (1896).

— **Encroachment of abutting owner on street.** Where a state road was, by the incorporation of a municipality, brought under the jurisdiction of the municipality, the fact that an abutting owner had encroached on the road is no defense to an action under G. C. § 8765 against a railroad company for destroying a fence and fruit trees and constructing an embankment which interfered with access, although the construction was under a franchise from the municipality. Traction Co. v. Hart, 2 Ohio App. 1; 19 C. C. n. s. 71 (1913).

— **Estoppel.** An abutting owner who induces a railroad to locate on a right of way, on which his land abuts, is estopped from claiming damages from its operation. His successors in title are also estopped, so long as it is operated in the same manner as when originally constructed.

Kinney v. Railway, 3 O. L. R. 545; 16 L. D. 761 (Super. Ct. Cin. 1906); aff'd, no rep., 77 O. S. 609.

Evidence. Of plaintiff's title. The plaintiff's title may be established by proof of adverse possession.

Lawrence R. Co. v. Cobb, 35 O. S. 94 (1878).

See Shepherd v. Baltimore, etc., R. Co., 130 U. S. 426, 434; 6 O. F. D. 322 (1888).

— **Of damages.** It is error to permit witnesses to testify how much less rent was received before, than after, the track was laid; to give opinions as to the amount of damages; and opinions as to the differences in value of the property with the track in the street, and if it was some other place.

Railway Co. v. Gardner, 45 O. S. 309 (1887).

See Railroad Co. v. Campbell, 4 O. S. 583 (1855).

What property is "near to" the street. Property is "near to" a street, so as to entitle the owner to avail himself of the remedy given by the statute, if the injury to it is the direct and necessary result of the occupancy of the street by the track or other structures of a railroad company. And an injury arises when the diminution of the value of the property can be fairly attributed to such use and occupancy of the street.

Shepherd v. Baltimore, etc., R. Co., 130 U. S. 426, 432; 6 O. F. D. 322 (1888).

Wheeling, etc., R. R. Co. v. McLaughlin, 15 C. C. 1 (1897); aff'd, 61 O. S. 279.

Columbus, etc., R. R. Co. v. Mowatt, 35 O. S. 284 (1880).

Madden v. Penna. Ry. Co., 21 C. C. 73; 11 C. D. 571 (1900); aff'd, 66 O. S. 649.

Property within fifty feet of that part of the street upon which the railroad is operated is "near" thereto. It is not error for the trial judge to so charge the jury.

Toledo, etc., Co. v. Meinen, 6 C. C. n. s. 377; 17 C. D. 208 (1905).

Land abutting upon a *cul de sac*.

Cleveland Furnace Co. v. Railway Co., 9 N. P. n. s. 426; 20 L. D. 188 (1909).

Lumber Co. v. Railway, 11 N. P. n. s. 289 (1911); *aff'd*, no rep., 86 O. S. 354.

See above, *Remedies of abutting owners. Injunction.*

Damages. Abutting owners are entitled to recover full compensation for the depreciation in value of their property. In estimating the damages the same standard is to be applied as in direct appropriation proceedings.

Grafton v. B. & O. Ry., 21 Fed. 309; 12 W. L. B. 214 (C. C. 1884).

Railway Co. v. Gardner, 45 O. S. 309, 320 (1887).

See note to § 11053.

The measure of damages is, in general, the difference in the value of the property before and after the final location and construction of the railroad.

Toledo, etc., Co. v. Meinen, 6 C. C. n. s. 377; 17 C. D. 208 (1905).

Shepherd v. B. & O. Ry., 130 U. S. 426 (1889).

Railway Co. v. Gardner, 45 O. S. 309 (1887).

The damages recoverable under § 8765 are personal in their nature.

Railroad Co. v. Campbell, 51 O. S. 328 (1894).

Railroad Co. v. Lersch, 58 O. S. 652 (1898).

Railway Co. v. Hall, 11 C. C. n. s. 97; 20 C. D. 718 (1908); *reversed in part*, 85 O. S. 148.

Inconvenience common to general public. Damages can not be recovered where the injury caused by the tracks and operation of the railroad is not different in kind from that suffered by the general public, although the injury may be greater in degree. The common law rule as to such injuries is not abrogated by § 8765.

Wheeling, etc., R. Co. v. McLaughlin, 15 C. C. 1; 7 C. D. 647 (1897); *aff'd*, 61 O. S. 279.

Herzog v. Railway Co., 6 C. C. n. s. 527; 15 C. D. 702 (1904); *aff'd*, 74 O. S. 440.

Railway Co. v. Railway Co., 3 N. P. n. s. 109; 16 L. D. 777.

Flielman v. Cleveland, etc., Ry. Co., 27 W. L. B. 302.

Kinnear Mfg. Co. v. Beatty, 65 O. S. 264 (1901).

Schmidt v. Cleveland, 15 C. C. n. s. 589; 34 C. D. 7 (1913).

See Hall v. Railway Co., 85 O. S. 148 (1911).

Columbus Plow Co. v. Railway, 12 N. P. n. s. 81 (1911).

Smoke, noise, danger of fire, etc. It is competent to take into consideration evidence of substantial injury and loss to the property (not common to the community at large) caused by smoke, noises and sparks of fire, occasioned by running locomotives and cars along the track in front of the property.

Railway Co. v. Gardner, 45 O. S. 309 (1887).

Wheeling, etc., R. Co. v. McLaughlin, 15 C. C. 1; 7 C. D. 647 (1897); *aff'd*, 61 O. S. 279.

Nypano Ry. Co. v. Wadsworth Salt Co., 9 C. C. n. s. 114; 19 C. D. 110 (1906).

Danger of fire may be considered where the proximity of the buildings to the railroad is such as to render the danger imminent and appreciable.

Hayes v. Toledo, etc., Co., 6 C. C. n. s. 281; 16 C. D. 395 (1903); *aff'd*, 70 O. S. 425.

Hatch v. Railroad Co., 18 O. S. 92 (1868).

Although in actions under § 8765 noise, smoke, etc., incident to the

proper operation of a railroad are proper elements of damage, yet in other actions property owners can not, in general, recover for injuries caused thereby.

Cincinnati, etc., Co. v. Burski, 4 C. C. n. s. 98; 16 C. D. 486 (1904).

Ross v. Cincinnati, etc., Ry. Co., 5 C. C. n. s. 565; 17 C. D. 135 (1905); aff'd, 74 O. S. 507.

Fliehman v. Cleveland, etc., Ry. Co., 27 W. L. B. 302 (1892).

Temporary obstruction of street. Damages caused by the temporary obstruction of a street during the construction of the railroad are not recoverable under this section unless such obstructions are unnecessarily and unreasonably interposed and prolonged.

Shepherd v. Baltimore, etc., R. Co., 130 U. S. 426; 6 O. F. D. 322 (1888).

Additional tracks. Additional tracks laid in a street, already occupied by one or more tracks, constitute an additional burden, and abutting owners are entitled to compensation and damages.

Railroad Co. v. Hambleton, 40 O. S. 496 (1884).

Varwig v. Railroad Co., 54 O. S. 455 (1896).

Chambers v. Cleveland, etc., Co., 5 C. C. n. s. 298; 17 C. D. 193; aff'd, 73 O. S. 348.

Cleveland, etc., Co. v. Reeder, 6 C. C. 354; 3 C. D. 489 (1892).

Interest. In an action under this section, an allowance may be made in the nature of interest on account of delay.

Lawrence R. Co. v. Cobb, 35 O. S. 94 (1878).

Limited to damages pleaded. Recovery is limited to the damages pleaded.

B. & O. R. Co. v. Lersch, 58 O. S. 639 (1898).

Railroad Co. v. Burski, 4 C. C. n. s. 98, 99; 16 C. D. 486 (1904).

Liability of municipality. The liability of the municipality is not affected, nor the remedy against it taken away, by this section, but in the action against the municipal corporation the plaintiff is not entitled to recover damages which are in the nature of compensation for the additional burden in the street arising from the location and construction of the tracks therein; for damages of that character the municipal corporation is not liable.

Zanesville v. Fannan, 53 O. S. 905 (1895).

See Steubenville v. McGill, 41 O. S. 235 (1884).

Dillenbach v. Xenia, 41 O. S. 207 (1884).

The liability of the railroad company is not limited to that of the municipality.

Lake Shore, etc., Ry. Co. v. Brown, 16 C. C. 269; 9 C. D. 37 (1896).

Section 8766. (Longitudinal occupancy of way unlawful.)

Nothing herein shall authorize a grant of the right to occupy any public street, avenue, or alley, longitudinally by an elevated track, except in so far as that is necessary to accommodate a curve in the line of the elevated track, in which case no supports shall be placed in the roadway of the street, avenue, or alley between the curb lines thereof, nor shall such longitudinal occupancy of the street, avenue, or alley exceed three hundred feet in length. (R. S. Sec. 3283; May 9, 1908, 99 v. 589; April 15, 1857, 54 v. 133, § 12.)

In the absence of legislative authority the construction and use by a railroad of its road longitudinally on a public highway is a public nuisance.

Railway Co. v. Hood, 94 Fed. 618 (C. C. A. 1899).

See Railway v. Cincinnati, 8 W. L. B. 334 (Dist. Ct. 1882).

Railway v. Defiance, 167 U. S. 88; 10 O. F. D. 480; affirming, 52 O. S. 262.

Section 8767. (Appropriation of easement.) If in the judgment of the board of directors of any domestic or foreign corporation owning or operating a railroad wholly or partly within this state, it be necessary to use and occupy for an elevated track any portion of any public ground lying within the limits of a municipality and dedicated to the public for use as a public ground, common, landing or wharf, or for any other public purpose, excepting all streets, avenues, alleys or public road, such company may appropriate an easement over so much of such ground as is necessary for such purpose, including the right to maintain the necessary piers and supports for the elevated track. Such appropriation shall be limited to such an easement as is necessary for the construction, maintenance and uses of such elevated track, in accordance with the plan hereinafter provided for. Proceedings for appropriation shall be conducted in the manner and upon the terms provided for the appropriation of the property of individuals. (R. S. Sec. 3283a; May 9, 1908, 99 v. 589.)

Piers in streets.

See Railway Co. v. Elyria, 69 O. S. 414 (1903); aff'g, 3 C. C. n. s. 250; 13 C. D. 482.

Railway Co. v. Steubenville (unreported), 83 O. S. 443 (1910).

See § 8763.

Prior to the enactment of this section (99 v. 589) a public common or landing could not be occupied with an elevated structure.

Railroad Co. v. Cincinnati, 76 O. S. 481 (1907).

This section authorizes the appropriation of an easement for an elevated track over a public landing.

Cincinnati v. Railway, 9 N. P. n. s. 433; 20 L. D. 440 (1910); aff'd, no report, 82 O. S. 466.

Affirmed by U. S. Supreme Court, 223 U. S. 390 (1912).

In appropriating an easement across a public landing under §§ 8767 to 8769 it is necessary to follow the procedure provided in § 11046.

Cincinnati v. Railroad Co., 88 O. S. 283 (1913); affirming, 12 N. P. n. s. 65; 22 L. D. 363; reversing 15 C. C. n. s. 62; 23 C. D. 464.

The directors have primary discretion to determine the necessity for the appropriation under this section, but under § 11046 the court in which the proceeding is brought has the final authority to determine such necessity and whether the proposed appropriation will be an abuse of corporate power or destructive of the public purpose to which the land is devoted.

Cincinnati v. Railroad Co., 88 O. S. 283 (1913); affirming, 12 N. P. n. s. 65; 22 L. D. 363; 10 N. P. n. s. 749; 56 Bull. 317; reversing 15 C. C. n. s. 62; 23 C. D. 464.

Sections 8767, 8768 and 8769 are constitutional.

Cincinnati v. Railway, 223 U. S. 390 (1912); affirming, 82 O. S. 466.

Section 8768. (Submission of plans to council.) Before such appropriation may be made, there shall be submitted to the council of the municipality general plans of the proposed structure showing the manner, character and location of all supports, any part of which will be upon public ground, common, landing or wharf, and also the vertical and longitudinal clearances between the supports. No right to appropriate shall accrue to the railroad company until after it and the council have agreed upon the manner, terms and conditions upon which the property may be used or occupied and the plans submitted have been approved by ordinance duly passed by a two-thirds vote of council. Such ordinance shall be read on three separate days. The rules requiring such reading shall not be suspended. (R. S. Sec. 3283a; May 9, 1908, 99 v. 590.)

An easement across a public landing can not be appropriated until an agreement has been made as to the "manner, terms and conditions" of the occupancy.

"Manner" means method or mode—the way tracks are laid; "terms", the boundary, limit and extent of the grant; "conditions", the stipulations, precedent, the inducement to the grant.

Railway v. Cincinnati, 12 N. P. n. s. 65, 75 (C. P. 1911); aff'd, 88 O. S. 283.

An ordinance, which deals with streets and a public landing, deals with two distinct subjects and is invalid.

Railway v. Cincinnati, 12 N. P. n. s. 65, 75, 76; 22 L. D. 363; (C. P. 1911); aff'd, 88 O. S. 283.

Section 8769. (Control by public authorities.) Such appropriation shall not be restrictive of the control by the public officers or authorities over such public ground, common, landing or wharf, subject to the continued maintenance and use of such elevated track upon the terms and conditions agreed upon. (R. S. Sec. 3283a; May 9, 1908, 99 v. 590.)

Section 8770. (Piers or other supports in a public way.) When it is deemed and declared necessary by two-thirds of the members of the council thereof and the mayor approving, any municipal corporation may grant the right, by ordinance duly passed, to a railroad company operating a steam railroad in such municipality to place and maintain necessary piers, or other stays or supports, in any street or way thereof, when they are provided for and included in the plans and specifications prepared for the abolishment of grade crossings therein under the provisions of an act to abolish crossings in municipal corporations, passed May 2, 1902, and all acts supplementary thereto and amendatory thereof. Every railroad to whom a grant has been made

by any municipal authority as herein provided shall notify in writing the authorities making the grant of its rejection or acceptance of the grant at a time fixed by such authorities, when making it. After such a grant has been made, and accepted by a railroad, if within sixty days after such acceptance, there is filed with the mayor of the city or village making such grant a petition protesting against it, and signed by such a number of the electors of the city or village qualified to vote at the last preceding general election, as equals ten per cent of the number of votes cast for mayor at the last preceding election for mayor he shall certify that fact to the proper election officials. (R. S. Sec. 3283-1; May 9, 1908, 99 v. 591.)

Prior to the enactment of this section and the amendment of § 8763 piers and supports in a street were unauthorized.

Railway Co. v. Elyria, 69 O. S. 414 (1903); affirming, 3 C. C. n. s. 250; 13 C. D. 482.

Railway Co. v. Steubenville, 83 O. S. 443 (unreported).

Sections 8770 and 8771 do not apply to § 8763 et seq. These sections are complete in themselves and do not depend upon such other sections.

Cincinnati v. Railway, 9 N. P. n. s. 433, 436; 20 L. D. 440; aff'd, no Rep., 82 O. S. 466; aff'd, 223 U. S. 390.

Section 8771. (Submission of question to electors.) The officials in charge of such general election, in accordance with the statutes relating to elections, shall arrange and provide for and conduct the submission of such question to such electors. The question whether such grant shall be made shall be submitted to the electors of such city or village at the next succeeding general election occurring more than thirty days after the expiration of such sixty days. The ballots at such election shall read "Elevated Railroad Grant—Yes"; "Elevated Railroad Grant—No". If at the election a majority of the votes cast on such question is against the grant, it shall be ineffective and void. (R. S. Sec. 3283-1; May 9, 1908, 99 v. 591.)

Blank ballots are not "votes cast on such question" under this section and can not be counted.

Brush v. Orgill, 9 N. P. n. s. 632 (C. P. 1910).

The canvassing board may be enjoined from counting ballots which did not express any vote.

Brush v. Orgill, 9 N. P. n. s. 632 (C. P. 1910).

Section 8772. (Extension of line, how authorized.) When a company desires to extend the line of its road beyond either of its previously designated termini, its president and directors may submit the question of such extension and change of termini to a meeting of its stockholders, to be called for that purpose by notice published for four con-

secutive weeks in some newspaper in general circulation in each county through or into which the road passes. If the holders of a majority of the stock, in person or by proxy, so determine, the president and directors, or a majority of them, shall make a certificate of the fact, naming the places of the new terminus or termini of the road, and the county or counties through or into which the extended line will pass, and file it in the office of the secretary of state. Such extension then shall be held to be a part of the original line of the road. (R. S. Sec. 3306; March 20, 1875, 72 v. 70, § 2.)

Change of line, § 8747.

The provision that an extension shall "be held to be a part of the original line" does not have the effect of including the extension in a prior mortgage on the original line, which mortgage did not in terms cover after acquired property.

Louisville Trust Co. v. Railway Co., 91 Fed. 699; 10 O. F. D. 646 (1897).

See also note to § 8793.

This section applies to completed lines and requires a vote of a majority of the stock, only, for a change of termini.

Louisville Trust Co. v. Railway Co., 91 Fed. 699, 705; 10 O. F. D. 646 (1897).

The provisions of this section are for the benefit of the public.

Metropolitan Trust Co. v. Railway Co., 91 Fed. 18, 20; 13 O. F. D. 58 (1899).

Section 8773. (Diversion of road or stream.) When it is necessary in the construction of its road to cross a road or a stream of water, a company may divert it from its location or bed, but without unnecessary delay it shall place such road or stream in such condition as not to impair its former usefulness. (R. S. Sec. 3284; May 1, 1852, 50 v. 274, § 16.)

See § 8763.

For bridges over highways, see § 8857.

This section does not authorize a railroad company to lay tracks upon or across a county road. Its purpose is confined to the diversion of a road or stream.

Commissioners v. Penna. Co., 6 N. P. n. s. 141; 18 L. D. 348 (1907); (aff'd Cir. Ct. without report).

This section applies only to county roads. A street in a municipal corporation can not be crossed or occupied by a railroad under this section. Such occupancy or crossing is governed by § 8763.

Youngstown v. Railroad Co., 3 C. C. 214; 2 C. D. 121 (1888).

Railroad Co. v. Cincinnati, 8 W. L. B. 334 (Dist. Ct. 1882).

See Commissioners v. Penna. Co., 6 N. P. n. s. 141; 18 L. D. 348 (1907); (aff'd Cir. Ct. without report).

This section is substantially the common law rule on the subject.

Railroad Co. v. Defiance, 52 O. S. 262, 314 (1895).

Power to divert. Subject to the performance of the duty to restore, the power or right to divert a road or stream is coextensive with the

public necessity which calls for its exercise, and the diversion may be temporary or permanent, as the public needs or necessities require.

Valley Ry. Co. v. Bohm, 34 O. S. 114, 119 (1877).

See Commissioners v. Penna. Co., 6 N. P. n. s. 141; 18 L. D. 348 (1907); (aff'd by Cir. Ct. without report).

Trust Co. v. Railway, 7 N. P. n. s. 497.

The diversion may be permanent, if reasonably necessary, and if the road is restored so as not to impair its former usefulness. Brown v. Railway, 16 C. C. n. s. 511; 25 C. D. 35 (1907); affirmed, except as to compensation for maintenance, 79 O. S. 440; Valley Ry. v. Bohm, 34 O. S. 114 (1877); Railroad v. Commissioners, 31 O. S. 338 (1877).

A railroad will not be enjoined from driving piling into the bed of a stream to construct a new bridge, unless substantial damage will be caused.

Commissioners v. Pierce, 90 Fed. 764; 12 O. F. D. 287 (C. C. 1898).

Necessity. The court may determine whether a necessity exists for the proposed diversion.

Commissioners v. Railway, 7 N. P. n. s. 529; 17 L. D. 418 (1908); aff'd in part, 79 O. S. 440.

After construction of road. A railroad company can not appropriate property for the purpose of diverting a stream after the original construction of its road.

Railway Co. v. South, 78 O. S. 10 (1908).

See Lorain County v. Railway, 11 C. C. n. s. 419; 12 C. D. 805.

Commissioners v. Railway, 7 N. P. n. s. 529; 17 L. D. 418 (1908); aff'd in part, 79 O. S. 440.

Duties of railroad company.

To guard pending construction. Until the highway is restored to its former condition of usefulness, the railroad company must, by proper barriers, prevent and guard travelers from using the highway where it is in a dangerous condition.

Potter v. Bunnell, 20 O. S. 150 (1870).

To restore to condition of usefulness. The requirement of this section is not to restore to its former place or conditions, but to such condition as not to affect materially its utility. It is to be left in such condition, how much so ever it may be diverted from its former course, that the right to the public or private enjoyment, where such right exists, shall not be materially disturbed or interfered with.

Valley Ry. Co. v. Bohm, 34 O. S. 114 (1877).

Little Miami R. R. Co. v. Commissioners, 31 O. S. 338 (1877).

Restoration to the former usefulness may be accomplished by the substitution of another way for the part taken.

Commissioners v. Railway, 7 N. P. n. s. 529; 17 L. D. 418 (1906); aff'd in part, 79 O. S. 440.

Megrue v. Commissioners, 15 C. C. 242; 8 C. D. 262 (1897).

The duty to restore rests upon the railroad company, and can not be shifted to a contractor.

Cincinnati, etc., R. Co. v. Van Dorn, 1 C. C. 292; 1 C. D. 160 (1885).

The obligation to restore is inseparable from the right to divert.

Zanesville v. Fannan, 53 O. S. 615 (1895).

State v. Dayton, etc., R. Co., 36 O. S. 434 (1881).

A railroad may appropriate land necessary to restore the road or stream.

Valley Ry. Co. v. Bohm, 34 O. S. 114 (1877).

But the power to appropriate may be exercised only at the time of the original construction of the road.

Railway Co. v. South, 78 O. S. 10 (1908).

Before the enactment of § 8770 it was held that piers or supports for overhead tracks could not be permanently placed in a street; and that a street had not been restored to its former usefulness where such supports were maintained.

Railway Co. v. Elyria, 69 O. S. 414, 435 (1903); s. c., 3 C. C. n. s. 250; 13 C. D. 482.

To keep in repair after restoration. No duty is imposed by this section to keep the highway in repair, after it has been placed in such condition as not to impair its usefulness.

Pittsburg, etc., Ry. Co. v. Maurer, 21 O. S. 421 (1871).

Brown v. Commissioners, 79 O. S. 440.

Remedies on failure to restore road or stream to condition of usefulness.

Injunction. Injunction will lie to compel a railroad to perform its obligation to restore the road. Such action may be brought by the attorney general in the name of the state.

State v. Dayton, etc., R. Co., 36 O. S. 434 (1881).

Commissioners v. Railway, 7 N. P. n. s. 529, 540; 17 L. D. 418 (1906); aff'd in part, 79 O. S. 440.

Or by the county commissioners.

Little Miami R. Co. v. Commissioners, 31 O. S. 338 (1877).

The remedy given to county commissioners by G. C. § 2424 et seq. is cumulative and does not affect the right of the state.

State v. Dayton, etc., R. Co., 36 O. S. 434 (1881).

The statute of limitations is not a defense to an action brought to compel the railroad company to perform its obligation.

Little Miami R. Co. v. Commissioners, 31 O. S. 338 (1877).

Action for damages. A railroad company is liable for injuries to persons or property caused by its failure to restore the road to the former condition of usefulness.

G. C. § 7473.

Pittsburg, etc., Ry. Co. v. Maurer, 21 O. S. 421 (1871).

Potter v. Bunnell, 20 O. S. 150 (1870).

Cincinnati, etc., R. Co. v. Van Dorn, 1 C. C. 292; 1 C. D. 160 (1885).

Consent of public authorities to the change does not affect the liability of the railroad company.

McNulta v. Ralston, 5 C. C. 330; 3 C. D. 163 (1891).

Where a stream is turned into a new channel on land of the railroad company, so that, beyond the railroad land, it is thrown upon the land of another, the railroad company is under a liability, which continues until the right to cause such damage is acquired.

Valley Ry. Co. v. Frantz, 43 O. S. 623 (1885).

Damages for a diversion of a highway can not be recovered in a proceeding to appropriate land adjoining the highway. A separate action must be brought for such injury.

Schaible v. Railway Co., 10 C. C. 334; 6 C. D. 505 (1895).

Where permission to divert a highway was granted by county commissioners, and certain individuals executed a bond securing the repair of the highway, and upon default of the railroad company the commissioners completed the repairs, it was held that the cost could be recovered in an action on the bond.

Megrue v. Commissioners, 15 C. C. 242; 8 C. D. 262 (1897).

Liability of municipal corporation. The fact that the railroad company is liable does not relieve a municipal corporation from its duty to keep its streets free from nuisance, nor change its liability.

Zanesville v. Fannan, 53 O. S. 605, 615 (1895).

Where a street bridge over a railroad falls, the railroad company having assumed the repair and maintenance of the bridge, and the municipality having control over it, are jointly liable.

Toledo, etc., R. Co. v. Sweeny, 8 C. C. 298; 4 C. D. 11 (1894); (aff'd by divided court, 52 O. S. 616).

Diversion of streams generally.

See *Railroad Co. v. Carr*, 38 O. S. 448 (1882).

Crawford v. Rambo, 44 O. S. 279 (1886).

C. & H. C. & I. Co. v. Tucker, 48 O. S. 41 (1891).

Section 8774. (Construction of bridges; use as toll bridge.) A railroad company may so construct its bridges as to answer the ordinary purposes of travel and business, as well as for railroad purposes, and may demand and receive such rates of toll for the passage of individuals, vehicles of all kinds, or animals, as it fixes, subject to the approval of the commissioners of the county or counties in which such bridge is erected. Rates of toll shall be uniform, shall be printed or painted, and kept conspicuously posted in or near the toll-house of the bridge, and may be revised and changed in the first week of each year. The company may compound and bargain with any person or party for the use of such bridge, by the month, quarter, or year. No company shall receive toll upon such a bridge if erected within one mile of a toll bridge previously constructed over the same stream. (R. S. Sec. 3285; May 11, 1853, 51 v. 415, § 1.)

Section 8775. (Bridging of canals or navigable rivers.) When the line of the road crosses a canal or any navigable water, the company shall file with the board of public works, the plan of the bridge, and other fixtures therefor, which shall designate the place of crossing. If the board approves such plan, it shall notify the company, in writing, of such approval. If the board disapproves such plan, or fails to approve it within twenty days from the filing thereof, the company may apply to the court of common pleas, or a judge thereof in vacation, and upon reasonable notice being given to the members of the board, upon good cause shown, the court or judge shall appoint a competent, disinterested engineer, not a resident of a county through which the road passes, to examine such crossing, and prescribe the plan and conditions thereof, so as not to impede navigation. Within twenty days from his appointment, such engineer shall make

his returns to the common pleas court of the county wherein such crossing is to be made, subject to exceptions by either party. At the next term after filing the return, the court shall examine, approve, and confirm it, unless good cause be shown against such approval. Its order of confirmation shall be sufficient authority for the erection, use, and occupancy of such bridge, in accordance with such plans. (R. S. Sec. 3317; May 1, 1852, 50 v. 274, § 20; 50 v. 205, §§ 4, 5.)

Approval of plans for a drawbridge by the board of public works and the secretary of war does not prevent the court from requiring a different motive power, where the plans approved did not disclose the motive power for moving the draw. *State v. Railway*, 24 C. C. n. s. 432 (1901).

The words "navigable waters" are used in no restricted sense; they embrace all waters within the state, which are navigable by the works of art or nature.

Works v. Junction R. R. Co., 5 McLain (U. S.) 425; 3 O. F. D. 101 (1853).

The right to cross a navigable water by a railroad bridge must be given by the sovereign power, by special or general act. Where this is not done, the board of public works can not approve the plan of a proposed bridge. The board has no power to grant leave to cross the navigable water.

Works v. Junction R. R. Co., 5 McLain (U. S.) 425; 3 O. F. D. 101 (1853).

Jurisdiction over the Miami River, see Rep. Atty. Gen. 1912, p. 1650; Rep. Atty. Gen. 1913, p. 450.

Remedy. See as to quo warranto in court of appeals.

Lake Shore, etc., Ry. Co. v. State (Sup. Ct.) 33 W. L. B. 169 (1894).

Power of congress. Under the power to regulate commerce, congress has power to prevent the obstruction of any navigable river, which is a means of commerce between any two or more states. The exercise of this great public right is not incompatible with the enjoyment of local rights. The public right consists in an unobstructed use of a navigable water connecting two or more states. The local right is to cross such water. The general commercial right is paramount to all state authority.

Lake Shore, etc., Ry. Co. v. Ohio, 165 U. S. 365 (1897).

Works v. Junction R. R. Co., 5 McLain (U. S.) 425; 3 O. F. D. 101 (1853).

See *Bridge Co. v. United States*, 105 U. S. 470; 5 O. F. D. 67 (1882).

State v. Commissioners, 7 C. C. n. s. 469; 18 C. D. 212 (1905); (dissenting opinion) 8 C. C. n. s. 169.

A sale of abandoned canal lands by the state does not revoke rights of way for railroad bridges granted under § 8775. The purchaser takes subject to the easement of the crossing road. Rep. Atty. Gen. 1913, p. 445.

Section 8776. (Height of bridges over canals.) No company shall construct over a canal any permanent bridge less than ten feet in the clear above the top water line of the canal, and the piers and abutments of such bridge must be placed so as not in any manner to contract the width of the

canal, or interfere with free passage on the tow-path. This section shall not prevent the construction or continuance of draw bridges which do not interrupt navigation. (R. S. Sec. 3317; May 1, 1852, 50 v. 274, § 20; 50 v. 205, §§ 4, 5.)

The court has no power to approve a plan for the construction of a bridge where the bridge is to be less than ten feet above the top water-line of the canal, or where the piers or abutments interfere with navigation.

State ex rel. v. Railway Co., 37 O. S. 157, 173 (1881).

Section 8777. (Certain established bridges not affected.)

All railroad bridges erected prior to May 1, 1852, over any navigable canal, feeder, slack-water improvement, river, stream, lake or reservoir, not less than ten feet in the clear above the top water line, shall remain undisturbed by the board of public works. (R. S. Sec. 3318; May 1, 1852, 50 v. 205, § 4.)

Section 8778. (Enforcement of preceding section.) If a company refuses to comply with any of the provisions of sections eighty-seven hundred and seventy-five and eighty-seven hundred and seventy-six, on being notified thereof, the attorney-general shall immediately institute proper legal proceedings, in the name of the state, against such company, for the purpose of enforcing such provisions. (R. S. Sec. 3319; May 1, 1852, 50 v. 205, § 5.)

Section 8779. (When companies must use same bridge.)

When it becomes necessary for two or more railroads to cross any of the navigable waters of this state at or near the same point, by draw or swing bridge, the companies or persons owning or controlling such roads, if practicable, shall use one and the same bridge, and approaches thereto. The right to use any such bridge and its approaches, or other similar structure, so situated and used as to make it necessary for the companies or persons owning or operating two or more roads to agree upon a common use thereof, in order to comply with this section, when such companies or persons can not so agree, may be appropriated by the company or persons owning or operating a road for which such use is desired, in accordance with the provisions of law authorizing the appropriation of private property to the use of corporations. (R. S. Sec. 3364; February 10, 1860, 57 v. 10, § 1.)

Section 8780. (Appropriation of use of joint bridge.)

The statement to be filed in such appropriation proceedings as near as may be, shall set forth the regulations according

to which the joint use of such bridge and approaches, or other structure, are to be regulated. If their reasonableness in any part be denied by the defendant in the proceedings, the court shall hear and determine the issue, and record its findings and order thereon, confirming or altering the regulations, as it deems just and reasonable, subject to exceptions and reversal for error by the court of common pleas, on petition filed for that purpose. The order fixing the regulations shall be made before the jury is impaneled to assess the compensation for the right sought to be appropriated, which shall be a sum equal to the annual value of such use, to be paid quarterly each year, in advance, while it continues. (R. S. Sec. 3365; February 10, 1860, 57 v. 10, § 2.)

This section applies to trestles. Whether a structure is a trestle or a bridge is a question of fact for the jury.

Johns v. Railway, 7 N. P. 592; 10 L. D. 348 (C. P. 1900).

DIRECTORS AND OFFICERS.

Section 8781. (Opening of transfer books in other states.)

When they deem it expedient for the interest or convenience of the company, its directors may open transfer books in any state of the United States, for the purpose of transferring stock purchased or held by persons out of this state, and employ suitable agents to keep such books, whose acts, done under the authority of this section, shall bind the company. (R. S. Sec. 3291; March 21, 1850, 48 v. 51, § 1.)

Section 8782. (Election of a vice-president.) The directors may elect from their number a vice-president, when, in their opinion, the interest or convenience of the company requires it. In case of the absence, death, resignation, or other disability of the president, the vice-president so elected shall exercise the powers and discharge the duties which belong to the office of president, until such vacancy is filled by a new election, or such disability removed. (R. S. Sec. 3292; March 29, 1856, 53 v. 36, § 1.)

The office of vice-president may be made active and independent.

Colman v. West Virginia, etc., Co., 25 W. Va. 148 (1884).

Chicago, etc., Co. v. James, 22 Wis. 194 (1867); s. c., 24 Wis. 388 (1869).

Richards v. Osceola, 79 Ia. 707 (1890).

Section 8783. (Election of a treasurer.) When, in their opinion, the interests or convenience of the company will

be promoted thereby, the directors may elect a suitable person as treasurer of the company, to be subject to such rules and regulations as they or the company prescribe. (R. S. Sec. 3293; April 7, 1857, 54 v. 103, § 1.)

Section 8784. (Number of directors may be increased or diminished.) By a vote of a majority of its stock, at any regular annual meeting of the company, it may increase the number of directors to not more than fifteen, or decrease the number before or after such increase to not less than seven. (R. S. Sec. 3294; January 14, 1875, 72 v. 17, § 3.)

A decrease or increase in the number of directors is not such a fundamental change but that it may be done by the majority.

Mower v. Staples, 32 Minn. 284 (1884).

Section 8785. (Directors may be classified at stockholders' meeting.) The stockholders of a company, whose railroad is wholly or partly within this state, at any regular meeting, or special meeting of which at least thirty days' notice has been given by publication, by an affirmative vote of those owning a majority of the stock of the company, may direct its board of directors so to classify the members thereof, by lot or otherwise, that one-third shall terminate their official term at the first annual election thereafter, one-third at the next annual election thereafter, and the remainder at the next succeeding annual election. At the first regular election succeeding such classification, when the term of the directors of the first class expires and at each succeeding annual election thereafter, the stockholders shall elect directors for three years, to take the places of those retiring, and no more. All vacancies which otherwise occur in the board shall be filled in the manner prescribed by law. (R. S. Sec. 3295; April 30, 1869, 66 v. 77, § 1.)

Section 8786. (Classification of directors.) The stockholders of a company whose road is wholly or partly within this state, at any regular annual election of directors thereof, may so classify and elect such directors that one-third thereof shall serve for one year, one-third for two years, and the remainder for three years. At each succeeding annual election thereafter the stockholders shall elect directors to take the place of those whose terms so expire. No person shall be allowed to vote for directors unless he has been a registered stockholder of the company at least thirty days prior to such election. The registry of such stock shall be made in the books kept at the principal office of the company. (R. S. Sec. 3296; April 30, 1869, 66 v. 77, § 2.)

Section 8787. (Rights of creditors in election of directors.) The provisions of the next two preceding sections also apply to companies whose bondholders or other creditors share with the stockholders in the election of directors. In such case the vote necessary to direct the classification provided for in those sections shall be the same as is required to elect directors of such company. (R. S. Sec. 3297; April 30, 1869, 66 v. 77, § 3.)

Section 8788. (Personal liability of directors.) Such directors shall be liable in their individual capacity to the stockholders for any damage sustained by them by reason of negligence, mismanagement, or unfaithfulness in the discharge of their duties; but a director may exonerate himself by entering his protest upon the record against an act done without his concurrence from which injury is feared, and forthwith publishing it for three weeks in some newspaper printed and of general circulation in the county in which is the principal office of the company. (R. S. Sec. 3314; May 1, 1854, 52 v. 91, § 3.)

Section 8789. (Who ineligible to office or appointment.) No person who is a stockholder, owner, or part owner of any express, dispatch, fast freight, or transportation company, whether incorporated or not, an object, or one of the objects, of which is the shipment of freight or the transportation of persons over any railroad in the United States, or who in any way is pecuniarily interested in a company or partnership formed for such or like purpose, shall perform the duties of, or be elected or appointed to, an office of profit or trust in a railroad company, or employed as freight or ticket agent thereof. All such persons shall be ineligible to any such office or appointment. (R. S. Sec. 3315; April 6, 1866, 63 v. 156, § 1.)

Similar acts are in force in Missouri, Pennsylvania and Wisconsin.

Employees of a freight despatch company are not "stockholders, owners or part owners." They are not interested in such company within the meaning of this section and are not disqualified from acting as directors.

Devou v. Cincinnati, etc., Co., 4 O. L. R. 313; 19 C. D. 113 (1906).

Section 8790. (Acts of ineligible persons void; forfeiture.) If any person be elected to an office, or appointed to a position, or performs duties, in violation of the next preceding section, all his official acts shall be null and void. For every day that he exercises or attempts to exercise the functions of such office or appointment, he shall forfeit and pay fifty dollars, to be recovered at the suit of any stock-

holder of the company, in its name, one-half of which shall go into the treasury of the company, and the other to the stockholder prosecuting. (R. S. Sec. 3316; April 6, 1866, 63 v. 156, § 2.)

Section 8791. (When directors may receive subscriptions in installments.) The directors of a company which has expended in the construction of its road ten per cent of its authorized capital, and has obtained actual bona fide subscriptions to its capital stock to the amount of at least twenty per cent thereof, may receive subscriptions to its capital stock, payable in such installments, dependent upon the completion of the whole or any part of its road so that cars may pass over it, as they deem expedient, and upon full payment thereof issue certificates of stock therefor. No subscriber to the stock hereby authorized shall be entitled to any of the privileges of a stockholder until his subscription is fully paid, nor for any purpose, be deemed a stockholder until the happening of the contingency upon which the installments on his subscription are made dependent. (R. S. Sec. 3298; April 15, 1857, 54 v. 133, § 3.)

If at the time a subscription is made it is unauthorized by this section, it may be a continuing offer to subscribe and become absolute when its conditions have been complied with, though it may be withdrawn at any time before such performance.

Armstrong v. Karshner, 47 O. S. 276 (1890).

Where a subscription is conditioned upon the completion and operation of the road between specified points, it is not necessary that the whole road should be completed before the subscription can be enforced.

Leshner v. Karshner, 47 O. S. 302 (1890).

The addition of the words "paid as donation" do not convert a conditional subscription to an agreement for a gift.

Leshner v. Karshner, 47 O. S. 302 (1890).

A subscriber to stock is entitled to no privileges until his subscription is fully paid; for instance, he can not vote if action is to be taken under §§ 8806 to 8808.

Railroad Co. v. Hinsdale, 45 O. S. 556 (1888).

For conditional subscriptions in general, see note to § 8630.

Section 8792. (Conditional subscriptions.) A company which has begun and partly built its road, but is unable to finish and operate it for want of means, may take subscriptions conditioned that the proceeds thereof shall not be used or applied upon the debts of the company. All money or material collected upon such subscriptions, and all material or implements purchased with such money for the construction of the track, houses, depots, and rolling stock of the company, shall be exempt from execution, or other process or proceedings for the payment of the debts of the com-

pany so long as such money, material or implements are used or designed for the construction of such track, houses, depots and rolling-stock. (R. S. Sec. 3299; April 16, 1867, 64 v. 192, § 1.)

Conditional subscriptions. See note to § 8630.

BORROWING MONEY.

Section 8793. (Mortgage bonds.) A railroad company may issue bonds, convertible or otherwise, bearing a rate of interest not exceeding seven per cent per annum, to an amount not exceeding two-thirds of its capital stock, actually subscribed, for one or more of the following purposes: Completing or extending its road, constructing branch roads, laying double or additional track, increasing its machinery or rolling-stock, building depots or shops, making improvements, paying its unfunded debts, or redeeming its bonds. It may secure the bonds so issued, by mortgage on its property, or otherwise, if authorized by the vote, in person or by proxy, of holders of a majority of the stock upon which all the installments called for by the board of directors have been paid. Such vote shall be taken at a meeting of stockholders, of which thirty days' notice shall be given. (R. S. Sec. 3286; March 14, 1876, 73 v. 25, § 5.)

Corporate mortgages and bond issues generally. See § 8705 et seq.

By consolidated railroad companies, § 8801 et seq.

By street and interurban railways, § 9121-1.

An issue of bonds by a railroad must be authorized by the public service commission.

See §§ 614-53 to 614-55.

Issue of bonds regardless of amount of capital stock, when authorized by commission, see G. C. § 614-53.

Vote of stockholders. This section does not in terms require a vote of the stockholders to give the directors authority to issue bonds. Such authority is only required for the execution of a mortgage over the corporate property.

Shoemaker v. Dayton, etc., R. Co., 19 W. L. B. 322 (1888); *aff'd*, 3 C. C. 473; 2 C. D. 270.

What property may be mortgaged.

After acquired property. Where railroad mortgages contain apt language to that effect, they attach to and cover future acquisitions of property for the use of the road.

Coopers v. Wolf, 15 O. S. 523 (1864).

Trust Co. v. Traction Co., 106 O. S. 577 (1922).

Feike v. Cincinnati, etc., Ry. Co., 14 C. C. 186; 7 C. D. 652 (1897).

Coe v. Columbus, etc., R. Co., 10 O. S. 372 (1859).

Coe v. Peacock, 14 O. S. 187 (1863).

Ludlow v. Hurd, 1 Dis. 552 (1857).

Hatry v. Painesville, etc., Ry. Co., 1 C. C. 426; 1 C. D. 238 (1886).
Maher v. Ventilating Co., 11 C. C. 381; 5 C. D. 159.
Trust Co. v. Cincinnati, etc., Ry. Co., 91 Fed. 699; 10 O. F. D. 646 (1897).

Compton v. Jessup, 68 Fed. 263; 8 O. F. D. 452 (1895).

After-acquired property clauses attach to equitable interests as well as to legal interests.

Property acquired by a consolidated company may be subject to mortgages given by constituent companies before the consolidation.

But, the mortgage does not attach to property conveyed by other constituent companies to the consolidated company, on the consolidation, in the absence of an agreement to that effect. Trust Co. v. Traction Co., 106 O. S. 577 (1922).

Where lands parallel to rights of way were acquired by the consolidated company and its lessee, for the purpose of removing tracks from the highway and straightening curves, but the removals were not completed at the time of foreclosure, all lands used or immediately useful or adapted to prospective needs become the property of the roads to which they were appurtenant and subject to the mortgages. Trust Co. v. Traction Co., 106 O. S. 577 (1922).

A railroad mortgage covering "all of the following, present and in the future to be acquired property and estate of said company" does not convey present and after acquired property generally where such description is followed by a specific reference to the property.

King v. Atlantic, etc., R. Co., 12 C. D. 551 (1886).

A conveyance of "all the right, title and interest which the said company now has or may hereafter acquire in and to its aforesaid railroad" specifies nothing and does not convey after acquired property.

King v. Atlantic, etc., R. Co., 12 C. D. 551 (1886).

Section 8772 does not operate to include an extension of line in a prior mortgage on the original line which does not, in terms, cover after acquired property.

Louisville Trust Co. v. Railway Co., 91 Fed. 699; 10 O. F. D. 646 (1897).

A railway company gave a mortgage to secure its coupon bonds, conveying all the property which it then possessed or should thereafter acquire, and subsequently executed a lease, to which the mortgagee was not a party, whereby the lessee agreed to pay the coupons at maturity, in the event the net earnings of the demised road should not be sufficient to protect the interest on the bonds. In a suit to foreclose the mortgage, held, that the lease was not after acquired property within the meaning of the mortgage.

Moran v. Pittsburg, etc., Ry. Co., 32 Fed. 878; 5 O. F. D. 712 (1887).

Where a lease is executed by a mortgagor subsequent to the mortgage, and there is no privity of estate or contract thereby created between the mortgagee and lessee, and there is no attornment by lessee to mortgagee, the mortgagee can not either before or after the mortgagor's default, demand the benefits of the lease without the consent of the lessee.

Moran v. Pittsburg, etc., Ry. Co., 32 Fed. 878; 5 O. F. D. 712 (1887).

A mortgage on "the road" of the company, "whether made or to be made, acquired or to be acquired," and all property, real or personal, "of the company, whether now owned or hereafter to be acquired, used or appropriated for the operating or maintaining the said road," is not a lien upon the real estate of the company then owned or afterward acquired which has not been used or appropriated for operating or maintaining the road.

Walsh v. Barton, 24 O. S. 28 (1873).

Hatry v. Painesville, etc., Ry. Co., 1 C. C. 426; 1 C. D. 238 (1886).

Franchise to be a corporation. A railroad company has no power to mortgage or sell its franchise to be a corporation, and a judicial sale upon mortgages executed by it would not invest the purchaser with any corporate capacity whatever.

Atkinson v. Marietta, etc., R. Co., 15 O. S. 21 (1864).

Coe v. Columbus, etc., R. Co., 10 O. S. 372 (1859).

Franchise to operate railroad. The franchise to maintain the railroad and receive compensation for transportation may be mortgaged.

Coe v. Columbus, etc., R. Co., 10 O. S. 372 (1859).

A street railway may mortgage its franchise to operate on streets.

Louisville Trust Co. v. Cincinnati, 76 Fed. 296; 10 O. F. D. 112 (C. C. A. 1896).

Rolling stock. Extra-territorial effect. A mortgage covers rolling stock, though temporarily out of the state, and a receiver may, under comity between states by an action brought in the foreign state in his own name, assert his right to the possession thereof where such right is not in conflict with the rights of citizens of such foreign state nor against the policy of its laws.

Bank v. McLeod, 38 O. S. 174 (1882).

Winslow v. Troy Iron, etc., Co., 1 Dis. 229 (1856).

Scrap. Cast-off articles. The cast-off articles, fragments and old materials, once forming part of the road, or used in its operation, still continue under the mortgage, if a proper and judicious management of the road requires that they should be recast or exchanged for new articles, for the uses of the road.

Coopers v. Wolf, 15 O. S. 523 (1864).

Construction of mortgage and bonds. Where the words or terms of a bond are equivocal or not entirely clear, the court may consider the deed of trust in connection with the bond in order to ascertain the real contract between the corporation and the bondholder.

Shoemaker v. Dayton, etc., R. Co., 18 W. L. B. 43 (1887).

A mortgage given to secure the payment of dividends to the holders of certificates of preferred stock, is an incident to the principal obligation, and the terms and purport of the certificates will be held to express the real intent of the parties, even though some of the stipulations of the mortgage may be apparently inconsistent with the intent as expressed by the certificates.

Miller v. Ratterman, 47 O. S. 141 (1890).

Interest. An interest coupon, in which no payee was designated, was held to be nonnegotiable.

Wright v. Ohio, etc., R. Co., 1 Disney 465 (1857).

But coupons payable to bearer are negotiable.

G. C. §§ 8106, 8114.

Where bonds were issued bearing interest at seven percent, per annum, payable semi-annually, and it was claimed that the corporation had no power to contract for the payment of interest either semi-annually or at any other time before the money fell due, it was held that the payment of the interest could be regulated according to the usual course of dealing in borrowing money and paying the price or compensation for its use.

Coe v. Columbus, etc., R. R. Co., 10 O. S. 372, 396 (1859).

Where interest on bonds is made payable out of net income at certain periods, a failure of income in one period does not discharge the interest, but it is payable from the income of succeeding periods.

Dayton, etc., R. Co. v. Shoemaker, 3 C. C. 473; 2 C. D. 270 (1888).

Where the mortgage provides that the bonds shall become due imme-

diately upon a default of interest for six months, it is doubtful whether a default alone, without any steps being taken by a holder to enforce the provisions, is such a dishonor as to destroy the negotiability. But where the interest is subsequently paid in full, the negotiability of the bonds is restored.

Railway Co. v. Lynde, 55 O. S. 23 (1896); *aff'd*, 172 U. S. 493.

Proceeds of sale of bonds as a trust fund. Where money is held by a corporation or its directors, arising from a sale of its mortgage bonds, and the purposes for which the bonds or their proceeds are to be used by the corporation are set forth in the mortgage, and are such as are authorized by statute, it is a trust fund to be used in good faith by the corporation for the purposes stated in the mortgage.

Columbus, etc., Ry. Co. v. Burke, 19 W. L. B. 27 (1887).

Central Trust Co. v. Burke, 1 N. P. 169; 2 L. D. 96 (1895).

Upon a proper showing the bondholders are entitled to an injunction to restrain a misuse of the funds arising from the sale of bonds.

Columbus, etc., Ry. Co. v. Burke, 19 W. L. B. 27 (1887).

Estoppel to deny validity of bonds. Where a company has paid interest and principal on bonds for several years, it may be estopped to deny the validity of the issue of the bonds.

Shoemaker v. Dayton, etc., R. R. Co., 19 W. L. B. 322 (1888).

See note to § 8705.

Negotiable notes secured by bonds. A trustee appointed by a railroad company to hold bonds as collateral security for its negotiable notes is the agent of the company and not of the holders of the notes. Notice to the trustee of defenses is not notice to bona fide holders of the notes.

Central Trust Co. v. Railway Co., 7 O. L. R. 15; 169 Fed. 466 (C. C. 1908).

Convertible bonds.

See § 8709 and note.

Where convertible bonds were issued, and the interest regularly paid, the bondholders are entitled to convert their bonds into stock, but to receive only an amount of stock equal to the principal sum of the bonds, without stock or money for dividends on the stock, not being entitled to both interest and dividends.

Sutcliffe v. Cleveland, etc., R. Co., 24 O. S. 147 (1873).

Where bonds are converted into stock, not in good faith, but for the purpose of keeping the control of the company in the hands of a board of directors, a court of equity may interfere on the ground of fraud.

Baldwin v. Hillsborough R. R. Co., 10 W. L. J. 356 (1853).

See note to § 8630, *Sales to directors and officers*.

Rights of general creditors, to unissued or undelivered bonds. Railroad mortgage bonds held by the company or its agents, for the use of the company before delivery, are not subject to execution as property of the company, nor can they be subjected to sale by proceedings in aid of execution.

Means v. Cincinnati, etc., R. Co., 2 Dis. 465 (1859).

A writ of mandamus will not be allowed to compel a corporation to issue its bonds to one of its creditors in order to obtain the benefit of a mortgage security, where the right of the creditor to such security is doubtful, and the property sought to be affected has passed into the hands of third parties as purchasers. The remedy in such case should be by a suit brought in equity against the parties whose interest it is sought to affect.

Ham v. Toledo, etc., Ry. Co., 29 O. S. 174 (1876).

Execution against railroad property. The levy of an execution upon personal property of a railroad, while in actual use, is invalid on the ground of public policy. But in general a railroad is not entitled to special immunity from process in favor of its creditors.

State v. Brimson, 46 W. L. B. 275 (Supreme Court without report, 1901).

A freight car in use in interstate commerce, and in transit into and from the state, can not be levied upon.

Buckeye Buggy Co. v. Railway, 3 O. L. R. 426; 16 L. D. 279 (C. P. 1905).

Pullman Co. v. Linke, 11 O. L. R. 64; 203 Fed. 1017 (D. C. 1913).

The execution of a mortgage by a railroad company can give no exemption to its personal property from liability for its debts that the execution of a like mortgage by an individual would not create.

Coe v. Columbus, etc., R. R. Co., 10 O. S. 372 (1859).

Coe v. Knox County Bank, 10 O. S. 412 (1859).

Coe v. Peacock, 14 O. S. 187.

See Carey v. Pittsburg, etc., R. Co., 1 W. L. M. 338 (1859).

But where the value of the entire mortgaged property is less than the amount of the mortgage, the removal and sale on execution of portions of such property may be enjoined.

Lane v. Bingham, 17 O. S. 642 (1867).

Ludlow v. Hurd, 1 Dis. 552 (1857).

Where the amount of mortgages exceeds the entire value of the mortgaged property, only nominal damages can be recovered against the sheriff for refusing to levy upon and sell the property on executions against the company.

Coopers v. Wolf, 15 O. S. 523 (1864).

See Coe v. Peacock, 14 O. S. 187 (1863).

When the property is inadequate security for the payment of mortgage debts, a judgment creditor's remedy is in equity, to subject the interest of the mortgagor to the payment of his judgment, or where the nature of his claim is such as to entitle him to have it paid out of the earnings of the company, by proceedings to appropriate so much thereof as may be necessary to the payment of the judgment.

Lane v. Baughman, 17 O. S. 642 (1867).

See Carey v. Pittsburg, etc., R. Co., 1 W. L. M. 338 (1859).

Stewart v. Railway Co., 53 O. S. 151 (1895).

FORECLOSURE.

By trustee. The trustee under a railroad mortgage is bound to recognize the rights of the holders of all bonds which are *prima facie* valid, and to act on their request to foreclose when made by the requisite number.

Central Trust Co. v. Ry. Co., 7 O. L. R. 15; 169 Fed. 466 (C. C. 1908).

A trustee under a railroad mortgage, in bringing suit to foreclose, acts for the benefit of every bondholder who may show his right to share in the proceeds of sale. The trustee is not incapacitated from maintaining the suit although there is a controversy between bondholders as to distribution of the proceeds, and although the trustee represents certain of the bondholders in a different capacity.

Central Trust Co. v. Railway Co., 7 O. L. R. 15; 169 Fed. 466 (C. C. 1908).

Where bonds are payable to the trustee or to bearer, in a suit for foreclosure the trustee may plead a separate cause of action praying for personal judgment. *Trust Company v. Traction Co.*, 106 O. S. 577 (1922).

Suit by holder of non-negotiable coupons to compel trustee to foreclose.

See *Wright v. Ohio, etc., R. Co.*, 1 Dis. 465 (1857).

A trustee, holding bonds for the benefit of others, can not maintain an action of deceit to recover damages suffered by his cestuis que trustent by reason of a deception practiced upon them in connection with their purchase of the bonds, nor can he maintain an equitable action on the ground of fraud.

Raymond v. Spring Grove, etc., Ry. Co., 21 W. L. B. 103 (1889).

By one bondholder on behalf of all. Where no provision is contained in the mortgage or bonds limiting the right of foreclosure to the trustee, one bondholder may bring suit on behalf of all, under G. C. § 11257. Where a special master was appointed, all who proved their claims before him were held bound by the judgment as if they had been formally made parties.

Carpenter v. Canal Co., 35 O. S. 307.

A suit by one bondholder to enforce an equitable lien of railroad equipment bonds, "on his own behalf as well as for all who may come in and contribute to the expense" is not a class suit under § 11257 and does not bind those who do not come in, unless they had notice and opportunity and refused to do so.

Adelbert College v. Toledo, etc., Ry. Co., 3 N. P. 15; 5 L. D. 14 (1896); s. c., 74 O. S. 483; reversed, 208 U. S. 38, 609 (1908).

In federal court. A suit in a federal court to foreclose a mortgage on the property of a railroad corporation, operates as constructive notice throughout the district, and all persons acquiring an interest in or lien on any part of the property during the pendency of the suit will be bound by the decree and sale made thereunder; the purchaser will take the property discharged from all such liens and interests; though the persons obtaining them be not parties to the suit, they must seek satisfaction from the proceeds of the sale, to reach which they should become parties, and bring their claims to the attention of the court by appropriate pleadings.

Stewart v. Railway Co., 53 O. S. 151 (1895).

See *Railway Co. v. Lynde*, 55 O. S. 23 (1896); aff'd, 172 U. S. 493.

The pendency of a foreclosure suit in federal court, in which the decree saves the rights secured by a prior mortgage, does not interfere with the negotiation of bonds secured by such prior mortgage or impair in any degree the lien thereby created.

Railway Co. v. Trust Co., 172 U. S. 493 (1899); affirming, 55 O. S. 23.

Effect of federal court proceeding on power of state courts.

Where the property is in the possession of the federal court, a state court has no power to order a sale of the property, or, as an essential part of the order of sale, to adjudge that certain equipment bonds are a lien upon the property.

Wabash Railroad Co. v. Adelbert College, 208 U. S. 38, 609 (1908); reversing 74 O. S. 483.

A judgment recovered in a state court against a railroad company by a creditor who was not made a party to the foreclosure suit in federal court, remains unaffected by the decree and sale. Such judgment becomes a lien on the real property owned by the company at the time of its recovery, in the county where rendered, including lands acquired for the roadway, right of way, depots and other purposes of the company, and continues to be so against the property in the hands of the purchaser at the foreclosure sale.

Stewart v. Railway Co., 53 O. S. 151 (1895).

Sale must be of entire road. Because of the interest of the public

in the operation of railroads, a railroad must, on a judicial sale, be sold in entirety and not in sections.

King v. Atlantic, etc., R. Co., 12 C. D. 551 (1886).

Stewart v. Railway Co., 53 O. S. 151 (1895).

An exception to this rule exists where the property subject to the lien is independent, as a lot of land not actually used in operation, the sale of which will not interfere with operation.

King v. Atlantic, etc., R. Co., 12 C. D. 551 (1886).

Injunction. An injunction may be allowed restraining the removal and sale on execution of portions of the mortgaged property of a railroad company on the application of the mortgagees, when the whole of the property is admitted to be inadequate security for the payment of the mortgage debts.

Lane v. Baughman, 17 O. S. 642 (1867).

Ludlow v. Hurd, 1 Dis. 552 (1857).

Possession by trustee. A power inserted in a mortgage authorizing the mortgagee, upon default of payment, to take possession of the railroad and other property connected therewith, and to use or sell the same, must be exerted upon all the property mortgaged; and does not authorize the mortgagee to detach portions thereof, either from the possession of the company or an officer succeeding to its rights by a valid levy.

Coe v. Peacock, 14 O. S. 187 (1863).

See Goodman v. Railroad Co., 2 Dis. 176 (1858).

Subrogation. The purchaser at a foreclosure sale may, when necessary for his protection, be subrogated to the rights of the mortgagee.

Stewart v. Railway Co., 53 O. S. 151 (1895).

Mill Creek, etc., Ry. Co. v. Carthage, 18 C. C. 216; 9 C. D. 833 (1899); aff'd, 62 O. S. 636.

Priorities. Where bonds, secured by one mortgage to a trustee, are issued at different times, the lien of all bonds, outstanding in the hands of bona fide holders for value, are equal in priority. The lien of each bond dates from the recording of the mortgage.

Railway Co. v. Lynde, 55 O. S. 23 (1896); aff'd, 172 U. S. 493.

Where interest on bonds is made payable out of net income, the corporation may be enjoined from expending its net income for other purposes.

Dayton, etc., R. Co. v. Shoemaker, 3 C. C. 473; 2 C. D. 270 (1888).

A claim for ties necessary to the preservation of a railroad, finished within six months of the appointment of a receiver, is not superior to a mortgage recorded prior to the making of the contract for furnishing the ties.

Gregg v. Metropolitan Trust Co. (U. S. Sup. Ct. 1905); 15 O. F. D. 21; affirming, 124 Fed. 721; 14 O. F. D. 65; 109 Fed. 220; 13 O. F. D. 624.

A railroad mortgage covering after acquired property has priority over a mechanic's lien for labor and materials under § 8345, which was enacted after the execution and recording of the mortgage.

Reed v. Ginsburg, 64 O. S. 11 (1901).

A claim against a railroad company for money advanced to pay interest and taxes is not entitled to an equitable lien as against mortgagees.

Coe v. Columbus, etc., R. Co., 10 O. S. 372 (1859).

Where a party contracts to sell land to a railway company, but retains the legal title pending payment, it is sufficient to put subsequent mortgagees of the road upon inquiry as to his rights.

Dayton, etc., R. Co. v. Lewton, 20 O. S. 401 (1870).

Priorities between vendor's lien and mortgage.

Hatry v. Railway Co., 1 C. C. 426; 1 C. D. 238; aff'd, 23 W. L. B. 281.

Between mortgage and lien under conditional sale agreement.

See notes to §§ 9060, 9061.

Duty of purchaser to operate railroad. Where a railroad company, organized under the laws of Ohio with power of eminent domain, has constructed and operated a line of railroad, portions of which were along and across public highways or other railroads, such railroad becomes impressed with a public interest. A purchaser, either at judicial sale or otherwise, has no right to operate it as a private road, to the exclusion of the public. *State v. Black Diamond Co.*, 97 O. S. 24 (1917).

A purchaser of a street railway at judicial sale assumes the obligation of the original grantee of its street franchise to operate the road. *Gress v. Fort Loramie*, 100 O. S. 35 (1919).

The purchaser at judicial sale is not personally obligated to pay the mortgage debt, but it is his duty to repair and restore the property, and if he neglects such duty, any accumulated net earnings may, on foreclosure, be ordered applied to such purpose, and, if not so expended, should be distributed to the mortgagee in the amount and to the value of the accrued depreciation. *Trust Co. v. Traction Co.*, 106 O. S. 577 (1922).

Miscellaneous. The title to rolling stock may be determined in the foreclosure suit.

Central Trust Co. v. Ohio Central Ry., 15 O. F. D. 843 (C. C. 1898).

In federal court, the court may order a sale before the final determination of the validity and amount of bonds held by each holder, and it is a recognized practice to postpone the final determination of such questions until after the sale. Petitioners who desire to contest the validity of certain bonds will not be allowed to intervene before the sale, but will be remanded for hearing before the master.

Central Trust Co. v. Railway Co., 7 O. L. R. 15; 169 Fed. 466 (C. C. 1908).

A trustee appointed by a railroad company to hold mortgage bonds pledged as security for its negotiable notes is the agent of the company only. Where such trustee is a party to a suit to foreclose the mortgage, in a different capacity, the note holders are not thereby made parties by representation.

Central Trust Co. v. Railway Co., 7 O. L. R. 15; 169 Fed. 466 (C. C. 1908).

Section 8794. (Aggregate indebtedness shall not exceed capital stock.) A railroad company may borrow money, at not exceeding seven per cent per annum interest for any purpose required in its business, execute bonds or promissory notes therefor in sums of not less than one hundred dollars, and secure payment thereof by a pledge of its property and income. The aggregate indebtedness authorized by this and the next preceding section shall not exceed the amount of the capital stock of the company. (R. S. Sec. 3287; May 1, 1852, 50 v. 274, § 14.)

See notes to §§ 8793, 8797 and 8705.

The power to mortgage income, conferred by this section, includes power to mortgage the property which produces the income. *Trust Co. v. Traction Co.*, 106 O. S. 577, 615 (1922).

Distribution of income on mortgage foreclosure. *Ib.*

The income which railway corporations are authorized to pledge is their net income, not their gross earnings. It is therefore the right and duty of these companies to apply their earnings, first, to pay for all services rendered by laborers, agents and officers; for taxes, machinery, fuel, expenses of maintaining and operating their roads, and for liabilities growing thereout. Second, to pay interest on mortgages. Third, to pay liens in the order of priority.

Carey v. Pittsburg, etc., R. Co., 1 W. L. M. 338 (1859).

See *McCormack v. Central Ohio R. Co.*, 3 W. L. G. 218 (1859).

Darst v. Pittsburg, etc., R. Co., 4 W. L. G. 377 (1859).

Railroad Co. v. Shoemaker, 3 C. C. 473; 2 C. D. 270 (1888).

A court of equity, upon application of an income bondholder for himself and others, should take cognizance of the trust, and restrain the corporation from diverting the funds, to which alone he and his associates may look for the payment of their interest.

Shoemaker v. Dayton, etc., R. R. Co., 18 W. L. B. 43; 3 C. C. 473 (1887).

Carey v. Pittsburg, etc., R. Co., 1 W. L. M. 338 (1859).

See *Darst v. Pittsburg, etc.*, R. Co., 4 W. L. G. 377 (1859).

One lien may be put on the property after another until bonds are executed to the amount authorized and the power exhausted.

See *Coe v. Columbus R. R. Co.*, 10 O. S., 372, 400 (1859).

Loan in excess of capital stock.

See §§ 8705, 614-53.

Railway companies have general power to issue bonds secured by mortgage and where such bonds are issued in excess of the amount allowed by law, there can be no recovery on the bonds against the individual stockholders and directors who caused the issue.

Raymond v. Spring Grove, etc., Ry. Co., 21 W. L. B. 103 (1889).

Estoppel to deny validity of issue. Where the stock of a railway company is irregularly increased, and bonds are issued based upon such increase in stock, both the corporation and the stockholders are estopped to deny the validity of the issue after they have acquiesced in the same for three years.

Farmers Trust Co. v. Toledo, etc., Ry. Co., 67 Fed. 49; 9 O. F. D. 230 (1895).

Kreisser v. Ashtabula, etc., Co., 2 C. C. n. s. 597; 14 C. D. 313 (1901).

Section 8795. (How mortgage or pledge made.) Such mortgage or pledge may be by a deed of mortgage or other instrument in writing, executed by the company, for the purpose of securing payment of money loaned to it, or the notes, bonds, or other evidences of indebtedness issued by the company, and may include both its personal and real property. (R. S. Sec. 3288; February 9, 1853, 51 v. 332, § 1.)

Section 8796. (Where mortgage recorded.) It shall be sufficient record of such mortgage or instrument, if it be recorded in the office of the recorder of deeds in each

county wherein the real or personal property therein described is situated or employed. So recorded, it shall be a good and substantial lien upon all of such property, from the date of its record in each of such counties. (R. S. Sec. 3289; February 9, 1853, 51 v. 332, § 2.)

The lien of all bonds, in the hands of bona fide holders, secured by one mortgage, but issued at different times, dates from the recording of the mortgage.

Railway Co. v. Lynde, 55 O. S. 23 (1896); aff'd, 172 U. S. 493.
See Bank v. Brotherton, 78 O. S. 173 (1908).

A recorded mortgage given by a railroad company on its roadbed and other property, creates a lien whose priority can not be displaced thereafter either directly by a mortgage given by the company, or indirectly by a contract between the company and a third party for the erection of buildings or other works of original construction.

Toledo, etc., R. R. Co. v. Hamilton, 134 U. S. 296; 6 O. F. D. 537 (1890).

A creditor having been permitted to levy an execution upon a part of the personal property, including a portion acquired subsequently to the date of both second and third mortgages, but this levy having been made after the action to foreclose was brought, and while the property was in the hands of a receiver appointed in the case, he is not entitled to a preference over the equitable second mortgage.

Coe v. Columbus, etc., R. Co., 10 O. S. 372 (1859).

Where a mortgage is defective in its execution, and therefore void under our laws, it is good as against a subsequent mortgage which is made subject to it.

Coe v. Columbus, etc., R. Co., 10 O. S. 372 (1859).

Section 8797. (Disposition of securities by directors.)

The directors of the company may sell, negotiate, mortgage, or pledge its own bonds or notes, as well as notes, bonds, scrip, or certificates for the payment of money or property which the company receives as donations, or in payment of subscriptions to the capital stock, or for other dues of the company, at such times and in such places, either within or without the state, and at such rates and for such prices, not less than seventy-five cents on the dollar, as, in their opinion will best advance its interests. If such notes or bonds are thus sold at a discount, without fraud, the sale shall be as valid in every respect, and the securities as binding for the respective amounts thereof, as if they were sold at their par value. (R. S. Sec. 3290; December 15, 1852, 51 v. 286, § 1; March 14, 1876, 73 v. 25, § 5.)

A pledge of bonds to secure a debt of less than 75% of their par is invalid to the extent of the excess. Trust Co. v. Railway, 211 Fed. 515 (D. C. 1914).

Under a Wisconsin statute, corresponding in some respects to § 8797, it was held that bonds sold for less than 75% of par were valid in the hands of bona fide purchasers without notice, who were entitled to enforce them for the full amount. In re Footville Co., 229 Fed. 698 (C. C. A. Wis. 1916).

Character of transaction—sale or loan. The giving of a guaranty of bonds is to be looked to in determining whether the real transaction is a bona fide sale or a disguised loan. If a sale, the guaranty passes as an incident, and is, in equity, assignable to subsequent purchasers of the bonds.

Bank of Ashland v. Jones, 16 O. S. 145 (1865).

See Junction R. R. Co. v. Bank, 12 Wallace (U. S.) 226 (1870).

When a transaction would otherwise be a sale by a railroad corporation of its own bonds, the fact that their payment is guaranteed by the directors in their individual capacities does not necessarily make the transaction a loan.

Bank of Ashland v. Jones, 16 O. S. 145 (1865).

Effect on usury laws. In so far as §§ 8797 and 8794 permit railroad companies to borrow money at a rate of interest exceeding 8 percent, their effect is to exempt railroad companies from the general usury statute; and notes or lease warrants executed by a railroad company for deferred payments on equipment purchased conditionally, and which were payable monthly as rental, the title to the equipment to vest in the company on their full payment are not usurious, though their amount is greater than the stated value of the equipment with 8 percent interest until maturity, but not greater than would have been required if they had borne 7 percent interest, and had been discounted at 75 percent of par.

Metropolitan Trust Co. v. Equipment Co., 108 Fed. 913; 13 O. F. D., 643; s. c., 93 Fed. 702.

Where one contracted to perform certain services in the reorganization of a railway company, for which he was to receive certain amounts of bonds and stock in the reorganized company, it being claimed that the bonds were issued for less than 75 percent of their par value, and were therefore void under this section; held, that the stock should be taken at its actual, and not at its par, value, in computing the amount received by the company for the bonds.

Continental Trust Co. v. Toledo, etc., R. R. Co., 86 Fed. 929 (1898); s. c., 95 Fed. 497 (1899); 82 Fed. 642 (1897).

Before a sale of bonds can be declared invalid, as in contravention of the settled policy of the state where made, the repugnancy must be plain and substantial. The fact that bonds sold here bear a higher rate of interest than may be prescribed for similar bonds issued under the authority of this state, but which are authorized to be sold at any price, creates no repugnancy.

Bank of Ashland v. Jones, 16 O. S. 145 (1865).

A corporation having power to sell its bonds at less than par may exchange them for iron rails.

Coe v. Columbus, etc., R. Co., 10 O. S. 372 (1859).

Sale in foreign state. A corporation of a state, authorized to raise money by the sale of its bonds, may itself sell the bonds directly, either within or without the state, and such transaction will not be regarded as a loan.

Bank of Ashland v. Jones, 16 O. S. 145 (1865).

Foreign corporations. The law of Ohio authorizing railroad companies to sell their own bonds and notes at such prices as they may deem expedient, is extended by comity to the companies of other states authorized to transact business in Ohio.

Junction R. R. Co. v. Bank, 12 Wallace (U. S.) 226 (1870).

In McGregor v. Covington, etc., R. R. Co., 1 Dis. 509 (1857), it was held that this section applies only to domestic corporations, and a sale of bonds by a foreign corporation at less than par is usurious.

Authority of officers to sell bonds.

See note to § 8705.

Section 8798. (Securities sold to directors; when void.)

All capital stock, bonds, notes, or other securities of such a company, purchased of it by a director thereof, either directly or indirectly, for less than par value, shall be null and void. (R. S. Sec. 3313; April 27, 1872, 69 v. 173, § 2.)

This section applies only to stock securities, etc., issued by a company of which the purchaser is a director. It does not apply to securities issued by one company and merely guaranteed by another company of which the purchaser is a director.

Railway Co. v. Kleybolte, 80 O. S. 311 (1909); affirming 5 N. P. n. s. 536; 18 L. D. 141.

The words "null and void" in this section are used in the sense of "voidable."

Toledo, etc., R. Co. v. Continental Trust Co., 95 Fed. 497; 13 O. F. D. 86 (C. C. A. 1899).

This section applies only to original sales, and does not apply to a subsequent purchase by a director from the original purchaser, although the original sale was for less than par.

Toledo, etc., R. Co. v. Continental Trust Co., 95 Fed. 497; 13 O. F. D. 86 (C. C. A. 1899).

Continental Trust Co. v. Toledo, etc., R. Co., 86 Fed. 929 (1898).

The issue of bonds to a syndicate of which the directors are members, for less than par, is in violation of this section.

Union Trust Co. v. Railway, 17 W. L. B. 176 (1887).

But such bonds are valid in the hands of bona fide purchasers.

Union Trust Co. v. Railway, 17 W. L. B. 176 (1887)

Railway Co. v. Lynde, 55 O. S. 23 (1896).

And the bona fide purchaser of such bonds is entitled to a lien under the mortgage.

Railway Co. v. Lynde, 55 O. S. 23 (1896).

Contra, Union Trust Co. v. Railway, 17 W. L. B. 176 (1887).

Where bonds have been purchased by a director for less than par, and the company has paid interest regularly for a long time, it can not repudiate the transaction without returning to the director the consideration paid.

Shoemaker v. Dayton, etc., R. R. Co., 19 W. L. B. 322 (1888).

Duty of directors. It is the duty of directors to use their best efforts to advance the value of the stock of their company, to restore, if lost, confidence therein, and to advise holders of the stock of its real value; and not by combinations and arrangements place themselves in a position of using their superior knowledge of its value to depress such value and purchase large quantities of stock at prices far below its real value.

Cincinnati, etc., R. Co. v. Duckworth, 2 C. C. 518; 1 C. D. 618 (1887).

Section 8799. (Narrow-gauge railroad may issue second mortgage bonds.) A railroad company having a gauge not exceeding three feet, known as a narrow-gauge road, incorporated under the laws of this state, having at least fifty miles of completed road, and not exceeding six thousand dollars per mile of first mortgage bonds issued for each mile

completed, for the purpose of funding its floating debt, or for the completion of its unfinished proposed line of road, or for the purchase of rolling stock, or for the erection of repair shops, or for the purchase of supplies necessary for the operation of such road, or for any or all of such purposes, is authorized to issue its second mortgage bonds, bearing a rate of interest not exceeding seven per cent per annum, secured by a second mortgage upon its entire property, real and personal, and its franchise, for a sum not exceeding two-thirds the amount of its authorized capital stock, and sell them at such time and places within or without the state, and at such rate as the directors of the company deem for its best interest. (77 v. 164, § 1; April 10, 1880; R. S. Sec. 3286-1.)

Section 8800. (How bonds and mortgage authorized.)

Such issue of bonds and mortgage must be authorized by a vote, either in person or by proxy, of a majority of the holders of paid up stock. But previous to taking such vote thirty days' notice shall be given to the stockholders of the company, by publication in a newspaper of general circulation in each and every county through which the line of road is operated. (77 v. 164, § 1; April 10, 1880; R. S. Sec. 3286-1.)

Section 8801. (When company may borrow money.)

A railroad company organized under the laws of this state, or which is or shall be consolidated with other companies, as hereinafter in this title provided, at a meeting of its stockholders, called as hereinbefore provided, instead of issuing preferred stock as provided in section eighty-eight hundred and seventeen may provide for borrowing money to locate, construct and equip its proposed line of railway, or for the purpose of leasing or purchasing and equipping branch or connecting roads constructed or in process of construction, not exceeding ten miles in length, or for redeeming or exchanging any of its previously issued bonds, or for funding its floating debt, or for any or all of such purposes, in such an amount as it deems necessary, not exceeding its authorized capital stock. (R. S. Sec. 3309a; April 14, 1880, 77 v. 206; April 19, 1881, 78 v. 230; March 13, 1883, 80 v. 55; March 20, 1884, 81 v. 57; April 11, 1890, 87 v. 181; March 10, 1892, 89 v. 82; April 27, 1896, 92 v. 415.)

Section 8802. (Bonds in excess of capital, when lawful.)

Railroad companies formed by consolidation of one or more companies of this state or of this state with one or more

companies of other states as hereafter in this title provided, may issue bonds in excess of such capital stock at such rates of interest as may be agreed upon between the respective parties, not exceeding seven per cent per annum, payable semiannually or quarterly, as they direct, and may execute and issue securities therefor, and to secure the payment thereof, pledge the entire property and net income of such company by mortgage or otherwise. (R. S. Sec. 3309a; April 27, 1896, 92 v. 415; March 10, 1892, 89 v. 82; April 11, 1890, 87 v. 181; March 20, 1884, 81 v. 57; March 13, 1883, 80 v. 55; April 19, 1881, 78 v. 230; April 14, 1880, 77 v. 206.)

Section 8803. (Bonds of consolidated railroad.) A railroad company formed by the consolidation of two or more railroad companies existing under the laws of this state or by the consolidation of one or more companies created by or existing under the laws of this state and any other state or states, with a railroad company or companies of this state or any other state, from time to time, if authorized by the vote in person or proxy of holders of two-thirds of the paid-up stock of such consolidated company present and voting at meetings of stockholders, called as aforesaid, may issue its bonds, convertible or otherwise, into stock, bearing a rate of interest not exceeding six per cent per annum, for one or more of the following purposes: Paying, redeeming or funding debts or obligations assumed, incurred or created by it or either of its predecessors or constituent companies, compromising claims made against it or either of its predecessors or constituent companies, purchasing the whole or a part of any railroad held by it under lease to, or operating contract with it or either of its predecessors or constituent companies acquiring the whole or a part of the stock or bonds of any company owning a railroad held by such consolidated company under lease or operating contract, acquiring the whole or any part of the bonds, notes or other obligations of any other railroad company of this or any other state, the whole or a majority of whose capital stock is held by such consolidated company, completing, extending, improving, maintaining or operating its road, branches or lines, held under lease or contract, laying double or additional track, purchasing rolling stock, building depots, elevators or shops, and generally for any purpose needed in its business, and if the directors so determine, may secure such issue or issues of bonds by mortgage or pledge of its real or personal estate, franchise or income. (R. S. Sec. 3309a; April 14, 1880, 77 v. 206; April 19, 1881, 78 v. 230; March

13, 1883, 80 v. 55; March 20, 1884, 81 v. 57; April 11, 1890, 87 v. 181; March 10, 1892, 89 v. 82; April 27, 1896, 92 v. 415.)

See notes to §§ 8793, 8794.

Application of section to street railways, before adoption of General Code.

See *Massillon Bridge Co. v. Cambria Iron Co.*, 59 O. S. 179 (1898)

Section 8804. (Form of disposition of such securities.)

Such securities may be expressed in dollars or in the currency of the country where disposed of and be sold upon such terms, at such prices as are agreed upon between the respective parties not inconsistent with the laws of this state. The proceeds of their sale shall be applied only as now required by law. (R. S. Sec. 3309a; April 27, 1896, 92 v. 415; March 10, 1892, 89 v. 82; April 11, 1890, 87 v. 181; March 20, 1884, 81 v. 57; March 13, 1883, 80 v. 55; April 19, 1881, 78 v. 230; April 14, 1880, 77 v. 206.)

Section 8805. (Articles of incorporation may provide for division and classification of capital stock.) At its formation, in its articles of incorporation, a railroad company may provide for the division of its capital stock into common stock and classes of preferred stock, by stating therein the amount of each kind and class of stock, the par value of the respective shares thereof, and the vote which shares of each class shall have. Such articles also may prescribe other terms and conditions of such preferred stock not inconsistent with law. (R. S. Sec. 3309b; April 2, 1891, 88 v. 267.)

See §§ 8817 and 8667 to 8671 and notes.

CONNECTING LINES.

Section 8806. (Subscription to aid another company.)

A company may aid another in the construction of its road, by means of subscription to its capital stock, or otherwise, for the purpose of forming a connection of the roads of the companies, if the road of the company so aided will not when constructed form a competing line. (R. S. Sec. 3300; March 14, 1882, 79 v. 35; R. S. 1880, § 3300; April 15, 1873, 70 v. 129, § 24; May 1, 1852, 50 v. 281.)

Purchase by mining, etc., company of stock in transportation company.

See § 10138.

This section does not apply to interurban railways. *Troy Trust Co. v. Railway*, 18 N. P. n. s. 298 (1915).

What roads are competing.

See note to § 8807.

POWER TO ACQUIRE STOCK IN OTHER CORPORATIONS.

Generally under § 8683. Section 8683 applies to railroad companies. Its provisions are not inconsistent with the provisions of §§ 8806 and 8809 but are cumulative.

Pollitz v. Commission, 96 O. S. 49 (1917).

Mannington v. H. V. Ry. Co., 8 O. L. R. 451, 476-480; 183 Fed. 133.

State v. H. V. Ry. Co., 12 C. C. n. s. 49, 59; 21 C. D. 175 (1909).

Under § 8683 a railroad company may acquire stock in corporations which are (1) kindred; (2) not competing and (3) when the result of the purchase is not the formation of a trust.

Mannington v. H. V. Ry. Co., 8 O. L. R. 451, 476; 183 Fed. 133 (1910).

Stock in competing railroads can not be acquired.

State v. H. V. Ry. Co., 12 C. C. n. s. 49, 145; 21 C. D. 175 (1909).

Mannington v. Ry. Co., 9 N. P. n. s. 641; 20 L. D. 468 (1910). Removed to U. S. Court, 183 Fed. 133; 8 O. L. R. 451.

A foreign corporation may own stock in kindred but not competing Ohio corporations, when authorized by the laws of its home state, and not prohibited by statute in Ohio.

Mannington v. H. V. Ry. Co., 8 O. L. R. 451, 481 to 484; 183 Fed. 133 (1910).

Smith v. Newark, etc., R. Co., 8 C. C. 583, 591 (1894).

Under § 8806. This section authorizes only subscriptions to or purchases of stock to aid the construction of a railroad. It does not authorize a purchase of stock from stockholders of another railroad company, the road of which has been completed.

Columbus, etc., Ry. Co. v. Burke, 19 W. L. B. 27 (1887).

State v. H. V. Ry. Co., 12 C. C. n. s. 49, 60; 21 C. D. 175 (1909).

Stock in mining company. This section does not authorize a railroad company to purchase stock in a mining company.

Columbus, etc., Ry. Co. v. Burke, 19 W. L. B. 27 (1887).

A railroad company and a coal mining company are not "kindred" corporations under § 8683. A railroad company has no power to acquire stock in a coal mining company, especially to acquire or hold a controlling interest.

State v. H. V. Ry., 8 Ohio App. 450; 28 O. C. A. 241 (1917).

State v. H. V. Ry. Co., 12 C. C. n. s. 49, 59; 21 C. D. 175 (1909).

That a coal mining company has power to construct a railway from its mines to a railroad or other outlet does not constitute the mining company a railway or kindred company.

State v. H. V. Ry. Co., 12 C. C. n. s. 49; 21 C. D. 175 (1909).

Stock in miscellaneous corporations. Bridge company, § 9315. Union depot company, § 9163. Elevator company, § 10173.

Aid by traffic guaranty and purchase or guaranty of bonds. Aid may be extended by a traffic guaranty and purchase of bonds.

O. & M. R. Co. v. Short, 3 W. L. B. 1143 (1879).

Or by a guaranty of bonds.

Zabriskie v. Railroad Co., 23 How. (U. S.) 381; 3 O. F. D. 562.

A railroad company which has purchased stock in another company, as authorized by § 8683, and has in good faith, for protection of its own interests, acquired bonds issued by such other company, may, in order to sell the bonds for an adequate price, guarantee their

payment. But it has no power to enter into a joint contract, with other guarantors, to guarantee an entire bonds issue of which it owns only a part. *Pollitz v. Commission*, 96 O. S. 49 (1917).

Abandonment of road to which donations have been made. Construction of parallel line. A railroad company which has received from private parties, donations of lands, subscriptions of stock, and payments in money, in consideration that it should locate its road at a particular place, and allow private side track and warehouse privileges in connection therewith, will not be permitted to effectuate a change in fact (though not in name) of the line of its road away from such place, by organizing a new corporation and constructing a new road parallel with its old one, under a different charter, and permitting its old line to go to decay, without compensating the parties with whom it has contracted as aforesaid. *Chapman v. Mad River, etc., R. R. Co.*, 6 O. S. 119 (1856).

Action by stockholder to enjoin acquisition of stock. Venue and parties defendant. An action by a stockholder in a railroad company to enjoin the unlawful acquisition of stock in other corporations must be brought in a county in which jurisdiction may be acquired over the railroad company. The other corporations are not proper parties defendant. *Westfall v. Lake Shore, etc., Ry.*, 13 N. P. n. s. 217; 22 L. D. 75, 397 (C. P. 1910).

Section 8807. (Lease or purchase of another railroad.) A company may lease or purchase any part or all of a railroad constructed, or in course of construction by another company, if the lines of their roads are continuous or connected, and not competing, upon terms agreed upon between the companies. After such purchase the purchasing company shall be vested with all the rights and powers in respect to the location, construction, completion, and operation of such railroad, and of branches thereto of the company from which it was purchased, including the power to acquire and appropriate property therefor, and be subject to all the duties, obligations, and restrictions of such company. (R. S. Sec. 3300; March 14, 1882, 79 v. 35; R. S. 1880, § 3300; April 15, 1873, 70 v. 129, § 24; May 1, 1852, 50 v. 281.)

Sale of road owned by two or more companies, § 9047 et seq.
Power to sell road, § 9054 et seq.

Connected roads. Two railroad companies owning lines of railroad connected only by other railroads, which such companies hold by lease, are not connected.

State v. Vanderbilt, 37 O. S. 590 (1882).

Where roads are connected by the tracks of a union depot and terminal company, in which each has a proprietary interest, they are connecting lines within the statute.

See *Burke v. Cleveland, etc., Ry. Co.*, 22 W. L. B. 11 (1889).

State v. H. V. Ry. Co., 12 C. C. n. s. 145, 151 (1909).

D. & U. Ry. Co. v. Ry. Co., 6 C. C. n. s. 537, 543; 15 C. D. 705 (1902); aff'd, 67 O. S. 523.

Competing roads. Where the lines of two railroad companies are in their general features parallel they are competing roads.

State v. Vanderbilt, 37 O. S. 590 (1882).

State v. H. V. Ry. Co., 12 C. C. n. s. 49, 66, 153; 21 C. D. 175 (1909).

Chapman v. Mad River, etc., R. R. Co., 6 O. S. 119 (1856).

But where only an inconsequential part of the lines are parallel, the roads are not competing.

State v. Railway, 12 C. C. n. s. 49, 66; 21 C. D. 175 (1909).

D. & U. Ry. v. Railway, 6 C. C. n. s. 537; 15 C. D. 705 (1902); aff'd, 67 O. S. 523.

Roads running at right angles from point of connection can not be said to be competing "in their general features or from a geographical standpoint;" although there may be incidental competition on through or seaboard business.

Burke v. Cleveland, etc., Ry. Co., 22 W. L. B. 11 (1889).

Roads may be competing though they reach competing points by trackage arrangements with other lines.

Hafer v. Cincinnati, etc., R. R. Co., 29 W. L. B. 68 (1893).

Or by virtue of connections.

State v. H. V. Ry. Co., 12 C. C. n. s. 145, 152 (1909).

Roads may be competing though they do not actually cut rates.

Hafer v. Cincinnati, etc., R. R. Co., 29 W. L. B. 68 (1893).

No road or line may be deemed competing until constructed.

Mannington v. H. V. Ry. Co., 183 Fed. 133; 8 O. L. R. 451; 16 O. F.

O. 552 (C. C. Ohio 1910); compare s. c., 9 N. P. n. s. 641; 20

L. D. 468 (C. P. 1910).

Section 9054 does not authorize a railroad to acquire an uncompleted road which is parallel and naturally competing in character.

State v. Railway Co., 13 C. C. n. s. 145; 22 C. D. 147 (1910).

Proof of illegal control of competing railroad. The control and management by a railroad of a competing road, may be shown by the circumstances. A unity of stockholding interests, together with unity of management pursuant to an established plan, is sufficient proof.

State v. H. V. Railway, 12 C. C. n. s. 49; 21 C. D. 175 (1909).

LEASE.

In the absence of statute, a railroad company has no authority to lease its line, if the contract lessens its obligations to the public.

Quigley v. Toledo Co., 89 O. S. 68 (1913).

A lease for more than three years must be acknowledged.

Ohio, etc., R. Co. v. Indianapolis, etc., R. Co., 5 A. L. Reg. n. s. 733 (1866).

The leasing of its right of way is not evidence of the abandonment of its corporate purposes and does not impair the right of a railroad company to appropriate property

Cincinnati, etc., R. Co. v. Murray, 1 N. P. n. s. 301; 48 Bull. 877 (1903).

A condition in a lease, prohibiting the lessee from receiving for transportation property from certain connecting roads, is a condition subsequent which is void as against public policy.

Metropolitan Trust Co. v. Columbus, etc., Ry. Co., 95 Fed. 18 (1899).

Prior to the act of March 14, 1882, only constructed roads could be leased or purchased.

Railroad Co. v. Hinsdale, 45 O. S. 556 (1888).

A contract which, owing to defects in its execution, is invalid as a lease may be valid as a license.

D. & U. Ry. Co. v. Railway Co., 1 N. P. n. s. 577 (1900); aff'd, 6 C. C. n. s. 537; 15 C. D. 705 (1902); 67 O. S. 523.

A foreign corporation having no charter from the state of Ohio, authorizing it to construct and operate a railroad in this state, can not, by a transfer of a portion of a railroad already constructed in the state by legal authority, acquire a right to use and operate such railroad within this state.

Ohio, etc., *R. Co. v. Indianapolis, etc., R. Co.*, 5 A. L. Reg. n. s. 733 (1866).

See § 8814.

Where the lessee agreed to advance the money necessary to pay the coupons on the bonds of the lessor, such advance to be paid out of subsequent earnings and not otherwise, the agreement will not be held to be harsh, oppressive or inequitable, and not to be an agreement to loan money to an insolvent corporation, which the court will not enforce.

Henry v. Pittsburg, etc., Ry. Co., 2 N. P. 118, 5 L. D. 41 (1895).

The lessee or purchaser is subject to control of the public utilities commission. *Barlotti v. Commission*, 103 O. S. 647.

In an action against a railroad company for personal injuries, it was held that operation by the defendant as lessee or otherwise was sufficiently shown by proof that it issued a bill of lading for freight consigned to it at a station on the leased line, that defendant's time table gave the leased line as one of its lines, and that the surgeon who treated the plaintiff was in the employ of the defendant. *Railroad v. Dickinson*, 18 C. C. n. s. 586 (1906); *aff'd*, no rep. 77 O. S. 639.

Rescission of lease. A lease can only be rescinded by the same consent of stockholders required to authorize a lease.

Henry v. Pittsburg, etc., Ry. Co., 2 N. P. 118, 5 L. D. 41 (1895).

Specific performance. The specific performance of a lease will not be compelled by a court.

Henry v. Pittsburg, etc., Ry. Co., 2 N. P. 118, 5 L. D. 41 (1895).

See *Port Clinton, etc., R. R. Co. v. Cleveland, etc., R. R. Co.*, 13 O. S. 544 (1862).

Effect of receivership of lessee. The receiver of a lessee company has no power to abrogate a valid lease. As between the lessor and lessee the lease stands until abrogated under some condition therein.

But the receiver has the option, under the direction of the court, to adopt or reject the lease.

Rent accruing prior to appointment of the receiver is not a preferred claim.

New York, etc., R. Co. v. Railway Co., 58 Fed. 278 (C. C. 1893).

See *Investment Co. v. Railway Co.*, 41 Fed. 379 (C. C. 1889).

Duty of lessor to repair. At common law, in the absence of express covenant in a lease, the lessor is not bound to make repairs, additions, or improvements to the leased property, or to rebuild structures thereon which may have become unfit for use, nor is there any implied covenant that the property is fit for the purpose for which it is leased. The fact that the demised property is a railroad does not affect the application of those principles.

Felton v. Cincinnati, 95 Fed. 336; 13 O. F. D. 68 (1899).

Under a covenant to make repairs and replacements, new equipment substituted by the lessee for equipment removed may be subject to a mortgage given by the lessor covering after-acquired property. *Trust Co. v. Traction Co.*, 106 O. S. 577 (1922).

Liability of lessor for negligence in operation.

See § 8814.

PURCHASE.

"Duties, obligations and restrictions." The purchaser takes the property subject to all limitations and restrictions, of a public nature, as to rates of fare.

Campbell v. Marietta, etc., Co., 23 O. S. 168 (1872).

Railway Co. v. Moore, 33 O. S. 384 (1878).

But not subject to private contract obligations of the seller unless assumed by the purchaser. A claim for breach of a contract, made by the selling company to transport stone for a specified rate, is not an "obligation" binding upon the purchaser.

Rice v. Norfolk & W. Ry., 153 Fed. 497; 15 O. F. D. 478 (C. C. A. 1907).

Subscriptions to stock of vendor company. This section does not authorize a sale of stock subscriptions.

Railroad Co. v. Hinsdale, 45 O. S. 556, 557, 572 (1888).

This section becomes a part of a contract of subscription to stock, and a sale of a part of the road does not release the subscriber, unless the subscription is conditional, and the sale makes performance of the condition impossible.

Armstrong v. Karshner, 47 O. S. 276 (1890).

Control of another railroad by voting trust.

See State v. O. & M. Ry. Co., 6 C. C. 415; 3 C. D. 518 (1892); aff'd, 49 O. S. 668.

License to use tracks.

See note to § 8808, *Trackage contracts*.

Effect of lease or purchase. A railroad corporation whose line is operated by another company under a long term lease is not required to make reports or pay taxes under the Willis Law (§ 5495 et seq.) although it maintains its corporate organization, collects the rent and pays dividends. Railroad Co. v. State, 2 Ohio App. 288, 20 C. n. s. 61; 26 C. D. 403; motion to certify record overruled, 11 O. L. R. 538; State v. Railroad, 7 Ohio App. 309; 27 C. C. n. s. 154; 28 C. D. 297; motion to certify record overruled, 15 O. L. R. 431; G. C. § 5518.

Sale of road as surrender or abandonment of special charter of vendor company. State v. Sherman, 22 O. S. 411.

A railroad company created under special charter, by making or taking leases under authority of § 8807 or similar statutes, was held to have accepted the general law and thereby to relinquish special privileges under its special charter. Railroad v. Cole, 29 O. S. 126 (1876).

Section 8808. (Companies not competing may make beneficial arrangements.) Two or more companies whose lines are connected and not competing, may enter into any arrangement for their common benefit consistent with, and calculated to promote the objects for which they were created. (R. S. Sec. 3300; March 14, 1882, 79 v. 35; R. S. 1880, § 3300; April 15, 1873, 70 v. 129, § 24; May 1, 1852, 50 v. 281.)

"Connected" and "competing" roads, see note to § 8807.

Trackage contracts. A trackage contract between two railroad com-

panies, whose tracks are parallel for fifteen miles and thereafter separate widely, is authorized, and does not destroy, but rather creates, competition between them.

D. & U. Ry. Co. v. Railway Co., 6 C. C. n. s. 537; 15 C. D. 705 (1902); aff'd, 67 O. S. 523; s. c., 1 N. P. n. s. 577.

An agreement permitting one company to use the tracks of another company for a short distance, made in part for the purpose of enabling it to take up its parallel track, is authorized. The removal of such parallel track is a public good.

D. & U. Ry. Co. v. Railway Co., 6 C. C. n. s. 537; 15 C. D. 705 (1902); aff'd, 67 O. S. 523; s. c., 1 N. P. n. s. 577.

An agreement permitting one railroad company to use the tracks of the other so long as they continue to exist as chartered corporations is in the nature of a permanent license.

D. & U. Ry. Co. v. Railway Co., 6 C. C. n. s. 537; 15 C. D. 705 (1902); aff'd, 67 O. S. 523; s. c., 1 N. P. n. s. 577.

A company can only charge a reasonable price for use of tracks.

See Toledo, etc., *R. R. Co. v. Railway Co.*, 7 N. P. 376 (1894).

Trackage agreement, to enable one company to connect disconnected portions of its line and to form a continuous line, the grantee company being prohibited from taking business from or to stations of the grantor company, construed and held not to entitled grantee company to use a private side track, and that grantee company could not be required to furnish cars to shippers in violation of the agreement. *Railway v. Commission*, 96 O. S. 414 (1917).

Orders of public utilities commission requiring parties to track-age contracts to perform certain service, see 14 O. L. R. 453, 15 O. L. R. 317.

Interpretation. The word "road" in a trackage contract is a generic term, including present and future tracks, side tracks and structural facilities in the transaction of both local and through business.

D. & U. Ry. Co. v. Railway Co., 6 C. C. n. s. 537; 15 C. D. 705 (1902); aff'd, 67 O. S. 523; s. c., 1 N. P. n. s. 577.

A grant of the use of the road of another company for "all trains required in the prosecution of its business" limits the licensee to its own business. Whether business conducted is that of the licensee is to be determined by the facts, and not from the engines or crews operating the trains.

D. & U. Ry. Co. v. Railway Co., 6 C. C. n. s. 537; 15 C. D. 705 (1902); aff'd, 67 O. S. 523; s. c., 1 N. P. n. s. 577.

Practical construction by the parties may be considered. Where a contract for the joint use of terminal property, in fixing the basis for the division between the companies of the cost of maintenance, used the terms "wheelage" and "car and engine mileage" indiscriminately, but in the performance of the contracts the division was based on wheelage, that construction was adopted by the court.

Columbus, etc., *Ry. Co. v. Penna. Co.*, 143 Fed. 757; 15 O. F. D. 353 (C. C. A. 1906).

But practical construction is not binding on successors in interest of one of the parties.

D. & U. R. Co. v. Railway Co., 1 N. P. n. s. 577 (1900); aff'd, 6 C. C. n. s. 537; 15 C. D. 705; 67 O. S. 523.

Ultra vires provision. An ultra vires provision looking toward the stifling of competition which has not been acted upon, and which may be eliminated from the remainder of the contract, does not render the entire contract invalid.

D. & U. Ry. Co. v. Railway Co., 6 C. C. n. s. 537; 15 C. D. 705 (1902); aff'd, 67 O. S. 523.

Liability for injuries. To passengers. A common carrier being the owner of its tracks is liable to its passenger for an injury received in a collision between its car and the car of another company which it admits to the joint use of its track, although the collision resulted wholly from the negligence of the latter company.

Maumee, etc., Co. v. Montgomery, 81 O. S. 426 (1910).

— **Liability of companies inter se.** In such a case the liability of the owning company for breach of its contract of carriage, and of the other for its negligence, may be enforced in the same action, and the facts should be so determined by interrogatories or special findings that liability for compensation may ultimately rest upon the company guilty of negligence.

Maumee, etc., Co. v. Montgomery, 81 O. S. 426 (1910).

— **To employee of other company.** While it is competent, in contracts to facilitate the movements of trains at crowded terminals, to incur liabilities for injuries to the employees of other companies, resulting from negligence of their own employees, such contracts may not, by implication, be extended beyond the scope of their terms.

Ann Arbor R. Co. v. Addison, 84 O. S. 259 (1911).

See note to § 8814.

— **To other persons.** The defendant made an arrangement with the D. company whereby it gave to the latter company the right to construct a track on the side of defendant's roadbed for the purpose of connecting the road of the D. company with defendant's road, the connecting track passing over a bridge previously constructed by defendant for its track, and which foot-passengers had been permitted to use for the purpose of transit. The plaintiff, in passing on foot, fell through the same, between the rails of the connecting track, and was injured by reason of the defective covering; held, the defendant having no interest in or control over the track, can not be held liable.

Gwathney v. Little Miami R. R. Co., 12 O. S. 92 (1861).

OTHER CONTRACTS.

Traffic agreements. A traffic agreement is not an "appurtenance" of a railroad so as to pass to the purchaser of the road from the receiver. Cincinnati, etc., R. Co. v. Cincinnati, etc., Ry. Co., 6 N. P. 427; 9 L. D. 493 (1899).

An injunction will not be granted to enforce a traffic contract where there is an adequate remedy at law, or where the complainant's right is doubtful.

B. & O. R. Co. v. Pittsburg, etc., R. Co., 1 C. C. 100; 1 C. D. 60 (1885).

A traffic agreement, unfair to one company, which was controlled by directors who were also directors of the other company, was set aside. Trust Co. v. Railway, 211 Fed. 515 (D. C. 1914).

A traffic agreement for the interchange of business between two railroads, for a term of years, requiring one road to pay to the other a percentage of its receipts, if necessary to pay interest on bonds of such other railroad, was held to create no lien on the property of the promissor as against subsequent purchasers or creditors. Baker v. Trust Co., 235 Fed. 17 (C. C. A. Ohio 1916).

Tonnage contracts, as such and without other features, are valid. State v. H. V. Ry. Co., 12 C. C. n. s. 145, 148 (1909).

Indorsement and guaranty of bonds of coal mining companies. The indorsement and guaranty of the bonds of a coal mining company by a railway company is *ultra vires*; and so also is an agreement between railroad companies operating parallel and naturally competing railroads to indorse and guarantee the bonds of a coal mining company, in consideration of an equal division between the railroad companies of all freight to and from the mines. Such obligations may be valid in favor of the bondholders, but are illegal as against the state.

State v. H. V. Ry. Co., 12 C. C. n. s. 49, 66; 21 C. D. 175 (1909).

Such a guaranty can not be construed as a tonnage contract, but is in the nature of a monopoly and leads to discrimination.

State v. H. V. Ry. Co., 12 C. C. n. s. 145 (1909).

Illegal agreements. Right of state to interfere. The state is not bound by the fact that the parties are satisfied with an illegal agreement, but, if the public is prejudiced, it may proceed against the parties.

State v. H. V. Ry. Co., 12 C. C. n. s. 145 (1909).

Section 8809. (Vote of stockholders of each company requisite.) No such aid shall be furnished, nor any purchase or lease perfected, until a meeting of the stockholders of each of the companies has been called for that purpose by the directors thereof, on thirty days' notice to each stockholder, at such place and in such manner as is provided for the annual meetings of the companies, and the holders of at least two-thirds of the stock of each company, in person or by proxy, at such meeting, assent thereto. In case of the lease of a railroad situate in whole or part within this state, the rental reserved and secured for the leased road shall be equal, at least to its net earnings for the fiscal year next preceding the one in which the lease is made. (R. S. Sec. 3301; April 17, 1892, 79 v. 111; Rev. Stats. 1880; April 15, 1873, 70 v. 129, § 24.)

The statute does not require the assent to be in any particular form, and the circumstances will be looked to for light on that question.

See *Humphreys v. St. Louis, etc., Ry. Co.*, 37 Fed. 307 (1889).

Where a lease is made without the stockholders' assent, their acquiescence in the lease for a long period will be held to be a waiver of the requirement of the statute.

See *St. Louis, etc., R. R. Co. v. Terre Haute, etc., R. R. Co.*, 33 Fed. 440 (1888); s. c., 145 U. S. 393.

Zabriskie v. Cleveland, etc., R. R. Co., 64 U. S. 381 (1859).

In construing a Nebraska statute similar to this section the court said: "The stockholders' meeting, and the vote in such meeting on the question of assenting to the proposed lease, are matters of essence, of substance, and not of mere form, and their assent individually obtained outside of such meeting, and in the absence of deliberation, would bind no one."

Peters v. Lincoln, etc., R. R. Co., 12 Fed. 513 (1881).

Where the notice of meeting was not given for the time prescribed in this section, and the contract was unfair to the corporation, the contract was set aside. *Trust Co. v. Railway*, 211 Fed. 515, 527 (D. C. 1914).

Section 8810. (Dissenting stockholder may sell stock; procedure.) A stockholder who refuses his assent to such sale, lease, or aid by subscription, and signifies it by notice in writing, to the purchaser or lessee, within sixty days thereafter, on demand, shall be entitled to receive from such purchaser or lessee, previous to the consummation of such sale or lease, the average market value of his stock for six months next preceding the day of the meeting of the companies at which the sale or lease is approved, on surrendering the stock. If the stockholder and purchaser or lessee can not agree as to the value of the stock, the parties may submit the question to arbitration, to be conducted in accordance with the provisions of law regulating arbitrations, so far as applicable, by three disinterested persons, to be appointed upon the motion of either of the parties, by the judge of the common pleas court of the county in which the owner of the stock resides, or, in case he is a non-resident of the state, or of any county through or into which the road passes, then the county in which the principal office of the company is kept. (R. S. Sec. 3302; April 15, 1873, 70 v. 129, § 24 [§ 2].)

See as to arbitration under a similar section, *Railway Co. v. Garrett*, 50 O. S. 405 (1893).

Arbitration under general corporation law, on sale of entire corporate property. § 8713 et seq.

Section 8811. (When court may appoint arbitrators.) If such stockholder refuses to submit the question to arbitration, upon the application of a director of either of the companies parties to the contract, the proper judge shall appoint the arbitrators, who shall proceed to ascertain the value of the stock as if the question had been submitted by consent of both parties. If the party owning the stock refuses to receive the amount awarded him, the company may deposit it with the clerk of the common pleas court of the county in which the arbitration is held, which deposit shall operate as if payment were made to the owner of the stock. (R. S. Sec. 3303; April 15, 1873, 70 v. 129, § 24 [§ 2].)

See *Railway Co. v. Garrett*, 50 O. S. 405 (1893).

Section 8812. (Notice of application therefor.) In all cases of arbitration under the two next preceding sections, the party desiring such arbitration shall give the opposite party at least ten days' notice of his intention to apply to the judge for the appointment of arbitrators, which notice shall be served in the manner provided for the service of

a summons, and must specify the time and place of the hearing of the application. In cases of non-residents, the notice shall be by publication for four consecutive weeks, in some newspaper printed in the county. (R. S. Sec. 3304; April 15, 1873, 70 v. 129, § 24 [§ 3].)

Section 8813. (Lease of railroad; security required.) No company shall lease its road or any part thereof to another company, whether of this or any other state, as hereinbefore provided, unless the lessor receives full and adequate security for the payment of the rental and for the preservation of its property in as good condition as on entering into possession thereof. If the lessee fails to pay such rental promptly when due, such lease shall be void, at the option of the lessor. The company to whom a railroad is leased, if a corporation of any other state, shall be subject to all the restrictions, disabilities, and duties of a railroad company incorporated within this state. (R. S. Sec. 3305; April 13, 1883, 80 v. 116; R. S. 1880; April 15, 1873, 70 v. 129, § 24 [§ 4].)

A judgment ordering the cancellation of a railroad lease may be appealed from by a stockholder of the lessor under § 12224 as a person directly affected thereby when there is reason to believe that the officers of the lessor are acting in the interest of the plaintiff.

Henry v. Jeanes, 47 O. S. 116 (1890); s. c., 48 O. S. 443.

Under a covenant to make repairs and replacements, new equipment substituted by the lessee for equipment removed may be subject to a mortgage given by the lessor covering after-acquired property. Trust Co. v. Traction Co., 106 O. S. 577 (1922).

Section 8814. (Lessor and lessee jointly liable.) Notwithstanding such lease the corporation of this state lessor therein, shall remain liable as if it operated the road itself, and both the lessor and lessee shall be jointly liable upon all rights of action accruing to any person for negligence or default growing out of the operation and maintenance of such railroad, or in any wise connected therewith, and may be jointly sued in the courts of this state of proper jurisdiction, and prosecuted to final judgment therein as in other cases of joint liability. Service may be had upon such companies, or either of them by the service of process upon any officer or agent of either of the companies. (R. S. Sec. 3305; April 13, 1883, 80 v. 116; Rev. Stat. 1880; April 15, 1873, 70 v. 129, § 24 [§ 4].)

Liability of lessor.

In general. This section does not require both companies to be sued, as they are jointly and severally liable.

Stoltz v. Baltimore, etc., R. R. Co., 7 N. P. 129 (1897).

See as to removal to U. S. court, *Spangler v. R. R. Co.*, 42 Fed. 305 (1890).

Commencing suit against one company will not save the running of the statute of limitations against the other.

Stoltz v. Baltimore, etc., R. R. Co., 7 N. P. 129 (1897).

For fires. Where damage is caused by a fire originating from the negligence of the lessee, both lessor and lessee are liable.

Fisher v. Baltimore, etc., R. Co., 3 N. P. 283; 6 L. D. 67 (1896).

For negligence of receiver of lessee. This section does not operate to give a right of action against a lessor company for negligent acts of the employes of a receiver who is operating the road as receiver of the lessee.

Chamberlain v. New York, etc. R. Co., 36 W. L. B. 81 (1896); 71 Fed. 636.

See *Caldwell v. Pittsburg, etc.*, R. Co., 33 W. L. B. 134 (1894).

To employes of lessee. The provisions of this section apply only to the obligations of the lessor to the public. The lessor does not owe to employes of the lessee the duty of exercising ordinary care in furnishing him a safe place to work.

Powers v. Railways, 12 C. C. n. s. 230; 21 C. D. 488 (1909).

This section relates only to the duties of a carrier, and does not make the lessor liable to an employe of the lessee injured through the lessee's failure to perform its duties as master.

Axline v. Toledo, etc., R. Co., 138 Fed. 169; 15 O. F. D. 463 (C. C. 1903).

Beltz v. B. & O. R. Co., 3 O. L. R. 419; 137 Fed. 1016 (C. C. 1905).

Where a railway company leases its line without authority of law, although the lease is void, the lessor is not liable to an employe of the lessee injured through the negligence of the lessee.

Hukill v. Maysville, etc., R. Co., 72 Fed. 745 (C. C.).

At common law.

See *Gwathney v. Little Miami, etc.*, R. Co., 12 O. S. 92 (1861).

Fisher v. Baltimore, etc., R. Co., 3 N. P. 283; 6 L. D. 67 (1896).

In the absence of statute, a railroad company has no authority to lease its line so far as the contract lessens its obligations to the public. *Quigley v. Railway*, 89 O. S. 68 (1913).

Under former statute.

Collins v. B. & O. R. Co., 7 N. P. 270; 7 L. D. 445 (1898).

Liability of companies using tracks jointly.

See note to § 8808. *Trackage contracts.*

Service of process. Jurisdiction over the lessee company is not obtained by the service of process upon the president of the lessor company.

Collins v. B. & O. R. Co., 7 N. P. 270; 7 L. D. 445 (1898).

Removal to federal court. Receivers of the lessee company can not remove an action brought against the lessor and receivers jointly under this section to federal court on the ground of diverse citizenship.

Central, etc., R. Co. v. Mahoney, 114 Fed. 732; 14 O. F. D. 61 (C. C. A. 1902).

But where an Ohio railroad company was joined as a defendant with a foreign railroad company, under a false allegation that the Ohio company had leased its road to the foreign company, the allegation being made to prevent the removal, the case may be removed to federal court.

Diday v. Railroad Co., 107 Fed. 565; 12 O. F. D. 734.

Removal on ground of local prejudice.

See *Whelan v. Railroad*, 35 Fed. 849; 6 O. F. D. 87.

INCREASE OF CAPITAL STOCK.

Section 8815. (Purposes for which stock may be increased.) A company may increase its capital stock, as hereinafter provided, when in the opinion of the directors it is insufficient for the construction of its road, or it becomes necessary for the speedy and convenient transactions of its business to construct a second additional track, extend its line, or construct branches thereof, increase its machinery, rolling-stock, depots, or other fixtures, or for the purpose of paying any bonds issued or guaranteed by it, or for the purchase of a railroad within this state, sold by a judicial order or decree, or for completing its line of road, or liquidating or paying off any unfunded or floating debt, or other liabilities incurred in the construction or equipment of its road, or for extending it, or constructing branches as authorized or for either or all of such purposes. (R. S. Sec. 3307; May 5, 1873, 70 v. 289, § 1; March 29, 1875, 72 v. 91, § 1.)

Increase of capital stock under general corporation law, § 8698.

The sale or other disposition of unissued stock is not an increase of capital stock.

Sims v. Street Railroad Co., 37 O. S. 556 (1882).

Irregularities in the proceedings to increase the stock, e. g., that no notice of the meeting of stockholders was given, will not defeat an action to recover on a subscription for such increased stock for the purpose of paying debts, where such subscriber having knowledge of the facts, acquiesced until the company became insolvent.

Clarke v. Thomas, 34 O. S. 46 (1877).

Turnbull v. Pomeroy Salt Co., 24 W. L. B. 133 (1890).

See Farmers' Loan, etc., Co. v. Toledo, etc., Ry. Co., 67 Fed. 49; 9 O. F. D. 242 (1895).

Where a railroad, having power to increase its stock, paid a stock dividend, a holder of bonds convertible into stock, who has been paid interest on the bonds, can not on converting his bonds into stock claim the stock dividend.

Sutliff v. Cleveland, etc., R. Co., 24 O. S. 147 (1873).

Section 8816. (Proceedings to increase capital stock.)

Before any stock is issued under the next preceding section a majority of the directors shall call a meeting of the stockholders, designating distinctly its time, place and purpose, and the amount of stock required, which meeting shall be held at the principal business office of the company in this state, and notice of which shall be given for at least thirty days previous, by continued publication in at least two newspapers published and of general circulation in the state, and by a like notice, mailed thirty days previous to the time named for the meeting, to each stockholder whose resi-

dence is known. If at such meeting the consent of the holders of a majority of the stock upon which they would be entitled to vote at an election of directors of the company be given, the stock of the company may be increased to such amount as is decided to be necessary for the purposes named in the preceding section. (R. S. Sec. 3308; March 14, 1876, 73 v. 25, § 2.)

Who may vote.

See § 8786.

Where bonds were issued and sold on the faith of increased stock, the increase having been authorized by an almost unanimous vote of the stockholders, and no objection was made for two years thereafter, the stockholders were held estopped from denying the validity of the bonds because of the lack of notice under § 8816 and of filing the certificate under § 8818. *Farmers Co. v. Toledo Co.*, 67 Fed. 49, 9 O. F. D. 230 (C. C. Ohio 1895).

Section 8817. (Common or preferred stock may be issued; sale thereof.) The increased stock may be "common" or "preferred", as is designated in the call for the meeting of stockholders. If preferred stock be issued, the company may guarantee to the holders thereof semi-annual or quarterly dividends, to an amount not exceeding six per cent per annum, payable at its office, or at such other place as the directors designate. The stock may be sold at such time and place, either within or without the state, as is deemed advisable and the proceeds thereof applied to the purposes for which it is issued. The unpreferred stock of the company shall be entitled to dividends only out of the surplus of profits, after setting apart a sum sufficient to pay the dividends upon the preferred stock. The company which issues such preferred stock shall reserve the privilege of redeeming and canceling it at par, at any time after three years from the date of its issue. The preferred stock herein provided for may be convertible into bonds of the company at the option of the parties. (R. S. Sec. 3309; May 5, 1873, 70 v. 289, § 3.)

See §§ 8667 to 8671, 8699 and 8805.

The right to redeem preferred stock may be exercised by the directors.

Mannington v. Hocking Valley Ry. Co., 183 Fed. 133, 142-146; 8 O.

L. R. 451, 462, 467; 16 O. F. D. 552 (U. S. D. C.).

See s. c., 9 N. P. n. s. 641, 678 (C. P.) 20 L. D. 468.

The redemption of preferred stock, authorized by this section, is not a reduction of the corporation's capital stock by a purchase of its own shares.

Mannington v. Hocking Valley Ry. Co., 183 Fed. 133; 8 O. L. R. 451; 16 O. F. D. 552 (U. S. D. C.).

Section 8818. (Certificate to secretary of state.) Within ten days after such meeting the president and secretary of the company shall make an abstract, stating the whole amount of pre-existing capital stock, the amount authorized, the number of shares of stock upon which all the installments called for by the board of directors have been paid, and the vote at the meeting, and add a certificate that the provisions of the two next preceding sections have been fully complied with. They also shall make affidavit to such abstract and statement, and file it in the office of the secretary of state, who shall cause it to be recorded. (R. S. Sec. 3310; March 14, 1876, 73 v. 25, § 4.)

Where bonds were issued and sold on the faith of increased stock, the increase having been authorized by an almost unanimous vote of the stockholders, and no objection was made for two years thereafter, the stockholders were held estopped from denying the validity of the bonds because of the lack of notice under § 8816 and of filing the certificate under § 8818. *Farmers Co. v. Toledo Co.*, 67 Fed. 49, 9 O. F. D. 230 (C. C. Ohio 1895).

MISCELLANEOUS.

Section 8819. (Dissolution of certain companies.) A company which has been in existence three years, and has not begun to build the road described in its articles of incorporation, or whose road if commenced, has been abandoned for three years, may be dissolved by a vote of two-thirds of its stockholders, at a meeting called for that purpose by its president, notice of which shall be published in each county through or into which the line of the proposed road passes at least thirty days before the meeting is held. (R. S. Sec. 3363; April 27, 1872, 69 v. 171, §§ 1, 2.)

Section 8820. (Owner of land leased for right of way not to be taxed.) Each company owning and occupying a right of way or easement in lands, either by agreement with the owners, or by virtue of an appropriation proceeding, shall present to the auditor of the county in which the land is situated a statement of the quantity embraced within the right of way or easement. Such quantity shall be deducted by the auditor from the land on the tax duplicate, so that the owners thereof shall not be required to pay taxes thereon. A company hereafter becoming the owner and occupant of any such right of way or easement, within six months thereafter, shall present such statement to the auditor. Upon the failure of the company to make the statement, the owner.

of the land may make it. (R. S. Sec. 3321; March 23, 1875, 72 v. 71, § 8.)

Section 8821. (Taxation of land used as right of way.)

Any company using or occupying any land as a right of way, without paper title or contract of record therefor, shall present a correct survey and plat of such land, exhibiting the quantity in such right of way taken from the lands of an owner abutting thereon, as it then stands on the tax duplicate of such county, to the auditor of the county in which the land is situated. Such land, so used or occupied by any such company he shall charge to it on his duplicate, and such relative quantity shall be deducted by him from the land on the tax duplicate, so that the abutting owners thereof shall not be required to pay the taxes thereon. All costs of such survey, plat and transfer shall be paid by the company. Upon the failure of a company to have such survey, plat and transfer made, the owner or owners of such abutting land may have it made and recover the costs thereof in an action against the company before any court having jurisdiction thereof. (R. S. Sec. 3322a; April 1, 1902, 95 v. 73.)

Section 8822. (Lease of right of way to be recorded.)

When the grant of such right of way or easement is not in the form of a lawfully executed deed or lease, the recorder of the county where the land is situated, upon the request of the company owning the right of way or easement, shall record such grant in the record book of leases, and index it. Such record, or a copy thereof duly certified by the recorder, shall be received in evidence in all courts and places, in the same manner and to the same effect as the original. The correctness of such record or copy may be impeached by any interested party, by competent proof. The recorder shall be entitled to the usual fee for recording such grants, and certifying copies thereof. (R. S. Sec. 3322; March 23, 1875, 72 v. 71, § 8.)

This section applies to a contract for a lease. A lease is not invalid because, by mistake of the recorder, it is recorded in a volume entitled "miscellaneous records," instead of in the book of leases.

Cleveland, etc., Co. v. Reid, 4 N. P. 127; 6 L. D. 273 (C. P. 1896).

Where a contract for a right of way is not entitled to record because of defective execution, the construction and operation of a railroad thereon is constructive notice to subsequent grantees of the land.

Miller v. Railway, 12 N. P. n. s. 683; 22 L. D. 638 (C. P. 1911).

CHAPTER 2.

TRACKS AND CROSSINGS.

Tracks.

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- § 8826. Railroad crossings.
- § 8827. Crossing of trains; how regulated.
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8897.	Highway crossings.	§ 8903.	Height of over railroads.
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TRACKS.

Section 8823. (Track to be of uniform gauge.) Every company shall make every railroad constructed or controlled by it of one uniform gauge or width of track from end to end. When a road connects with or crosses another road, the companies owning or controlling such roads may adopt such uniform gauge or width of track as will enable each company to pass its cars over the road of the other. If roads so connecting or crossing are constructed of different gauges or widths of track, the companies controlling them may lay down, and maintain upon the whole or any portion of such road or roads, an additional rail or rails, so as to admit the passage of the same cars over both roads, and also maintain and operate either or both of such roads, upon the track or tracks originally constructed, as is deemed expedient by the company or companies owning or controlling either or both of the roads. (R. S. Sec. 3338; April 3, 1866, 63 v. 88, § 1.)

Section 8824. (When tracks used in common.) When two or more companies have two or more tracks of the same gauge in the same street, alley, public way, or opening, through a city or village, the council thereof may require such companies to use such tracks in common, and to pass their locomotives and cars over each track in one direction only. (R. S. Sec. 3339; April 15, 1857, 54 v. 133, § 4.)

It is the policy of the law to do away with unnecessary tracks.

Dayton, etc., Ry. Co. v. Ry. Co., 6 C. C. n. s. 537, 545; 15 C. D. 705 (1902); aff'd, 67 O. S. 523.

Section 8825. (Obstructing the laying of a track.) No person or corporation shall wilfully interfere with or obstruct any company engaged in laying the track of its road across any other railroad, if such company has fully complied with the law, and obtained the right to so lay its track; nor shall any person or corporation obstruct the full operation of any road so constructed. A person or corporation violating the provisions of this section, for each day of such interference or obstruction, shall pay one thousand dollars,

to be recovered by action in the name of the state, half of the recovery to go to the company so interfered with, and half to the county in which the interference occurs, and shall also be liable for damages to the party injured. (R. S. Sec. 3362; April 1876, 73 v. 160, §§ 1, 2.)

RAILROAD CROSSINGS.

Section 8826. (Railroad crossings.) When the tracks of two railroads cross each other, or in any way connect at a common grade, the crossings shall be made and kept in repair, and watchmen maintained thereat, at the joint expense of the companies owning the tracks. All trains or engines passing over such tracks must come to a full stop not nearer than two hundred feet, nor further than eight hundred feet from the crossing, and not cross until signaled so to do by the watchman, nor until the way is clear. (R. S. Sec. 3333; April 14, 1882, 79 v. 95; R. S. 1880; March 24, 1860, 57 v. 106, § 1.)

When section does not apply. See § 8833.

Constitutionality. This act is a valid exercise of the police power of the state, and is a reasonable regulation of the manner in which railroad trains shall be run so as to avoid danger to the lives and property of people using a railroad.

Lake Shore, etc., Ry. Co. v. Cincinnati, etc., Ry. Co., 30 O. S. 604 (1876).

Every railroad company in this state accepts its charter and maintains and operates corporate property as a railroad, subject to the inherent power of the state to adopt such police regulations as this, whenever public necessity requires them.

Lake Shore, etc., Ry. Co. v. Cincinnati, etc., Ry. Co., 30 O. S. 604 (1876).

This section applies to tracks existing at the time of its enactment.

Street Ry. Co. v. Railroad Co., 32 W. L. B. 4 (1894).

Joint duty. This section imposes a joint duty and obligation of making and maintaining the crossings and keeping watchmen thereat, and requires the expense to be borne by the companies jointly. The burden is common to both companies, and where either performs the whole duty and pays the whole expense it is entitled to recover from the other its equal proportion thereof.

Baltimore, etc., R. Co. v. Walker, 45 O. S. 577 (1888).

This section imposes on both companies the expense of making and keeping up such crossing as is required, without regard to the date of their respective charters, or the location or construction of their respective roads.

Lake Shore, etc., Ry. Co. v. Cincinnati, etc., Ry. Co., 30 O. S. 604 (1876).

Whether in a case under this section the expense should be apportioned according to the use of the crossing, or otherwise than equally, *quaere*.

Baltimore, etc., R. Co. v. Walker, 45 O. S. 577 (1888).

Duty of lessee. A railroad company which has possession and control of a railroad in this state as lessee is one "owning the tracks" of such railroad within the meaning of this section.

Baltimore, etc., R. Co. v. Walker, 45 O. S. 577 (1888).

The necessity for keeping the crossing in repair, and maintaining watchmen thereat, grows out of the use and operation of the railroads crossing each other at a common grade, and the benefits thereof accrue to the companies using and operating the roads; and as a lessee company, while operating its road, receives the benefit and security resulting from a safe crossing and the services of the watchmen, it takes them subject to the burden of their expense, as provided by the statute.

Baltimore, etc., R. Co. v. Walker, 45 O. S. 577 (1888).

Negligence in operating crossing. For a charge to a jury in a negligence case involving this section,

See Moulder v. Cleveland, etc., R. R. Co., 1 N. P. 361 (1894).

Specific performance of contract to maintain crossing.

See Columbus, etc., Ry. Co. v. Ohio Southern Ry. Co., 1 C. C. 275; 1 C. D. 151 (1885).

Right to cross tracks and manner of crossing.

See § 8834 et seq.

Street railway crossings.

See § 9124 et seq.

Stopping of electric cars at steam railroad crossings.

Order of Railroad Commission, 4 O. L. R. 668 (1906).

Section 8827. (Crossing of trains; how regulated.) When two passenger or freight trains approach the crossing at the same time, the train on the road first built shall have precedence if the tracks are both main tracks over which all passengers and freights on the road are transported. But if only one track is such main track, and the other is a side or depot track, the train on the main track shall take precedence. If one of the trains is a passenger train and the other a freight train, the former shall take precedence, and regular trains on time take precedence over trains of the same grade not on time. Engines with the cars attached, not on time, shall take precedence of engines without cars attached, not on time. (R. S. Sec. 3333; April 14, 1882, 79 v. 95; R. S. 1880; March 24, 1860, 57 v. 106, § 1.)

See note to § 8826.

Section 8828. (Rules to be made and published.) The managing agent or superintendent of each railroad shall establish, and publish to all the employes on the road, such rules and regulations as in all cases will secure strict compliance with the provisions of the two next preceding sections, and shall republish such rules and regulations on each

time table or card issued to the employes on the road. (R. S. Sec. 3334; March 24, 1860, 57 v. 106, § 2.)

Section 8829. (Forfeiture.) If such managing agent or superintendent fails or neglects to establish and publish such rules and regulations, or to republish them on each time table or card issued to the employes on the road, he shall be personally liable, for every such failure or neglect, to a penalty of one hundred dollars, to be recovered together with costs, in an action against him in favor of the state, to be brought in the court of common pleas of any county wherein such crossing is. (R. S. Sec. 3334; March 24, 1860, 57 v. 106, § 2.)

Section 8830. (Agent or superintendent liable.) Such agent or superintendent, and the company of which he is agent or superintendent, shall also be liable in damages to any person or company injured in person or property by an accident arising from such failure or neglect. (R. S. Sec. 3334; March 24, 1860, 57 v. 106, § 2.)

Section 8831. (Forfeiture.) An engineer or person in charge of an engine who wilfully fails to comply with the provisions of sections eighty-eight hundred and twenty-six and eighty-eight hundred and twenty-seven, or fails to bring the engine of which he is in charge, with the train, if any, thereto attached, to a full stop at least two hundred feet before arriving at a railroad crossing, or connection, or crosses it before signaled so to do by the watchman, or before the way is clear, shall be personally liable to any person injured by reason of such failure in a penalty of one hundred dollars to be recovered by civil action, at the suit of the state, in the court of common pleas of the county wherein such crossing or connection is. (R. S. Sec. 3335; March 31, 1874, 71 v. 50, § 3.)

Section 8832. (Liability of company.) The company in whose employ such engineer or person in charge of an engine is, as well as the person himself, shall be liable in damages to any person or company injured in person or property by such neglect or act of such engineer or person. (R. S. Sec. 3335; March 31, 1874, 71 v. 50, § 3.)

Section 8833. (When trains may cross without stopping.) If such two railroads crossing each other, or in any way connecting at a common grade, by works or fixtures to be erected by them render it safe to pass over such crossings

without stopping, and such works and fixtures first be approved by the state railroad commission, and the plan thereof for such crossing, designating the plan of crossing, has been filed with such commission, the provisions of the preceding sections of this chapter relating to railroad crossings, shall not apply. If the commission disapproves such plan, or fails to approve it within twenty days from the filing thereof, such companies may apply in the county where the crossing is situated, to the common pleas court or to a judge thereof in vacation, in the manner provided in section eighty-seven hundred and seventy-five. The same proceedings may be had, and with the same effect. (R. S. Sec. 3333; April 14, 1882, 79 v. 95; R. S. 1880; March 24, 1860, 57 v. 106, § 1.)

Interlocking system.

See § 592 et seq.

Where, to obtain the right to cross the track of another company, a railroad company agreed to install and maintain an interlocking system at its own expense, such company was held liable to an employee of the other company injured through the negligence of the towerman in charge.

Hydell v. Railway, 74 O. S. 138 (1906).

Section 8834. (Court of common pleas, duty of.) When outside the corporate limits of a city or village it becomes necessary for the track or tracks of a steam, street, electric or interurban railroad company to cross the track or tracks of another steam, street, electric or interurban railroad company, or it is necessary within the corporate limits thereof, for the track or tracks of a steam, street, electric or interurban railroad company to cross the track or tracks of another steam, street, electric or interurban railroad company, other than within the limits of a public street or highway, unless the manner of such crossing be agreed to between such companies, the common pleas court of the county wherein such crossing is located, or a judge thereof in vacation, on application of either party, must ascertain and define by its decree the mode of such crossing which will inflict the least practical injury upon the rights of the company owning or operating the road intended to be crossed. (May 9, 1908, 99 v. 358, § 1; April 23, 1904, 97 v. 548; May 10, 1902, 95 v. 530; R. S. Sec. 3333-1.)

Crossing in a highway. See § 3775.

This act is constitutional.

Railway Co. v. Traction Co., 79 O. S. 136, 149 (1908).

A similar act has been in force in Pennsylvania since 1871.

Railway Co. v. Traction Co., 79 O. S. 136, 150.

Railroad v. Railroad, 14 C. C. n. s. 321, 325 (1910); *aff'd*, 80 O. S. 540.

This act applies to all crossings where the companies can not agree.

Traction Co. v. Railway Co., 11 C. C. n. s. 17; 20 C. D. 355; aff'd, 79 O. S. 136.

The original act (95 v. 530) applied to pending cases and it was held that an application might be made although proceedings to appropriate the right to cross had been commenced prior to its enactment.

Railroad v. Railroad, 72 O. S. 368 (1905).

But the amendments do not apply to pending proceedings.

Railroad v. Railroad, 14 C. C. n. s. 321, 322 (1907); aff'd, 80 O. S. 540.

The original section (95 v. 530) was held not to apply to the crossing of a steam railroad by an interurban railway.

D. & U. Ry. Co. v. Traction Co., 4 C. C. n. s. 329; 16 C. D. 1; reversed on other grounds, 72 O. S. 429; s. c., 1 N. P. n. s. 218, 296; 14 L. D. 17, 143.

Rapid Ry. Co. v. Railroad Co., 48 O. L. B. 245 (Super. Ct. Cin.).

The inability of two railroad companies to agree does not require a disagreement leading to violence. It may appear in divergent views respecting their respective rights.

Railway Co. v. Traction Co., 79 O. S. 136, 15 (1908).

This section is not restricted to an initial crossing, but applies where one company desires to eliminate a grade crossing. Railway v. Railway, 18 N. P. n. s. 289 (1915).

Right to cross tracks prior to enactment of § 8834 et seq. Corporate charters and franchises are subject to the power of the state to authorize the construction of other railroads across their tracks whenever the public welfare may require. Neither the priority of one charter over the other, nor the prior location or construction of a railroad thereunder, affects this right.

Lake Shore, etc., Ry. Co. v. Cincinnati, etc., Ry. Co., 30 O. S. 604 (1876).

The right of one railroad corporation to cross the track of another in constructing and operating its road is derived by grant of the franchise so to do from the state, and not by purchase or appropriation from the road first located and constructed. The latter has no vested exclusive right to such crossing for its use against the right of the public to a crossing, provided compensation is made.

Lake Shore, etc., Ry. Co. v. Cincinnati, etc., Ry. Co., 30 O. S. 604 (1876).

Measure of damages. In a proceeding under the statute by a railroad corporation to appropriate a strip of land across the track of another, to be used in common by each as a railroad crossing, at a common grade, the owner of such track has no right to recover as consequential damages the additional expense rendered necessary in operating its road caused by complying with the provisions of this section.

Lake Shore, etc., Ry. Co. v. Cincinnati, etc., Ry. Co., 30 O. S. 604 (1876).

In such condemnation proceeding the company whose tracks it is sought to cross is entitled to compensation for the property or interest in its right of way and tracks actually appropriated, and for such consequential damages, not provided for by this section, as are the direct and proximate consequence of such appropriation.

Lake Shore, etc., Ry. Co. v. Cincinnati, etc., Ry. Co., 30 O. S. 604 (1876).

The jury in such condemnation proceeding can not include the additional expenses provided for by this section, nor take into account the detention of trains, loss of future business, nor additional expenses incident to the future exercise of their corporate powers.

Lake Shore, etc., Ry. Co. v. Cincinnati, etc., Ry. Co., 30 O. S. 604 (1876).

Section 8835. (Grade crossings avoided, if practicable.) If in the judgment of such court or judge thereof, it is reasonable and practicable to avoid a grade crossing, by its process it shall prevent a crossing at grade. In determining the mode of such crossing, no grade shall be required to exceed the established maximum or ruling grade governing the operation by motive power of that division or part of the railroad on which the improvement is to be made, without the consent of the company; nor shall either company's track be required to be placed below high water mark. (May 9, 1908, 99 v. 358, § 1; April 23, 1904, 97 v. 548; May 10, 1902, 95 v. 530; R. S. Sec. 3333-1.)

This act defines the policy of the state to be that railroad tracks may cross at grade only in cases of necessity.

Railway Co. v. Traction Co., 79 O. S. 136 (1908).

Railway v. Railway, 20 C. C. n. s. 408, 22 C. D. 608.

The junior company may not defeat the operation of the act by voluntarily choosing a place of crossing at which the grades can not be separated, when there is a practicable place of crossing at which the grades may be separated.

Railway Co. v. Traction Co., 79 O. S. 136 (1908).

Where an interlocking device has been in use for a considerable period, with favorable results from its operation and comparatively little interruption to trains of the other road and to avoid the grade crossing would involve heavy expense and other hardships, a grade crossing will not be avoided.

Railroad Co. v. Railway Co., 14 C. C. n. s. 321; 23 C. D. 303 (1907);
aff'd, 81 O. S. 540, 550.

"Reasonable and practicable." This term is not synonymous with the term "reasonably practicable" in the Pennsylvania statute.

Railway v. Railway, 14 C. C. n. s. 321, 322 to 325; 23 C. D. 303 (1907).

While one of the purposes of the act is to conserve public safety, grade crossings will not be avoided unless it is reasonable and practicable to be so. *ib.*

Street railway crossings at grade within municipalities.

See notes to §§ 9108, 3775.

Railway Co. v. Railway Co., 5 C. C. n. s. 597, 598; aff'd, 73 O. S. 364.

Section 8836. (Order of court.) The court by its order, shall define the manner in which the applicant is to do or let the work for such crossing and equitably apportion the initial expense of such construction or crossing and the expense of maintenance among the parties interested. (May 9, 1908, 99 v. 358, § 1; April 23, 1904, 97 v. 548; May 10, 1902, 95 v. 530; R. S. 3333-1.)

An equitable apportionment is not necessarily an equal apportionment.

Railway v. Traction Co., 79 O. S. 136, 150 (1908).

The cost of maintenance as well as the initial cost should be apportioned.

Traction Co. v. Railway Co., 79 O. S. 243 (1908).

Where the junior road has projected and is constructing a double track road, the cost of a crossing sufficiently wide to carry a double track should be apportioned between the companies.

Traction Co. v. Railway Co., 79 O. S. 243 (1908).

The court should apportion between the roads only the cost of such a grade of approach as will be practicable. If the junior road desires a lesser grade it may be charged with the entire additional expense.

Traction Co. v. Railway Co., 79 O. S. 243 (1908).

The road which is first established and in operation has no proprietary rights affecting a division of the costs which are superior to those of the later company seeking a crossing.

Traction Co. v. Railway Co., 11 C. C. n. s. 17; 20 C. D. 355; aff'd, 79 O. S. 136 (1907).

Lake Shore, etc., Ry. v. Cincinnati, etc., Ry. Co., 30 O. S. 604 (1876).

But to the extent that the senior company has improved its right of way by structures and expended money, the companies do not stand on an equal footing.

Railroad v. Railway, 14 C. C. n. s. 321, 323 (1907); aff'd, 80 O. S. 540.

As between a steam railroad, first established, and an electric railway, the steam railroad should share the cost only of that part of the crossing that is necessary to provide a way and support for the tracks of the junior company. The cost of ties, rails, ballast, etc., should be paid by the junior company. *Railway v. Railway*, 20 C. C. n. s. 408; 22 C. D. 608 (1906).

Section 8837. (Appeal.) A party feeling aggrieved by the decision of the court shall have the right of appeal and proceedings in error as in other civil cases. (May 9, 1908, 99 v. 358, § 1; April 23, 1904, 97 v. 548; May 10, 1902, 95 v. 530; R. S. Sec. 3333-1.)

Right of appeal.

See *Railway Co. v. Traction Co.*, 79 O. S. 136, 137 (1908).

D. & U. Ry. Co. v. Traction Co., 4 C. C. n. s. 329; 16 C. D. 1 (1903); reversed, 72 O. S. 429.

Although the supreme court will not consider the weight of evidence, it will, in a proceeding in error to the circuit court, examine the record to see that the order of the circuit court is in accordance with a proper interpretation of the statute.

Railway Co. v. Traction Co., 79 O. S. 136 (1908).

Section 8838. (Jury.) Unless such companies agree upon the compensation to be paid for the land occupied by such crossing, the court shall submit that question to a jury as provided in other cases for the appropriation of private property. (May 9, 1908, 99 v. 359.)

Section 8839. (Exceptions.) Nothing herein shall prevent any street, electric or interurban railroad company or steam railroad company from laying additional tracks at existing crossings, under authority now existing by virtue

of law. (May 9, 1908, 99 v. 359, § 1; May 3, 1904, 97 v. 548, § 2.)

Section 8840. (One steam railroad crossing another within corporate limits.) When, within the corporate limits of a city, or village, it becomes necessary for the track of a steam railroad company to cross the track of another steam railroad company unless the manner of such crossings be agreed to between such companies, the common pleas court of the county wherein such crossing is located, or a judge thereof in vacation, on application of either party, shall ascertain and define by its decree the mode of such crossings which will inflict the least practical injury upon the rights of the company owning or operating the road to be crossed. If in the judgment of such court or the judge thereof, it is reasonable and practicable to avoid a grade crossing, by its process it shall prevent a crossing at grade. (May 3, 1904, 97 v. 538, § 1a; R. S. § 3333-3.)

See notes to §§ 8834, 8835.

Crossing of street railway in highway. See § 3775.

Section 8841. (Change of grade.) In changing the grade of a steam railroad, no grade shall be required to exceed the established maximum or ruling grade governing the operations by engines of that division or part of the railroad on which the improvement is to be made, without the consent of the railroad company, nor shall the railroad company's tracks be required to be placed below high water mark. (May 3, 1904, 97 v. 538, § 1a.)

Section 8842. In its order, the court shall equitably apportion the initial expense of such construction or crossing, and the expense of such construction or crossing, and the expense of maintenance thereof among the parties interested. A party feeling aggrieved by the decision of the court may appeal therefrom as in other civil cases. Nothing herein shall prevent any railroad company from laying additional tracks at existing crossings. (May 3, 1904, 97 v. 538, § 1a.)

See notes to §§ 8836 and 8837.

HIGHWAY CROSSINGS.

Section 8843. (Highway crossings, sidewalks, etc.) Companies operating a railroad in this state, shall build and keep in repair good and sufficient crossings over or approaches to such railway, its tracks, side-tracks and switches,

at all points where any public highway, street, lane, avenue, alley, road or pike is intersected by such railway, its tracks, side-tracks or switches; also good and sufficient sidewalks on both sides of streets intersected by their roads, the full width of the right of way owned, claimed or occupied by them. Crossings and approaches outside of municipal corporations, the township trustees shall have power to fix and determine as to their kind and extent, and the time and manner of constructing them. (April 2, 1891, 88 v. 261; R. S. Sec. 3337-3.)

The power of township trustees under this section is not abridged by § 8863 et seq., which confer power on county commissioners to provide for the abolition of dangerous grade crossings.

Grinnell v. Commissioners, 6 C. C. n. s. 180; 17 C. D. 118 (1904).

Crossing defined.

Lynch v. Railway Co., 20 C. C. 248 (1899).

Constitutionality.

Lake Shore, etc., Ry. Co. v. Cincinnati, etc., Ry. Co., 30 O. S. 604 (1876).

See generally §§ 8913 to 8915, 8873.

Section 8844. (Powers of councils.) As to crossings, approaches and sidewalks within municipal corporations, the municipal councils may exercise the same powers as trustees concerning crossways and approaches outside of municipalities, and such crossways, approaches and sidewalks shall be constructed, repaired and maintained by the railroad companies as so ordered. (April 2, 1891, 88 v. 261, § 1; R. S. Sec. 3337-3.)

A municipal corporation may, by ordinance, regulate the length of time a train may remain standing across street crossings. Akron v. Temple, 16 C. C. n. s. 327 (1909).

Section 8845. (Service of notice.) The officer or officers having charge of a public highway, street or alley intersected by a line of railway, shall serve a written notice upon the nearest station agent or section foreman having charge of that portion of the railway where such intersection occurs, that the crossing, approach or sidewalk herein described must be built or repaired, setting forth its kind and extent and the time and manner of constructing it, as ordered by the council or trustees. (April 2, 1891, 88 v. 261, § 2; R. S. Sec. 3337-4.)

Section 8846. (Failure to comply with notice.) A railway company so notified must comply with such notice within a period of thirty days after receiving it. On failure so to do, the township trustees, or council as may be the

case, may cause such crossing, approach or sidewalk to be constructed or repaired as before ordered, and recover the cost of so doing with interest thereon, in a civil action against the railroad company, in the name of the trustees or municipality. (April 2, 1891, 88 v. 261, § 3; R. S. Sec. 3337-5.)

Section 8847. (Crossings must be kept clear of snow.)

All railway companies owning or operating a line of railway within this state, must keep public highways crossing such line of railroad clear of snow, for a distance of fifty feet each way from the center of its railroad along such highway, so that at all times they will be in safe and convenient condition for travel. (April 2, 1891, 88 v. 261, § 4; R. S. Sec. 3337-6.)

The company is only bound to use such care as a reasonable person would use under like circumstances.

Cincinnati, etc., R. R. Co. v. Dagner, 39 W. L. B. 19 (1898).

Section 8848. (Forfeiture.) A railroad company which neglects to comply with the terms of the five next preceding sections, shall be liable to pay damage to the city, village, or township in which the highway is situated in the sum of thirty dollars for such neglect, and a further sum of ten dollars per day for each and every day such company fails to comply with the terms of such sections, to be recovered in an action brought in the name of the city, village, or township. The prosecuting attorney of the county shall prosecute to judgment any claim arising under the foregoing provisions, without charge to the city, village, or township. (April 2, 1891, 88 v. 261, § 5; R. S. Sec. 3337-7.)

The remedy provided by this section is not exclusive.

Alexander v. Railroad Co., 2 N. P. n. s. 59; 14 L. D. 102 (1903).

Section 8849. (Bridges over railroad crossings.) No person, company or corporation owning, or operating a railroad, crossing, or that may hereafter cross, over and above a street, less than seventy feet in width, in any city in this state, at an elevation above such street, sufficient to permit persons to pass and repass along such street beneath such crossing, shall place or cause to be placed, or permit to be or remain in such street, beneath such crossing or bridge, any pier or other stay or support therefor, unless the placing or maintaining thereof be authorized by the city wherein the crossing is situated, by ordinance duly passed, or permit such crossing or bridge to be or remain in such condition,

that iron, coal or other hard substance, or fluid or noisome matter, can fall or drop through such crossing or bridge, upon persons traveling or passing beneath it. (April 23, 1904, 97 v. 302, § 1; April 3, 1889, 86 v. 197; R. S. Sec. 3337-1.)

This section does not authorize a municipality to grant permission to a railroad company to occupy a public common or landing with an elevated structure.

Railroad Co. v. Cincinnati, 76 O. S. 481 (1907); affirming, 4 N. P. n. s. 217, 497.

See note to § 8763.

Prior to the amendment of this section in 1904 a municipal council had no power to permit supports for an overhead bridge to be placed in the street.

Alexander v. Railroad Co., 2 N. P. n. s. 59; 14 L. D. 102 (1903).

Railway Co. v. Elyria, 69 O. S. 414 (1903).

Railroad Co. v. Defiance, 52 O. S. 262 (1895); aff'd, 167 U. S. 88; 10 O. F. D. 480.

Where abutments were constructed and maintained on the right of way of a private turnpike, more than twenty-one years prior to its acquisition by the county, an action by the county to compel removal of the abutments was barred by the statute of limitation. Railway v. Commissioners, 92 O. S. 513 (1915); reversing, 21 C. C. n. s. 446, 12 N. P. n. s. 446.

Section 8850. (Forfeiture.) A person, company or corporation owning or operating such railroad, that fails to comply with the requirements of, or violates any provision of, the next preceding section, for each and every day during the continuance of such failure or violation, and on account thereof, shall forfeit and pay to such city the sum of one hundred dollars, to be recovered in a civil action, in the city's name, against the owner or operator of such railroad, or both, as the city elects. Thereafter like recovery may be had for subsequent failures and violations. (April 23, 1904, 97 v. 302, § 1; April 3, 1889, 86 v. 197; R. S. Sec. 3337-1.)

Section 8851. (Council may regulate use of bridge.) The council of a city may prohibit the switching of freight engines, trains, or cars, over or on such crossing or bridge, the sounding of locomotive steam whistles, thereon or near thereto, and the standing or stopping of a railroad engine over or on such crossing or bridge, and by ordinance, constitute a violation thereof an offense, and provide for the punishment of any person guilty thereof. (April 3, 1889, 86 v. 197; R. S. § 3337-2.)

Section 8852. (Signboards at road crossings.) At all points where its road crosses a public road, at a sufficient

elevation from such public road to admit of the free passage of vehicles of every kind, each company shall erect a sign, with large and distinct letters placed thereon, to give notice of the proximity of the railroad, and warn persons to be on the lookout for the locomotive. A company which neglects or refuses to comply with this provision shall be liable in damages for all injuries which occur to persons or property from such neglect or refusal. (R. S. Sec. 3323; May 1, 1852, 50 v. 274, § 18.)

In an action by a traveler on a public highway against a railroad company, to recover for injuries by collision with a passing train at a public crossing, alleged to have been caused by negligence in the management of the train, where the evidence tends to show that he did not exercise proper care and caution to avoid the injury, it is competent for him to show that there was no sign-board up, as required by law, as reflecting upon the question of his want of care, although the want of such sign-board is not alleged as a ground of recovery.

Baltimore, etc., R. Co. v. Whitacre, 35 O. S. 627 (1880).

Unless it is averred as a ground of negligence that a sign was omitted, he can not insist upon it as a substantive cause of action. If a party is acquainted with the crossing the absence of the warning post is not available as a proof of negligence.

New York, etc., R. R. Co. v. Kistler, 16 C. C. 316 (1894); 9 C. D. 277.

C. C. & I. Ry. Co. v. Reiss, 13 C. C. 405 (1889); 7 C. D. 450.

See Baltimore, etc., R. Co. v. Whitacre, 35 O. S. 627 (1880).

Lang v. Holiday, etc., Mining Co., 49 Ia. 469 (1878).

A violation of this section does not render the company absolutely liable for injuries to persons or property while attempting to cross the track. Evidence of such omission merely establishes the negligence of the company, and if it appear that the plaintiff's negligence contributed to the injury, he can not recover.

Dodge v. Burlington, etc., R. R. Co., 34 Ia. 276 (1872).

Section 8853. (Signals at railroad crossings.) Every company shall attach to each locomotive engine passing upon its road, a bell of the ordinary size in use on such engines, and a steam whistle. When an engine in motion and approaching a turnpike, highway or town road crossing or private crossing where the view of such crossing is obstructed by embankment, trees, curve or other obstruction to view, upon the same line therewith, and in like manner where the road crosses any other traveled place, by bridge or otherwise, the engineer or person in charge thereof, shall sound such whistle at a distance of at least eighty and not further than one hundred rods from such crossing, and ring such bell continuously until the engine passes the crossing. (R. S. Sec. 3336; April 16, 1892, 89 v. 331; May 13, 1886, 83 v. 153; R. S. 1880; March 25, 1872, 69 v. 49, § 1.)

Duty of person about to cross tracks. Ordinary prudence requires that a person in the full enjoyment of the faculties of hearing and seeing,

before attempting to pass over a known railroad crossing, should use them for the purpose of discovering and avoiding danger from an approaching train; and the omission to do so without a reasonable excuse therefor is negligence, and will defeat a recovery.

B. & O. R. Co. v. McClellan, 69 O. S. 142 (1903).

Stugard v. Railway, 92 O. S. 318.

Pennsylvania Co. v. Rathgeb, 32 O. S. 66 (1877).

Bellefontaine Ry. Co. v. Snyder, 24 O. S. 670 (1874).

Cleveland, etc., R. R. Co. v. Crawford, 24 O. S. 631 (1874).

Cleveland, etc., Ry. Co. v. Elliott, 28 O. S. 340 (1876).

Lake Shore, etc., Ry. Co. v. Gaffney, 9 C. C. 32 (1894); s. c., 6 C. D. 94.

Lake Shore, etc., Ry. Co. v. Schade, 15 C. C. 424 (1895); s. c., 8 C. D. 316.

Railway v. Schneider, 45 O. S. 678 (1888).

Lake Shore, etc., Ry. Co. v. Geiger, 8 C. C. 41 (1893); s. c., 4 C. D. 307.

New York, etc., Ry. Co. v. Swartout, 14 C. C. 582 (1895); s. c., 6 C. D. 768.

C. C. & I. Ry. Co. v. Reiss, 13 C. C. 405 (1889); s. c., 7 C. D. 450.

Schmidt v. Railway, 22 C. D. 539 (1911).

Traction Co. v. Smith, 15 C. C. n. s. 124 (1912).

The duty to exercise reasonable care to discover an approaching train continues until the track is crossed and the danger passed. If a person makes no further effort than to stop and look when sixty feet from the track, he is guilty of contributory negligence. *Woolley v. Railroad*, 90 O. S. 387 (1914). See *Penna. Co. v. Gulling*, 5 Ohio App. 183; 25 C. C. n. s. 326 (1916); motion to certify record overruled, 14 O. L. R. 180; *Railroad v. Kately*, 12 Ohio App. 16; 30 O. C. A. 97; motion to certify record overruled, 17 O. L. R. 24.

Where a street car motorman, driving his car on railroad tracks, pursuant to a negligent direction by his conductor to "come ahead," was struck and killed by a locomotive which approached without giving signals by bell as required by this section, it was held that failure to ring the bell was at least a concurring cause of the accident, and that it was error to direct a verdict for the railroad company.

Hales v. Railroad Co., 200 Fed. 533 (C. C. A. 1912).

Where turnpike is crossed by bridge. This section requires the engineer having in charge an engine in motion to ring the bell and sound the whistle on approaching a place where the road crosses any highway or traveled place by a bridge or other structure.

Railway v. Jump, 50 O. S. 651 (1893).

Duty to persons on track. This section is intended for the protection of such persons only as are crossing the track or are about to do so; and does not inure to the benefit of persons who are on the track but not at a crossing.

Cleveland, etc., Ry. Co. v. Workman, 66 O. S. 509 (1902).

See *Dick v. Railroad Co.*, 38 O. S. 389 (1882).

Railroad Co. v. Depew, 40 O. S. 121, 126 (1883).

Railway Co. v. Gesswine, 144 Fed. 56 (1906).

Byrket v. Railway, 10 C. C. n. s. 73; 19 C. D. 614.

Drown v. Traction Co., 76 O. S. 234.

Evidence. Though there is positive evidence that the whistle was blown before the train reached the crossing, the court can not direct a verdict for defendant where some of the witnesses testify that the whistle

was blown more than 2,000 feet from the crossing instead of within 80 or 100 rods of it, as required by this section.

Griffith v. Baltimore, etc., R. R. Co., 44 Fed. 574 (1890); 6 O. F. D. 666.

Hales v. Railroad Co., 200 Fed. 533 (C. C. A. 1912).

The testimony of witnesses who testify that they were walking on the track, knew the train was coming, were giving their attention to the train, and that they heard no whistle or bell, is not negative, but positive testimony.

Lake Shore, etc., R. R. Co. v. Schade, 15 C. C. 424 (1895); 8 C. D. 316.

Other things being equal, the testimony of the engineer and fireman of the train that the whistle was blown and the bell rung as it approached the crossing is entitled to more weight than the negative testimony of other witnesses that they did not hear either or both.

Griffith v. Baltimore, etc., R. R. Co., 44 Fed. 574 (1900); 6 O. F. D. 666; affirmed, 159 U. S. 603; 8 O. F. D. 573.

Duty to trackmen. The custom of a railroad company to give signals as required by this section was for the sole benefit of persons using the crossings. A failure to give such signals does not constitute negligence as against a trackman.

Norfolk, etc., Co. v. Gesswine, 144 Fed. 56; 15 O. F. D. 426 (C. C. A. 1906).

See Railroad v. Skiles, 64 O. S. 458.

Barton v. Railway, 12 C. C. n. s. 387; 21 C. D. 441; aff'd, 74 O. S. 479.

Duty of company to take precaution in addition to bell and whistle signals. Compliance with § 8853 does not excuse a railroad company from taking other precautions if the circumstances are such as to require them.

Erie R. Co. v. Weinstein, 166 Fed. 271; 7 O. L. R. 531 (C. C. A. 1909).

Evans v. Erie R. Co., 213 Fed. 129 (C. C. A. 1914).

Compliance with this section does not relieve a railway company from liability for injury to a traveler at a crossing resulting from negligent failure to take additional precautions by maintaining a watchman, crossing gates, etc., or from negligently running the train at a high rate of speed.

Rothe v. Penna. Co., 195 Fed. 21 (C. C. A. 1912).

Begert v. Payne, 274 Fed. 785 (C. C. A. 1921); Railway v. Iron Works, 279 Fed. 32 (C. C. A. 1922).

In the operation of trains over a highway crossing at grade in a municipality where buildings obscure the approach of trains, care commensurate with the danger existing must be exercised, although that may exceed the giving of signals by bell and whistle; but the railroad company is not the insurer of the safety of travelers using the crossing.

Weaver v. Railway, 76 O. S. 164 (1907).

The statutory requirement as to signals at a crossing is not exclusive. Railway Co. v. Parker, 9 C. C. n. s. 28; 19 C. D. (1907).

Section 8854. (Not to interfere with city ordinance.)

The provisions of the next preceding section shall not interfere with the proper observance of an ordinance passed by a city or village council regulating the management of railroads, locomotives and steam whistles thereon, within the limits of such city or village. (R. S. Sec. 3336; April 16, 1892, 89 v. 331; May 13, 1866, 83 v. 153; R. S. 1880; March 25, 1872, 69 v. 49, § 1.)

The most that can be claimed for this section is that it by implication

confers powers upon municipal corporations to regulate the management of locomotives and steam whistles and bells with reference to crossings in such municipalities. It does not enable municipalities to compel railroads to employ watchmen.

Ravena v. Pennsylvania Co., 45 O. S. 118, 125 (1887).

Rapid Transit Co. v. Erie R. Co., 7 C. C. n. s. 199; 18 C. D. 36 (1905).

An ordinance is invalid which requires the bell to be rung continuously while the train is passing through the corporate limits regardless of whether or not it is "approaching a turnpike, highway, etc."

Caskey v. Belle Center, 8 N. P. n. s. 153; 19 L. D. 726 (C. P. 1908).

Section 8855. (Penalties for violation of preceding section.) Every engineer or person in charge of such engine who fails to comply with the provisions of the two preceding sections shall be personally liable to a penalty of not less than fifty nor more than one hundred dollars, to be recovered by civil action, at the suit of the state, in the court of common pleas of a county wherein there is such a crossing. (R. S. Sec. 3337; March 25, 1872, 69 v. 49, § 2.)

Criminal penalty, see G. C. §§ 12549, 12550.

Section 8856. (Liability of company.) The company in whose employ such engineer or person in charge of an engine is, as well as the person himself, shall be liable in damages to a person or company injured in person or property by such neglect or act of such engineer or person. (R. S. Sec. 3337; March 25, 1872, 69 v. 49, § 2.)

The omission to ring the bell or sound the whistle at public crossings is not of itself sufficient ground to authorize a recovery, if the party, notwithstanding such omission, might, by the exercise of ordinary care, have avoided the accident.

Cleveland, etc., Ry. Co. v. Elliott, 28 O. S. 340 (1876).

Pennsylvania Co. v. Rathgeb, 32 O. S. 66, 72 (1877).

New York, etc., Ry. Co. v. Swartout, 14 C. C. 582 (1895); s. c., 6 C. D. 768.

Baltimore, etc., R. R. Co. v. Griffith, 159 U. S. 603, 607 (1895); s. c., 8 O. F. D. 573.

Horn v. Baltimore, etc., R. R. Co., 54 Fed. 301 (1893).

Pennsylvania Co. v. Alburn, 3 C. C. n. s. 104; 13 C. D. 130 (1901).

See *Heine v. Erie R. Co.*, 6 C. C. n. s. 7, 9; 17 C. D. 155; reversed, 75 O. S. 629.

This section does not confer a right of action unless the omission of the signals caused the injury, nor in case the person injured is guilty of contributory negligence.

Rothe v. Penna. Co., 195 Fed. 21 (C. C. A. 1912).

It is evident from the language of this section that the failure to give signals must have occasioned the accident, that is, must have been the proximate cause of it, before a recovery can be had.

Pennsylvania Co. v. Rathgeb, 32 O. S. 66, 72 (1877).

Cincinnati, etc., R. Co. v. Murphy, 18 C. C. 298 (1899); s. c., 10 C. D. 195.

Horn v. Baltimore, etc., R. Co., 54 Fed. 301 (1893).

Where it appears that the plaintiff was struck several hundred feet

from a crossing, the failure to give signals for the crossing can not be regarded as the proximate cause of the accident.

Lake Shore, etc., R. R. Co. v. Harris, 3 C. C. n. s. 599; 13 C. D. 400 (1901).

The railroad can not recover from the owner of a truck for damage to railroad equipment from a collision at a crossing, where there was failure to sound whistle and ring bell as required by § 8853. Railway v. Norton Iron Works, 279 Fed. 32 (1922).

Section 8857. (Crossing of highway to cemetery.) All railroads hereafter constructed, which cross an avenue or public highway leading from a city to a public cemetery thereof, situate within or without the limits of the city, shall be constructed so as to pass under or over such avenue or highway, at an elevation or depression as the case may be, that will allow the unobstructed passage of all wagons, carriages, or other vehicles necessary for any person to use thereon. (R. S. Sec. 3284; May 1, 1852, 50 v. 274, § 16.)

The cemetery of a private association does not come within the terms of this section. It covers and protects only cemeteries owned by cities.

Youngstown v. Pittsburg, etc., R. R. Co., 3 C. C. 214; 2 C. D. 121 (1888).

PRIVATE CROSSINGS AND WAYS.

Section 8858. (When private crossings must be built.) When a person owns fifteen or more acres of land in one body, through which a railroad passes, and which is so situated that he can not use a crossing in a public street, lane, road or other highway, in going from his land on one side of the railroad to that on the other side without great inconvenience, at his request, and within four months thereafter, the company or person operating it, at the expense of such company or person shall construct a good and sufficient private crossing across such railroad and the lands occupied by the company, between the two pieces of land to enable such landowner to pass with a loaded team, and over which he may go at all times when such railroad is not being used at the crossing, or so near to it as to render passing thereat dangerous. (R. S. Sec. 3327; April 18, 1874, 71 v. 85, § 1.)

This section was held constitutional in Mitchell, etc., Co. v. Wabash R. Co., 3 N. P. 231; 6 L. D. 135 (C. P. 1896), which case was affirmed by the supreme court (59 O. S. 607), without, however, passing on its constitutionality.

Railway Co. v. Wachter, 70 O. S. 113, 117, 121 (1904).

This section and § 8859 apply only to cases where lands, intersected by a railroad, are in one ownership at the time of the construction of the road.

Gratz v. Railroad Co., 76 O. S. 230 (1907).

But any owner of land lying on both sides of the road may, at his own expense, construct a crossing, providing it is suitably located and necessary for the convenient use of his lands and does not interfere with the movement of trains.

Gratz v. Railroad Co., 76 O. S. 230 (1907).

This section does not apply where the lands are used for industrial purposes. *Railway v. Bradford*, 30 O. C. A. 40 (1919); compare, *Mitchell v. Railroad*, 3 N. P. 231; 6 L. D. 135 (1896).

Where the land on either side of the tracks is accessible to a highway, a private crossing can not be required as a way of necessity, although the highway crossing may be less convenient. *Railway v. Bradford*, 30 O. C. A. 40 (1919).

The right to a crossing under this section is not affected by the fact that the right of way was appropriated, and the railroad constructed, before the enactment of this section.

Mitchell, etc., Co. v. Wabash R. Co., 3 N. P. 231; 6 L. D. 135 (C. P. 1896); *aff'd*, 59 O. S. 607.

The right to a private crossing depends upon the fact that the public crossing can not be used "without great inconvenience," and that such private crossing shall be used only when not dangerous; a crossing, therefore, should be constructed at the point most convenient and least dangerous.

Mitchell v. Wabash R. R. Co., 3 N. P. 231; 6 L. D. 135 (C. P. 1896).

Where the matter is before a court of equity, if the parties can not agree as to the location, the court will fix it by means of engineers and referees.

Mitchell v. Wabash R. R. Co., 3 N. P. 231; 6 L. D. 135 (C. P. 1896).

Injunction. Where a landowner, who is entitled to a crossing at his own expense but not at the expense of the railroad company, served a notice on the company requiring it to construct such crossing, the company is not entitled to an injunction preventing such crossing.

Gratz v. Railroad Co., 76 O. S. 230 (1907).

Where a landowner has complied with this section, and the railroad company has declared its intention of preventing the construction of the crossing, an injunction may be allowed to prevent such interference.

Mitchell v. Wabash R. R. Co., 3 N. P. 231; 6 L. D. 135 (1896); *aff'd*, 59 O. S. 607.

See *Jones, etc., Co. v. C. C. C. T. & S. Ry. Co.*, 7 N. P. 245 (1894).

Right to crossing in absence of statute. Where a landowner conveys to a railroad company a right of way through his land, the right to a private crossing remains in the grantor, provided such crossing is necessary for the convenient use of his lands, and will not unreasonably interfere with the use of the right of way for railroad purposes.

Railway v. Wachter, 70 O. S. 113 (1904).

See *Gratz v. Railroad Co.*, 76 O. S. 230, 233 (1907).

Statute of limitations. The right to a crossing is not barred by the statute of limitation of twenty-one years.

Railway v. Wachter, 70 O. S. 113.

Contract for private crossing; remedies for breach.

See *Bell v. Dayton, etc., R. R. Co.*, 3 C. C. 31; 2 C. D. 19 (1887).

Dayton, etc., R. R. Co. v. Lewton, 20 O. S. 401 (1870).

Where a contract for a right of way required the railroad company to construct a cattle pass, but the deed of the right of way was silent as to the cattle pass, which had been constructed before the execution of the

deed, it was held that the purchaser of a railroad, on foreclosure, could not fill up the cattle pass, possession by the grantor constituting notice.

Lowe v. Railway, 12 C. C. 743; 4 C. D. 85 (1894).

An agreement requiring the railroad company to build a crossing within one year after completion of the road is not a covenant running with the land, specifically enforceable against a successor railroad company, several years thereafter, where the agreement contained no covenant requiring the successor to build or maintain the crossing.

Zens v. Railway, 14 N. P. n. s. 202; 23 L. D. 182 (C. P. 1912).

Section 8859. (Owner may build at company's expense.)

If, for four months after request by such landowner for that purpose, such company or person neglects to construct a good and sufficient private crossing as provided in the next preceding section, after reasonable notice to the agent of the company for receiving and shipping freight at the station on the railroad nearest to the land where it is proposed to construct such crossing by the landowner of the time when he will proceed to construct it, he may enter upon the lands of the company, at any point he wishes between the two pieces of his land, and construct such crossing. Such company or person shall be liable to him for all the reasonable expense thereof, not exceeding the sum of fifty dollars, which he may recover in an action against it or him. (R. S. Sec. 3328; April 18, 1874, 71 v. 85, § 1.)

Section cited 30 W. L. B. 206.

Constitutionality of section.

See *Railway v. Wachter*, 70 O. S. 113, 117, 121 (1904).

Mitchell, etc., Co. v. Wabash R. Co., 3 N. P. 231; 6 L. D. 135 (C. P. 1896).

This section and § 8858 apply only to cases where lands are in one ownership at the time of the construction of the road. But any owner of land lying on both sides of the road may, at his own expense, build a proper crossing.

Gratz v. Railroad Co., 76 O. S. 230 (1907).

Section 8860. (When two preceding sections do not apply.) The provisions of the next two preceding sections relating to private crossings shall not apply to any case in which compensation for building a private crossing has been or may hereafter be taken into consideration, and estimated as part of the consideration to be paid for the right of way, so far as the right to private crossing, has been or may be settled or paid for; nor shall such sections be held to affect, in any manner, any contract or agreement between any railroad company, or person having control or management of a railroad, and the proprietor or occupants of lands adjoining, for the construction or maintenance of railroad crossings. (R. S. Sec. 3329; March 25, 1859, 56 v. 62, § 4; April 18, 1874, 71 v. 85, § 1.)

Where compensation for building a fence or private crossing was taken into consideration when the right of way was acquired, the company is not liable either to the landowner or the public for failure to fence or for insufficient fences.

Railway Co. v. Wood, 47 O. S. 431 (1890).

Where the defense of the company is that it has made compensation for fencing under this section, and the records of the condemnation proceedings are silent upon the subject, no presumption arises that the matter of fences was considered, even if the proceedings were had prior to the passage of this act.

Railroad Co. v. Hoffhines, 46 O. S. 643 (1888).

Mitchell, etc., Co. v. Wabash R. Co., 3 N. P. 231; 6 L. D. 135 (1896).

Contract between owner and railroad company. An agreement is not binding on a subsequent purchaser of the land who had neither actual nor constructive notice thereof at the time of the purchase.

Railway v. Bosworth, 46 O. S. 81 (1888).

A valid agreement embodied in the record of the appropriation proceeding is binding upon subsequent purchasers.

Huston v. Railroad Co., 21 O. S. 235 (1877).

See also notes to §§ 8918 and 8914.

Section 8861. (Freight ways may be constructed.) A person owning or operating a coal or iron-ore mine, stone-quarry, rolling mill, or machine shop, who, as a means of removing the product thereof, uses or desires to use a railway, may construct one and run cars thereon, over or under any railroad or public highway, the consent of the owner of the fee in the land at such crossing first being obtained. Such railway shall be so constructed as in no wise to impede or interfere with the running of cars or the travel upon such railroad or highway, or in any manner injure or impair either, or any switch, building, or appurtenance connected therewith or belonging thereto. When such freightway is constructed over a railroad, it shall be at the height of at least eighteen and one-half feet in the clear above the rails thereof. (R. S. Sec. 3355; May 1, 1873, 70 v. 194, § 1.)

This section contemplates a private railroad or switch for the use of the company constructing it. Barlotti v. Commission, 103 O. S. 647 (1921).

Section 8862. (Plan must be approved.) Before a person constructs such railway across a railroad he shall submit the plan of construction to the railroad commission for its approval, which at the cost of such person for traveling expenses or otherwise, must see that the structure in all respects conforms to the requirements of the next preceding section. (R. S. Sec. 3356; May 1, 1873, 70 v. 194, § 2.)

GRADE CROSSINGS.

Section 8863. (Alteration or elimination of grade or other crossings. Powers of commissioners with respect to roads lying within municipalities.) If the council of a municipal corporation in which a railroad or railroads, and a street or other public highway cross each other at a grade or otherwise, or the commissioners of a county in which a railroad or railroads and a public road or highway cross each other at grade, and the directors of the railroad company or companies are of the opinion that the security and convenience of the public require alterations in such crossing, or the approaches thereto, or in the location of the railroad or railroads or the public way, or the grades thereof, so as to avoid a crossing at grade, or that such crossing should be discontinued with or without building a new way in substitution therefor, and if they agree as to the alterations they may be made as hereinafter provided; provided, however, that the commissioners of a county shall have the same powers with respect to that part of a state, county or township road which lies within the limits of a municipal corporation as are conferred upon municipal corporations to alter or require to be altered, any railroad crossings, or to require any improvement in connection therewith to be made, and to apportion the cost thereof between the county and such railroad or railroads, as is provided in sections 8874, 8875, 8876, 8877, 8878, 8879, 8880, 8881, 8882, 8883, 8884, 8885, 8886, 8887, 8888, 8889, 8890, 8891, 8892, 8893 and 8894, of this chapter. (106 v. 206; R. S. Sec. 3337-8; April 27, 1893, 90 v. 359.)

This act (§§ 8863 to 8873), is adopted from a similar act in Massachusetts.

Stoner v. Railway, 9 N. P. n. s. 337, 348; 20 L. D. 448 (C. P. 1909).

Sections 8863 et seq. are limited to existing crossings and do not apply to proposed crossings over a railway not yet constructed.

Grinnell v. Commissioners, 6 C. C. n. s. 180; 17 C. D. 118 (1904).

The highway may be diverted from its original location for a short distance.

Stoner v. Railway, 9 N. P. n. s. 337; 20 L. D. 448 (C. P. 1909).

An owner of lands abutting upon that portion of a highway, which it is proposed to vacate or divert, may enjoin such change where the injury is different in kind from that of the general public.

Grinnell v. Commissioners, 6 C. C. n. s. 180; 17 C. D. 118 (1904).

Injunction by taxpayer.

See *Stoner v. Railway*, 9 N. P. n. s. 337; 20 L. D. 448 (C. P. 1909).

The authority of township trustees under § 8843 to determine the kind, manner, etc., of construction of crossings, is not repealed or abridged by this section.

Grinnell v. Commissioners, 6 C. C. n. s. 180; 17 C. D. 118 (1904).

Elimination of a grade crossing by agreement under this section

may be enforced against an interurban railway, although it has an existing crossing contract with the railroad company. *Railway v. Railway*, 18 N. P. n. s. 289 (1915).

While § 8863 et seq. apply only to elimination of grade crossings by agreement and § 8874 et seq. apply only to adversary proceedings, "yet the whole is one scheme of legislation having for its purpose the elimination of grade crossings where the security and convenience of the public require such elimination." *Sandusky v. Railroad*, 101 O. S. 225 (1920).

In proceeding under § 8874 county commissioners must not only adopt a resolution of necessity, but must endeavor to reach an agreement with the railroad company as to the location of the undercrossing and the plans and specifications therefor. *Arbaugh v. Railroad*, 104 O. S. 110 (1922).

As to power of county commissioners, see also §§ 6952-2, 6952-3.

Section 8864. (Resolution to alter or abolish.) When it is deemed necessary by a municipality or a county to join with any railroad company or companies in the alteration or abolition of a grade or other crossing, the council of the municipality, by a two-thirds vote of all the members elected thereto, or the commissioners of the county, by a unanimous vote, by resolution, shall declare such necessity and intent, and state therein the manner in which the alterations in the crossing are to be made, giving the method of constructing the new crossing with the grades for the railroad or railroads and the public way or ways; also what land or other property it is necessary to appropriate, and how their cost is to be apportioned between the municipality or county and the railroad company or companies; also by whom the work of construction is to be done and how its cost is to be apportioned between the municipality or county and the railroad company or companies. (R. S. Sec. 3337-9; April 27, 1893, 90 v. 360, § 2.)

See note to § 8863.

Where the preliminary steps required by § 8864 et seq. have not been taken, a taxpayer may enjoin the abolition of a grade crossing, when the prosecuting attorney, after request, has refused to take action. *Stoner v. Railway*, 9 N. P. n. s. 337; 20 L. D. 448 (C. D. 1909).

A judgment in an action brought by a city solicitor is a bar to an action by a taxpayer, as to all questions which might have been litigated therein. *Stockyards Co. v. Cincinnati*, 1 Ohio App. 452; 20 C. C. n. s. 139; 24 C. D. 251 (1913); affirming, 14 N. P. n. s. 529.

Inconvenience to an abutting owner by the conversion of the street into a viaduct does not entitle him to an injunction, although he alleges that the damage will be irreparable. The statutory remedy for compensation bars his right to an injunction. *Stockyards Co. v. Cincinnati*, 1 Ohio App. 452; 20 C. C. n. s. 139; 24 C. D. 251 (1913).

An ordinance providing for the separation of grades, and for other proceedings necessary for the abolishment of a grade crossing, but requiring separate ordinances to effect the same, is not invalid as containing more than one subject. *Stockyards Co. v. Cincinnati*, 1

Ohio App. 452; 20 C. C. n. s. 139; 24 C. D. 251 (1913); affirming, 14 N. P. n. s. 529.

Section 8865. (Publication of resolution.) Such resolution shall be published and notice of its passage given to owners of property abutting on the proposed improvement, in the manner provided as to resolutions of a city council declaring the necessity of a contemplated public improvement, and claims for damages thereby caused, must be filed in the manner, and within the time prescribed in such cases. (R. S. Sec. 3337-9; April 27, 1893, 90 v. 360, § 2.)

See notes to §§ 8765 and 8885.

Where a subway is constructed under the tracks immediately adjoining the highway, which is not vacated except at the grade crossing, and a *cul de sac* thus formed between the tracks and the entrance to the subway, with the result that the main travel was diverted from the *cul de sac*, the owner of a business property, abutting on the *cul de sac*, may recover damages caused by the depreciation in value.

Schimmelmann v. Railway Co., 83 O. S. 356 (1911).

Section 8866. (Ordinance or resolution, to proceed with improvement.) In not less than thirty nor more than ninety days after the passage of such resolution the council or commissioners shall determine whether it or they will proceed with the proposed improvement or not. If it is decided to proceed therewith, an ordinance by the council or resolution by the commissioners shall be passed, which ordinance or resolution must contain, in addition to the terms and conditions stated in such resolution, the plans and specifications of the proposed alteration and improvement, a statement of the damages claimed or likely to accrue by reason thereof, and how their payment is to be apportioned between the municipality or county and the railroad company or companies; also who shall supervise the work of construction. Upon the acceptance of this resolution or ordinance by resolution by the railroad company or companies through their directors, it shall constitute an agreement, valid and binding on the municipality or county and the railroad company or companies respectively. Such agreement shall thereupon be filed in the common pleas court of the county in which the crossing is located, for entry upon its records, whereupon it shall have the same force and effect as a decree of the court. (R. S. Sec. 3337-10; April 27, 1893, 90 v. 359.)

See State v. Amlin, 1 N. P. n. s. 517, 528; 14 L. D. 113 (1903); aff'd, 74 O. S. 447.

The provision of this section investing the agreement with the force of a decree of court is probably unconstitutional. But the court may enter a decree which will have the effect of a judicial determination as to the execution of the agreement and of its terms

and conditions. *Stockwell v. Railroad*, 18 N. P. n. s. 29; 26 L. D. 211 (1915).

An answer by a railroad company, alleging that, because of conditions occurring after the execution of the agreement, it is unable to raise funds to pay its share of the cost, was held good against demurrer. *Stockwell v. Railroad*, 18 N. P. n. s. 29; 26 L. D. 21 (1915).

Where by error two crossings were omitted from an ordinance providing for the sale of bonds to pay the city's share of the cost, but such crossings had been specified in the original resolution of the council, and in the published notice of a referendum election, at which the issue of such bonds was approved by the electors, a curative ordinance, subsequently enacted, which includes such crossings renders the bond issue valid.

Cadwell v. Cleveland, 12 N. P. n. s. 483; 22 L. D. 306 (C. P. 1911).

The time limit of this section does not apply to a proceeding by a municipality under §§ 8874-8894. Rep. Atty. Gen. 1912, p. 1714.

Section 8867. (Necessary property, how acquired.) The land or property required to make the alteration in the street or highway necessitated by the proposed improvement, shall be purchased or appropriated by the municipality or county in the manner provided by law for the appropriation of private property for public use, and the land or property required to make the alteration in the railroad or railroads necessitated by the proposed improvement, shall be purchased or appropriated by the railroad company or companies in the manner provided for the appropriation of private property by such corporation. (R. S. Sec. 3337-11; April 27, 1893, 90 v. 361, § 4.)

Property may be appropriated by the municipality for the purpose of opening a new street from a railroad depot near the crossing to the crossing at its higher level. *Morrison v. Cleveland*, 17 C. C. n. s. 427 (1911).

Section 8868. (Apportionment of cost.) The cost of the construction of the improvement in the crossing, including the cost of land or property purchased or appropriated, and the payment of damages to abutting property shall be apportioned as follows: The railroad company or companies, if several railroads cross a public way at or near the same point, shall pay not less than sixty-five per cent and the municipality or county not more than thirty-five per cent of such cost. Within these limits the apportionment may be fixed by the agreement hereinbefore provided for. (R. S. Sec. 3337-12; April 27, 1893, 90 v. 361, § 5.)

Where the share of the county is twenty percent of the cost, and the remaining eighty percent is divided between two steam railroad companies and a street railway company, the apportionment is valid, although the share of the steam railroads aggregates less than sixty-five percent.

State v. Amlin, 1 N. P. n. s. 517; 14 L. D. 113 (1903); aff'd, 74 O. S. 417.

A certificate from the auditor, under G. C. § 3806, that money to meet the expenditure is in the municipal treasury to the credit of the fund, and not otherwise appropriated, is not required to validate a contract or obligation of the municipality to pay its share of the cost of elimination of grade crossings.

Cincinnati v. Waite, 12 N. P. n. s. 633 (1912).

Section 8869. (Cost of maintenance of bridge to be borne by county or state.) After the completion of the work, the crossings and approaches shall be kept in repairs as follows: When the public way crosses a railroad or railroads, or railroad or railroads and interurban railroad or interurban railroads, by an overhead bridge, the cost of maintenance must be borne by the county, or by the state of Ohio as may be provided by law. When the public way passes under a railroad or railroads, or railroad or railroads and interurban railroad or interurban railroads, the bridge and its abutments shall be kept and maintained by the railroad company or companies, or the railroad company or companies and interurban railroad company or companies, as the case may be, in such proportions as may be fixed by agreement between the parties or, in the absence of such agreement, in such proportions as may be fixed by the common pleas court of the county in which the improvement is located, and the public way and its approaches shall be maintained and kept in repair by the county in which they are situated, or by the state of Ohio as may be provided by law. (110 v. 241; R. S. Sec. 3337-13; April 27, 1893, 90 v. 361, § 6.)

Overhead crossings erected prior to the enactment of § 8863 et seq. should be kept in repair by the railway company. *Opins. Atty. Gen.* 1922, p. 1020.

Liability of railroad company for defective guard rails on overhead bridge. *Railway Co. v. Hether*, 91 O. S. 233.

Section 8870. (Bonds and tax levy.) For the purpose of raising money to pay its proportion of the cost of such improvement, the municipality or county may issue its bonds to the necessary amount, which bonds shall be of such denomination and payable at such place and times as the council or the commissioners determine, and bear interest not exceeding six per cent per annum, but not to be sold for less than their par value. A tax on the taxable property of the municipality or county not exceeding one-half mill in each year may be levied to pay the principal and interest of the bonds as they mature. After the improvement is completed, a tax may be levied by the municipality or county to pay the cost of maintaining and keeping in repair that part of

the work required to be maintained and kept in repair by it. (109 v. 530; R. S. Sec. 3337-14; April 27, 1893, 90 v. 361, § 7.)

This act authorizes county commissioners to contract for a division of the cost of a bridge and to issue bonds, without reference to the emergency bridge fund, or the fact that sufficient funds are not in the county treasury.

State v. Amlin, 1 N. P. n. s. 517; 14 L. D. 113 (C. P. 1903); aff'd, 74 O. S. 447.

Injunction against issue of bonds by county commissioners without a referendum vote.

State v. Amlin, 1 N. P. n. s. 517; 14 L. D. 113 (1903); aff'd, 74 O. S. 447.

Sections 5635, 5636 relating to a special tax for the restoration of county bridges do not apply to bridges constructed under this act.

State v. Amlin, 1 N. P. n. s. 517; 14 L. D. 113 (1909); aff'd, 74 O. S. 447.

Bonds of municipalities issued to abolish grade crossings are subject to G. C. § 3940 et seq. Cleveland v. Cleveland, 16 C. C. n. s. 471 (1913); aff'd, no rep. 76 O. S. 594.

Section 8871. (Assessment and determination of damages.) All claims for damages by reason of such improvement, filed as hereinbefore provided, shall be assessed and determined as in other cases of public improvements within cities, wherein like claims are made, either before the beginning or after the completion of the proposed crossing improvement, as the council, or commissioners decide, when it is determined to proceed therewith. (R. S. Sec. 3337-15; April 27, 1893, 90 v. 362, § 8.)

The ascertainment of damages to property owners is provided for by this section.

Stoner v. Railway, 9 N. P. n. s. 337, 348; 20 L. D. 448 (C. P. 1909).

See East End, etc., Co. v. Cleveland, 1 N. P. n. s. 493; 14 L. D. 33 (C. P. 1903).

Elements of damage.

See notes to §§ 8885, 8865 and 8765.

Section 8872. (If company fails to comply with agreement.) If a railroad company fails to comply with any provision of an agreement entered of record in a common pleas court, as above provided, on application of a city solicitor or prosecuting attorney, stating the nature of its failure, the court shall make such orders and decrees to enforce the terms of the agreement, the requirements of law relating thereto, and to secure compliance therewith, by the railroad company, as it deems just and proper, and if necessary, may enjoin the company from the use of its track and the operation of its road on and over the crossing in question, until it complies with such order or decree as is made. (R. S. Sec. 3337-16; April 27, 1893, 90 v. 362, § 9.)

Section 8873. (Grade crossing on county line road.)

When a grade crossing is on a county line road, the commissioner of the counties in which such crossing is situated may join in all the proceedings necessary for the abolition of such grade crossing as hereinbefore provided, and that part of the cost of making such change in the crossing and of keeping it in repair which is not agreed to be paid by the railroad company or companies, shall be paid by the counties in equal proportions, and the money for such purpose be raised in accordance with the above provisions as to county road crossings. (R. S. Sec. 3333-17; April 27, 1893. 90 v. 362, § 10.)

Cited, *Grinnell v. Commissioners*, 6 C. C. n. s. 180, 182; 17 C. D. 118 (1904).

The highway may be diverted from its original location for a short distance.

Stoner v. Railway, 9 N. P. n. s. 337; 29 L. D. 448 (C. P. 1909).

Section 8874. (Powers as to grades above or below railroad tracks, erection of piers, etc.) Any municipal corporation may raise or lower, or cause to be raised or lowered, the grade of any street or way owned by it, either within or without its municipal limits, above or below railroad tracks, and may require any railroad company operating a railroad across such streets or ways to raise or lower the grade of its tracks and may construct ways or crossings above the tracks of any railroad, or require the railroad company to construct ways or crossings that are to be passed under its tracks. The word "railroad" shall include interurban railroads and the words "railroad company" shall include interurban railroad companies engaged in the operation of cars by electricity or other lawful motive power which said companies may adopt or use. Any municipality may require such railroad company to erect permanent piers, abutments or any other appropriate supports, in the ways, crossings, streets, roads or alleys, whenever in the opinion of council, the raising or lowering of the grade of any such railroad tracks, or the raising or lowering of the construction of such ways, crossings or other supports may be necessary, upon the terms and conditions hereinafter set forth. (May 3, 1913, 103 v. 502; May 31, 1911, 102 v. 507; March 23, 1909, 100 v. 77; May 2, 1902, 95 v. 356, § 1; R. S. Sec. 3337-17a.)

This act (§ 8874 et seq.) is constitutional.

Quinby v. Cleveland, 9 O. L. R. 313; 16 O. F. D. 583; 191 Fed. 68 (U. S. C. C. 1911).

See *Railway v. Minneapolis*, 232 U. S. 430 (1914); *Railway v. Omaha*, 232 U. S. 121 (1914).

While § 8863 et seq. apply only to elimination of grade crossings by agreement and § 8874 et seq. apply only to adversary proceedings, "yet the whole is one scheme of legislation having for its purpose the elimination of grade crossings where the security and convenience of the public require such elimination." *Sandusky v. Railroad*, 101 O. S. 225 (1920).

The authority of municipalities to eliminate grade crossings is an exercise of the police power which is a power continuing in its nature and not in any way limited by the extent of the grant or a franchise. *Cincinnati v. Traction Co.*, 25 C. C. n. s. 513 (1916); dismissed, 96 O. S. 602.

Sections 8874 to 8882 relate only to streets and highways, and not to public grounds. These sections confer power upon municipalities to change existing occupancy of streets, but not to grant rights to occupy streets.

Railroad Co. v. Cincinnati, 76 O. S. 481, 499, 500 (1907).

The general policy of the state to avoid permanent obstructions in streets is not infringed by piers which do not interfere with travel.

Cincinnati v. Railway, 7 N. P. n. s. 81; 19 L. D. 74 (1908).

Under this section and § 8863, a municipality may alter or reconstruct an existing bridge, on which a railroad crosses a street above grade, to widen the street and extend it through the embankment supporting the tracks at the ends of the bridge.

Cadwell v. Cleveland, 12 N. P. n. s. 483; 22 L. D. 306 (C. P. 1911).

Section 8875. (Changes in location of public ways.)

When the council of a municipality deems it necessary in the abolishment of such grade crossings to change the location of any street, alley, road or way such council may relocate such street, alley, road or way or any part thereof, may vacate the whole or any portion of such street, alley, road or way abandoned by such relocation, and cause the improvements above contemplated to be placed in such relocated street, alley, road or way. (May 2, 1913, 103 v. 268; March 23, 1909, 100 v. 77, § 1; May 2, 1902, 95 v. 356, § 1; R. S. Sec. 3337-17a.)

Streets may be altered and relocated.

Cincinnati v. Railway, 7 N. P. n. s. 81; 19 L. D. 74 (1908).

Cincinnati v. Traction Co., 25 C. C. n. s. 513 (1916); dismissed, 96 O. S. 602.

Plow Co. v. Railway, 12 N. P. n. s. 81 (1912).

Section 8876. (Preparations of plans and specifications.)

The council of such municipality, for the purpose of making or causing such an improvement to be made, by ordinance may require the railroad company, in co-operation with the engineer of the municipality, or the engineer designated in such ordinance, to prepare and submit to such council, within three months, unless longer time is mutually agreed upon in writing, plans and specifications for such improvement, specifying the number, character and location of all piers and supports, which are to be permanently placed in

any street or way, therein, specifying the grades to be established for the streets, and the height, character and estimated cost of any viaduct or way above or below any railroad track, and the change of grade required to be made of such tracks, including the side-tracks and switches. But in changing the grade of any railroad, no grade shall be required to exceed the established maximum or ruling grade governing the operations by engines of that division or part of the railroad on which the improvement is to be made, without the consent of the railroad company, nor shall the railroad company's tracks or such highway, street or way, be required to be placed below high water mark. (May 3, 1913, 103 v. 502; March 23, 1909, 100 v. 78, § 2; May 2, 1902, 95 v. 356, § 2; R. S. Sec. 3337-17b.)

The provisions of this section and § 8877, requiring that plans be prepared and agreed upon within a limited time are directory and not mandatory so far as they concern anyone except the municipality and the railroad company. The improvement can not be enjoined by a taxpayer because of failure to prepare or accept the plans within the time limited.

Cadwell v. Cleveland, 12 N. P. n. s. 483; 22 L. D. 306 (C. P. 1911).

The municipality or county commissioners must endeavor to reach an agreement with the railroad company as to location, plans and specifications, before appealing to the court. Arbaugh v. Railroad, 104 O. S. 110 (1922).

Section 8877. (When common pleas court to determine manner of improvement.) If at the expiration of three months from the passage of such ordinance, the railroad company has refused or failed to co-operate in the preparation of such plans and specifications or if the engineer of the municipality or engineer designated in such ordinance by council, and the railroad company fail to agree upon the plans and specifications for such improvement, then either the railroad company or municipal corporation may submit the matter of determining the method by which the improvement shall be made to the court of common pleas having jurisdiction in the county in which the municipality is situated. (March 23, 1909, 100 v. 78, § 2; May 2, 1902, 95 v. 356, § 2; R. S. Sec. 3337-17b.)

A part of the original of this section (95 v. 357), which provided for submission to the circuit court, was held invalid.

Cincinnati v. Railway, 7 N. P. n. s. 81; 19 L. D. 74 (1908).

The approval, by the railroad company, of plans and specifications, in a proceeding under § 8874 et seq. does not constitute such an agreement for the elimination of a grade crossing as to make applicable the procedure of § 8863 et seq. No resolution to proceed with the improvement under § 8866 is required. Rep. Atty. Gen. 1912, p. 1714.

Section 8878. (Who may petition the court.) Either the municipality or company after the expiration of three months

from the passage of the ordinance may apply to such court of common pleas by petition accompanied by the necessary plans prepared by the municipality or railroad company asking that any grade crossing or grade crossings be abolished. Such plans must show the grades to be established for such streets, the changes to be made in the location of streets, alleys, roads or ways; the height, character and estimated cost of any viaduct or way above or below railroad tracks, and the number, character and location of piers, abutments and supports to be permanently located in the streets, alleys, roads or ways, in the municipality and the change of grade to be made in any railroad tracks, including side tracks and switches. (May 2, 1913, 103 v. 269; March 23, 1909, 100 v. 78, § 2; May 2, 1902, 95 v. 356, § 2; R. S. Sec. 3337-17b.)

Section 8879. (Procedure.) Upon the filing of such petition, accompanied by plans, the railroad company or municipality opposed to the prayer thereof, or directly interested therein, shall have the right, within sixty days thereafter to file an answer to such petition and to present other plans for the abolition of such crossing or crossings. After the expiration of such period of sixty days the court shall proceed to a hearing upon the petition and any answers that have been filed, which hearing must be advanced upon the docket upon motion of either party. After examination of all plans presented to it and after hearing the evidence, the court shall make a finding as to whether or not the security and convenience of the public require that alterations be made in the crossing or crossings or in the approaches thereto, or in the location of the railroad or railroads or the public way, or any grades thereof, so as avoid a crossing at common grade, or that such crossings, or any of them be discontinued with or without building a new way in substitution therefor, and whether such plans or any of them are reasonable and practicable. (March 23, 1909, 100 v. 78, § 2; May 2, 1902, 95 v. 356, § 2; R. S. Sec. 3337-17b.)

Each party is entitled to present plans and modifications thereof, and the court may adopt the most reasonable and most practicable plan. *Sandusky v. Railroad*, 101 O. S. 225 (1920).

Where it is impracticable to eliminate the grade crossing by a vertical raising of the tracks or vertical lowering of the street, the court may adopt a plan requiring a reasonable lateral diversion. *Sandusky v. Railroad*, 101 O. S. 225 (1920).

Section 8880. (Order of the court.) If the court finds that the public security and convenience require such changes

to be made, and that the plans presented by the petitioner or any of the parties answering thereto are reasonable and practicable, it shall order the changes to be made in accordance with the most reasonable and practicable plan presented to the court. The municipality shall be required to make such changes in the streets, roads or highways as may be necessary, and the railroad company or companies be required to make the changes necessary in the tracks and roadbed, in order to comply with the rulings of the court. If more than one railroad company own tracks on the crossing in question, the court shall apportion the part of the expense payable by the railroad companies between or among such companies. But if the court finds that the security and convenience of the public do not require that alterations be made in such crossing or crossings, or that none of the plans are reasonable or practicable, the improvement shall not be made upon such plans. (March 23, 1909, 100 v. 78, § 2; May 2, 1902, 95 v. 356; R. S. Sec. 3337-17b.)

Section 8881. (Appeal and error.) Either party feeling aggrieved by the decision and order of the court may appeal or prosecute error as in other civil cases, the hearing of which shall be advanced upon the docket upon motion of either party. (March 23, 1909, 100 v. 78, § 2; May 2, 1902, 95 v. 356; R. S. Sec. 3337-17b.)

A judgment of the trial court authorizing a crossing at grade will not be reversed, unless it appears to be an abuse of discretion. *Railway v. Lakewood*, 18 C. C. n. s. 521 (1911).

Section 8882. (How orders of court enforced.) If a municipality, or railroad company refuses or neglects to comply with the orders or findings made by the court under the provisions hereof, the court may enforce its orders or findings by either mandamus or mandatory injunction or as for contempt of court, as the necessity of the case may require, upon the application of either party to such proceedings. (March 23, 1909, 100 v. 78, § 2; May 2, 1902, 95 v. 356, § 2; R. S. Sec. 3337-17b.)

Section 8883. (Apportionment of cost.) The cost of constructing the improvement authorized, including the making of ways, crossings or viaducts, above or below the railroad tracks, and the raising or lowering of the grades of the railroad tracks and side tracks for such distance as may be required by such municipality and made necessary by such improvement, together with the cost of land or property

purchased or appropriated, and damages to owners of abutting property, or other property, shall be borne thirty-five per cent. by the municipality and sixty-five per cent. by such railroad company or companies. The municipality shall have a right of action against any such railroad company for the recovery of the sixty-five per cent. and such costs payable by it, with interest from the time they become due. Such municipality and railroad company may agree as to what part of the work shall be done by the railroad company, and also fix the amount to be allowed or credited to the company for doing the work. Such railroad company shall be entitled to deduct from its sixty-five per cent. of the cost of the improvement the expense incurred by it in the change of its grade required by the municipality or made necessary by it under such specifications, but only in case the amount of expense has been agreed upon in writing between the municipality and the railroad company. If the amount of work done by the company, or made necessary by reason of such change of grade on lowering or raising its tracks, exceeds sixty-five per cent. of the cost of the improvement, then it shall have the right to recover the amount with interest in excess of sixty-five per cent. of the expenses, in an action at law against the municipality. (May 10, 1910, 101 v. 377; April 2, 1906, 98 v. 191, § 3; May 2, 1902, 95 v. 356, § 3; R. S. Sec. 3337-17c.)

Share of street railway. § 8892.

Under an ordinance imposing 65 percent of the cost upon the railroad company and 35 percent upon the municipality, an additional credit to the railroad for the actual cost of material and labor, plus ten percent for superintendence and the use of tools, is proper.

Quinby v. Cleveland, 9 O. L. R. 313; 16 O. F. D. 583; 191 Fed. 68 (U. S. C. C. 1911).

See State v. Amlin, 1 N. P. n. s. 517; 14 L. D. 113 (1903); aff'd, 74 O. S. 417.

As a part of the same improvement, a municipality may widen the street, and bear the entire expense of the street widening, without violating this section, where the street widening is not necessary to the abolishment of the grade crossing. Stockyards Co. v. Cincinnati, 1 Ohio App. 452; 20 C. C. n. s. 139; 24 C. D. 251; affirming, 14 N. P. n. s. 529 (1913).

A certificate from the auditor, under G. C. § 3806, that money to meet the expenditure is in the municipal treasury to the credit of the fund, and not otherwise appropriated, is not required to validate a contract or obligation of the municipality to pay its share of the cost of elimination of grade crossings.

Cincinnati v. Waite, 12 N. P. n. s. 633; 23 L. D. 22 (1912).

Section 8884. (Notice of intention to make improvement.) Before any work shall be done which may be required in the making of such proposed improvement, the council of such municipality shall by ordinance or resolu-

tion require notice of its intention to make such improvement in accordance with the plans and specifications to be given, after the manner provided by law, to the owner of each piece of property abutting upon any street, highway, or public place, the grade of which will be changed by the proposed improvement. (April 2, 1906, 98 v. 191, § 3; May 10, 1902, 95 v. 356, § 3; R. S. Sec. 3337-17c.)

See *East End, etc., Co. v. Cleveland*, 1 N. P. n. s. 493; 14 L. D. 33 (1903).

Section 8885. (Claims for damages and judicial inquiry.)

The provisions of law relating to the manner of service of such notices, the filing of claims for damages, and the effect of failure to file such claims, shall apply to the notice herein provided and to all claims for damages by reason of such proposed improvement. After the expiration of the time provided by law for the filing of such claims, the council of such municipality, when claims have been filed within the time limited, shall determine by ordinance or resolution whether such claims are to be judicially inquired into, as hereinafter provided, before commencing, or after the completion, of the proposed improvement. Thereupon, the mayor or solicitor shall make application for a jury, in the manner provided by law to the common pleas or probate court, of the county in which the municipality, or the larger part of it, is situated, either before commencing, or after the completion, of the improvement, as the council determines, and all proceedings upon such application shall be governed by the laws relating to the application provided for in other cases of city improvements. (April 2, 1906, 98 v. 191, § 3; May 10, 1902, 95 v. 356, § 3; R. S. Sec. 3337-17a.)

Damages to abutting owners are of two classes: damages from change of grade of the street, and damages by reason of piers and abutments in the street.

Quinby v. Cleveland, 9 O. L. R. 313; 16 O. F. D. 583; 191 Fed. 68 (U. S. C. C. 1911).

See note to § 8765.

East End, etc., Co. v. Cleveland, 1 N. P. n. s. 493; 14 L. D. 33 (1903).

Abutting property is property abutting on the street. As to piers and abutments, § 8888 applies and the right must be acquired by purchase or appropriation. As to change of grade the law relating to change of grade for other purposes controls.

Quinby v. Cleveland, 9 O. L. R. 313; 16 O. F. D. 583; 191 Fed. 68 (U. S. C. C. 1911).

A municipality may proceed with the improvement, leaving the matter of compensation to abutting owners, for damages for the change of grade, until the improvement is completed. But the railroad company must acquire the right to erect piers and abutments before the work proceeds. *Ib.*

Damage claims may be settled and paid without judicial determination of their amount. *Ib.*

A provision in an ordinance that the municipality shall not settle damage claims without the consent of the railroad company does not render the ordinance invalid. *Ib.*

Where a subway is constructed under the track immediately adjoining the highway, which is not vacated except at the grade crossing, and a *cul de sac* thus formed between the tracks and the entrance to the subway, whereby travel was diverted from the *cul de sac*, the owner of a business property, abutting on the *cul de sac*, may recover damages caused by the depreciation in value.

Schimmelmänn v. Railway Co., 83 O. S. 356 (1911).

An owner of property abutting on the railroad is not entitled to damages resulting from inability to connect with the railroad by a switch as he had done prior to the improvement. *Pratt v. Cleveland*, 191 Fed. 65 (C. C. 1908).

Where the vacation of a street, the appropriation of land for a street adjacent thereto (and between the vacated street and the theretofore abutting lands) and the appropriation of the vacated street for a railroad above grade, are contemporaneous and simultaneous transactions, the land abuts upon the vacated street for the purpose of fixing the compensation and damages of the owner. *Port Clinton v. Fall*, 99 O. S. 153 (1919).

Damages can not be recovered for less convenient means of ingress and egress, where the same inconvenience is suffered by the general public, although in less degree.

Schmidt v. Cleveland, 1 Ohio App. 264; 15 C. C. n. s. 589; 24 C. D. 7 (1913); *aff'd*, no rep. 91 O. S. 410.

Kinnear Mfg. Co. v. Beatty, 65 O. S. 264 (1901).

See note to § 8765.

Damages for change of grade may be recovered by an abutting owner. *Lewis v. Douglass*, 12 Ohio App. 386; 31 O. C. A. 13 (1919).

Section 8886. (Payment of railroad company's proportion of cost.) The council of such municipality, may by ordinance prescribe the manner and time or times of payment by such railroad company or companies of the proportion of the cost of such improvement which the railroad company or companies shall be required to pay. (April 2, 1906, 98 v. 191, § 3; May 2, 1902, 95 v. 356, § 3; R. S. Sec. 3337-17c.)

Section 8887. (Height of viaduct.) Any way, crossing or viaduct so constructed over a railroad track or tracks in any municipality shall be of such height as not to be of less than twenty-one feet in the clear from the top surface of the rails in the railroad track to the lowest point or projection of such overhead way, crossing or viaduct, unless such company consents to, or the common pleas court orders a less height. But in no event shall such court order a less height than sixteen feet and three inches. (March 23, 1909, 100 v. 80, § 4; May 2, 1902, 95 v. 356, § 4; R. S. Sec. 3337-17d.)

See § 8903.

Section 8888. (How necessary land acquired.) The land or property required to make alterations in the street, road, alley or other way or any right, title or interest in a public street, alley or other way, required for the erection of piers or supports in any municipality, necessitated by the proposed improvement, shall be purchased or appropriated by the municipality or company after the manner provided by law for the appropriation of private property for public use. The land or property required to make any alteration in a railroad or railroads or any right, title or interest in a public street, road, alley or way required to permit the erection of piers or supports in any municipality, and structure necessitated by the proposed improvements, shall be purchased or appropriated by the railroad company or companies after the manner provided for the appropriation of private property by such corporation. But the municipality shall not appropriate land held or owned by a railroad company and necessary for the use of the company in maintaining and operating this road. (May 2, 1913, 103 v. 269; March 23, 1909, 100 v. 80, § 5; May 2, 1902, 95 v. 356, § 5; R. S. Sec. 3337-17e.)

See note to § 8885.

The right to the circulation of air, passage of light and an unobstructed view over a street, together with the relative harmony of the street with the abutting lots, is an incorporeal hereditament and is property within the meaning of this section. *Port Clinton v. Fall*, 99 O. S. 153 (1919).

Property may be appropriated by a municipality for the purpose of opening a new street from a railroad depot near the crossing to the crossing at its higher level. *Morrison v. Cleveland*, 17 C. C. n. s. 427 (1911).

Section 8889. (Cost of maintenance.) After the completion of the work the crossings and approaches shall be kept in repair as follows: When the public way crosses a railroad by an overhead bridge, the cost of maintenance must be borne by the municipality. When the public way passes under the railroad, the bridge and its abutments shall be kept and maintained by the railroad company, and the public way and its approaches be maintained and kept in repair by the municipality in which they are situated. (May 2, 1902, 95 v. 359, § 6; R. S. Sec. 3337-17f.)

Section 8890. (Bond issue. Application of law.) For the purpose of raising the money to pay the proportion of the cost of such improvement payable by the municipality, the bonds of the municipality may be issued in the necessary amount and shall be of such denomination and payable at

such place and times as the council determines, and bear interest not exceeding six per cent per annum, and shall not be sold for less than par value.

This act and the sections of the General Code as hereby amended [G. C. §§ 8870 and 8890] shall apply to all pending proceedings for the issuance of bonds to defray the cost of eliminating grade crossings, and shall apply to any bonds which have heretofore been authorized but remain unsold. (109 v. 530; 103 v. 269; 100 v. 80, § 7; 95 v. 359, § 7; R. S. Sec. 3337-17g.)

Where the cost will raise the net indebtedness of the municipality beyond the limit authorized by statute, bonds can not be issued without the approval of the electorate.

Cleveland v. Cleveland, 7 N. P. n. s. 249 (1907); aff'd, 76 O. S. 594.

Bonds of municipalities issued to abolish grade crossings are subject to G. C. § 3940 et seq. Cleveland v. Cleveland, 16 C. C. n. s. 471 (1913); aff'd, no rep. 76 O. S. 594.

Section 8891. (Tax levy.) A tax on the taxable property of the municipality in addition to all other levies now allowed by law may be levied to pay the principal and interest of such bonds as they mature. After completion of the improvement, a tax in addition to all other levies allowed by law may be levied by the municipality to pay the cost of maintaining and keeping in repair that part of the work required to be maintained and kept in repair by the municipality. (March 23, 1909, 100 v. 80, § 7; May 2, 1902, 95 v. 359, § 7; R. S. Sec. 3337-17g.)

Section 8892. (Street railway company to bear share of expense.) In case the track or tracks of any street railway company or companies within the limits of a municipality where the improvements hereinbefore authorized are made, cross at grade or otherwise a public street or the right of way of any railroad company or companies at a point where, under the plans and specifications above provided for, it has been determined to construct such improvements, the municipality by ordinance may require such street railway company or companies to bear a reasonable proportion of the cost assumed by it, in making the improvement, not exceeding one-half the portion payable by the municipality; and it shall have a right of action against such street railway company or companies for that part of the cost which the ordinance requires it or them to bear. Such part of the cost also shall be a lien upon all the property, real and personal, of such company or companies situated in the same county with the municipality from and after the date of

the passage of such ordinance. (April 2, 1906, 98 v. 192, § 8; May 2, 1902, 95 v. 359, § 8; R. S. Sec. 3337-17h.)

See *State v. Amlin*, 1 N. P. n. s. 517; 14 L. D. 113 (1903); *aff'd*, 74 O. S. 417.

Sections 8892-8894 are constitutional. *Traction Co. v. Akron*, 23 C. C. n. s. 497 (1912); *aff'd*, 91 O. S. 382.

Where the municipality and street railway company are unable to agree upon the apportionment of the cost, the municipality may, by ordinance, fix the amount to be paid by the company, but, in an action to recover the same, recovery will be for only such amount as the jury shall determine to be a reasonable share of the cost. *Traction Co. v. Akron*, 23 C. C. n. s. 497; 26 C. D. 644 (1912); *aff'd*, 91 O. S. 382. See *Cincinnati v. Traction Co.*, 25 C. C. n. s. 513 (1916); dismissed by supreme court, 96 O. S. 602.

A street railway franchise exempting the company from payment of any part of future elimination of grade crossings is invalid. *Carpenter v. Traction Co.*, 13 N. P. n. s. 81; 23 L. D. 588 (1912); s. c., 88 O. S. 625.

Section 8893. (Time and manner of payment of proportion.) The council of such municipality may by ordinance provide the mode and time or times of payment for the proportion of the cost of such improvement to be borne by such street railway company or companies. (April 2, 1906, 98 v. 192, § 8; May 2, 1902, 95 v. 359, § 8; R. S. Sec. 3337-17h.)

Section 8894. (Repairs.) Such street railway company or companies shall keep in repair at its or their own expense all tracks affected by such improvement and all construction work of whatever character, necessary to support such tracks. (April 2, 1906, 98 v. 192, § 8; May 2, 1902, 95 v. 359, § 8; R. S. Sec. 3337-17h.)

Section 8895. (Crossings to be above or below grade.) Except as hereinafter provided, all crossings, hereafter constructed, whether of highways by railroads, or of railroads by highways, shall be above or below the grade thereof. (April 25, 1904, 97 v. 546, § 1; R. S. Sec. 3337-17j.)

This act (§ 8895 et seq.) does not apply to interurban railways.

Commissioners v. Traction Co., 75 O. S. 548 (1907).

In re Avon Beach, etc., R. Co., 3 N. P. n. s. 561; 16 L. D. 87 (1905).

This act does not authorize a municipality to grant to a railroad company the right to occupy a public common or landing with an elevated railroad structure.

Railroad Co. v. Cincinnati, 76 O. S. 481 (1907).

Until an order of the common pleas court is made under § 8899, a municipality may be enjoined from opening a street across tracks at grade. *Railroad v. Lima*, 89 O. S. 442 (1913).

This section does not preclude county commissioners from making an agreement, authorized by G. C. § 8763, permitting a railroad to cross highways above or below grade. *Ritter v. Railway*, 17 C. C. n. s. 4 (1908); reversing, 6 N. P. n. s. 161; 18 L. D. 846.

Private rights of way are not "highways" under this section. *Railroad Co. v. Realty Co.*, 92 O. S. 96 (1915).

Section 8896. (Railroad crossings.) Every railroad company building a new line of road, under its charter powers, across a highway, shall construct it above or below the grade of the highway, unless in the manner hereinafter provided, allowed to build it at grade. Such company may exercise the power contained in its charter and the general laws, for altering the grade and location of highways in order to avoid grade crossings. (April 25, 1904, 97 v. 546, § 2; R. S. Sec. 3337-17k.)

The words "general laws" in this section permit a resort to § 8763. *Ritter v. Railway*, 17 C. C. n. s. 4 (1908); reversing, 6 N. P. n. s. 161; 18 L. D. 846.

Section 8897. (Highway crossings.) Every municipality or other authority hereafter building a highway across an existing railroad, shall construct it above or below the grade thereof, unless in the manner hereinafter provided allowed to build at grade. The cost of such work shall be paid, thirty-five per cent. by such municipality or other authority, and sixty-five per cent. by the company owning the railroad. The word "railroad" shall include interurban railroads and the words "railroad company" shall include interurban railroad companies engaged in the operation of cars by electricity or other lawful motive power which said companies may adopt or use. The method or procedure for the construction of such highway and the manner of construction thereof shall be governed by the statutes regulating the abolition of grade crossings. (May 3, 1913, 103 v. 502; April 25, 1904, 97 v. 546, § 3; R. S. Sec. 3337-17l.)

The grade crossing act is constitutional. *Railroad v. Martins Ferry*, 92 O. S. 157 (1915); *Railway v. Cincinnati*, 93 O. S. 496, 497 (1915); affirming, 4 Ohio App. 443; 23 C. C. n. s. 289.

Where a railroad company has acquired entire control of the privileges, tracks and property and assumed the liabilities of another company, both companies are liable for the share of the cost imposed on the railroad. *Cincinnati v. Railway*, 4 Ohio App. 443; 23 C. C. n. s. 289 (1915); affirmed, 93 O. S. 496, 497.

The grade crossing act (§ 8897 et seq.) did not repeal or modify § 3677, and appropriation proceedings therein authorized can not proceed until it is judicially determined that the appropriation will not unnecessarily interfere with the reasonable use of the property to be crossed by the street. The court of common pleas may, in one proceeding, hear and determine all questions under §§ 3677 and 8899. *Railroad v. Martins Ferry*, 92 O. S. 158 (1915).

A certificate from the auditor, under G. C. § 3806, that money to meet the expenditure is in the municipal treasury to the credit of the fund, and not otherwise appropriated, is not required to validate a contract

or obligation of the municipality to pay its share of the cost of elimination of grade crossings.

Cincinnati v. Waite, 12 N. P. n. s. 633 (1912).

Section 8898. (Grade crossings.) When it is desired by a railroad company constructing a new railroad, or in changing or in altering the location of one heretofore constructed, or by any municipality or authority constructing a new highway that the railroad or highway should be so constructed that the railroad and highway will cross each other at the same grade or if it is desired to divert, change or alter an existing public highway, a petition shall be presented by the party desiring such construction or diversion, to the common pleas court of the county within which the crossing or diversion is situated, and if it is a highway asking for the right to cross a railroad, the railroad company shall be the defendant. If it is a railroad company asking for the right to cross a highway, or divert, change or alter any existing public highway, in a municipality, such municipality shall be the defendant. If outside the municipality, the trustees of the township and the board of county commissioners of the county shall be the defendants. Summons shall be served and the rule days and the rights of the defendants to plead shall be the same as in civil actions in such court. (April 25, 1904, 97 v. 546, § 4; April 3, 1908, 99 v. 58, § 4; R. S. Sec. 3337-17m.)

Section 8899. (Petition, what to contain.) Such petition shall set forth the reasons that are supposed to make such change or alteration necessary or desirable; and the court of common pleas thereupon shall have the jurisdiction of the parties and the subject matter of the petition, and may proceed to examine the matter, either by evidence, by reference to a master commissioner or otherwise. If satisfied that such construction is reasonably required to accommodate the public, or to avoid excessive expense, in view of the small amount of traffic on the highway or railroad, and considering the future uses to which the highway may be adapted, or in view of the difficulties of other methods of construction, or for other good and sufficient reasons, the court shall make an order or orders permitting such crossing at a grade or diversion to be established. In such order, or orders, in its discretion, the court may prescribe that gates, signals, watchmen, or other safeguards shall be maintained by the railroad company, in addition to the signals and safeguards prescribed by statute, and all such orders shall be binding upon the parties and be observed by them. (April 25, 1904,

97 v. 546, § 4; April 3, 1908, 99 v. 58, § 4; R. S. Sec. 3337-17m.)

This section is constitutional. *Railway Co. v. Akron*, 18 C. C. n. s. 250 (1909).

The court may grant permission to cross at grade, conditional upon the acquirement by the railroad company, by agreement or condemnation, of the right to do so. Such agreement or condemnation need not precede the order of the court under this section.

In re Avon Beach, etc., R. Co., 3 N. P. n. s. 561; 16 L. D. 87 (C. P. 1905).

A municipality may be enjoined from constructing or opening a highway across tracks at grade until an order of court is obtained under this section. *Railway v. Lima*, 89 O. S. 442 (1913).

An order permitting a municipality to cross at grade is within the discretion of the common pleas court, and will, ordinarily, be reversed only for abuse of discretion. *Railway v. Lakewood*, 18 C. C. n. s. 521 (1911).

An order of the court of common pleas under this section must be obtained before a proceeding will lie to appropriate the use of a street at grade. A petition for appropriation which does not allege such an order is subject to a motion to make definite and certain.

Railway v. East Liverpool, 10 N. P. n. s. 157; 55 O. L. B. 173 (Pr. Cr. 1909).

See *Toledo v. Railway Co.*, 9 C. C. n. s. 399; 19 C. D. 658 (1907); aff'd, 78 O. S. 429.

In re Avon Beach, etc., R. Co., 3 N. P. n. s. 561; 16 L. D. 87 (C. P. 1905).

Section 8900. (Costs and expenses.) All costs and expenses of the proceedings shall be ascertained and allowed by the court of common pleas and be paid by such party as it decides; or by it apportioned between the parties, and may be collected by execution out of such court. (April 25, 1904, 97 v. 546, § 4; April 3, 1908, 99 v. 58, § 4; R. S. Sec. 3337-17m.)

Section 8901. (Appeals.) Appeals may be taken and error prosecuted from the decision of the common pleas court to the court of appeals in such proceedings, as in civil actions. The decision of that court shall be final and conclusive. In both the common pleas court and court of appeals proceedings brought hereunder shall be advanced over other civil causes. (May 6, 1913, 103 v. 425; April 25, 1904, 97 v. 546, § 4; April 3, 1908, 99 v. 58, § 4; R. S. Sec. 3337-17m.)

Section 8902. (Additional tracks and switches.) Nothing in sections eighty-eight hundred and ninety-five to eighty-nine hundred and one both inclusive, shall prevent a railroad company from laying additional tracks at previously existing crossings, or from constructing switches, sidings and branch lines from their lines of road to a mill, factory, or

other manufacturing establishment, or other industrial plant, or an elevator, wharf or pier, or gravel, marl, or clay bed, or any mine, or from laying additional track to increase their yard facilities at terminal or other points across public highways at the grade thereof. Such signposts and signals shall be employed for the protection of such crossings as are by law prescribed for railroad crossings of public highways. (April 25, 1904, 97 v. 547, § 6; R. S. Sec. 3337-170.)

Under this section a track may be built to several mills, factories, etc., and over several streets. This section does not limit the construction of a track over a single street to a single mill, factory, etc. *Cincinnati v. Railway*, 15 N. P. n. s. 219 (1912); aff'd, no rep. 89 O. S. 416.

A spur track 3,200 feet long, from which numerous private sidings will branch off to neighboring factories is not a new line of railway, and may be authorized by the council, under this section. *Cincinnati v. Railway*, 15 N. P. n. s. 219 (1912); aff'd, no rep. 89 O. S. 416.

See *State v. Toledo, etc., Co.*, 1 C. C. n. s. 513; 14 C. D. 321 (1903); aff'd, 69 O. S. 550.

State v. Railroad Co., 40 O. S. 504 (1884).

State v. Railroad Co., 50 O. S. 239 (1893).

Reeves v. Treasurer of Wood County, 8 O. S. 333 (1858).

A crossing by a spur track leading to factories, commercial houses and docks, is within the exception as to tracks for increasing "yard facilities at terminal or other points" and such crossing may be at grade.

Toledo v. Railroad Co., 9 C. C. n. s. 399; 19 C. D. 658 (1907); aff'd, 78 O. S. 429.

In an action brought in the court of common pleas to enjoin the laying of a crossing at grade, under a judgment of the probate court, it is error to exclude testimony offered to show that the crossing is within the exception of this section.

Toledo v. Railroad Co., 9 C. C. n. s. 399; 19 C. D. 658 (1907); aff'd, 78 O. S. 429.

Section 8903. (Height of over railroads.) Except cases in which the state railroad commission finds that such construction is impracticable, bridges, viaducts, overhead roadways, foot-bridges, wire or other structure hereafter built over the track or tracks of a railroad or railroads, by a county, municipality, township, railroad company, other corporation or person, shall be not less than twenty-one feet in the clear from the top of the rails of such track or tracks, to such wire or other structure or to the bottom of the lowest sill, girder or crossbeam, and the lowest downward projection on the bridge, viaduct, overhead roadway or foot-bridge. (April 16, 1900, 94 v. 297, § 1; May 21, 1894, 91 v. 365; R. S. Sec. 3337-18.)

See § 8887.

Penalty for violation.

See § 12546.

The jurisdiction of the utilities commission extends to regulating the overhead structures in city street railroad crossings, independent of any interlocking device connected therewith.

Opin. Atty. Gen., 39 W. L. B. 115 (1898).

Duty of railroad to employes.

Lake Shore, etc., Ry. Co. v. Shook, 16 C. C. 665; 9 C. D. 9 (1895).

In the absence of a statute requiring it, or of evidence showing that it is usual, a railroad company is not required to construct its bridges so as to permit a person to stand upon them in safety while a train is passing.

Erie R. Co. v. McCormick, 69 O. S. 45 (1903).

Power to close bridge for repairs. Where it is the duty of a railroad company to erect and maintain a bridge in a street under which its road is passing, and such bridge becomes dangerous and out of repair, the company has the same right as the city to close the bridge for repairs, although it constitutes part of the public street.

Toledo, etc., Ry. Co. v. Mammet, 13 C. C. 591; s. c., 6 C. D. 244 (1895).

Duty to maintain bridge. Although there may be some doubt as to the original liability of a company to build a bridge across its road, if it in fact builds a bridge and maintains it for forty years, it will be held liable to continue to maintain the same.

Toledo v. Lake Shore, etc., Ry. Co., 17 C. C. 265; 9 C. D. 135 (1893).

Bridges over right of way—removal by municipal authorities.

Where a railroad is constructed in a cut across a highway, and the highway is restored by bridging across, such bridge constitutes a part of the highway and may be removed, when the council deem it necessary for the public convenience to make the crossing at grade.

Railroad Co. v. Defiance, 52 O. S. 262 (1895); aff'd, 167 U. S. 88.

Low bridge over highway—remedy. Where an injunction is asked to restrain a railroad from building a bridge over a turnpike which would leave only a space between the surface of the road and the bridge not sufficient for the purposes of the public using such road, and it appears that much work has been done in building such bridge before objection was made, and that the cost of raising such bridge would involve a heavy expense, and that the difficulty could be remedied at much less expense and trouble by lowering the surface of the road at the point in question, the court will order that the latter be done at the expense of the railroad company.

Wooster Turnpike Co. v. Railroad Co., 15 C. C. 268; 8 C. D. 269 (1897).

Section 8904. (Exceptions.) The exception in the next preceding section shall not apply to the structures therein named when built over the main tracks of railroads; and in cases wherein it is allowed, the railroad commission shall file in its office a written statement of the facts upon which it relied in finding the required construction impracticable. (April 16, 1900, 94 v. 297, § 1; May 21, 1894, 91 v. 365; R. S. Sec. 3337-18.)

Section 8905. (Costs.) In case of the rebuilding of bridges or the other structures above provided for, if the

structure is at or in line with a public street or highway, and a cross-street or streets, the cost of making such streets or highways conform to a new grade, with all damages to owners of property abutting thereon because of such change shall be determined and paid, as follows: The railroad company or its assigns shall pay all costs or damages resulting from the raising or building of its bridges or structures in the line of a street or highway at a greater height than heretofore was required. If such company is only part owner of such structure it shall pay its proportionate share of the cost of such change in grade and damages. Should a railroad company, or its assigns, hereafter raise the grade of its track or tracks under any of such structures not owned by it, thereby causing a bridge or structure to be put at a higher grade when rebuilt, the company shall pay all costs and damages thereby made necessary. (April 16, 1900, 94 v. 297, § 1; May 21, 1894, 91 v. 365; R. S. Sec. 3337-18.)

“Said structures” refer to § 8903 and not to structures erected under § 8834. *Railway v. Railway*, 18 N. P. n. s. 289 (1915).

Section 8906. (Plans and specifications to be filed with railroad commission.) Every railroad company, public or private corporation, or person building or permitting to be built, any such bridge, viaduct, overhead roadway, foot bridge, wire and other structure, before proceeding therewith, shall file with the state railroad commission, plans and specifications therefor, and have its permit for the erection of such structure or wire. (May 21, 1894, 91 v. 366, § 2; R. S. Sec. 3337-19.)

Section 8907. (How enforced.) Observance of the provisions of the four next preceding sections may be enforced by an injunction on complaint of any person, corporation or board interested therein. (May 21, 1894, 91 v. 366, § 2; R. S. Sec. 3337-19.)

Penalty for violation.
See § 12546.

CHAPTER 3.

DRAINAGE AND FENCES.

Drainage.		§ 8914.	Cattle-guards and crossings.
§ 8908.	Waterways must be provided.	§ 8915.	Temporary crossings.
§ 8909.	Proceedings to enforce company to provide a waterway.	§ 8916.	Land owner may construct fence at company's expense.
§ 8910.	When probate judge may let work.	§ 8917.	Owner may repair fence.
§ 8911.	Sale of work and proceedings.	§ 8918.	When preceding sections do not apply.
§ 8912.	Fees of officers.	§ 8919.	When company may build fence at landowner's expense.
Fences.		§ 8920.	Forfeitures for not constructing and repairing fences.
§ 8913.	Fences.	§ 8921.	Right to use culvert, etc., for cattle-way.

DRAINAGE.

Section 8908. (Waterways must be provided.) Except where the road-bed of a railroad extends through or by swamp land, the company or person operating the road shall made and keep open ditches, or drains along such road-bed of depth, width, and grade sufficient to conduct water accumulating at the sides of the road-bed from the building or operation of the road, to some proper outlet. (R. S. Sec. 3342; May 7, 1869, 66 v. 335, § 1.)

This section is valid in so far as the accumulation of water is injurious to the contiguous lands, or detrimental to the public, but invalid where such water is not injurious to such lands or the public.

Railroad Co. v. Keith, 67 O. S. 279 (1902); reversing 21 C. C. 669.

Railway Co. v. Eby, 67 O. S. 552 (1903).

Only the company owning the railroad, and not the lessees thereof, can be subjected to ditch assessments.

Baltimore, etc., R. Co. v. Pausch, 35 W. L. B. 1 (1896).

Agreement to maintain ditch. Where a county ditch was constructed over and along the ditch which a railroad company had agreed to open and maintain along the right of way granted by the plaintiff, under a contract made when the grant was made, the railroad company was released from further obligation.

Railway Co. v. Henry, 14 C. C. n. s. 97 (1910).

In an action for damages against the railroad company for failure to maintain such ditch, the question of whether the construction of the county ditch, with the consent of plaintiff, had not carried a large amount of water which did not naturally flow there should be submitted to the jury.

Railway Co. v. Henry, 14 C. C. n. s. 97 (1910).

Under an agreement to maintain a culvert and crossings necessary to enable the parties "to reasonably occupy their lands, to carry off surplus water," etc.; and to keep open on the hillside of the road a sufficient drain "for the discharge of the drainage," the company was held liable

for damages caused by an obstruction of a lower drain through which the drainage of such parties was discharged.

Madden v. Railway Co., 36 O. S. 46 (1880).

Specific performance of a contract for the maintenance of a waterway may be decreed against the railway company.

Bell v. Railroad Co., 3 C. C. 31; 2 C. D. 19 (1887).

An agreement can not be rescinded on the ground of insufficient consideration where two suits, for damages, were brought thereon by the party seeking rescission and recovery was had in one suit and denied in the other suit. Forsythe v. Railway, 88 O. S. 514 (1913).

Liability for damages by flood waters. Damages for injury to land by flood waters can not be recovered from a railroad company where the flood was unprecedented, and other causes to produce the injury intervened.

B. & O. R. Co. v. Simpson, 12 C. C. n. s. 185 (1906).

An owner of land, abutting on a river, through which a creek flows and empties into the river, may, as against proprietors on the opposite side of the river, change the channel and mouth of the creek upon his own land and for his own protection or convenience, if, in so doing, he exercises reasonable care not to injure the rights of others.

Railroad Co. v. Carr, 38 O. S. 448 (1882).

If the opposite bank of the river be subject to inundation and overflow in case of unusual but not unprecedented floods in the river, such change in the mouth of the creek can not be made if increased danger of inundation and overflow on the opposite bank of the river might be anticipated, in the exercise of ordinary care and prudence.

Railroad Co. v. Carr, 38 O. S. 448 (1882).

Where such change is made without fault or carelessness, and a levee on the opposite bank is broken or washed away by an unusual, but not unprecedented flood, whereby the crops growing on adjacent lands are destroyed, it is *damnum sine injuria*, notwithstanding a sandbar in the river at the new mouth of the creek may have contributed to the damage.

Railroad Co. v. Carr, 38 O. S. 448 (1882).

Where a railroad company constructed an embankment containing sufficient culverts to take care of the drainage, and the municipality subsequently constructed a cross embankment dividing the basin into two parts, leaving one part with insufficient drainage and without constructing culverts in the cross embankment, the railroad company is not liable to the municipality for injuries caused by insufficient drainage of the part so cut off. Cincinnati v. Railway, 1 Ohio App. 461; 17 C. C. n. s. 137 (1913); aff'd, no rep. 92 O. S. 510.

Liability for assessments for county ditch. A railroad company may enjoin the levy of an assessment against its right of way for a county ditch, where the right of way has sufficient drainage and the county ditch would be of no benefit.

Railway v. Commissioners, 15 C. C. n. s. 236 (1912).

Section 8909. (Proceedings to enforce company to provide a waterway.) After ten days' notice or request to a ticket or other agent of the company or person operating a railroad, to provide such drain or ditch, preferred by a person authorized to institute the proceedings hereinafter provided for, if the requirements of the foregoing section are not complied with, any owner or tenant of land con-

tigious to such railroad aggrieved by such neglect may give notice of the fact, in writing, to the probate judge of the county in which it occurs designating therein the place or places on such road where drains or ditches have not been made. Upon receipt of such notice the probate judge shall appoint a commission, of three disinterested freeholders of such county, who with the county surveyor, shall proceed to the places designated in the notice, and, if upon inspection, it is found that such requirements are not complied with, the commission or a majority thereof, shall report the fact to the judge who shall keep a record of such proceedings. He also shall designate a time within which such ditches or drains shall be made or opened and forthwith notify the company or person operating such road, in writing, whose duty it shall be to make or open such ditches or drains within the time specified. (R. S. Sec. 3343; May 7, 1869, 66 v. 335, § 2.)

This section was held unconstitutional in

Railroad Co. v. Keith, 67 O. S. 279 (1902); reversing 21 C. C. 669.

Section 8910. (When probate judge may let work.) If such company or person neglects to comply with the notification of the probate judge, he shall forthwith give notice that the work of making or opening the ditches or drains will be let to the lowest bidder at the time and place designated in the advertisement. Such advertisement shall be for three consecutive weeks, in one or more of the weekly newspapers published in such county. (R. S. Sec. 3344; May 7, 1869, 66 v. 335, § 3.)

This section was held unconstitutional in

Railroad Co. v. Keith, 67 O. S. 279 (1902); reversing 21 C. C. 669.

Section 8911. (Sale of work and proceedings.) At the time and place so specified, such judge shall sell the job or jobs of making or opening such ditches or drains to the lowest bidder, and take from him a sufficient bond, with surety, for the performance thereof. Upon its completion to his satisfaction, he shall give the bidder a certificate therefor, stating the amount due for the work. On its presentation to the auditor of the county, he forthwith shall place the amount so certified upon the county tax duplicate, against the company, together with all costs and expenses for inspection by the commission and surveyor, notices, advertisements, sale of work, making contract therefor, approval of the work, and other costs, and interest on the amount certified to be due, from the time the work is ap-

proved until the amount can be collected by the county treasurer. Such tax shall be collected as other taxes, and be paid to the persons entitled thereto on the warrant of the auditor on the treasurer. (R. S. Sec. 3345; May 7, 1869, 66 v. 335, § 4.)

This section was held unconstitutional in

Railroad Co. v. Keith, 67 O. S. 279 (1902); reversing 21 C. C. 669.

Section 8912. (Fees of officers.) The probate judge, commissioners, and surveyor shall be paid for their services such costs, fees and expenses as are provided by law for costs, fees, and expenses of county commissioners and others under proceedings relating to ditches. (R. S. Sec. 3346; May 7, 1869, 66 v. 335, § 5.)

This section was held unconstitutional in

Railroad Co. v. Keith, 67 O. S. 279 (1902); reversing 21 C. C. 669.

FENCES.

Section 8913. (Fences.) A company or person having control or management of a railroad shall construct and maintain in good repair on each side of such road, along the line of the lands of the company owning or operating it, a fence sufficient to turn stock. When such fence is constructed of barbed wire, or separate lateral strands not connected by interwoven wire, or cross perpendicular wire not more than fifteen inches apart, there shall be securely fastened to the posts, at the top thereof, at right angles thereto, at least one board, not less than one and one-eighth inches thick and five inches wide, and extending the entire length thereof. (R. S. Sec. 3324; April 3, 1908, 99 v. 58; May 18, 1894, 91 v. 297; April 8, 1891, 88 v. 295; April 20, 1887, 78 v. 199; R. S. 1880; April 18, 1874, 71 v. 85, §-1.)

Section 8913 to 8915 are constitutional, founded on a sound, public policy, and equally obligatory on railroad companies whether organized under charters granted prior or laws enacted since the constitution of 1851 went into effect.

Railroad Co. v. Infirmary, 32 O. S. 566, 570 (1877).

This act does not apply to interurban railways. Brindle v. Railway, 4 Ohio App. 135; 21 C. C. n. s. 552 (1915).

Duty to fence. Sufficiency of fence. This section does not require railroad companies to fence against persons. The fence required is one sufficient to turn stock.

L. S. & M. S. Ry. v. Lidtke, 69 O. S. 384 (1904).

See Devereaux v. Thornton, 4 W. L. B. 355 (1879); s. c., 2 Clev. L. R. 177; 10 W. L. B. 266.

This section requires the construction and maintenance of fences within

the limits of cities and villages where they do not obstruct streets, highways or other public grounds.

Cleveland, etc., R. Co. v. McConnell, 26 O. S. 57 (1875).

The duty of a railroad company is not discharged by contracting with another party to perform it, when the performance itself is insufficient.

Gill v. Atlantic, etc., Ry. Co., 27 O. S. 240 (1875).

Railway Co. v. Allen, 40 O. S. 206 (1883).

Inclosures of railroads under this act must be separate and distinct from the inclosures of adjoining proprietors.

Marietta, etc., R. Co. v. Stephenson, 24 O. S. 48 (1873).

This section does not require railroad companies to see that gates are kept closed.

Megrue v. Lennox, 59 O. S. 479 (1898).

Didman v. Railway Co., 7 N. P. 380; 5 L. D. 140; 31 W. L. B. 240.

See note to § 8914, *Defenses*.

This section does not refer to railroad land other than its line of road and right of way, and does not require such other land to be fenced.

Railroad Co. v. Kinz, 68 O. S. 210, 225 (1903).

The obligation to construct and maintain fences upon both sides of railroads, imposed by this act, is not limited to owners and occupiers of adjoining lands, but extends to the public generally.

Marietta, etc., R. R. Co. v. Stephenson, 24 O. S. 48 (1873).

Railway Co. v. Allen, 40 O. S. 206 (1883).

Gill v. Atlantic, etc., Ry. Co., 27 O. S. 240 (1875).

Railroad Co. v. Scudder, 40 O. S. 173, 175 (1883).

Where the tracks of two railroad companies are parallel and adjoining, it is the duty of the companies to maintain a fence between their respective rights of way.

Hall v. Railway Co., 14 L. D. 74 (C. P. 1903).

The duty to fence is imposed by statute only. At common law there was no duty to fence.

Railway Co. v. Phillips, 81 O. S. 453, 458 (1910).

Seymour v. Railway Co., 44 O. S. 12, 19 (1886).

Kerwhacker v. Cleveland, etc., R. Co., 3 O. S. 172 (1854).

Agreement by railroad company to fence. Where in proceedings to condemn land the parties enter into an agreement of record whereby the company bound itself to build and maintain fences, the agreement is valid and binding, and runs with the land so as to be binding on the assignees or grantees of both parties.

Huston v. Cincinnati, etc., R. R. Co., 21 O. S. 235 (1871).

Where a contract for a right of way required the railroad company to construct a cattle-pass, but the deed of the right of way was silent as to the cattle-pass, which had been constructed before the execution of the deed, it was held that the purchaser of the railroad, on foreclosure, could not fill up the cattle-pass, possession by the grantor constituting notice.

Lowe v. Railway, 12 C. C. 743; 4 C. D. 85 (1894).

Breach of agreement. Remedies. Where the owner of land, by written contract, agreed to give to a railroad company the perpetual right of way through the same, at a stipulated price, which was paid to him, with a provision in the contract that when the road should be completed the company should fence the same, *held*, that after the road is completed, the owner of the land can not, upon failure to put up the fence, eject the company from the land.

Hornback v. Cincinnati, etc., R. R. Co., 20 O. S. 81 (1870).

See § 8916.

Where a landowner agreed to release a right of way in consideration of a certain sum of money and the construction of road crossings and cattle-guards, and the company took possession before receiving a deed or constructing the crossings or guards, the landowner has an equitable lien upon the property sold, as well for damages for not constructing the crossings and guards as for the unpaid purchase money, and the landowner may have a remedy by compelling specific performance or by enforcing his lien.

Dayton, etc., R. R. Co. v. Lewton, 20 O. S. 401 (1870).

— **Damages.** In an action by the vendee of the original owner against the vendee of the company, for failure to build fences and crossings, the rule of damages is the amount of injury to the use and enjoyment of the adjoining land, occasioned by the want of such fences and crossings during the time the railroad or right of way was owned by the defendant.

Huston v. Cincinnati, etc., R. R. Co., 21 O. S. 235 (1871).

The abutting owner can not recover the cost of herding his animals on the abutting unfenced land, nor loss of profits from dairy cows by reason of inability to pasture them at night. Church v. Railroad, 10 Ohio App. 80; 30 O. C. A. 44 (1918); motion to certify record overruled, 16 O. L. R. 404.

Decisions under former acts.

Railroad Co. v. McElroy, 35 O. S. 147 (1878).

Railroad Co. v. Shultz, 43 O. S. 270, 274 (1885).

Partition fences under former act.

See Railroad Co. v. Miami County Infirmary, 32 O. S. 566 (1877).

Sandusky, etc., R. R. Co. v. Sloan, 27 O. S. 341 (1875).

Haxton v. Pittsburg Ry. Co., 26 O. S. 214 (1875).

Liability of railroad companies.

See § 8914 and note.

Section 8914. (Cattle-guards and crossings.) Before operating such road, such company or person shall maintain at every point where a public road, street, lane or highway used by the public, crosses such railroad, safe and sufficient crossings, and on each side of such crossings cattle-guards sufficient to prevent domestic animals from going upon such railroad; and such company or person shall be liable for all damages sustained in person or property by reason of the want or insufficiency of such fence, crossing or cattle-guard, or neglect or carelessness in the construction thereof, or in keeping them in repair. (R. S. Sec. 3324; April 3, 1908, 99 v. 58; May 18, 1894, 91 v. 297; April 8, 1891, 88 v. 295; April 20, 1887, 78 v. 199; R. S. 1880; April 18, 1874, 71 v. 85, § 1.)

This section applies where the construction of the highway precedes that of the railroad. It does not apply where a street is extended over existing tracks.

Railway Co. v. Troy, 68 O. S. 510, 514 (1903).

This section does not refer to railroad land other than its line of road and right of way.

Railroad Co. v. Kinz, 68 O. S. 210, 225 (1903).

Crossings.

See also §§ 8763 to 8766.

Where the grade of the track is higher than that of the road the approaches need not be built by the railroad company so far on both sides of the crossing that there would be practically no incline on the approaches, so that the approaches are brought practically to a level with the railway crossing. It had a right to make inclines, and where the inclines are made safe and sufficient for ordinary and regular purposes of travel, that is a sufficient compliance with the statutes.

Lake Shore, etc., R. R. Co. v. Brazzill, 13 C. C. 622 (1895); s. c., 6 C. D. 363.

Under this section the company is liable for all damages sustained in person or property in any manner by reason of the want or insufficiency of a crossing over its tracks. The word "crossing" is used in a limited or restricted sense, and includes only that part of the structure immediately over and across the tracks, and sufficient space on either side to make a sufficient and safe way over such tracks.

Lynch v. Railway Co., 20 C. C. 248; 11 C. D. 243 (1899).

Where a private road extends across the track and right of way of a railroad company and connects with a public highway, the company is required to maintain across such private road suitable fences, or provide other protection against injuries which may result from animals passing from such highway through the private road on or along the railroad track.

Railroad Co. v. Cunningham, 39 O. S. 327 (1883).

Cattle-guards in towns and station yards. This section, so far as it relates to cattle-guards, may be construed as allowing exceptions, required by public necessity and convenience, and the proper use of a station yard by the company, but when the company is thus relieved, it is its duty to construct the guards at the first point where they will not interfere with the needs of the public and the company; and in an action against the company for damages, the question whether the guards are properly located and placed is for the jury.

Railroad Co. v. Newbrander, 40 O. S. 15 (1883).

Railroad Co. v. Cunningham, 39 O. S. 327 (1883).

Pierce v. Andrews, 13 C. C. 513; 7 C. D. 105 (1896).

To come within the above exception it is necessary that three elements be present: necessity (1) of the public, (2) of the railroad company and (3) of its employees, that the cattle-guards be omitted.

Norfolk, etc., Ry. Co. v. Vallery, 6 C. C. n. s. 348; 17 C. D. 658 (1905); aff'd, 75 O. S. 564.

A railroad company is not entitled to compensation for making or maintaining cattle-guards.

Railway Co. v. Sharpe, 38 O. S. 150 (1882).

Liability of railroad companies. Where the railroad company owning the track permits another company to run trains thereon, both companies are liable.

Berchold v. Railway, 1 Cleve. L. R. 314 (1878).

— **To whom liable.** The liability of a railroad company under this section is not limited to owners and occupiers of abutting lands but is "for all damages sustained in person or property."

Railway Co. v. Allen, 40 O. S. 206 (1883).

Railroad Co. v. Stephenson, 24 O. S. 48 (1873).

Gill v. Railway, 27 O. S. 240 (1875).

Railroad Co. v. Scudder, 40 O. S. 173, 175 (1883).

Hall v. Railway Co., 14 L. D. 74 (C. P. 1903).

A railroad company may be liable to its employes. As a general rule a railway engineer is not chargeable as a matter of law with knowledge of a break in the fences along the line of the road through which cattle may stray upon the track. Where, after discovering that cattle are upon the track, he does all that a man of ordinary prudence would do to avoid an accident, the derailment that followed, resulting in his death, can not be said to be due to his contributory negligence.

Isley v. Railroad Co., 5 C. C. n. s. 669; 17 C. D. 785 (1905).

— For injuries occurring on tracks of another company. The liability of a railroad company under this section is limited to loss or injuries occurring upon its own right of way. Where stock went through a defective fence over the tracks of the railroad company and upon the track of another company, where it was killed, the railroad company was held not liable.

Railway Co. v. Phillips, 81 O. S. 453 (1910).

As to liability of company upon whose tracks the stock was killed, see

Didman v. Railway Co., 7 N. P. 380; 5 L. D. 140; 31 W. L. B. 240 (C. P. 1894).

Railway Co. v. Wood, 47 O. S. 431 (1890).

Hall v. Railway, 14 L. D. 74 (C. P. 1903).

— For injury to stock running at large. In an action under this section, it is a sufficient answer to allege that the plaintiff did not live along the line of the railway, nor were his cattle grazing in any inclosed field adjacent thereto. That said plaintiff knowingly, willfully and unlawfully permitted his cattle to run at large on the highways and uninclosed lands adjacent to defendant's said railroad, whereby said cattle went upon said road and were accidentally killed.

Pittsburg, etc., Ry. Co. v. Methaven, 21 O. S. 586 (1871).

Railway Co. v. Wood, 47 O. S. 431, 436 (1890).

Where cattle are running at large without the fault of the owner, he is not guilty of contributory negligence in case they are injured.

Marietta, etc., R. R. Co. v. Stephenson, 24 O. S. 48 (1873).

If the owners of cattle permit them to run at large in the vicinity of an uninclosed railroad track, and do not choose to avoid danger to their cattle by keeping them within their own inclosures, they can ask no more than that the agents of the railroad company, in the legitimate conduct of its business, running its trains with a speed regulated by the grade of its road, the capacity of its locomotive power, and the safety of persons and property carried, shall, with due regard to the safety of persons and property in their charge, being the paramount consideration, exercise, what, "in that peculiar business," would be ordinary and reasonable care to avoid unnecessary injury to animals casually coming upon their uninclosed railroad. The company is not bound to take into consideration the possibility of cattle being on the track.

Central Ohio R. R. Co. v. Lawrence, 13 O. S. 66 (1861).

Cleveland, etc., R. Co. v. Elliott, 4 O. S. 474 (1855).

Kerwhacker v. Cleveland, etc., R. Co., 3 O. S. 172 (1854).

Bellefontaine, etc., R. R. Co. v. Schruyhart, 10 O. S. 116 (1859).

Bellefontaine, etc., Co. v. Bailey, 11 O. S. 333 (1860).

Didman v. Michigan, etc., R. R. Co., 31 W. L. B. 240 (1894).

Cranston v. Cincinnati, etc., R. R. Co., 1 Handy, 193 (1854).

If the road is properly fenced the company is held to the exercise of ordinary care only in the running of trains to prevent the killing of

animals. Where the road is not properly fenced, a higher degree of care is required.

Gill v. Atlantic, etc., Ry. Co., 27 O. S. 240 (1875).

A railroad company in the operation of its trains, is bound to use ordinary care to avoid injury to domestic animals trespassing on the track.

Railroad Co. v. Smith, 22 O. S. 227 (1871).

Railroad Co. v. Weisel, 55 O. S. 155 (1896).

Railway Co. v. Slater, 24 W. L. B. 2 (1890).

Where the contributory negligence of the owner of the animals is the proximate cause of the injury, he can not recover, although the operation of the train was without ordinary care.

Railroad Co. v. Weisel, 55 O. S. 155 (1896).

But where the negligence of the owner of the animals was not the proximate cause of the injury, he may recover.

Railroad Co. v. Elliott, 4 O. S. 474 (1855).

The mere fact that cattle have strayed, without right, on the track of a railroad, neither establishes that character of negligence which precludes a claim for injury done by running the locomotive against them, nor justifies a want of proper care to save and preserve them from destruction.

Cranston v. Cincinnati, etc., R. R. Co., 1 Handy, 193 (1854).

Defenses.

— That railroad company was not negligent. This section is to be reasonably construed, and where damage results from defects (occurring without the fault or neglect of such companies) in an otherwise sufficient fence, there is no liability.

Railroad Co. v. Schultz, 43 O. S. 270 (1885).

Railroad Co. v. Bailey, 11 O. S. 333 (1860).

— Agreement by landowner to build or repair fence. Where the owner of land through which a railroad runs agrees with the railroad company, for a valuable consideration, to build and keep up good and sufficient fences, and fails to do so, and on account of the insufficiency of such fences his animals stray upon the track and are injured, he is not entitled to recover for such injury, although the insufficiency of the fences was caused by casualty and without negligence on his part, unless such injury is shown to have been intentional, or the result of gross carelessness on the part of the agents and servants of the company.

Lake Erie, etc., R. R. Co. v. Weisel, 55 O. S. 155 (1896).

Pittsburg, etc., Ry. Co. v. Smith, 26 O. S. 124 (1875).

Cincinnati, etc., R. R. Co. v. Waterson, 4 O. S. 424 (1854).

Railway Co. v. Heiskell, 38 O. S. 666 (1883).

See *Easter v. Little Miami R. R. Co.*, 14 O. S. 48 (1862).

And where stock of a third person gets upon the track, by reason of the fence not being built by the landowner, the company is not liable, in the absence of negligence.

Railway Co. v. Wood, 47 O. S. 431 (1890).

See *Railway Co. v. Allen*, 40 O. S. 206 (1883).

See note to § 8918.

Where the defense is that the expense of fencing was included in the damages awarded in the appropriation proceeding (see § 8918), but the record of the appropriation proceeding is silent on the subject, no presumption arises that the expense of fencing was so included.

Railroad Co. v. Hoffhines, 46 O. S. 643 (1889).

When a land owner is bound by an agreement made by his predecessor in title,

See *Hulshizer v. Railway*, 13 N. P. n. s. 497 (C. P. 1912).

——. **Gates left open.** Where a company puts in a private crossing with gates, and stock wanders through the gate upon the company's track and is killed, the duty of keeping the same closed devolves primarily upon the landowner, and not upon the company, and evidence showing a gate was carelessly left open is not admissible on the issue as to the condition of the fence.

Megrue v. Lennox, 59 O. S. 479 (1898).

Where gates to permit passage to and from fields across the track are constructed at the request of the landowner, and where he uses them exclusively, the company owes him no duty to see that they are kept closed.

Didman v. Michigan, etc., R. R. Co., 31 W. L. B. 240 (1894); s. c., 7 N. P. 380; 5 L. D. 140.

The same rule applies to a third person whose cattle break into a field in which gates have been left open.

Didman v. Railway Co., 7 N. P. 380; 5 L. D. 140; 31 W. L. B. 240.

See *B. & O. R. Co. v. Wood*, 47 O. S. 431.

——. **Statute of limitations.** An action against a railroad company to recover damages for killing or injuring a domestic animal which had strayed upon its tracks, and was killed or injured without fault or negligence of the railroad company in operating its train, but solely by the neglect to fence the road as required by law, is founded upon "a liability created by statute, other than a forfeiture or penalty," and is barred in six years.

Seymour v. Railway Co., 44 O. S. 12 (1886).

Roice v. Railway Co., 5 N. P. n. s. 7; 17 L. D. 505 (C. P. 1907).

——. **Knowledge by landowner of defective fence.** Where it is the duty of the railroad company to fence, it is not contributory negligence for a landowner to turn his stock into a field which he knew to be insufficiently fenced.

Railway Co. v. Smith, 38 O. S. 410 (1882).

Railroad Co. v. Scudder, 40 O. S. 173 (1883).

Pittsburg, etc., Ry. Co. v. Methven, 21 O. S. 586 (1871).

See under old partition fence act,

Railroad Co. v. Infirmary, 32 O. S. 566 (1877).

Sandusky, etc., R. Co. v. Sloan, 27 O. S. 341 (1875).

But where railroad employes, engaged in repairing or rebuilding a defective fence on the line where the fence had always been located, are ordered off the premises by the landowner, who claimed that the line of the fence was not the true line, and who continued to use the land as a pasture with knowledge that the fence is defective and dangerous, without revoking his warning to the company or taking steps to determine the true line, and his stock is injured in the loose barbed wire of the fence, he can not recover.

Railroad Co. v. McIllyar, 77 O. S. 391 (1908).

——. **That railroad company had no notice of condition of fence.** A railroad company can not escape responsibility by showing that it had no notice of the condition of a fence.

Railway Co. v. Smith, 38 O. S. 410 (1882).

Railroad Co. v. Shultz, 43 O. S. 270, 273 (1885).

Baltimore, etc., R. Co. v. Reamer, 24 W. L. B. 222 (1890).

——. **Breachy and unruly animals.** An owner of breachy and unruly animals may recover for their injury or loss provided the animals were at large without his fault, and he has used that reasonable care and precaution in restraining them which a prudent and cautious man would use under like circumstances.

Railway Co. v. Howard, 40 O. S. 6 (1883).

Pleading. The facts upon which the company's liability depends must be stated in the petition, and, if not admitted, must be established by proof. An allegation that the defendant was, by law, bound to fence and inclose its railroad, tenders an immaterial issue, and is not to be taken as true because not denied.

Baltimore, etc., R. R. Co. v. Wilson, 31 O. S. 555 (1877).

Proof. In an action against a railroad company to recover damages for killing live stock, the plaintiff must prove affirmatively that want of ordinary care on the part of the company or its employes caused the injury. Such inference does not arise from the mere fact that the animal was killed.

Railroad Co. v. McMillan, 37 O. S. 554 (1882).

Railway Co. v. Heiskell, 38 O. S. 666 (1883).

Bellefontaine, etc., R. R. Co. v. Bailey, 11 O. S. 333 (1860).

Where one of the issues in an action is whether a fence is sufficient to turn stock, it is error to permit witnesses, who show no other qualifications than that they had seen the fence, to give to the jury their opinions as to the sufficiency of the fence to turn stock.

Railroad Co. v. Schultz, 43 O. S. 270 (1885).

An expert may testify whether, in view of the distance between the cattle and the engine, it was possible to avoid injury.

Bellefontaine, etc., R. R. Co. v. Bailey, 11 O. S. 333 (1860).

The fact that an insufficient fence has for several weeks been maintained by a railroad company along its right of way is sufficient to justify a jury in finding it guilty of negligence; and the fact that the plaintiff's stock had, during all such time, been kept in a field adjoining the right of way, without escaping through such fence and passing upon the railroad track, is not sufficient to excuse the company from such neglect. Where the immediate means or cause of such stock passing over such fence and upon the railroad track is that, recently prior thereto, a board or rail had become detached and fallen from the fence, without the knowledge of the company, such company is not excused from liability where there is evidence to justify the jury in finding that such special defect was attributable to the generally defective condition of the fence.

Railroad Co. v. Schultz, 43 O. S. 270 (1885).

Section 8915. (Temporary crossings.) In the case of a road in process of construction, or a proposed road which passes through inclosed land, the company or person having control thereof during its construction, shall provide suitable crossings for the owner or occupant of each farm, and make and keep in repair fences along the line of such road through such inclosed fields, and protect crops growing thereon. When the company or person agrees with the owner of the lands through which a railroad passes, that he is to build and keep in repair any portion of the fencing, and if such fencing be destroyed or damaged by fire from passing trains or by the elements, the company or person owning or operating such road, shall rebuild or repair such fence, if the property holder demands it. If a railroad company fails or refuses to construct a fence in the manner hereinbefore provided, after having received written notice so to do from the owner or occupant of lands through which

the road passes, then, after thirty days from the time of serving such notice upon the agent of such company nearest such lands, such owner or occupant may proceed to construct it, and the company shall be liable to such person for the cost thereof, together with the attorney's fees as in the next following section provided. This applies to all fences now built, as well as those hereafter constructed. (R. S. Sec. 3324; April 18, 1874, 71 v. 85, § 1; R. S. 1880; April 20, 1887, 78 v. 199; April 8, 1891, 88 v. 295; May 18, 1894, 91 v. 297; April 3, 1908, 99 v. 58.)

Section 8916. (Land owner may construct fence at company's expense.) If such company or person neglects or refuses to construct a fence, as hereinbefore provided, the owner of land abutting on the line of the land of the railroad may construct it so far as his land abuts on the railroad lands. When he has completed the fence he may present for payment a sworn itemized account of the expense thereof, including materials and labor, to the agent of the company for receiving and shipping freight at the station nearest to the tract of land so fenced. If such company or person neglects or refuses for thirty days, to pay the account, the land owner may recover from the owner or lessee of the road, the reasonable cost of such fence, and in addition thereto, if recovery is had for an amount not less than the amount of the verified itemized account as presented to such corporation or person, all reasonable attorney fees not to exceed the sum of twenty-five dollars to be assessed and awarded by the court or jury trying the issue. (R. S. Sec. 3325; April 3, 1908, 99 v. 59; April 18, 1874, 71 v. 85, § 1.)

An abutting owner who has constructed a fence may, under this section, recover of the company the reasonable cost and expense thereof, together with the value of the use and occupation of his premises during the time such fence is being constructed or repaired, but he must do all he can to confine his loss to the minimum, and he can not recover for damages he might have avoided.

Millhouse v. Railway Co., 7 C. C. 466; 4 C. D. 682 (1893); aff'd, 55 O. S. 684.

See Railway v. Bosworth, 46 O. S. 81 (1888).

Section 8917. (Owner may repair fence.) When the fence is completed the company or person shall keep it in good repair, and if such company or person permits any part of the fence on the line of its road to get out of repair, or it is damaged or destroyed by fire or the elements, so that it will not turn stock, the owner of the land abutting on the railroad lands where the fence is out of repair

may notify the agent of the company for receiving and shipping freight at the station on the road nearest to the place where it is defective, that a portion of the fence on the line of the road is out of repair, stating where, how, and the probable cost of repairing it. If such company or person fails for twenty-four hours thereafter, to repair or replace the fence so that it will turn stock, the owner of the land may furnish materials and repair or replace it, and present to such agent, for payment, a sworn itemized account of the expense thereof, including materials and labor, and if this be not paid within thirty days thereafter such land owner may recover from the owner or lessee of the road the reasonable expense of such repairs, and in addition thereto, attorney's fees as is provided for in the next preceding section. (R. S. Sec. 3326; April 3, 1908, 99 v. 58; April 18, 1874, 71 v. 85, § 1.)

Section 8918. (When preceding sections do not apply.)

The provisions of the preceding sections relating to fences shall not apply to any case in which compensation for building a fence has been or may hereafter be taken into consideration, and estimated as a part of the consideration to be paid for the right of way, so far as the fence has been or may be settled or paid for; nor shall such sections affect in any manner, any contract or agreement between a railroad company, or person having the control and management of a railroad, and the proprietors or occupants of lands adjoining for the construction or maintenance of fences, and cattle-guards. (R. S. Sec. 3329; April 18, 1874, 71 v. 85, § 1; March 25, 1859, 56 v. 62, § 4.)

See note to § 8860.

Agreements by landowner to build or repair fences. Occasional repairs by a company to fences, which by contract it was the duty of the landowner to repair, do not release the landowner from his duty to maintain and repair.

Railway Co. v. Heiskell, 38 O. S. 666 (1883).

— **When covenant runs with the land.** Where a railroad company makes a deed poll of land in fee along which its right of way is located, "subject to the condition that said grantee, his heirs and assigns, shall make and maintain good and sufficient fences on each side of the right of way of the railroad as now located and built, . . . which condition and obligation shall be perpetually binding on the owners of the land." the grantee, by accepting the deed, will be deemed to have entered into an express undertaking to perform the condition contained in the deed, and such undertaking will run with the land and become obligatory upon a subsequent owner by purchase from the grantee of the company.

Hickey v. Railway Co., 51 O. S. 40 (1894).

In such case the company will not have a right of action against the

grantee for failure to repair, after he has ceased to be the owner of the land by conveying it to another.

Hickey v. Railway Co., 51 O. S. 40 (1894).

A written agreement by the grantor of the right of way to a railway company to fence it on each side through his lands will not affect the right of a subsequent purchaser to require the company to fence its road, where the purchase was made without actual or constructive notice of the existence of such agreement. Such agreement not being recorded, the mere use and occupation of the right of way by the company and its successors for the purpose of a railroad will not constitute constructive notice of the existence of such agreement.

Railway v. Bosworth, 46 O. S. 81 (1888).

Where it is stipulated in a deed poll that the grantee, his heirs and assigns, shall build and perpetually maintain a fence on the line between the land granted and other lands owned by the grantor, and the parties to such deed, at the time of its execution, contemplate the subdivision of the granted premises into building or town lots, and their subsequent sale, the burden of maintaining such fence will not attach to or run with lots which do not abut on the line of the proposed fence.

Walsh v. Barton, 24 O. S. 28 (1873).

Where the covenant runs with the land the grantee of the original owner, whose duty it was to fence, can not recover the cost of fencing.

Warner v. Baltimore, etc., R. R. Co., 31 O. S. 265 (1877).

Where a landowner by duly recorded deed conveyed a right of way and covenanted for himself, his heirs and assigns, to erect and maintain a fence on each side of such way, a lessee of his grantee would be so far bound by the covenant that he could not claim from the railroad company a higher degree of care to avoid injury to a horse than if the covenant had been kept.

Easter v. Little Miami R. R. Co., 14 O. S. 48 (1862).

An agreement requiring the railroad company to build a crossing within one year after completion of the road is not a covenant running with the land, specifically enforceable against a successor railroad company, several years thereafter, where the agreement contained no covenant requiring the successor to build or maintain the crossing.

Zens v. Railway, 14 N. P. n. s. 202; 23 L. D. 182 (C. P. 1912).

Where a contract for a right of way required the railroad company to construct a cattle pass, but the deed of the right of way was silent as to the cattle pass, which had been constructed before the execution of the deed, it was held that the purchaser of the railroad, on foreclosure, could not fill up the cattle pass, possession by the grantor constituting notice.

Lowe v. Railway, 12 C. C. 743; 4 C. D. 85 (1894).

— As a defense to railroad company in action for injury to stock.

See note to § 8914.

Compensation for fencing included in award in appropriation proceeding. Where the defense, in an action against a railroad company for failing to maintain a fence, is that the expense of fencing was included in the compensation awarded in the appropriation proceeding, but the record of the appropriation proceeding is silent on the subject, no presumption arises that the expense of fencing was so included.

Railroad Co. v. Hoffhines, 46 O. S. 643 (1889).

Section 8919. (When company may build fence at land-owner's expense.) If an owner of lands abutting on the line of lands of a company, who is legally bound to build

or repair the fence dividing his lands from the lands of the company, neglects or refuses to build or repair such fence within the time in which he is bound to build or repair it, the company may build or repair such fence, and present an itemized account of the cost of labor and materials so expended, to the person thus bound, for payment. If it be not settled or paid within thirty days thereafter, the company may recover from such person the reasonable cost of such labor and materials. (R. S. Sec. 3330; April 18, 1874, 71 v. 85, § 1.)

Section 8920. (Forfeitures for not constructing and repairing fences.) A company or person having the control and management of a railroad, neglecting or refusing to construct fences, cattle-guards, or public crossings, or to keep them in repair, as hereinbefore prescribed, after thirty days' previous notice or request to construct them, made in writing by any person, shall forfeit and pay, for each and every day such company or person so refuses or neglects, a sum not exceeding fifty dollars per day, to be recovered in a civil action, in the name of the state, for the use of the county in which suit is brought. (R. S. Sec. 3331; March 25, 1859, 56 v. 62, § 5.)

A state court is without power to enforce payment of the penalty under this section against a railroad out of funds, in the hands of a receiver appointed by a federal court.

Rep. Atty. Gen. 1911-1912, p. 724.

Section 8921. (Right to use culvert, etc., for cattle-way.) An owner of land through which a railroad is constructed, and upon which there is a culvert, waterway, or opening through the embankment of the railroad, of sufficient height for such purpose, may use such culvert, waterway, or opening, as a stock or cattle-way, under the track of the road, so as to permit stock to pass and re-pass. But the land-owner shall build and maintain all necessary fences on both sides of the opening, and not, by use, or otherwise, permit the foundations of structures about such opening to be injured or interfered with. (R. S. Sec. 3332; R. S. 1880.)

Contract for cattle pass.

Lowe v. W. & L. E. R. R. Co., 12 C. C. 743, 4 C. D. 85 (1894).

Contract for waterway; specific performance.

See Bell v. Dayton, etc., R. R. Co., 3 C. C. 31; 2 C. D. 19 (1887).

CHAPTER 4.

TRAINS AND EQUIPMENT.

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Section 8922. (Passenger trains must stop at certain stations.) Each company shall cause three, each way, of its regular trains carrying passengers, if so many are run daily, Sundays excepted, to stop at a station, city or village, containing over three thousand inhabitants, for a time sufficient to receive and let off passengers. (R. S. Sec. 3320; April 13, 1889, 86 v. 291; April 13, 1867, 64 v. 142, § 26.)

Powers of public utility commission as to passenger service, see § 535. Railroad v. Commission, 92 O. S. 1.

This section is a valid exercise of the police power of the state, and does not violate the interstate commerce clause of the constitution of the United States, and is valid until congress passes an act inconsistent with it.

Lake Shore, etc., Ry. Co. v. State ex rel. Lawrence, 8 C. C. 220 (1894); s. c., 4 C. D. 406; s. c., 37 W. L. B. 196.

Lake Shore, etc., Ry. Co. v. State ex rel. Lawrence, 173 U. S. 285 (1899).

This section is not inconsistent with § 5258, Rev. Stat. U. S.

Lake Shore, etc., Ry. Co. v. State ex rel. Lawrence, 8 C. C. 220 (1894); s. c., 4 C. D. 406.

In the absence of statutory provision to the contrary, a railroad company may adopt a regulation that a certain train or trains of passenger cars running regularly on its road shall not stop at designated stations or places; and one traveling as a passenger on such road is bound to inquire whether the train upon which he takes passage stops at the station or place to which he is going. A passenger who is on a train not stopping at the station he desires may be put off if he is unwilling to pay the regular fare to a station at which the train does stop.

Pennsylvania Co. v. Wentz, 37 O. S. 333 (1881).

The power of a railway company to adopt and enforce regulations that certain trains shall not stop at all places is subject to legislative control, and by this section is taken away as to cities of three thousand inhabitants.

Pennsylvania Co. v. Wentz, 37 O. S. 333 (1881).

Where the laws make provision for the stopping of trains at certain places, all tickets and contracts must be construed with reference to such laws, and a contract recognizing the validity of a regulation disregarding such laws is invalid.

Pennsylvania Co. v. Wentz, 37 O. S. 333 (1881).

Where a person who has purchased a ticket to a certain station is, by the fault of the agent of the railroad company, induced to take a train which does not stop at such station, and the passenger is ejected from the train before reaching his destination, he may recover damages in tort.

Railway v. Reynolds, 55 O. S. 370.

Decisions of railroad commission as to establishment of stations and stopping trains.

Leedon v. Railway, 7 O. L. R. 474.

Good v. Railway, 8 O. L. R. 260.

See §§ 487 to 614.

Section 8923. (Forfeiture.) A company, agent or employe thereof, which violates or causes or permits to be violated, the next preceding section, shall forfeit not more than one hundred nor less than twenty-five dollars, to be recovered in an action in the name of the state, upon the complaint of any person, before a justice of the peace of the county in which the violation occurs, for the benefit of the general fund of the county. In all cases of forfeiture under the preceding section, the company whose agent or employe caused or permitted such violation shall be liable for the amount of the forfeiture, and the conductor in charge of such train may be held, *prima facie*, to have caused the violation. (R. S. Sec. 3320; April 13, 1889, 86 v. 291; April 13, 1867, 64 v. 142, § 26.)

Section 8924. (Posting time of arrival of trains.) Each company or person operating a railroad within this state shall place a blackboard, at least four feet in length and two feet in width, in a conspicuous place in each passenger depot of such company located at any station in the state at which there is a telegraph office. Such company or person must have written upon such board, at least ten minutes before the schedule time for the arrival of each passenger train stopping regularly upon such road at such station, the fact whether such train is on schedule time or not, and if late, how much. (R. S. Sec. 3321-1, May 8, 1886, 83 v. 118, § 1.)

The discrimination in this section between stations having telegraph offices and those without such offices does not render the section unconstitutional.

Pennsylvania Co. v. State, 42 Ind. 428 (1895).

Section 8925. (Forfeiture.) For each violation of any provision of the next preceding section, such company or person so neglecting or refusing to comply therewith, shall forfeit and pay the sum of ten dollars, to be recovered in a civil action in the name of the state, one-half of which shall go to the party commencing proceedings, and the remainder be paid to the treasurer of the township, village or city in which such proceedings are had. (R. S. Sec. 3321-2; May 8, 1886, 83 v. 118, § 2.)

The action to recover a penalty under this section can only be brought before a justice of the peace or a mayor.

State ex rel. McClurg v. Railroad Co., 8 C. C. 604 (1894); s. c., 4 C. D. 372.

Section 8926. (Waiting rooms must be maintained; toilet rooms in connection therewith.) Every person, firm or corporation operating a steam railroad wholly or in part within this state, shall provide a suitable waiting room for the use of the traveling public, at each station where a passenger train of the road is regularly scheduled to stop. Such rooms shall be so maintained and kept, as to be conducive to the comfort, and health of the patrons of the road. Where any such waiting room is located within a municipality within reasonable connecting distance of a water supply and sewerage system, there shall be provided in connection therewith suitable and separate toilet rooms and water closets for the use of male and female persons. Each such toilet room or water closet compartment shall be properly heated, lighted and ventilated and shall contain sufficient floor space and a sufficient number of water closets, urinals, lavatories and toilet accessories to properly and suitably accommodate the patrons of the road. The location, construction and installation of such toilet rooms and water closets shall be in accordance with the provisions of the state building code. (107 v. 178; R. S. Sec. 3321-3; April 16, 1900, 94 v. 231, § 1.)

See § 519.

Greenwich v. Railway, 6 O. L. R. 51; 53 Bull. 103 (Railroad Commission).

Section 8927. (Duty of railroad commission.) Upon the written complaint of ten or more citizens of this state being filed with the state railroad commission that any provision of the next preceding section is being violated, at such station, the commission shall forthwith make investigation thereof. If upon such investigation it be found that such violation exists, it shall issue an order to the person, firm or corporation guilty thereof, setting forth the nature of the improvement required and directing that it be completed within a time to be specified therein. (R. S. Sec. 3321-4; April 16, 1900, 94 v. 231, § 2.)

Section 8928. (Forfeiture.) Any person, firm or corporation failing to comply with an order of such commission, or any of the provisions of the two next preceding sections, upon conviction therefor before a court of common pleas of the county in which such violation occurs, shall forfeit

and pay any sum not less than one hundred dollars. Such forfeiture shall be recovered in a civil action in the name of the state, for the benefit of the county in which the failure or violation occurs, and such action shall be brought by the prosecuting attorney of the county, at the instance of such commission, as provided in other cases for the recovery of forfeitures against railroad companies. (R. S. Sec. 3354; April 16, 1900, 94 v. 231, § 3.)

Section 8929. (Movable bridge between passenger cars required.) Every company conveying passengers shall provide the passenger cars in its trains with a flexible or movable bridge or apron, of the full width of the opening between the railings attached to the platforms of such cars, with sideboards or network of strap iron, large wire, or other suitable material, at each side of the bridge or apron, of at least equal height with the ordinary railings upon the platforms, or some other apparatus or arrangement equally efficient to enable passengers to pass from car to car with safety. (R. S. Sec. 3347; March 10, 1871, 68 v. 35, § 1.)

Section 8930. (Penalties for violation of preceding section.) A company which fails to comply with the provisions of the next preceding section shall be subject to a penalty of one hundred dollars for each and every day of such failure, to be recovered in a civil action, in the name of the state, and paid into the state treasury. (R. S. Sec. 3348; March 10, 1871, 68 v. 35, § 2.)

Section 8931. (Enforcement of two preceding sections.) The state railroad commission shall see that the requirements of the two next preceding sections are enforced. Such sections shall not apply in case of passenger car attached to a freight train. (R. S. Secs. 3349, 3350; March 10, 1871, 68 v. 35, §§ 3, 4.)

Section 8932. (Heating apparatus for cars.) When necessary to heat its cars for carrying passengers, mail, baggage or express matter, each railroad company shall do so by a stove or heater so constructed and protected as will most effectually guard passengers against danger from fire, in accidents by collision, or when cars are overturned or thrown from the track. No such company shall permit any other corporation or person to use cars carrying passengers, mail, baggage or express matter, over its road, unless their heating apparatus conforms to the above requirements. (R.

S. Sec. 3351; May 4, 1869, 66 v. 94, § 1; R. S. 1880; April 14, 1880, 77 v. 202.)

Constitutionality.

See *People v. New York, etc., R. R. Co.*, 55 Hun. (N. Y.), 409 (1890).

Section 8933. (Forfeiture under preceding section.) A railroad which fails to comply with the provisions of the next preceding section shall be liable to a forfeiture of not less than one hundred nor more than five hundred dollars, to be recovered in the name of the state, for the benefit of its common schools. Such action shall be prosecuted in any county, through which the road passes, by the prosecuting attorney thereof, at his own instance, or that of the state railroad commission, as provided by law in other cases for the recovery of penalties, and forfeitures against railroad companies, after due notice given by the railroad commission to the president or managing officer of such delinquent company, and its further neglect for thirty days to comply with the requirements of such section. The prosecutor shall receive twenty-five per cent of all penalties and costs so collected. (R. S. Sec. 3354; April 14, 1880, 77 v. 202; R. S. 1880; May 4, 1869, 66 v. 94, § 4.)

Section 8934. (Lighting of passenger cars.) No passenger car on a railroad shall be lighted by naphtha or any fluid made in part from it, or wholly or in part from coal or petroleum, or other substance which will ignite at a temperature of less than three hundred degrees Fahrenheit. (R. S. Sec. 3353; May 7, 1877, 74 v. 207, § 2.)

Section 8935. (Forfeiture under preceding section.) The state railroad commission or its agent at any time may enter cars running on a railroad and take from any lamp therein samples of the oil or fluid there found for the purpose of testing it. When, on trial, such oil or fluid ignites at a lower temperature than that above specified, the company or person running the car from which it was taken, shall be liable to a forfeiture of not less than one hundred nor more than five hundred dollars, which such commission shall bring suit to recover, or cause to be brought for the benefit of the state common school fund, as provided in section eighty-nine hundred and thirty-three. (R. S. Secs. 3353, 3354; April 14, 1880, 77 v. 202; R. S. 1880; May 7, 1877, 74 v. 207, § 2; May 4, 1869, 66 v. 94, § 4.)

Section 8936. (Distance from station platform to step on passenger cars.) Companies and persons operating a rail-

road shall so regulate the distance between station floors, or platforms and the top of the lowest step on passenger cars that it will not exceed twelve inches. When the distance is more than one foot, it shall be changed, or safe steps provided for passengers within that limit. (R. S. Sec. 3354-1; April 16, 1892, 89 v. 347, § 1.)

Section 8937. (Forfeiture under preceding section; penalty.) A company failing to comply with the next preceding section shall forfeit and pay not less than fifty nor more than five hundred dollars for each and every delinquency. On the written complaint of any citizen, the prosecuting attorney of a county wherein such default occurs at once shall begin suit against the company guilty thereof, for the recovery of such penalty. If personal injury results from failure to comply with such section, in addition to such liability for damages, the person in charge of the operation and management of the road shall be deemed to be guilty of a misdemeanor and shall be fined not less than fifty dollars nor more than five hundred dollars. (R. S. Sec. 3354-1; April 16, 1892, 89 v. 347, § 1.)

Section 8938. (Equipment of passenger trains with fire extinguishers.) If one can be bought for fifteen dollars or less, every person, company or corporation operating a railroad shall put at least one portable chemical fire extinguisher on each passenger train. Each year, one such extinguisher shall be added to every such train until all coaches carrying passengers are supplied therewith. (R. S. Sec. 3354-2; April 27, 1896, 92 v. 396, § 1.)

Section 8939. (Extinguishers to be approved by railroad commission.) Such fire extinguishers shall be of a construction which renders them durable and efficient. Before they are put on trains, they make selected shall be approved for that purpose by the state railroad commission, whose duty it is to exercise its discretion in the premises, so as to invite the fullest competition among the different makers. (R. S. Sec. 3354-3; April 27, 1896, 92 v. 396, § 2.)

Section 8940. (Designation of cars, place and manner of installing extinguisher.) The state railroad commission shall designate which car of a passenger train wherein the first and each subsequent extinguisher is to be placed, until every coach in all such trains is fully supplied. Such commission shall determine where in the car an extinguisher shall be placed, how attached so as to make it easy of ac-

cess; and also see that the provisions of the two next preceding sections are carried into effect. (R. S. Sec. 3354-4; April 27, 1896, 92 v. 396, § 3.)

Section 8941. (Failure to provide fire extinguishers; penalty.) A person, company or corporation operating a railroad, or railroads, in whole or in part in this state, violating any provision of the three next preceding sections failing to comply with any of the provisions of such sections, upon conviction in any court of competent jurisdiction shall be fined not less than twenty-five dollars nor more than one hundred dollars, and each day that such person, company or corporation runs its trains in violation of such provisions shall constitute a separate offense. (R. S. Sec. 3354-4; April 27, 1896, 92 v. 396, § 3.)

Section 8942. (Telegraph and telephone wires.) Every steam railroad company operating ten miles or more of railroad for the transportation of passengers and freight, shall erect and maintain in complete working order, for use along the line of its road a telegraph or telephone wire, with an office and proper means for communication by such wire at each of its principal stations. No such company operating a road without a telegraph or telephone wire along the line thereof, shall ask, or receive any compensation for the transportation of passengers or freight thereon. (R. S. Sec. 3354-5; April 7, 1898, 93 v. 88, § 1.)

Penalty for violation, see § 12547.

Section 8943. (Forfeiture under preceding section.) The charter of a steam railroad company which fails to comply with the conditions of the next preceding section shall be declared forfeited and shall be annulled, by a civil action brought for that purpose in the name of the state by the prosecuting attorney of any county in or through which its road is operated. (R. S. Sec. 3354-6; April 7, 1898, 93 v. 89, § 2.)

Section 8944. (Self-cleaning ash dump pans.) A person, firm or corporation owning, operating or controlling any railroad running through or within this state, shall in all cases where practicable, cause each locomotive to be equipped with a self cleaning ash dump pan, of modern and approved pattern and design; and all engines or locomotives built or constructed shall be so equipped. No engineer or fireman shall be compelled to go under any locomotive for the purpose of removing ashes from it, ex-

cept in cases of emergency. This section shall not apply to a person, firm or corporation which does not require engineers or firemen to go under the engine for the purpose of removing ashes therefrom, except in cases of emergency. (R. S. Sec. 3365-27i; March 14, 1906, 98 v. 46, § 1.)

Penalty for noncompliance, see §§ 12558, 12559.

Section 8945. (Contributory negligence.) A person, firm or corporation failing to comply with the provisions of the next preceding section shall not be allowed to set up or make the defense of contributory negligence, or assumption of risk, in an action for personal injury to, or death of, an engineer or fireman resulting from the failure of such person, firm or corporation to comply therewith. (R. S. Sec. 3365-27k; March 14, 1906, 98 v. 47, § 3.)

HEADLIGHTS.

Section 8945-1. (Headlight provisions.) Every railroad corporation operating a railroad or a part of one in this state, shall on or before the first day of January, 1911, equip each of its locomotives, (except locomotives used exclusively in yard service,) with a headlight of such construction, and with sufficient candle power to render plainly visible at a distance of not less than three hundred and fifty feet in advance of such engine, whistling posts, land marks and other warning signs, and it shall be unlawful, after such date for any such railroad to use a locomotive, (except locomotives used exclusively in yard service) upon any part of its road lying within this state, that is not equipped with a headlight of such construction and candle power as will enable the engineer, to see whistling posts, land marks and other warning signs at a distance of not less than three hundred and fifty feet in advance of the engine; provided that not less than thirty per cent. of all the locomotives hereinbefore required to be provided with such headlights shall be so equipped on or before September 1, 1910. (May 20, 1910, 101 v. 330.)

That a headlight was not burning was held not to constitute negligence as a matter of law, but was a question for the jury to determine. *Railroad Co. v. Stoianoff*, 89 O. S. 440 (1913); *Penna. Co. v. Gulling*, 5 Ohio App. 183; 25 C. C. n. s. 326 (1916); motion to certify record overruled, 14 O. L. R. 180.

The operation of a locomotive with its headlight obstructed by a box-car or caboose which is pushed by the locomotive is a violation of this section. *Railway v. Shurts*, 10 Ohio App. 226 (1918).

Where the public generally used a railroad track as a foot passage, with the knowledge and acquiescence of the railroad company, a person injured on such track by a train drawn by an engine on which no headlight was lighted is entitled to recover. *Ford v. Railway*, 107 O. S. 100 (1923).

Section 8945-2. (Inspection by railroad commission.)

The state railroad commission shall from time to time inspect or cause to be inspected the headlights of all locomotives found in use on any railroad in this state. On discovering any defective headlight the commission shall report the fact to the superintendent or other officer having charge of the road on which it is found, and the railroad corporation receiving such notice, shall thereupon cause such defective headlight to be immediately repaired, and if so ordered by the railroad commission shall put the locomotive containing such defective headlight out of service until repaired and put in good working order. (May 20, 1910, 101 v. 330.)

Section 8945-3. (Penalty.) Any railroad corporation using or permitting to be used on its line in this state a locomotive, in violation of any provision of this act shall be liable to a penalty of one hundred dollars for each violation, to be recovered in a suit or suits to be brought by the prosecuting attorney in the common pleas court of the county having jurisdiction in the locality where such violation occurred. Upon duly verified information being given him of such violation such prosecuting attorney shall bring such suits. The railroad commission shall give the proper prosecuting attorney information of any such violations as may come to its knowledge. (May 20, 1910, 101 v. 330.)

Section 8945-4. (Lights on front and rear of car required.) It shall be unlawful for any superintendent, trainmaster, yardmaster or other employe of the railroad company doing business in the state of Ohio, to allow or permit passenger or freight car to stand on a track commonly called a running track, within yard limits unless flagman or red light is on end of car during the period from thirty minutes before sunset to thirty minutes after sunrise. (107 v. 605, § 1.)

Section 8945-5. (Penalty.) Whoever being superintendent, trainmaster, yardmaster, or other employes of a railroad company, violates section 1 of this act, shall be guilty of misdemeanor, and shall be fined not less than twenty-five dollars nor more than three hundred dollars for each and every offense. (107 v. 605, § 2.)

Section 8945-6. (Enforcement.) The public utilities commission shall be empowered to enforce the forgoing sections and prosecute any violations thereof. (107 v. 605, § 3.)

COUPLERS AND BRAKES.

Section 8946. (Automatic couplers and air-brakes.) Repealed March 18, 1913, 103 v. 117. (R. S. Sec. 3364-24; April 14, 1893, 90 v. 185, § 2.)

Section 8947. (Power brakes on engines.) Repealed March 18, 1913, 103 v. 117. (R. S. Sec. 3365-25; April 14, 1893, 90 v. 185, § 3.)

Section 8948. (Forfeiture.) Repealed March 18, 1913, 103 v. 117. (R. S. Sec. 3365-27; April 14, 1893, 90 v. 185, § 5.)

Section 8949. (Power brakes for locomotives and cars. Percentage required to be so equipped.) No common carrier, engaged in moving traffic on a railroad, between points within this state, shall use on its line a locomotive therefor not equipped with power driving wheel brakes and appliances for operating the train-brake system, or, in such business, run a train unless at least eighty-five percentum of the cars therein shall have air brakes thereon so arranged that they can be operated and used from the engine by the engineer of the locomotive drawing such train, and unless all of such cars so equipped shall be associated together. (March 18, 1913, 103 v. 117; R. S. Secs. 3365-27a, 3363-23; March 19, 1906, 98 v. 75, § 1; April 23, 1904, 97 v. 615; February 27, 1900, 94 v. 25; April 25, 1898, 93 v. 286; April 14, 1893, 90 v. 184.)

Section 8950. (Automatic couplers.) No such common carrier shall haul, or permit to be hauled or used on its line, a locomotive, car, tender, or similar vehicle used in moving state traffic, not equipped with couplers coupling automatically by impact, and which can be uncoupled, without the necessity of men going between the ends of the cars. (R. S. Sec. 3365-27b; March 19, 1906, 98 v. 76, § 2.)

This section is constitutional. It requires the same kind of automatic couplers required by the act of congress, and is not a regulation of interstate commerce.

Railway Co. v. State, 82 O. S. 60 (1910); affirming, 11 C. C. n. s. 482; 21 C. D. 20; 7 N. P. n. s. 41; 19 L. D. 285.

State v. Railway Co., 7 N. P. n. s. 571; 19 L. D. 867 (1908).

This act is in conflict with the federal automatic coupler act.

Railway Co. v. State, 82 O. S. 60 (1910).

State v. Railway Co., 7 N. P. n. s. 571; 19 L. D. 867 (1908).

See also Erie R. Co. v. Solomon, 237 U. S. 427.

The additional penalty under § 8965 for keeping defective couplers in use does not render the act invalid.

State v. Railway, 10 N. P. n. s. 585 (C. P. 1911).

The moving of dirt from one point on the line of railway to another, for the purpose of constructing a fill, or yard, is "traffic" within the meaning of this section.

State v. Pgh., etc., Ry., 13 N. P. n. s. 145; 23 L. D. 135 (C. P. 1912).

This section makes it the positive duty of a railroad company to provide automatic couplers. The use of cars without such equipment is unlawful.

McGarvey v. Railway Co., 83 O. S. 273 (1911).

It is the duty of a railroad company to use ordinary care to keep the couplers in working order.

McGarvey v. Railway Co., 83 O. S. 273 (1911).

See § 8963.

Section 8951-4. (Public utilities commission shall prescribe dimensions, etc., of footboards for locomotives. Penalty.) Section 1. That it shall be unlawful for any railroad doing business in the state of Ohio to operate or permit to be operated in the state of Ohio, a locomotive regularly assigned in mine run, drop or package local freight, or switching service, not equipped with two or more footboards.

Section 2. That the public utilities commission of Ohio shall prescribe the dimensions, location and the manner of application of said footboards, as provided by section 1.

Section 3. That any railroad doing business in the state of Ohio who shall send or cause to be sent out on its road a locomotive not equipped in accordance with sections 1 and 2 of this act shall be guilty of misdemeanor and upon conviction shall be fined not less than one hundred dollars or more than five hundred dollars for each offense.

Section 4. That the words "regularly assigned" as used in section 1 shall be construed to mean more than three consecutive days.

Section 5. That it shall be the duty of the public utilities commission of Ohio to have this law enforced. (110 v. 142.)

The purpose of this act is to require the use of couplers which will obviate the necessity of employes going between the ends of the cars.

McGarvey v. Railway Co., 83 O. S. 273, 289 (1911).

While this statute is in derogation of the common law, it should receive a reasonable construction.

McGarvey v. Railway Co., 83 O. S. 273, 292 (1911).

Under this section the car and not the train is the unit.

Railway v. State, 11 C. C. n. s. 482; 21 C. D. 20 (1909); affirming, 7 N. P. n. s. 541; 19 L. D. 285 (1908); aff'd, 82 O. S. 60 (1910).

Application of former statute to interurban railways.

See C. & E. R. Co. v. Somers, 3 C. C. n. s. 638; 14 C. D. 67 (1902); s. e., 74 O. S. 477.

A crane or derrick, built upon car trucks, used to unload heavy materials, and equipped with a boiler and engine to furnish power to operate the crane and move the machine about on the tracks, is not a "locomotive car, tender or similar vehicle."

Lake Shore, etc., Co. v. Benson, 85 O. S. 215 (1912).

Section 8951. (Secure grab-irons, sill steps, ladders and running boards required on locomotives, tenders and cars.) No such common carrier shall haul, or permit to be hauled or used, on its line a locomotive, car, tender, or similar vehicle, used in moving state traffic, not provided with secure grab-irons or hand-holds on the sides and ends thereof. Every locomotive shall be provided with secure sill steps, on each side of the pilot thereof and each and every tender and car used in such business shall be provided also with secure sill steps on each end of each side thereof, and efficient hand-brakes; and all cars requiring ladders and running boards shall be equipped with secure ladders and running boards, and with secure hand-holds or grab-irons on their roofs at the top of such ladders; provided, that, in the loading and hauling of long commodities requiring more than one car, the hand-brakes may be omitted on all save one of the cars while they are thus combined for such purpose. (March 18, 1913, 103 v. 117; R. S. 3365-27c; March 19, 1906, 98 v. 76, § 3.)

A railroad company which operated an engine, on the pilot of which was a turtleback or iron bar, rendering use of the hand-holds impossible, was held guilty of negligence. *Haskett v. Penna. Co.*, 245 Fed. 327 (C. C. A. Ohio 1917).

Section 8951-1. (Automatic or foot power doors required on steam locomotive engines.) That all steam railroad companies, operating steam locomotives on its railroads in, or through this state, shall provide and equip each and every such locomotive engine so operated over its said road, or roads, in this state, with an automatic or foot power door to the fire box of such locomotive engines. Such automatic or foot power doors shall be so constructed and operated by steam, compressed air, electricity, or foot power, as deemed best and most efficient. The device for operating such door shall be so constructed that it may be operated by the fireman on said engine by means of a push button, pedal, or other appliance located in, on, or near the floor of the engine deck or floor of the tender at a suitable distance from such door to enable the fireman, while firing such engine, by pressure with his foot, to open such door for the firing of such engine. (107 v. 560, § 1.)

Section 8951-2. (Penalty.) Any person, or steam railroad company, violating any of the provisions of this act shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined not less than one hundred dollars, nor more than five hundred dollars for each offense. (107 v. 560, § 2.)

Section 8951-3. (Enforcement and prosecution.) The public utilities commission shall be empowered to enforce the foregoing sections and prosecute any violations thereof.

This law shall take effect and be in force on and after December 31, 1920.

All laws, and parts of laws, in conflict herewith are hereby repealed. (107 v. 560, §§ 3, 4, 5.)

Section 8952. (Drawbars.) No such common carrier shall use a locomotive, tender, car, or similar vehicle used in the movement of state traffic, that is not provided with drawbars of the standard height, to-wit: Standard gauge cars, thirty-four and one-half inches; narrow gauge cars, twenty-six inches, measured perpendicularly from the level of the tops of the rails to the centers of the drawbars. The maximum variation from such standard heights between drawbars of empty and loaded cars shall be three inches. (R. S. Sec. 3365-27d; March 19, 1906, 98 v. 76, § 4.)

Section 8953. (Cars from connecting lines.) Such common carrier may refuse to receive from connecting lines or from any shipper a car not equipped in accordance with the four next preceding sections. (R. S. Sec. 3365-27e; March 19, 1906, 98 v. 76, § 5.)

See note to § 8950.

Section 8954. (Penalty for violations of this act. Public service commission shall give information to prosecuting attorneys. Cars or trains to which act does not apply.) Such common carrier using any locomotive engine, running any train, or hauling or permitting to be hauled or used on its line any tender or car in violation of any of the provisions of this act, shall be liable to a penalty of one hundred dollars for each any every such violation thereof, to be recovered in a suit or suits to be brought by the prosecuting attorney in the common pleas court of the county having jurisdiction in the locality where such violation occurred. Upon duly verified information being given him of such violation such prosecuting attorney shall bring such suits. The public service commission of Ohio shall give the proper

prosecuting attorney information of any such violations as may come to its knowledge. Nothing contained in the above provisions to common carriers shall apply to locomotives, tenders, cars, or trains, used exclusively in the movement of logs, and when the height of the drawbars of such locomotives, tenders and cars does not exceed twenty-five inches, or to street cars, or to locomotives, tenders, cars, similar vehicles, or trains, while in actual use in interstate commerce. (March 18, 1913, 103 v. 118; R. S. Sec. 3365-27f; March 19, 1906, 98 v. 76, § 6.)

Proceedings under this act are civil in their nature and guilty knowledge and intention are not essential elements of the offense.

State v. Railway Co., 7 N. P. n. s. 571; 19 L. D. 867 (C. P. 1908).

The car is made the unit; and hauling an unequipped car is penalized by this section.

Railway Co. v. State, 11 C. C. n. s. 482; 21 C. D. 20 (1909); affirming, 7 N. P. n. s. 541; 19 L. D. 285 (1908); aff'd, 82 O. S. 60 (1910).

A carrier using a car in violation of this act is not immune from the penalty because the car, or the railroad, is commonly used in interstate traffic, or because it was in a train containing cars loaded with interstate traffic.

Railway Co. v. State, 82 O. S. 60 (1910); affirming, 11 C. C. n. s. 482; 21 C. D. 20; 7 N. P. n. s. 541; 19 L. D. 285.

But see Southern R. Co. v. R. R. Com. of Indiana, 236 U. S. 439 (1915).

A car is used in interstate commerce where it is received from another company by the defendant company and hauled from one of its yards to another for the purpose of being put in a train and forwarded to its destination in another state.

U. S. v. Railway Co., 143 Fed. 360 (C. C. 1905).

See McGarvey v. Railway Co., 83 O. S. 273, 291, 292 (1911).

Where a coupler became out of order after the train had been made up and started, and the car was watched until it reached the first point where the coupler could be repaired, and there removed from the train and repaired, the company is not liable for a penalty. Railroad Co. v. State, 17 C. C. n. s. 124 (1910).

A proceeding may be brought against a receiver, who was acting as such at the time of the neglect of duty.

State v. Harmon, 6 O. L. R. 649; 54 O. L. B. 70 (C. P. 1909).

This section provides penalties for failure to equip cars with automatic couplers. Section 8965 provides penalties for operating cars on which the couplers are out of repair or not used.

State v. Pittsburgh, etc., Railway, 13 N. P. n. s. 145 (C. P. 1912).

Section 8955. (Contributory negligence.) Any employee of such common carrier, who is killed or injured by a locomotive, tender, car, similar vehicle, or train, in use contrary to the provisions of sections eighty-nine hundred and forty-nine to eighty-nine hundred and fifty-four both inclusive, shall not be deemed to have assumed the risk thereby occasioned, although continuing in the employment of such carrier after the unlawful use of such locomotive, tender,

car, similar vehicle, or train had been brought to his knowledge, nor shall such employe be held to have contributed to his injury in a case where the carrier violated any provision of such sections, when such violation contributed to his death or injury. (R. S. Sec. 3365-27g; March 19, 1906, 98 v. 77, § 7.)

Both Federal and Ohio employers' liability acts apply only where the relation of master and servant exists. *Loucks v. Railway*, 14 Ohio App. 320 (1919); affirmed, 103 O. S. 164.

A railroad company transported a car belonging to another railroad company and delivered it to a steel company. Two days later the coupler on the car was found to be defective. Thereafter a brakeman employed by the steel company, acting under orders of his superior, was injured while uncoupling the car. Held, the brakeman was not entitled to recover from the railroad company. *Loucks v. Railroad Co.*, 103 O. S. 164 (1921).

Sections 8949 and 8954 are in derogation of the common law of negligence and a court may not read into the act anything which does not come within the clear meaning of the language, but the act should be given such liberal construction as will accomplish the purpose and intention of the legislature. §§ 8950 and 8952 were held not to apply to a locomotive crane, whirley or derrick. *Railway Co. v. Benson*, 85 O. S. 215 (1911).

Where an employe is injured in attempting to couple cars, not equipped with automatic couplers, the railroad company is liable in damages. Under this section he is not deemed to have assumed the risk, nor to have contributed to the injury, where the violation of § 8950 by the railroad company contributed to the injury.

McGarvey v. Railway Co., 83 O. S. 273 (1911).

See *Railroad Co. v. Somers*, 3 C. C. n. s. 638; 14 C. D. 67 (1902); s. c., 74 O. S. 477.

Where automatic couplers have become defective, from long use or other cause, and it became necessary for an employe to go between the cars to make the coupling, and in so doing he was injured, he may recover.

McGarvey v. Railway Co., 83 O. S. 273 (1911).

See §§ 8963, 8965.

Section 8956. (Power of railroad commission concerning brakes.) The state railroad commission after full hearing and for good cause shown, may increase the minimum proportion of cars in a train required to be operated by power or train brakes. Failure to comply with the requirements of such commission, shall be subject to a like penalty as failure to comply with any requirement herein made of such carriers. (R. S. Sec. 3365-27a; March 19, 1906, 98 v. 75, § 1.)

CABOOSE CARS.

Section 8956-1. (Construction of caboose cars. Exception. Extension of time by railroad commission.) It shall

be unlawful, from and after the first day of September, 1910, for any common carrier operating a railroad, in whole or in part, within this state, or any manager or superintendent thereof, to require or permit the use, within this state upon such railroad, of any caboose car, or other car used for like purpose, which is not provided with a door in each end thereof and an outside platform across each end of such car; each platform shall not be less than twenty-four inches in width and shall be equipped with proper guard rails, and with grab irons and steps for the safety of persons getting on and off said car. Said steps shall be equipped with a suitable rod, board or other guard at each end and at the back thereof, properly designed to prevent slipping from such step. But nothing herein provided shall affect the right of any railroad to operate a caboose car now constructed or in use having the platforms each not less than twenty inches in width and equipped with the other appliances as herein provided. The railroad commission is hereby authorized to grant to any common carrier, upon full hearing and for good cause shown, a reasonable extension of time in which to comply with the provisions of this act; provided that in no case shall such extension or extensions in the aggregate exceed the period of one year from the time herein limited for compliance with this act. (April 25, 1910, 101 v. 133.)

Section 8956-2. (Penalty.) Any person or common carrier violating any of the provisions of section 8956-1 shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined not less than one hundred dollars nor more than five hundred dollars for each offense. (April 25, 1910, 101 v. 133.)

Section 8956-3. (Size of caboose cars specified.) Except as otherwise provided in this act, it shall be unlawful, from and after the first day of July, 1919, for any common carrier operating a railroad, in whole or in part, within this state, or any manager or division superintendent thereof to require or permit the use, upon such railroad, within this state, of any caboose car or other car used for like purpose, unless such caboose or other car shall be at least twenty-four feet in length, exclusive of platforms, and equipped with two four-wheel trucks, suitable closets and cupola; provided however, that the provisions of this section shall not apply to common carriers which operate less than ten miles of inter-

state railroad in Ohio. (106 v. 429; May 5, 1913, 103 v. 719, § 1.)

For opinion upholding constitutionality of amendment of 106 v. 429, see Opins. Atty. Gen. 1915, p. 878.

Section 8956-4. (Repaired caboose cars shall conform to provisions of this act.) Whenever any such caboose car now in use upon any such railroad, shall, after this act goes into effect, be brought into any of the shops of such railroad for general repairs, it shall be unlawful to again put the same into the service of such railroad, within this state, unless it be equipped as provided in section one of this act. (May 5, 1913, 103 v. 720, § 2.)

Section 8956-5. (Percentage of cars to be so equipped each year.) Such common carrier shall, each year, from and after the first day of July, 1914, equip, in accordance with the provisions of this act, at least fifteen per cent. of the caboose cars in use on its railroad; but the public service commission is hereby authorized to grant to any common carrier, upon full hearing and for good cause shown, a reasonable extension of time in which to comply with the provisions of this act; provided that in no case shall such extension in the aggregate exceed the period of one year from the time herein limited for compliance with this act. (May 5, 1913, 103 v. 720, § 3.)

Section 8956-6. (Penalty.) Any person or common carrier violating any of the provisions of this act shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined not less than one hundred dollars nor more than five hundred dollars for each offense. (May 5, 1913, 103 v. 720, § 4.)

INSPECTION.

Section 8957. (Inspector of automatic couplers and brakes, etc., on locomotives and cars.) An inspector of automatic couplers, air brakes, automatic power brakes, and other safety appliances prescribed by law, on railroad locomotives, tenders, cars and similar vehicles, shall be appointed by the public service commission of Ohio. He shall hold office for two years, unless sooner removed for cause, and until his successor is appointed and qualified. When a vacancy occurs in the office such commission immediately shall fill it by appointment. (April 26, 1913, 103 v. 192, in

effect July 25, 1913; R. S. Sec. 3365-23b; May 12, 1902, 95 v. 658.)

Section 8958. (Qualifications.) No person shall be eligible to the office who is an officer or employe of a railroad company or owns or is interested, directly or indirectly, in the stocks or bonds of any railroad company, or who has not had at least seven years' experience in the transportation department on some line of railroad of more than thirty miles in length, operated in this state. (R. S. Sec. 3365-23b; May 12, 1902, 95 v. 658.)

Section 8959. (Bond and oath.) Before entering on his duties, the inspector shall give bond to the state in the sum of three thousand dollars, with two or more sureties, or a bond and security company, acceptable to the state railroad commission, conditioned for the faithful performance of his duties. He also shall take the usual oath of office, which oath and bond with the approval of the commission endorsed thereon, shall be deposited with the secretary of state. (R. S. Sec. 3365-23c; May 12, 1902, 95 v. 659.)

Section 8960. Repealed. (107 v. 503.)

Section 8961. (Office under supervision of railroad commission.) Such inspector shall have his office in the office of the railroad commission, and shall be under its supervision. In the performance of his duties he also shall have the right of passing upon all the railroads within the state, and upon all trains, and any part thereof free of charge. (R. S. Sec. 3365-23d; May 12, 1902, 95 v. 659.)

Section 8962. (Duties of inspector.) Such inspector shall inspect the couplers, air brakes, automatic power brakes, hand brakes, ladders, running boards, sill-steps and hand-holds or grab-irons on all locomotives, tenders, cars and similar vehicles found on any railroad in Ohio, and make weekly reports of his inspections to the public service commission, reporting all locomotives, tenders, cars and similar vehicles, giving number thereof, points of billing and final destination, road on which they are found, and the road owning them, if known, which are found to have a defective appliance, describing the defect. On discovering such defective appliance he shall also immediately report it to the superintendent of the road on which it is found, and to the agent thereof at the nearest station, describing the defect. If such defective appliance be found on any locomotive,

tive, tender, car or similar vehicle which is then being used in interstate commerce, he shall under oath lodge with the United States district attorney of the district wherein such violation shall have been committed, all information of such violation and mail a like report to the interstate commerce commission, filing a copy thereof with the public service commission of Ohio. When any one of such appliances is lacking on any locomotive, tender, car or similar vehicle, this shall be deemed to be a defective appliance. (April 24, 1913, 103 v. 193; R. S. Sec. 3365-23e; May 12, 1902, 95 v. 659.)

Section 8963. (Liability of company for failure to make repairs.) A railroad whose superintendent or station agent receives such notice of such defective appliance shall cause it to be immediately repaired. The company shall be liable in damages to any person injured, for any injury received by reason of such defective appliance. Nothing in this chapter contained shall diminish the existing legal liability of railroads for injury to persons or property. (April 24, 1913, 103 v. 193; R. S. Sec. 3365-23f; May 12, 1902, 95 v. 660.)

See *McGarvey v. Railway Co.*, 83 O. S. 273 (1911).
State v. Railway, 10 N. P. n. s. 585 (C. P. 1911).

Section 8964. (Inspector may condemn locomotive, tender or car.) On the discovery of such defective appliance on any locomotive, tender, car or similar vehicle, such inspector may condemn such locomotive, tender, car or similar vehicle, and order it out of service until repaired and put in good working order. On receiving an order from the inspector condemning any locomotive, tender, car or similar vehicle, the employes of the road in charge thereof shall put it out of service at the first freight division terminal. (April 24, 1913, 103 v. 193; R. S. Sec. 3365-23g; May 12, 1902, 95 v. 660.)

Section 8965. (Daily forfeiture for use of defective appliance.) A railroad company which fails to comply with such order, shall forfeit and pay to the state, in addition to the penalties prescribed in section 8954 of the General Code, the sum of twenty-five dollars for each day such defective appliance is kept in use, contrary thereto, to be collected in a civil suit in any county in the state where service of process can be had on such road. On request from the inspector, the attorney general or the prosecuting attorney of any county in which the company has a line of

railroad shall immediately commence and prosecute, without unnecessary delay, proceedings to collect such sum. The sum so collected less ten per cent. fees for collecting it, due such officer, shall be paid to the general revenue fund of the state. (April 24, 1913, 103 v. 193; R. S. Sec. 3365-23h; May 12, 1902, 95 v. 660.)

Penalty against officers, see § 12562.

The additional penalty imposed, for keeping defective cars in use, does not render the act invalid.

State v. Railway, 10 N. P. n. s. 585 (C. P. 1911).

It is immaterial how short the distance a defectively equipped car was moved; but if the defect was of a temporary nature, easily repairable, and was at once repaired, the use was not unlawful.

State v. Harmon, 6 O. L. R. 649; 54 O. L. B. 70 (C. P. 1909).

This section provides penalties for operating cars on which the couplers are out of repair or not used. Section 8954 provides penalties for operating cars which are not equipped with couplers.

State v. Railway Co., 13 N. P. n. s. 145; 23 L. D. 135 (C. P. 1912).

A railroad company is not required to carry skilled workmen and repair tools on every train operated, to repair defects discovered en route. Railroad Co. v. State, 17 C. C. n. s. 124 (1910).

Where a coupler became out of order after the train had been made up and started, and the car was watched until it reached the first point where the coupler could be repaired, and there removed from the train and repaired, the company is not liable for a penalty. Railroad Co. v. State, 17 C. C. n. s. 124 (1910).

BOILERS.

Section 8965-1. (Inspection.) Every person, firm or corporation operating a steam railroad wholly or in part within this state shall require thorough inspection to be made of the boilers and appurtenances of all locomotives which shall be used by such person, firm or corporation on such railroad within this state. (May 20, 1910, 101 v. 328.)

By the enactment of the federal boiler inspection act (February 27, 1911, 36 U. S. Stat., pt. 1, p. 913) the Ohio act is superseded and is invalid in so far as it applies to a railroad company, the locomotives of which are used in transportation from Kentucky and other states into Cincinnati, and from Cincinnati to such other states, all of said locomotives being used exclusively in interstate commerce.

L. & N. R. Co. v. Hughes, 201 Fed. 727 (D. C. 1912).

See Rep. Atty. Gen. 1911-1912, p. 719.

Section 8965-2. (Boiler requirements specified.) All such boilers so used shall comply with the following requirements: The boilers and appurtenances shall be well made of good and suitable material; the openings for the passage of water and steam respectively, and all pipes and tubes exposed to heat, shall be of proper dimensions and

free from obstructions; the spaces between and around the flues shall be sufficient; the flues, boiler, furnace, safety valves, fusible plugs, low water indicators, feed water apparatus, gauge cocks, steam gauges, and means of removing mud and sediment from the boiler, and all other machinery and appurtenances thereof shall be of such construction, shape, condition, arrangement and material that the same may be safely employed in the active service of such railroad without peril to life or limb. (May 20, 1910, 101 v. 328.)

Section 8965-3. (Duty of inspector.) Each inspector shall satisfy himself by thorough examination that said requirements have been fully complied with. No boiler, pipe, nor any connections therewith shall be approved which is made in whole or in part of bad material, or is unsafe in its form, or dangerous from defects, workmanship, age, use or other cause. (May 20, 1910, 101 v. 328.)

Section 8965-4. (Quarterly inspection.) Said inspections shall be made at least every three months under the direction of such person, firm or corporation operating such railroad, by persons of suitable qualifications and attainments to perform the services required of inspectors of boilers and who are able to form a reliable opinion of the strength, form, workmanship and suitability of boilers to be employed without hazard of life from imperfections in the material, workmanship or arrangement of any part of such boiler and appurtenances. (May 20, 1910, 101 v. 329.)

Section 8965-5. (Rules and regulations.) The state railroad commission shall have power to formulate rules and regulations for the uniform inspection and testing of boilers and their appurtenances, and for the qualifications and competency of inspectors of boilers under the provisions of this act. Copies of such rules and regulations shall be mailed to every person, firm or corporation operating a railroad by steam in this state. If it shall be ascertained by such inspection and test, or otherwise, that any locomotive boiler is unsafe for use, the same shall not again be used until it shall be repaired and made safe so as to comply with the requirements of this act. (May 20, 1910, 101 v. 329.)

Section 8965-6. (Inspector of locomotive boilers.) The public utilities commission shall appoint a competent person as inspector of locomotive boilers, and such inspector shall, under the direction of the commission, have charge of the

inspection of boilers and their appurtenances, of locomotives used in the operation of steam railroads within this state and shall perform such other duties in connection therewith as the commission shall direct. (107 v. 504; 101 v. 329.)

Section 8965-7. (Certificate of inspector.) Each inspector, if he shall approve of the boiler and the appurtenances throughout, shall make and subscribe his name to a written or printed certificate which shall contain the number of each boiler inspected, the date of its inspection, the condition of the boiler and appurtenances, and such details as may be required by the forms and regulations which shall be prescribed by the railroad commission. Every such certificate shall be verified by the oath of the inspector, and he shall cause said certificate to be filed in the office of the railroad commission within ten days after each inspection shall be made, and also a copy thereof with the officer or employee of such railroad having immediate charge of the operation of such locomotive boiler, which copy shall be placed by such officer or employee in a conspicuous place in the cab connected with the locomotive boiler inspected, and there kept framed under glass. (May 20, 1910, 101 v. 329.)

Section 8965-8. (Penalties.) Every person, firm or corporation operating such railroad and violating any of the provisions of this act shall be liable to a penalty to be paid to the general revenue fund of the state, of one hundred dollars (\$100.00) for each offense, and the further penalty of one hundred dollars (\$100.00) for each day it or they shall omit or neglect to comply with said provisions; and the making or filing of a false certificate shall be a misdemeanor, and every inspector who wilfully certifies falsely touching any steam boiler or appurtenances thereto belonging, or any matter or thing contained or required to be contained in any certificate signed and sworn to by him, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined in any sum not less than two hundred dollars (\$200.00) nor more than five hundred dollars (\$500.00). (May 20, 1910, 101 v. 329.)

Section 8965-9. It shall be the duty of the state railroad commission to enforce the provisions of this act. (May 20, 1910, 101 v. 330.)

Section 8965-10. This act shall take effect and be in force on and after September 1, 1910. (May 20, 1910, 101 v. 330.)

FIRES.

Section 8966. (Spark arresters.) Except in the months of December, January and February, any company or person operating a railroad or a part of one, shall place on every locomotive engine used therefor, or in construction or repairing the road, such device or contrivance as most effectually will guard against the escape of fire or sparks that otherwise would be thrown out by such engines, and keep the device in good repair. (R. S. Sec. 3365-1; April 9, 1885, 82 v. 118, § 1.)

Character of spark arrester required. This section requires a railroad company to use a spark arrester which will most effectually guard against the emission of sparks.

Railway Co. v. Wahlers, 1 C. C. n. s. 139; 14 C. D. 310 (1902).

It is sufficient compliance that the spark arrester used is the best in general use.

Railroad Co. v. Kelly, 10 C. C. 322; 6 C. D. 555 (1895); aff'd, 56 S. 785.

See Railroad Co. v. Fredenbur, 3 C. C. 23; 2 C. D. 15 (1887).

A higher degree of care is imposed by this section than was required by common law. Railroad Co. v. Ohio Co., 214 Fed. 751 (C. C. A. Ohio 1914).

To show that a certain netting or arrester is in general use in the United States, the company can not show its use on particular roads.

Lake Side, etc., R. R. Co. v. Kelly, 10 C. C. 322; 6 C. D. 555 (1895); aff'd, 56 O. S. 785.

Cleveland, etc., R. Co. v. Fredenbur, 3 C. C. 23; 2 C. D. 15 (1887).

Evidence.

— **Expert testimony.** Where witnesses for the railroad company testified that the engine was equipped with the most approved kind of spark arresting device, and that it was in good condition, the plaintiff may show, in rebuttal, that on the same day other fires were caused by sparks from the same engine within two miles of plaintiff's property, and by experts that such fact would indicate that the spark arrester was not in good condition.

Toledo, etc., R. v. Star Flouring Mills, 146 Fed. 953; 15 O. F. D. 321 (C. C. A. 1906).

Where witnesses for the railroad company testified that the engine was equipped with a proper spark arrester, and witnesses for the plaintiff testified that the engine threw out live sparks, larger than any which could pass through the device described, the question was held to be one of fact for the jury. Railroad Co. v. Ohio Co., 214 Fed. 751 (C. C. A. Ohio 1914).

It is not competent to ask a witness to examine the spark arrester complained of and to state whether it was the most efficient in preventing fires. The proper way is to get all the knowledge the expert has upon the different kinds of netting used, the different classes of spark arresters,

their efficiency, etc., and to submit to the jury the question as to the efficiency of the arresters.

Cleveland, etc., Ry. Co. v. McKelvey, 12 C. C. 426 (1895); 5 C. D. 561.

The testimony of expert witnesses is competent to show the different kinds of netting that were used by different roads, to enable the jury to say whether the appliance used was proper. An expert may testify as to defects in the mode of attaching a spark arrester, and as to the effect of sparks and their vitality, and the distance they will carry and still start a fire.

Cleveland, etc., Ry. Co. v. McKelvey, 12 C. C. 426 (1895); 5 C. D. 561.

Expert testimony is admissible to prove that a properly constructed locomotive will not throw sparks a long distance, although the fact that the witness has not been in the employ of a railroad for a long time may affect the weight of his testimony.

Martz v. Cincinnati, etc., R. R. Co., 12 C. C. 144 (1896); 5 C. D. 561

— **Fires set by other engines.** Where it is alleged that the appliances were defective and the management negligent, it is only competent to show that other engines of the company emitted sparks and coal on other occasions, when such evidence is limited and confined to a time and place not remote from the fire, and not until evidence has first been given tending to exclude the probability that the fire was communicated by any other means.

Pennsylvania Co. v. Rossman, 13 C. C. 111; 7 C. D. 119 (1896).

— **Specimens of wire.** Specimens of wire netting can not be used as showing the netting used by the defendant, unless it is shown when it was used.

Cleveland, etc., Ry. Co. v. McKelvey, 12 C. C. 426; 5 C. D. 561 (1895).

Charge to jury. The following request and charge is proper, where the fire occurred in one of the months excepted: "The laws of Ohio expressly permit a railroad company to operate its engines during the months of December, January and February, without using a spark arresting device, and if, therefore, you find that the defendant's engine was, at the time of the fire, equipped with and using such a device, that was merely a voluntary precaution against fire taken by the defendant, and which the law did not require of it. The jury are, therefore, not concerned with the questions whether the spark arrester was or was not of the best pattern, or was or was not in repair except as the fact that it was of the best pattern and was in good repair, if proved, may tend to show that the engine so equipped did not and could not have started the fire."

Railroad Co. v. Burr, 82 O. S. 129, 135, 136 (1910).

See Railway Co. v. Kelly, 10 C. C. 322; 6 C. D. 555 (1895); aff'd, 56 O. S. 785.

Negligence. Decisions prior to amendment of § 8970 and repeal of § 8971. A failure to comply with this section would be regarded as negligence per se.

Continental Trust Co. v. Toledo, etc., R. Co., 89 Fed. 637; 40 W. L. B. 379 (1898).

The exception in this section relative to the months of December to February, does not relieve a company from the ordinary legal duty to observe proper care to avoid injuring the property of others by fire.

Toledo, etc., Ry. Co. v. Wickenden, 11 C. C. 378 (1896); 5 C. D. 171.

The inspection of the locomotive and appliances before sending it upon the road, and finding it then in good order, is not sufficient to avoid liability; they must be kept in good order on the line of road.

Cleveland, etc., R. R. Co. v. Fredenbur, 3 C. C. 23; 2 C. D. 15 (1887).

The fact that a high wind caused a greater draft and fire to escape

is no defense unless it appears that a locomotive properly constructed with suitable appliances necessarily emits fire during a high wind.

Cleveland, etc., R. R. Co. v. Fredenbur, 3 C. C. 23 (1887); 2 C. D. 15; s. c., 23 W. L. B. 434.

In an action against a railroad company for damages by fire emitted from the smokestack, when it is shown by the evidence that a locomotive properly constructed and equipped with the best appliances in general use, will not emit sparks, and that the fire was caused by sparks from the company's locomotive, the burden of proof is upon the company to prove that its locomotive and appliances were properly constructed and in good order.

Cleveland, etc., R. Co. v. Fredenbur, 3 C. C. 23 (1887); 2 C. D. 15.

An action under any of these sections involves title to real estate; and a justice of the peace has no jurisdiction.

Erie R. R. Co. v. Furry, 18 C. C. 880 (1894); s. c., 31 W. L. B. 282.

Section 8967. (Forfeiture under preceding section.) A railroad company, corporation or person violating the provisions of the next preceding section, upon conviction thereof in a court of competent jurisdiction, shall forfeit and pay for each violation any sum not exceeding one hundred dollars. In addition thereto the court of common pleas, in a county through which such railroads are constructed and operated, may enjoin such companies, corporations or persons from using on such railroads, a locomotive not provided with the device hereinbefore required. (R. S. Sec. 3365-2; April 9, 1885, 82 v. 118, § 2.)

Section 8968. (Company must keep right of way free from combustible material.) Every company, or person in charge of a railroad as manager or receiver, shall keep the right of way clear from weeds, high grass, and decayed timber, which from nature or condition are combustible, and liable to take or communicate fire from passing locomotives to abutting or adjacent property. Such company shall be liable for all damages sustained by the owner or occupant of such property from carelessness or neglect to keep its right of way clear of such combustible material. (R. S. Sec. 3365-3; March 24, 1890, 87 v. 99, § 1.)

A grain elevator is not combustible material.

Martz v. Railroad Co., 12 C. C. 144; 5 C. D. 451 (1896).

Whether the fire was negligently allowed to escape or not is immaterial.

Indiana, etc., Ry. Co. v. Overman, 110 Ind. 538 (1886).

Louisville, etc., Ry. Co. v. Nitcher, 126 Ind. 229 (1890).

Galveston, etc., R. R. Co. v. Polk, 28 S. W. (Tex.) 353 (1894).

See Pittsburg, etc., Ry. Co. v. Hixon, 79 Ind. 111 (1881).

The entire width of the right of way must be cleared.

Blue v. Railroad Co., 23 S. E. 275 (N. C. 1895).

Constitutionality of Indiana statute requiring railroad companies to cut noxious weeds. Railway Co. v. Anderson, 242 U. S. 283 (1916).

Section 8969. (When abutting owner may remove combustible material.) In case of failure to comply with the above requirements, a person owning or controlling property abutting on or adjacent to a railroad right of way, after twenty days' notice in writing, the default still continuing, may cause all combustible material to be removed from the right of way along or by such property. Upon presentation of a reasonable account therefor to the agent at the nearest station of such company or receiver, if it or he refuses to pay the amount asked, within thirty days, it may be recovered before any court having jurisdiction thereof. (R. S. Sec. 3365-4; March 24, 1890, 87 v. 99, § 2.)

Section 8970. (Liability of railroad company for loss or damage by fire.) Every company, or receiver of such company, operating a railroad or a part of one shall be liable for all loss or damage by fires originating upon the land belonging to it caused by operating such road. Such company, or receiver of such company, further shall be liable for all loss or damage by fires originating on lands adjacent to its land, caused in whole or part by sparks from an engine passing over such railroad, and the exercise by such company, or receiver of such company, of due care in equipping and operating such engine shall not exempt such company, or receiver of such company, from such liability, which may be recovered before any court of competent jurisdiction within the county in which the lands on which such loss or damage occurs are situated. The existence of fires upon the railroad company's lands is prima facie evidence that they are caused by operating such railroad. Provided that nothing herein shall invalidate or prohibit contracts of such company or receiver now existing or hereafter made, by which such company or receiver is indemnified against such loss or damage by fire, or liability therefor released. (May 5, 1911, 102 v. 108; R. S. Sec. 3365-5; April 26, 1894, 91 v. 187.)

Act: history and occasion for.

Insurance Co. v. Railway, 74 O. S. 30, 33, 35 (1906).

Before the amendment of 1911 (102 v. 108) this section and § 8972 were held constitutional.

Baltimore, etc., Ry. Co. v. Kreager, 61 O. S. 312 (1899).

Martz v. Railroad Co., 12 C. C. 144; 5 C. D. 451 (1896).

Liability in absence of statute. In the absence of a statute, the decisions are generally to the effect that a railroad company is not liable for loss caused by fire, unless it was occasioned by its negligence.

Insurance Co. v. Railway, 74 O. S. 30, 33 to 35 (1906).

And negligence could not be inferred from the mere fact that injury to the adjacent property was caused by sparks from the locomotive.

Ruffner v. Railroad Co., 34 O. S. 96 (1877).

Railroad Co. v. Fredenbur, 3 C. C. 23; 2 C. D. 15 (1888).

Cincinnati, etc., Ry. v. Coal Co., 139 Fed. 528; 1 L. R. A. n. s. 533 (C. C. A. 1905).

Railway v. Bell, 206 Fed. 395 (C. C. A. 1913).

An owner of lumber piled on the right of way with consent of the railroad company may recover where the lumber is destroyed by fire occurring through negligence in the operation of trains. Cincinnati, etc., Railway v. Coal Co., 139 Fed. 528; 1 L. R. A. n. s. 533 (C. C. A. 1905).

Liability under § 8970. This section imposes upon every railroad company operating a railroad in this state an absolute liability for loss or damage by fire, originating on its land, caused by operating the road and the fact that the fire originated on the land of the company is made prima facie evidence that it was caused by operating the road. In an action for loss or damage, it is not necessary to allege or prove negligence on the part of the company; nor is the absence of such negligence a defense.

Baltimore, etc., Ry. Co. v. Kreager, 61 O. S. 312 (1899).

Lake Erie, etc., R. Co. v. Falk, 62 O. S. 297 (1900).

See Martz v. Railroad Co., 12 C. C. 144; 5 C. D. 451 (1896).

This section applies to railroad companies in existence and which obtained their right of way prior to its enactment as well as to companies organized since.

Railway Co. v. Kreager, 61 O. S. 312 (1899).

In an action brought by the owner of property destroyed by fire against a railroad company, an insurance company, having made payment to the owner of a portion of the loss, may intervene for the purpose of being subrogated to the extent of its payment. The amount recovered from the railroad company should be adjudged to the owner and insurer according to the interest of each.

Railroad Co. v. Falk, 62 O. S. 297 (1900).

A prima facie case is made out under this statute when evidence is offered tending to prove the facts set out in the statute, the fire, the loss of property, and that the fire was caused by sparks coming from an engine belonging to the defendant.

Toledo, etc., Ry. Co. v. Wales, 11 C. C. 371; 5 C. D. 168 (1896).

A railroad is not liable where the fire originated on land owned by it, but leased for elevator purposes to others, the railroad having no control over the premises. Compton v. Railway, 12 Ohio App. 322 (1919).

Contract exempting railroad company from liability. A stipulation in a lease made by a railroad company that it shall not be liable to the lessee for damages to property on the demised premises, caused by fire accidentally or negligently communicated in the operation of the road, is valid.

Insurance Co. v. Railway, 74 O. S. 30 (1906).

Such lessee and his insurers can not recover for loss by fire, when the fire was communicated to a part of the building located on the demised premises.

Insurance Co. v. Railway, 74 O. S. 30 (1906).

Contracts of indemnity purporting to relieve one from the results of his failure to exercise ordinary care should be strictly construed. A contract whereby a lessee agreed to save harmless a railroad company, lessor, from loss, damage or injury "by fire or otherwise", was held to include only loss from fire or kindred causes and not to include injury to an employe of the lessee by negligent operation of

lessor's locomotive. *Lumber Co. v. Erie Rd. Co.*, 102 O. S. 236 (1921); *Sugar Co. v. Railroad*, 104 O. S. 608 (1922).

Contributory negligence of plaintiff. The mere fact that the owner stored inflammable property on his premises near the railroad right of way, and that the railroad company preceded the owner in the establishment of its business, does not amount to contributory negligence. *Leroy Fibre Co. v. Railway Co.*, 232 U. S. 340 (1914).

An adjoining owner is not limited in the use of his property by its proximity to a railroad; nor is he subject to the careless as well as the careful operation of the road. *Leroy Fibre Co. v. Railway Co.*, 232 U. S. 340 (1914); *Railroad Co. v. Coal Co.*, 139 Fed. 528, 530 (C. C. A. Ohio).

Measure of damages. The measure of damages is the actual value of the property, and not what it would have cost to reconstruct or replace the same, with deductions for wear and tear. Under such a rule the damages might far exceed the actual value of the property and the actual loss to the plaintiffs. Where property totally destroyed has a market value, that market value is the measure of compensation for the loss.

Cleveland, etc., Ry. Co. v. McKelvey, 12 C. C. 426; 5 C. D. 561 (1895).

When the property destroyed under circumstances which make the company liable therefor is insured, the right of the owner as against the railroad company and the insurer is limited to indemnity for his loss.

Lake Erie, etc., R. R. Co. v. Falk, 62 O. S. 297 (1900).

A letter from the plaintiff to the company written soon after the fire, stating the amount of loss, does not limit the recovery to such amount, where evidence detailing the loss shows that it exceeds the amount stated. *Railway v. Applegate*, 1 Ohio App. 350; 17 C. C. n. s. 256; 24 C. D. 338 (1913); *aff'd*, no rep. 90 O. S. 445.

Parties plaintiff. Section 8970 inures both to the owner of property destroyed and, by way of subrogation, to insurance companies making payment to the owner under policies. The owner and insurance companies may join in an action. *Railway v. Mauk*, 9 Ohio App. 438; 29 O. C. A. 257 (1918); motion to certify record overruled, 16 O. L. R. 349.

Pleading. A petition is sufficient under this section which avers that fire and sparks were emitted by a locomotive of defendant, causing fire on the railroad right of way and plaintiff's land, the plaintiff being ignorant as to whether the fire started on his land or that of the railway company.

Railway Co. v. Anderson, 7 C. C. n. s. 17; 17 C. D. 577 (1904).

The direction in which the locomotive was moving need not be alleged. An averment that the locomotive was moving in a southerly direction is immaterial and need not be proved. *Railway v. James*, 1 Ohio App. 335; 18 C. C. n. s. 210 (1913).

Proof.

— **As to ownership of tracks.** It is not necessary to show ownership of the tracks. If the proof shows the defendant was the owner, and operated the engine that caused the fire, it is sufficient to make a case.

Toledo, etc., Ry. Co. v. Wales, 11 C. C. 371 (1896).

— **As to cause of fire.** Where the proof shows that a locomotive passed a short time before the fire; that the wind was blowing in the direction of the plaintiff's land with sufficient force to carry sparks thereon, and that there were no other fires in the neighborhood at the time, the

jury is warranted in finding that the fire originated from sparks from such locomotive.

Railway Co. v. Anderson, 7 C. C. n. s. 17; 17 C. D. 577 (1904).

It is competent to show that the fire started in the grass along the track soon after the passage of the engine, and that about that time and immediately after the passage of the locomotive other fires occurred in the neighborhood.

Lake Side, etc., R. R. Co. v. Kelly, 10 C. C. 322; 6 C. D. 555 (1885); aff'd, 56 O. S. 785.

Where the particular locomotive that is claimed to have set the fire is not traceable, it may be shown that the railway company was reckless in this particular, and it would be competent to show that every one of the company's locomotives emitted fire.

Lake Shore, etc., R. R. Co. v. Kelly, 10 C. C. 322; 6 C. D. 555 (1895); aff'd, 56 O. S. 785.

Martz v. Cincinnati, etc., R. R. Co., 12 C. C. 144; 5 C. D. 451 (1896).

If it is clearly established that cinders picked up and produced in evidence came from the engine, it would be competent to admit them in evidence.

Cleveland, etc., Ry. Co. v. McKelvey, 12 C. C. 426; 5 C. D. 561 (1895).

It is incumbent upon the plaintiff to prove that the fire was caused in whole or in part by sparks from an engine upon or passing over or along the railroad while the defendant was operating it. Insurance Co. v. Railway, 2 Ohio App. 136; 18 C. C. n. s. 502 (1913); Columbus Hoop Co. v. Railway, 20 N. P. n. s. 529 (1918); Minneapolis Co. v. Railway, 83 Minn. 370; 86 N. W. 451 (1901).

Where the evidence warranted the conclusion that the fire originated from sparks emitted from a locomotive, the court refused to set aside the verdict on the theory that the fire originated from the chimney of the burned building. Railway Co. v. Applegate, 1 Ohio App. 350; 17 C. C. n. s. 256; 24 C. D. 338 (1913); aff'd, no rep. 90 O. S. 445.

A party may rest his case when he has made out a prima facie case under this statute, but he can not withhold evidence confirmatory of such prima facie case and offer it in rebuttal, unless that evidence would also actually be rebutting evidence.

Toledo, etc., Ry. Co. v. Wales, 11 C. C. 371 (1896); 5 C. D. 168.

Jurisdiction of justice of peace. A justice of the peace has no jurisdiction for the reason that the action involves the title or possession to real estate, and not an action of trespass.

Furry v. Erie R. R. Co., 31 W. L. B. 282 (1894); s. c., 18 C. C. 880.

Section 8971 (Repealed May 5, 1911, 102 v. 109.)

The communication of fire from a locomotive was by this section made prima facie evidence of negligence.

B. & O. Ry. v. Kreager, 61 O. S. 312 (1899).

Railway Co. v. Anderson, 7 C. C. n. s. 17; 17 C. D. 577 (1904).

Railway Co. v. Wahlers, 1 C. C. n. s. 139; 14 C. D. 310 (1902).

Toledo, etc., R. Co. v. Star Flouring Mills, 146 Fed. 953 (C. C. A. 1906); 15 O. F. D. 321.

Continental Trust Co. v. Railroad Co., 89 Fed. 637 (1898).

Section 8972. (What not considered negligence.) In no case shall it be considered as negligence on the part of the owner or occupant of property so injured by fire, that

he used it, or permitted it to be used and remain as if no railroad passed through or near such property. But this rule shall not apply in cases of injury by fire to personalty which at the time was on the property occupied by such road. (R. S. Sec. 3365-6; April 26, 1894, 91 v. 188, § 2.)

Section 8973. (Costs in appeal and attorney fee.) If either party appeals from the judgment of a court in which an action under the three next preceding sections is begun, or carries the case up on error, the party in whose favor judgment finally is rendered shall have included in his bill no case shall it be considered as negligence on the part of of costs against the adverse party, an attorney fee of fifty dollars, if it is not carried beyond the circuit court. But if carried to the supreme court of Ohio an attorney fee of one hundred dollars shall be included in his bill of costs. (R. S. Sec. 3365-7; April 26, 1894, 91 v. 188, § 3.)

This section is unconstitutional.

Rowland v. Railroad Co., 13 C. C. n. s. 221; 22 C. D. 93 (1910).

See Coal Co. v. Rosser, 53 O. S. 12.

But it is severable from the other sections of the original act and does not affect their validity.

Baltimore, etc., R. Co. v. Kreager, 61 O. S. 312 (1899).

Section 8974. (Application of sections.) Sections eighty-nine hundred and seventy-one and eighty-nine hundred and seventy-two shall apply to all cases now pending, as well as to those hereafter to be commenced. (R. S. Sec. 3365-8; April 26, 1894, 91 v. 188, § 4.)

WIRES OVER TRACKS.

Section 8975. (Rules and regulations governing the construction, maintenance, etc., of telephone, telegraph, etc., wires.) The public utilities commission shall, within six months after this act takes effect, determine standards of maintenance and operation and also the nature, location and character of the construction to be used where telegraph, telephone, electric light, power, or other electric wires of any kind cross or more or less parallel the line of a railroad, interurban railway or other public utility, and to this end shall formulate, and from time to time issue rules and regulations and complete detailed specifications, covering each class of construction, maintenance and operation of such electric wire crossing and (or) parallel, under the various conditions existing; and the commission upon complaint of any

person, railroad, interurban railway, or public utility, claiming to be injuriously affected or subjected to hazard, shall, after hearing, make such order and prescribe such terms and conditions for the construction, maintenance and operation of the lines, plants, or systems, as to it may seem just and reasonable. (109 v. 526; R. S. Sec. 3365-28; 93 v. 154, § 1.)

See *Street Railway Co. v. Railroad Co.*, 21 C. C. 391; 12 C. D. 113 (1898); *aff'd*, 64 O. S. 550.

See also § 8903 et seq.

Section 8976. (Duty of the public utilities commission.)

The public utilities commission shall see that the provisions of the next preceding section are enforced, and for that purpose shall have power to cause the removal of such telegraph, telephone, electric light, power or other electric wires of any kind crossing or paralleling such other line and not in accordance with the rules, regulations, and specifications issued by said commission. (109 v. 527; R. S. Sec. 3365-29; 93 v. 154, § 2.)

CHAPTER 5.

FARE AND FREIGHT.

Passenger Fare.

- § 8977. Rates of passenger fare.
- § 8978. Excess fare on trains.
- § 8979. Bicycle as baggage.

Freight Charges.

- § 8980. Repealed.
- § 8981. Points competing with public works.
- § 8982. Tariff of rates published; how changed.
- § 8983. Contracts prohibited.
- § 8984. Trunk roads not to discriminate between roads.
- § 8985. Must forward freight by line named by shipper.
- § 8986. Provisions may be enforced by injunction.
- § 8987. No discrimination between way and through freight.
- § 8988. Repealed.
- § 8989. Repealed.
- § 8990. Must furnish equal facilities to same class of shippers.
- § 8991. Damages.
- § 8992. Passengers on freight trains.
- § 8993. To furnish bills of lading.
- § 8993-1. Bills of lading must contain, what.
- § 8993-2. (Carrier may insert in bill, what.)
- § 8993-3. (Nonnegotiable or straight bill.)

- § 8993-4. When negotiable.
- § 8993-5. Shall not be issued in sets; to what countries; liability when so issued.
- § 8993-6. When "duplicate" should appear on the face of bill.
- § 8993-7. "Nonnegotiable."
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- § 8993-10. Carrier bound to deliver goods, when.
- § 8993-11. (To whom carrier to deliver goods.)
- § 8993-12. Carrier liable for wrongful delivery.
- § 8993-13. Delivery to purchaser of bill in good faith.
- § 8993-14. Exceptions.
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- § 8993-19. Interpleader.
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- § 8993-23. No attachment after delivery to carrier.
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- § 8993-27. When bill negotiated by delivery.
- § 8993-28. Negotiated by endorsement.
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- § 8993-30. (Holder of negotiable bill may negotiate same, when.)
- § 8993-31. Title acquired by negotiated bill.
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- § 8993-35. Previous endorsers.
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- § 9001. How distance computed.
- § 9002. Penalty for overcharge.
- § 9003. Separate actions for each violation.
- § 9004. When provisions do not apply.

PASSENGER FARE.

Section 8977. (Rates of passenger fare.) A company operating a railroad in whole or in part in this state may demand and receive for the transportation of passengers on its road, not exceeding three cents per mile, for a distance of more than five miles, but the fare shall always be made that multiple of five nearest reached by multiplying the rate by the distance. (108 (Pt. 2) v. 1165; R. S. Sec. 3374; 98 v. 4; 73 v. 102, § 13.)

Schedule of fares to be posted and filed, §§ 8981, 505 et seq.

Power of public utilities commission over fares, §§ 527, 535.

Penalty for violation of this section, §§ 9002, 9003.

Under the Federal Transportation Act of 1920 the Interstate Commerce Commission may change rates fixed by a state statute or state commission, the effect of which is an undue, unreasonable or unjust discrimination against interstate or foreign commerce. R. Com. of Wis. v. C. B. & Q. Ry. (U. S. Sup. Ct. 1922); 66 L. Ed. 236; New York v. U. S., 66 L. Ed. 244.

Unit of measurement. The unit of measurement provided by this section is one mile and fractions of a mile are not to be counted. The words "more than five miles" are equivalent to six miles. The limit of three cents per mile applies first to six miles, then to seven and so on. For any distance less than six miles the limit does not apply.

Railway Co. v. Wells, 65 O. S. 313 (1901).

See Scheidler v. Railway, 20 C. C. 712; 10 C. D. 822.

Multiple of five. A railroad company may charge as fare that multiple of five which is nearest to the product produced by multiplying the rate of three cents per mile by the distance, whether such multiple is above or below such product. If such product should be equidistant from the multiple below and the one above, the company may charge as fare either multiple.

C. C. & St. L. Ry. Co. v. Wells, 61 O. S. 268 (1899).

See Railroad Co. v. Skillman, 39 O. S. 444 (1883).

Heaton v. Cincinnati, etc., R. Co., 1 N. P. 433 (1894); s. c., 2 L. D.

47.

Scheidler v. Railway Co., 20 C. C. 712; 10 C. D. 822.

Distance less than five miles. For any distance less than six miles the limit does not apply.

Railway Co. v. Wells, 65 O. S. 313 (1901).

The railroad company may charge a reasonable rate. Whether the rate is unreasonable is a question for the jury.

Railroad Co. v. Skillman, 39 O. S. 444 (1883).

Smith v. Railway Co., 23 O. S. 10 (1872).

Peters v. Railroad Co., 42 O. S. 275 (1884).

Campbell v. Railroad Co., 23 O. S. 168, 190 (1872).

Application of section to companies organizing under special charter.

See Railroad Co. v. Cole, 29 O. S. 126 (1876).

Shields v. State, 26 O. S. 86 (1875); s. c., 95 U. S. 319.

Railroad Co. v. Moore, 33 O. S. 384 (1878).

See also § 8732.

Tickets.

Right to require tickets. A railroad company has a right to require passengers on freight trains to procure tickets prior to taking passage.

Railroad Co. v. Bartram, 11 O. S. 457 (1860).

Hatten v. Railroad Co., 39 O. S. 375 (1883).

Nature of ticket. A ticket is a convenient symbol to represent the fact that the bearer has paid to the company the agreed price for his conveyance upon the road to the place therein designated.

Frank v. Ingalls, 41 O. S. 560, 563 (1885).

Railroad Co. v. Campbell, 36 O. S. 647, 658 (1881).

The contract between the railroad company and passenger may be proved by parol evidence aside from the ticket.

Penna. Co. v. Loftis, 72 O. S. 288, 300 (1905).

See Penna. Co. v. O'Connell, 84 O. S. 218, 221 (1911).

Railroad Co. v. Cook, 37 O. S. 265 (1881).

Where the language of a ticket is ambiguous it should be construed most strongly against the carrier and in favor of the purchaser.

Ann Arbor Ry. v. Amos, 85 O. S. 300 (1912).

— Is for continuous passage. In the absence of any agreement or rule or regulation to the contrary, the obligation created by a sale of the ticket was for one continuous passage, and if the passenger volun-

tarily left the train at an intermediate station while the carrier was engaged in the performance of its contract, he thereby released it from further performance and had no right to demand such performance on another train at another time.

Hatten v. Railroad Co., 39 O. S. 375 (1883).

Cleveland, etc., R. R. Co. v. Bartram, 11 O. S. 457 (1860).

Where a continuous passage necessitates a change of trains it must be continued on the next available train.

Ellsworth v. Penna. Co., 2 C. C. n. s. 483; 15 C. D. 797 (1904);
aff'd, 74 O. S. 443.

But to relieve the carrier the continuity of the passage must be broken by the holder of the ticket without the assent or fault of the carrier. Where the passenger had no information as to the time of the next train and ignorantly allowed one train to pass, the continuity of the passage was not broken.

Ellsworth v. Penna. Co., 2 C. C. n. s. 483; 15 C. D. 797 (1904);
aff'd, 74 O. S. 443.

— **Over connecting lines.** A railroad company selling a coupon ticket over its own and connecting lines may, by contract, express or implied, make itself liable for safe carriage over the entire route, but the mere sale of such coupon ticket does not of itself import a contract to be responsible beyond its own line. The presumption is that the selling company acts as agent of the connecting lines.

Penna. Co. v. Loftis, 72 O. S. 288, 300 (1905).

See Railroad Co. v. Campbell, 36 O. S. 647 (1881).

Darlington v. Railway, 14 N. P. n. s. 427; 24 L. D. 37 (1913).

A stipulation, in a ticket over several lines, that the issuing company is acting as agent for connecting lines and is not responsible beyond its own line, relates to railroad transportation and not to a transfer between depots by motor vehicle. The issuing company in such a case is liable for damages caused by negligence of the driver of the vehicle. Harmon v. Barber, 17 O. L. R. 109; 247 Fed. 1 (C. C. A. Ohio 1918).

— **Authority of agent to sell tickets.** An agent authorized to sell tickets, and stamp and deliver the same upon receiving pay therefor, can not bind his company by stamping and delivering such tickets, without the knowledge or consent of its proper officers, to a third person, to be sold by him, and to be paid for when sold.

Frank v. Ingalls, 41 O. S. 560 (1885).

Terms and conditions in tickets.

Assent of purchaser essential. The purchaser of a ticket does not, by its mere acceptance, acquiesce in, and bind himself to, all the terms and conditions printed therein in the absence of actual knowledge of them.

Kent v. Railroad Co., 45 O. S. 284, 288 (1887).

Railroad Co. v. Campbell, 36 O. S. 647 (1881).

Although the ticket is sold at a reduced rate.

Kent v. Railroad Co., 45 O. S. 284, 288 (1887).

Railway Co. v. Mortal, 18 C. C. 562; 8 C. D. 134 (1897).

A passenger purchasing a ticket, immediately before the departure of the train, is not guilty of negligence in not examining the ticket.

Ann Arbor Ry. Co. v. Amos, 85 O. S. 300 (1912).

Waiver of conditions. Conditions in a ticket may be waived by the acts or conduct of the railroad company or its agents.
Requirement of continuous passage.

Ellsworth v. Penna. Co., 2 C. C. n. s. 483; 15 C. D. 797 (1904); aff'd, 74 O. S. 443.

Signature of purchaser in mileage book.

Kent v. Railroad Co., 45 O. S. 284 (1887).

Where a person has a ticket, purchased from a company, entitling him to be carried from a certain station to another on the line of its road, and is good only on trains stopping at his destination, is, by the fault of the company's station agent, induced to take a train that does not, under the schedule stop at such place, and as a consequence is ejected by the conductor on calling for his ticket, and before reaching his destination, such facts show a right in the passenger against the company to recover as for a tort, and not merely for breach of contract.

Pittsburg, etc., Ry. Co. v. Reynolds, 55 O. S. 370 (1896).

See Pennsylvania Co. v. Wentz, 37 O. S. 333 (1881).

Haskins v. Lake Shore, etc., Ry. Co., 4 W. L. B. 951 (1879).

Special conditions. Time limit. Where a railroad company sold a ticket, which entitled the purchaser to ride upon its cars a certain number of times within a given period, for a price below the usual rate of fare, which ticket specified upon its face that it was only good during such period, the purchaser, having failed to ride the specified number of times within the period named, is not entitled to ride upon such ticket after the expiration of the period.

Powell v. Pittsburg, etc., R. R. Co., 25 O. S. 70 (1874).

Pennsylvania Co. v. Hine, 41 O. S. 276 (1884).

— **Continuous passage.** A stipulation for continuous passage is reasonable.

Ellsworth v. Penna. Co., 2 C. C. n. s. 483; 15 C. D. 797 (1904); aff'd, 74 O. S. 443.

— **Ticket nontransferable.** Stipulations, in tickets sold at reduced rates, that the tickets were to be nontransferable, and requiring the original purchasers to identify themselves by subscribing their names whenever required, are valid.

Kinner v. Railway Co., 69 O. S. 339, 340, 345 (1904); affm'g, 3 C. C. n. s. 401; 13 C. D. 294.

A railroad company, having sold return tickets containing such stipulation, is entitled to an injunction against ticket brokers acquiring the return portions of such tickets and selling them to others to be used by them in violation of the terms of the contract. The fact that the railway company had agreed with other carriers respecting the reduction of rates and conditions of tickets is no defense to the ticket brokers.

Kinner v. Railway Co., 69 O. S. 339 (1904).

A railroad company has no right to confiscate a nontransferable mileage book, purchased by a ticket broker in a fictitious name, when found in the hands of another person. But the conductor may refuse to accept such ticket and collect the regular fare.

Morton v. Railway Co., 20 C. C. 666; 10 C. D. 812; 35 W. L. B. 359 (1898); affirming, 7 N. P. 605; 5 L. D. 580.

In the absence of a stipulation, restricting transfer, a ticket is transferable.

Penna. Co. v. O'Connell, 84 O. S. 218, 220, 221 (1911).

A ticket, with no limitation as to transfer on its face, is good in the hands of one who has purchased it from the original purchaser, or from a ticket broker or "scalper", when the purchase is made without knowledge of an undisclosed rule of the railroad company prohibiting such transfer.

Knecht v. Railway Co., 6 N. P. n. s. 13; 18 L. D. 202 (C. P. 1907).

— **Exempting railroad company from liability for negligence.**

A stipulation in a drover's ticket exempting the company from liability for negligence is void.

Cleveland, etc., R. R. Co. v. Curran, 19 O. S. 1 (1869).

The validity of a stipulation in a free pass exempting a carrier from liability for negligence must be determined by the law of the place where made.

Knowlton v. Erie Ry. Co., 19 O. S. 260 (1869).

An express messenger is not regarded as a passenger, and a contract, between the messenger and express company, exempting the railroad company from liability was held valid.

Railway v. Voight, 176 U. S. 498 (1900).

Lost tickets, rights of owner. The purchaser of a nontransferable commutation ticket, who has lost it, and refuses, on account of such loss, to pay his fare upon a train, can not maintain an action against the company for being ejected from the train.

Crawford v. Cincinnati, etc., R. R. Co., 26 O. S. 580 (1875).

Right of holder of fraudulently obtained ticket. When the possession of a railroad passenger ticket, which entitles the holder to a first-class passage between points named therein, has been fraudulently obtained from the company, a person purchasing such ticket from the holder thereof, although for value and without notice of equities, acquires no title thereto.

Frank v. Ingalls, 41 O. S. 560 (1885).

Passage on freight trains. A railroad company has the right to prescribe reasonable conditions for the admittance of way passengers upon its freight trains; and payment of fare to its office agents, or procuring a ticket prior to taking passage on such trains, is not an unreasonable condition.

Cleveland, etc., R. R. Co. v. Bartrain, 11 O. S. 457 (1860).

Expulsion from train on refusal to pay. A railway company has the right to require passengers to pay fare, and a rule directing its conductors to remove from the cars those who refuse to comply with the requirement is reasonable.

Shelton v. Lake Shore, etc., Ry. Co., 29 O. S. 214 (1876).

Traction Co. v. Rosnagle, 84 O. S. 310 (1911).

Crawford v. Cincinnati, etc., R. R. Co., 26 O. S. 580 (1875).

Railroad Co. v. Skillman, 39 O. S. 444 (1883).

Corry v. Cincinnati, etc., R. R. Co., 3 Gaz. 90 (1859).

See § 9157 and note.

A person having in charge a child of sufficient age to require payment of fare is liable for payment of the child's fare and both may be ejected for refusal to pay the same.

Railroad v. Orndorff, 55 O. S. 589 (1897).

When such person has paid fare, or purchased a ticket which has been taken up by the conductor, the unused value of the ticket or fare must be tendered back.

Railroad v. Orndorff, 55 O. S. 589 (1897).

A person refusing to pay fare acquires no right to remain on the train by offering to pay the usual fare after the train has been stopped for the purpose of ejecting him.

Railroad Co. v. Skillman, 39 O. S. 444 (1883).

An offer to pay the fare to an employe on the train unauthorized to receive the same is not an offer to the company, and does not entitle the person to passage.

Cleveland, etc., R. R. Co. v. Bartram, 11 O. S. 457 (1860).

A passenger failing to get a seat may refuse to ride, and bring suit, but if he rides he must give up his ticket and pay.

Close v. Cooper, 34 O. S. 98 (1877).

See Railway Co. v. McLean, 1 C. C. 112 (1885); 1 C. D. 67; 19 W. L. B. 217.

The fact that a ticket has been purchased by a passenger, which was afterward wrongfully taken up by a conductor of one of the defendant's trains, will not relieve the passenger from the duty of providing himself with a ticket or paying fare on another train of the defendant in which he may be a passenger. In such case the right of action of the passenger would be for the wrongful taking up of the ticket, and not for having been removed from a train by another conductor for refusing to pay fare.

Shelton v. Lake Shore, etc., Ry. Co., 29 O. S. 214 (1876).

See Railway v. Conner, 74 O. S. 225 (1906).

Wilt v. Railway Co., 21 C. C. 579; 11 C. D. 589.

A person is only entitled to compensatory damages where his object in taking passage on the train was to be ejected and to bring suit against the company.

Cincinnati, etc., R. R. Co. v. Cole, 29 O. S. 126 (1876).

Where a ticket is for passage over three lines, and calls for one exchange at the office of the intermediate line, and the agent in making the exchange negligently writes, in a coupon attached to the ticket, a wrong destination, but in the ticket itself inserts the proper destination, the passenger is entitled to be carried to the proper destination. On ejection from the train, he may recover substantial damages.

Ann Arbor Ry. v. Amos, 85 O. S. 300 (1912).

Where, by mistake of the ticket agent, the ticket is to a destination short of the proper destination, and the conductor informs the passenger that he will telegraph for instructions, which he does, it is the duty of the company to give proper instructions to the conductor.

Ann Arbor Ry. Co. v. Amos, 85 O. S. 300 (1912).

Where a conductor through an error of judgment expels a person who is entitled to ride, the company is liable.

Traction Co. v. Rosnagle, 84 O. S. 310 (1911).

Where a coin which is worn, bruised or cracked, but which is not appreciably diminished in weight, and retains evidence of genuine coinage, is tendered as fare, the passenger can not be expelled.

Traction Co. v. Rosnagle, 84 O. S. 310 (1911).

A person who was wrongfully ejected from a train between stations in the night time, and who was injured by falling into a cattle guard while making his way to the nearest highway crossing, may recover.

Railway Co. v. Willing, 5 C. C. n. s. 137; 14 C. D. 474 (1902).

A person who takes passage on a train which he knows does not stop at his destination may be ejected at any reasonably safe place between stations, upon his refusal to pay fare to the next stopping place.

Railway Co. v. Willing, 5 C. C. n. s. 137; 14 C. D. 474 (1902).

Section 8978. (Excess fare on trains.) Any company operating a railroad in whole or part within this state which has posted up proper notice to that effect in a conspicuous place in each waiting room and on the front of its depot building, may collect ten cents extra in addition to the fare allowed by law, when such fare is paid on the train, and if an office at the point at which the passenger boarded the train has been open for the sale of tickets at least thirty minutes next prior to the departure of such train. (R. S. Sec. 3374-a; April 7, 1908, 99 v. 65.)

A railroad company may charge a higher price for carrying passengers when the fare is paid on the train than it does at its ticket offices, provided the price thus charged is reasonable, and the fare charged on the train does not exceed the maximum allowed by law.

Railroad Co. v. Skillman, 39 O. S. 444 (1883).

See *Smith v. Pittsburg, etc., Ry. Co.*, 23 O. S. 10 (1872).

If a railroad company fix two rates of passenger fare, to wit, a ticket rate and a car rate, the former within and the latter beyond the limits of its authority, and the conductor of the train, under the direction of the company, refuse to accept from the passenger less than the illegal and unauthorized rate, it is not necessary, to entitle the passenger to remain on the train, to tender more than the ticket rate, although the company might have fixed such ticket rate at a higher sum. Quaere, whether any tender is necessary in such case.

Smith v. Pittsburg, etc., Ry. Co., 23 O. S. 10 (1872).

Section 8979. (Bicycle as baggage.) For the purposes herein specified, bicycles, with or without lanterns or tool-boxes attached, are baggage, and shall be transported as such, for passengers, by all railroad companies, and be subject to the same charges and liabilities as other baggage. No passenger shall be required to crate, cover, or otherwise protect a bicycle. But such companies are not required to transport more than one bicycle for a single person. (R. S. Sec. 3378-2; March 3, 1898, 93 v. 24; April 27, 1896, 92 v. 372.)

A carrier can not limit the liability imposed by § 8994-1 to a specific sum, by a regulation filed with the public utilities commission and printed on the baggage check. *Erie R. Co. v. Steinberg*, 94 O. S. 189 (1916).

Nor may liability for loss of a parcel checked for safe keeping be so limited. *Union Depot Co. v. Ulrich*, 22 N. P. n. s. 141 (1918).

An initial carrier selling a ticket over its own and connecting lines, may be liable for baggage lost on a connecting line, regardless of printed statements on the ticket or check. *Darlington v. Railway*, 14 N. P. n. s. 427; 24 L. D. 37 (1913); *Railroad v. Campbell*, 36 O. S. 647 (1881); *Penna. Co. v. Quimby*, 7 Ohio App. 197; 27 O. C. A. 6 (1916); motion to certify record overruled, 14 O. L. R. 490.

Limitation of liability for baggage in interstate commerce is governed by the federal interstate commerce act, and amendments. *Railroad v. Hooker*, 233 U. S. 97 (1914).

The obligation of a carrier to carry the baggage of a passenger is limited to articles which are for his personal comfort and convenience.

Railway Co. v. Bowler & Burdick Co., 57 O. S. 38, 56 (1897).

It is under no obligation to carry merchandise as baggage, and is not liable for its loss if such merchandise is received by it as baggage without knowledge of its true character. But if a carrier receives merchandise as baggage, with actual knowledge on the part of its agents that it is merchandise, it is liable for the loss thereof.

Railway Co. v. Bowler & Burdick Co., 57 O. S. 38 (1897).

Smith v. Railroad Co., 2 N. P. 29; 3 L. D. 192 (1895).

Insurance Co. v. Packet Co., 1 N. P. 126; 4 L. D. 405 (1894).

See Bank v. Railroad Co., 20 O. S. 259 (1870).

Jones v. Voorhees, 10 Ohio 145 (1840).

FREIGHT CHARGES.

Section 8980. Repealed. (106 v. 333.)

Charges for less than thirty miles. Where a company is authorized to charge for the transportation of goods for less than thirty miles such reasonable rates as it may fix from time to time, it is unreasonable, as a matter of law, to fix a greater sum for a distance less than thirty miles than the maximum for full thirty miles.

Peters v. Railroad Co., 42 O. S. 275 (1884).

Campbell v. Marietta, etc., R. R. Co., 23 O. S. 168 (1872).

Whether a freight rate fixed by a company for distances less than thirty miles is reasonable or not is a question of fact for the jury, to be determined under such instructions by the court as the circumstances of the particular case may require.

Peters v. Railroad Co., 42 O. S. 275 (1884).

See Smith v. Pittsburg, etc., Ry. Co., 23 O. S. 10 (1872).

A municipality has no power to prescribe the rates to be charged by a belt line for hauls over its entire line, less than 30 miles long as a condition to granting a right of way over its streets for a part of its line. Such a provision in an ordinance is ultra vires and void. In an action by an individual claiming the benefit of such provision, the railroad company is not estopped from setting up its ultra vires character as a defense.

Brick Co. v. Trust Co., 187 Fed. 63 (C. C. A. 1911).

Recovery of overcharges. A shipper has the right to have his goods transported at legal rates over the usual line of a common carrier of such goods; and if, to procure the services of such carrier, the shipper is compelled to pay illegal rates, the payment is not such a voluntary payment as will preclude recovering back the illegal charge, nor will it preclude such recovery, if payments, by arrangement of parties, are made at the end of each month.

Peters v. Railroad Co., 42 O. S. 275 (1884).

See § 9002.

Filing of claims with public utilities commission. Award of reparation. Procedure. §§ 579, 580.

Contracts for freight. The board of directors of a railroad company may, within the limit of the maximum rate authorized by law, make contracts for transportation for a fixed future period. Such a contract, if otherwise valid, is not ultra vires and void, for the reason that it binds the company for a fixed time.

Railroad Co. v. Furnace Co., 37 O. S. 321 (1882).

Himrod Furnace Co. v. Cleveland, etc., R. R. Co., 22 O. S. 451 (1872).

See G. C. § 513.

What companies not bound by this act. The provision in the twelfth section of the act of Feb. 11, 1848, that no reduction shall be made in the rates of fare and charges for freight allowed to companies organized under said act, unless their net profits for the previous ten years amount to ten percent on their capital, is in the nature of a contract, and binding on the state, and companies which have not lost their rights under said act and have not realized ten percent profit, are not bound by later acts reducing freight rates.

Iron R. R. Co. v. Lawrence Furnace Co., 29 O. S. 208 (1876).

Railway Co. v. Furnace Co., 49 O. S. 102 (1892).

Rights under special charters.

Campbell v. Marietta, etc., R. R. Co., 23 O. S. 168 (1872).

Section 8981. (Points competing with public works.) Every company whose line of road extends to a place in the vicinity of, or to a point of intersection with, a navigable canal or other work of internal improvement belonging to the state, shall fix and establish a tariff of rates for the transportation of merchandise, produce, and other property consigned to or from such place or point of intersection, and not charge or receive a higher rate for transporting similar merchandise, produce, or property over a shorter distance of its road, than is charged or received according to such tariff for transportation to and from such place of intersection. (R. S. Sec. 3366; May 1, 1852, 50 v. 205, § 1.)

See §§ 564 to 568 and § 8982.

The intent of the statute was not to restrain companies subject to its provisions from charging the maximum rates allowed by their charters, but only to prevent them from fixing rates for longer distances below the maximum and below the rates fixed for shorter distances, either to the prejudice of the canals belonging to the state, or of the public whose shipments might be for the shorter distances.

Campbell v. Marietta, etc., R. R. Co., 23 O. S. 168, 191 (1872).

A railroad company whose line extends to a point of intersection with a canal of the state can not make a valid contract to repay to a shipper a portion of the freight paid by him, it being the regular rate posted by the company and received from other shippers, such contract being prohibited by this section. An action can not be maintained to enforce a promise of such repayment.

Baltimore, etc., R. R. Co. v. Diamond Coal Co., 61 O. S. 242 (1899).

Section 8982. (Tariff of rates published; how changed.) Every such company shall publish its tariff of rates so established on property consigned to and from such places or points of intersection, and keep it conspicuously posted at the several business stations on its road. Such company, its officers or agents, shall not charge or receive, directly or indirectly, for transporting property so consigned, a less rate than is designated on such printed card, until the rate is changed by an order of its board of directors, and at least ten days' notice of the change be given by bill or card to be posted as specified above. No such company, its officers or agents, shall evade, or attempt to evade, by drawback, free warehousing, or in any other manner, the payment of full freightage, according to its printed tariff of rates, as herein provided. (R. S. Sec. 3367; May 1, 1852, 50 v. 205, § 2.)

See § 505 et seq. and §§ 564 to 568.

This section is valid as an exercise of the police power of the state.

Railroad Co. v. Fuller, 17 Wall. (U. S.) 560 (1873).

Liability of consignee for freight charges. Where, by agreement, a railroad company delivered on side tracks all cars consigned to a

manufacturer and rendered monthly bills for the freight, acceptance of the cars renders the consignee liable for the freight, although the consignor may also be liable. *Duncan v. Union Steel Co.*, 244 Fed. 258; 16 O. L. R. 48 (D. C. Ohio 1917).

Where a railroad company, by mistake, collected less than its published rate, it may recover the deficiency from the consignee, although as between consignee and consignor the charges were to be paid by the consignor.

Railway Co. v. Magnus Co., 13 C. C. n. s. 305 (1910).

Railroad v. Peak, 6 Ohio App. 399, 28 O. C. A. 77 (1917).

Railway v. Tile Co., 19 N. P. n. s. 244 (1916).

Railroad v. Fink, 250 U. S. 577 (1919); reversing, 2 Ohio App. 235; 19 C. C. n. s. 103; 25 C. D. 494.

Rebates. A railroad company whose line extends to a point of intersection with a canal of the state can not make a valid contract to repay to a shipper a portion of the freight paid by him, it being the regular rate posted by the company and received from other shippers, such contract being prohibited by this section. An action can not be maintained to enforce a promise of such repayment.

Baltimore, etc., R. R. Co. v. Diamond Coal Co., 61 O. S. 242 (1899).

Where a lower rate is given by a common carrier to a favored shipper, which is intended to give and necessarily gives an exclusive monopoly to the favored shipper, affecting the business and destroying the trade of other shippers, the latter have the right to require an equal rate for all under like circumstances. An injunction may be obtained to prevent discrimination.

Scofield v. Railway Co., 43 O. S. 571 (1885).

A railroad company is not warranted in making a contract whereby it binds itself to carry for one shipper crude petroleum, or other article, at half the rate it agrees to charge all others for the same service, at the same time, and as part of the agreement, binding itself to charge all others double the amount as a fixed open rate, and to pay such favored shipper one-half of it when collected, in consideration of his agreeing to establish and maintain a system of pipe lines to its road. Money so paid by a shipper, in ignorance of the agreement, and received by the favored shipper, may be recovered back in an action for money had and received by the former against the latter.

Brundred v. Rice, 49 O. S. 640 (1892).

Where a railway company, as a common carrier, in consideration of the fact that a shipper furnished a greater quantity of freights than other shippers during a given term, agrees to make a rebate from the published tariff on such freights to the prejudice of the other shippers of like freights under the same circumstances, the contract so made is an unlawful discrimination in favor of the larger shipper, tending to create monopoly, destroy competition, injure, if not destroy, the business of smaller operators, contrary to public policy, and will be declared void at the instance of parties injured thereby.

And such a contract can not be upheld simply because the favored shipper may furnish for shipment during the year a larger freightage in the aggregate than any other shipper, or more than all others combined. A discrimination resting exclusively on such a basis will not be sustained. And such a contract will not be upheld simply because the business to be done under it is "largely profitable" to the company.

Scofield v. Railway Co., 43 O. S. 571 (1885).

A corporation created by this state, and engaged in carrying goods for hire as a common carrier, has no franchise, privilege, or right to discriminate in its freight rates in favor of one shipper, even when it is necessary to do so to secure his custom, if the discriminating rate will

tend to create a monopoly by excluding from their proper markets the products of the competitors of the favored shipper.

State ex rel. v. Railway, 47 O. S. 130 (1890).

Rights of shipper when agent fraudulently overcharges.

Maple v. Railroad Co., 40 O. S. 313 (1883).

Section 8983. (Contracts prohibited.) A company whose road forms part of a line of railway between points common to another line, shall not contract or agree with any person, or other railroad company or companies, having a road or line of roads, or forming a part of a line of roads, between the same points, not to carry freight or passengers to or from such common points, nor shall it refuse to receive or carry freight or passengers brought to it to be so carried. (R. S. Sec. 3368; April 11, 1861, 58 v. 74, § 1.)

See Metropolitan Trust Co. v. Columbus, etc., Ry. Co., 95 Fed. 18 (1899).

This section does not apply where one company, under an agreement the object of which is to enable it to connect disconnected portions of its railroad and to form a continuous line to and from points on its railroad, is operating on the line of another company and in such agreement the owning company does not attempt to narrow its own obligations to the public, or to relieve itself of duties imposed by law. Railway v. Commission, 96 O. S. 414 (1917).

Section 8984. (Trunk roads not to discriminate between roads.) When a railroad is a trunk road, or in the nature of a trunk road, and at or near the same place connects with or is intersected by two or more other railroads tributary to or competing lines for business to or from such trunk road, or to or from points on or beyond the same, a company or person operating or using such trunk road shall transport passengers and freight going to or coming from such tributary or competing roads without discrimination in the charges therefor, directly or indirectly, for or against either of such roads. The company or person owning or controlling such trunk road shall not, by lease or otherwise, permit it to be used or operated in any manner contrary to the foregoing provision. (R. S. Sec. 3369; April 11, 1861, 58 v. 74, § 2.)

Cited: Central Trust Co. v. Railway, 211 Fed. 515, 527 (D. C. 1914).

Section 8985. (Must forward freight by line named by shipper.) Every company shall ship all freight that comes within its control by the railroads over which it is ordered to be conveyed by the shipper. A company whose agent knowingly diverts, or permits to be diverted, freight that

comes under his control from the railroad over which it is ordered to be conveyed, shall forfeit and pay to the company from which such freight is diverted three times the amount received for transporting it. (R. S. Sec. 3370; April 11, 1861, 58 v. 74, § 3.)

Penalty for violation, § 13420.

Liability of initial carrier, § 8994-1.

Where the line named by the shipper refused to accept the freight, and the shipper was notified, the carrier was held not liable for forwarding it over another line, pursuant to a provision in the bill of lading giving the carrier the right to forward by any line in case of physical necessity. *Frank v. Railway*, 19 N. P. n. s. 574 (1917).

Section 8986. (Provisions may be enforced by injunction.) On complaint of the violation of any provision of the three next preceding sections by petition as in other actions, their observance may be enforced by injunction, and the party violating any of them, shall be liable in damages to the person or company injured, for the injury sustained in consequence thereof. (R. S. Sec. 3371; April 11, 1861, 58 v. 74, § 4.)

Section 8987. (No discrimination between way and through freight.) Every company whose line of road is wholly or partly within this state, shall so employ its rolling stock used for the transportation of freight as to afford as ample facilities for the transportation of local and way freight, delivered to or discharged by it along its line of road, as it affords for the transportation of through freight, in proportion to the amount of its rolling stock, and not give facilities for transportation to either class of freight in preference to the other. (R. S. Sec. 3372; April 14, 1863, 60 v. 93, § 1.)

Section 8988. Repealed. (107 v. 431.)

See § 504-1.

Section 8989. Repealed. (107 v. 431.)

Section 8990. (Must furnish equal facilities to same class of shippers.) Railroad companies and persons operating a railroad, shall secure and extend to all persons, companies and corporations, the same and equal opportunities and facilities for receiving and shipping freights of all kinds, of the same class, that such railroad company or person operating such railroad, extends to, has used or enjoys, of and concerning freights owned by such company, or the

person operating such road or any officer or stockholder therein, or in which it, they or either of them have an interest. (R. S. Sec. 3373-1; April 29, 1891, 88 v. 429, § 2.)

See §§ 535, 567, 520, 8981, 8982 and notes.

Section cited. *Ohio Dairy Co. v. Railway*, 7 N. P. n. s. 451, 457 (1908).

Creamery Co. v. Railroad Co., 8 O. L. R. 10, 19 (1910).

Both under the common law and by this section it is the duty of a railroad company to extend to all persons, without favoritism or discrimination, equal opportunities and facilities for receiving and shipping freight of all kinds and of the same class.

Railway Co. v. Wren, 78 O. S. 137 (1908).

Railway v. Commission, 98 O. S. 218.

But the common law did not impose a duty to give equality in switching connections. *Railway Co. v. Coal Co.*, 217 Fed. 727 (C. C. A. Ohio 1914).

Terminal facilities. An unloading machine, situated on a dock belonging to a railroad company, and necessarily operated in connection with its tracks and terminals, which was originally constructed and jointly owned by the railroad company and a coal company for the accommodation of patrons of the railway and at prices fixed by it, is devoted to public use and is a part of terminal facilities. A grant of its exclusive use to one patron is an unlawful discrimination and may be enjoined, although the railroad company has transferred its rights in the machine to such patron.

Coal Co. v. Railway, 1 C. C. n. s. 333; 14 C. D. 289 (1902); dismissed in supreme court by plaintiff in error, 2 O. L. R. 280.

Duty to connect private switch. Where a railroad company had connected with its main track switches built by several coal mining companies in the vicinity, a coal mining company having constructed a switch from its mine, similar to these of the other companies, was held entitled to compel the railroad company, by mandatory injunction, to permit the switch to be connected.

Johnson, etc., Co. v. H. V. R. R. Co., 1 N. P. n. s. 385; 14 L. D. 209 (1904).

Quinn Coal Co. v. Railway, 20 C. C. n. s. 420 (1905).

A shipper who is discriminated against in the matter of switch connections may sue under § 8991. *Railway Co. v. Coal Co.*, 217 Fed. 727 (C. C. A. Ohio 1914).

Where a railroad company has made a practice of constructing and maintaining private sidings, without restrictions as to what cars may be placed thereon, it is unjust discrimination to require, as a condition precedent to connecting a private side track, that the owner make a written agreement not to ask the company to switch thereon the cars of other companies.

Gill v. Railway, 6 O. L. R. 140 (R. R. Com. 1908).

The public utilities commission, in granting an application by a shipper for a switch connection with a railroad siding, is not authorized to require the applicant to reimburse another shipper for expenses voluntarily incurred incident to a change in location of the siding and rearrangement of the track of the railroad. *Stone Co. v. Commission*, 96 O. S. 288 (1917).

For clause in side track contract held not to indemnify railroad against injuries to employe of shipper, see *Lumber Co. v. Railroad*, 102 O. S. 236 (1921).

Discrimination in switching service.

See *Gill v. Railway Co.*, 6 O. L. R. 140 (R. R. Com. 1908).

Pierce, etc., Co. v. Railroad Co., 6 O. L. R. 147 (R. R. Com. 1908).

Reinstrom v. Railway Co., 4 O. L. R. 755; 52 B. 187 (R. R. Com.).

Railway Co. v. Seofield, 2 C. C. 305 (1887).

See § 8998.

Other discrimination.

See notes to §§ 535, 567.

Section 8991. (Damages.) A railroad company or person operating a railroad failing to comply with or observe the provisions or requirements of the next preceding section, shall be liable to the party injured for the damages sustained, but for any violation of such section the recovery in such action shall be at least five hundred dollars. (R. S. Sec. 3373-1; April 29, 1891, 88 v. 429, § 2.)

An action under this section is on a "liability created by statute" and is barred in six years by G. C. § 11222. *Railroad Co. v. Coal Co.*, 217 Fed. 727 (C. C. A. Ohio 1914).

In an action for damages for discrimination in giving to other shippers preference in the distribution of cars, the plaintiff is entitled to recover as damages only such sum as will compensate him for the loss actually sustained as the result of the discrimination, except that, where discrimination be proved, the recovery shall not be less than \$500.

Railway Co. v. Wren, 78 O. S. 137 (1908).

Where there is no allegation of special damages, the measure of damages is the difference between the market value of the property that would have been transported in the cars which plaintiff should have received, at destination, at the time when they would have reached such destination, and the value of said property at the place of shipment, at the same time, less the cost of transportation.

Railway Co. v. Wren, 78 O. S. 137 (1908).

This section does not take away the remedies at common law.

Johnson, etc., Co. v. Railroad Co., 1 N. P. n. s. 385, 390; 14 L. D. 209 (C. P. 1903).

Section 8992. (Passengers on freight trains.) Physicians in the discharge of professional duties, sheriffs, and deputy sheriffs, in performance of official duties, officers and guards of the penitentiary or state reformatory in pursuit of escaped prisoners or returning them to their respective institutions, shall be permitted to ride at their own risk, and take a prisoner or prisoners with them on freight trains, between stations where such trains stop, paying therefor the regular passenger fare. (R. S. Sec. 3375a; April 15, 1902, 95 v. 153; April 13, 1892, 89 v. 275; April 23, 1891, 88 v. 381.)

To give a sheriff the right to ride on freight trains in the performance of his official duties, "between stations where such trains stop," it is not necessary that such trains should regularly stop at such stations, or be scheduled to stop there; it is sufficient, if they are in fact stopping

there at the time the sheriff gets aboard. It is not necessary to allege that the train stopped regularly at the point the sheriff came aboard.

Allen v. Lake Shore, etc., Ry. Co., 57 O. S. 79 (1897).

The right of a sheriff to ride upon a freight train is not confined to cases in which a prisoner is taken upon such train; but the right exists whenever the sheriff is in the performance of any official duty, and complies in other respects with the statute.

Allen v. Lake Shore, etc., Ry. Co., 57 O. S. 79 (1897).

A physician who has not filed his certificate under G. C. § 1278 is not entitled to take advantage of this section. Railway v. McTeague, 41 Bull. 331.

Section 8993. (To furnish bills of lading.) Railroad companies operating a line of railway, upon demand of a person or corporation desiring to ship goods or merchandise of any kind in car lots, at any railway station or shipping point in this state, shall count or check the packages composing each lot or car load, and furnish to the shipper of such goods a receipt or bill of lading, specifying the number of packages shipped in each car. Such receipt shall bind the company so executing it to deliver the number of packages so specified, at the place of destination named in such bill of lading. (R. S. Sec. 3378-3; May 8, 1894, 91 v. 207, § 1.)

See § 8993-22.

Prior to the enactment of this section it was held in an action by a shipper against the owners of a steamboat engaged in the business of common carrier, to recover for the nondelivery of goods as per bill of lading, the defendants were liable only for so much of the goods as was actually received on the boat or delivered to some one authorized to receive freight on her account.

Dean v. King, 22 O. S. 118 (1871).

See Little Miami, etc., R. R. Co. v. Dodds, 1 C. S. C. 47 (1870).

Adams v. Brig Pilgrim, 10 W. L. J. 141.

Section 8993-1. (Bills of lading must contain, what.) Bills of lading issued by any common carrier shall be governed by this act. Every bill must embody within its written or printed terms:

- (a) The date of its issue,
- (b) The name of the person from whom the goods have been received,
- (c) The place where the goods have been received,
- (d) The place to which the goods are to be transported,
- (e) A statement whether the goods received will be delivered to a specified person, or to the order of a specified person,
- (f) A description of the goods or of the packages containing them which may, however, be in such general terms as are referred to in section 8993-22, and
- (g) The signature of the carrier or his agent.

A negotiable bill shall have the words "order of"

printed thereon immediately before the name of the person upon whose order the goods received are deliverable.

A carrier shall be liable to any person injured thereby for the damage caused by the omission from a negotiable bill of any of the provisions required in this section. (May 22, 1911, 102 v. 138.)

The uniform bills of lading act recommended by the Commissioners on Uniform Laws for general adoption is contained in §§ 8993-1 to 8993-54 inclusive and applies to bills of lading issued after January 1, 1912.

The act has been adopted in 22 states.

Prior to the adoption of this act a bill of lading was defined to be a contract, including a receipt. A receipt for goods with an agreement to carry them to destination.

Wood v. Perry, Wright 240 (1833).

Babcock v. May, 4 Ohio 335 (1831).

So far as it was a receipt, as well as in its recitals of fact, it could be contradicted by parol evidence.

Page v. Railroad Co., 4 West L. M. 644 (C. P. 1863).

Dean v. King, 22 O. S. 118 (1871).

Railroad Co. v. Pontius, 19 O. S. 221 (1869).

But parol evidence was inadmissible to contradict the terms of the contract.

Babcock v. May, 4 Ohio 335 (1831).

Section 8993-2. A carrier may insert in a bill, issued by him, any other terms and conditions, provided that such terms and conditions shall not

(a) Be contrary to law or public policy, or

(b) In any wise impair his obligation to exercise at least that degree of care in the transportation and safe-keeping of the goods entrusted to him which a reasonably careful man would exercise in regard to similar goods of his own. (May 22, 1911, 102 v. 138.)

A carrier may agree with the shipper limiting the amount of the liability of the carrier to the agreed value of the property.

Railroad v. Hubbard, 72 O. S. 302, 319, 320 (1905).

Cohn-Goodman Co. v. Wells Fargo & Co., 13 C. C. n. s. 467; 22 C. D. 190 (1910); aff'd, no rep., 87 O. S. 458.

Railway Co. v. Simon, 15 C. C. 123; 8 C. D. 540 (1897).

Unless the carrier knew at the time of making the contract that the property was of greater value than stipulated.

U. S. Express Co. v. Bachman, 28 O. S. 144 (1875).

But where the freight rate is not based on the value of the goods, and the limitation of liability is not in consideration of a reduced rate, the limitation of liability is invalid. Railway Co. v. Euclid Builders Supply Co., 11 Ohio App. 196; 30 O. C. A. 561 (1919).

A provision in a contract between shipper and carrier requiring the shipper to make verified claim for damages within a specified time, is valid providing the time is reasonable.

Penna. Co. v. Shearer, 75 O. S. 249 (1906).

See Railroad Co. v. Hubbard, 72 O. S. 302 (1905).

Express Co. v. Gordon, 5 C. C. n. s. 563; 17 C. D. 243.

Stevenson v. Wells Fargo & Co., 33 W. L. B. 247.

The time for bringing suit for damages may be limited, if the time is reasonable.

Gatton v. Express Co., 14 C. C. n. s. 125; 22 C. D. 532 (1911).

A provision authorizing the carrier "in case of physical necessity" to forward the freight by any line, was held valid and to protect the carrier, where the freight was refused by the line named by the shipper. Frank v. Railway, 19 N. P. n. s. 574 (1917).

A provision in a bill of lading exempting the express company from liability for money, which it received and carried only through its money department, is valid, and the company is not liable for money lost in transit, where the fact that the package contained money was not disclosed at the time of shipment. Adams Express Co. v. Starkey, 4 Ohio App. 121; 21 C. C. n. s. 326; 26 C. D. 332 (1915).

A carrier may, by contract, restrict its liability as an insurer against losses occurring through accident or mistake. But it can not, by contract, exempt itself from liability for negligence.

Davidson v. Graham, 2 O. S. 131 (1853).

Gaines v. Transportation Co., 28 O. S. 419 (1876).

A carrier may limit its liability for loss by fire, to loss by fires caused by its negligence.

C. H. & D. Ry. Co. v. Berdan, 22 C. C. 326; 12 C. D. 481 (1901); aff'd, no rep., 68 O. S. 683.

A bill of lading exempting a carrier from liability for loss "caused by the act of God" is valid, and *vis major* is a defense although but for negligent delay by the carrier, the goods would have been delivered to the consignee before the occurrence of the flood. Railroad v. Kohler, 26 C. C. n. s. 337; 30 C. D. 191 (1916); Railway v. Kibler, 97 O. S. 262 (1918); Urbana Co. v. Railroad, 16 N. P. n. s. 321 (1914). *Contra*, Railway v. Myers 4 Ohio App. 493, 25 C. C. n. s. 204 (1915).

The burden is on the carrier to prove non-liability for loss by fire, although the fire originated on the premises of the plaintiff. Huenefeld Co. v. Railway, 24 C. C. n. s. 92; 27 C. D. 227 (1915).

The burden of proof is on a carrier to show that loss was due to a cause specified in the provision for exemption.

Davidson v. Graham, 2 O. S. 131 (1853).

Union Express Co. v. Graham, 26 O. S. 595 (1875).

Section 8993-3. A bill in which it is stated that the goods are consigned or destined to a specified person, is a non-negotiable or straight bill. (May 22, 1911, 102 v. 138.)

Section 8993-4. (When negotiable.) A bill in which it is stated that the goods are consigned or destined to the order of any person named in such bill, is a negotiable or order bill.

Any provision in such a bill that it is non-negotiable shall not affect its negotiability within the meaning of this act. (May 22, 1911, 102 v. 138.)

Negotiability prior to passage of this act.

See Emery's Sons v. Bank, 25 O. S. 360 (1874).

Page v. Railroad Co., 4 West L. M. 644.

Section 8993-5. (Shall not be issued in sets; to what countries.) Negotiable bills issued in this state for the

transportation of goods to any place in the United States on the continent of North America, except Alaska, shall not be issued in parts or sets.

If so issued the carrier issuing them shall be liable for failure to deliver the goods described therein to any one who purchases a part for value in good faith, even though the purchase be after the delivery of the goods by the carrier to a holder of one of the other parts. (May 22, 1911, 102 v. 138.)

Section 8993-6. (When "duplicate" should appear on the face of bill.) When more than one negotiable bill is issued in this state for the same goods to be transported to any place in the United States on the continent of North America, except Alaska, the word "duplicate" or some other word or words indicating that the document is not an original bill shall be placed plainly upon the face of every such bill, except the one first issued. A carrier shall be liable for the damage caused by his failure so to do to any one who has purchased the bill for value in good faith as an original, even though the purchase be after the delivery of the goods by the carrier to the holder of the original bill. (May 22, 1911, 102 v. 139.)

Section 8993-7. ("Non-negotiable".) A non-negotiable bill shall have placed plainly upon its face by the carrier issuing it "non-negotiable" or "not-negotiable."

This section shall not apply, however, to memoranda or acknowledgments of an informal character. (May 22, 1911, 102 v. 139.)

Section 8993-8. (When negotiability not limited.) The insertion in a negotiable bill of the name of a person to be notified of the arrival of the goods shall not limit the negotiability of the bill, or constitute notice to a purchaser thereof of any rights or equities of such person in the goods. (May 22, 1911, 102 v. 139.)

Section 8993-9. (When estopped from denial.) Except as otherwise provided in this act, where a consignor receives a bill and makes no objection to its terms or conditions at the time he receives it, neither the consignor nor any person who accepts delivery of the goods, nor any person who seeks to enforce any provision of the bill, shall be allowed to deny that he is bound by such terms and conditions, so far as they are not contrary to law or public policy. (May 22, 1911, 102 v. 139.)

A bill of lading signed by the agent of a carrier and acquiesced in by the shipper is binding on the latter although not signed by him.

Railroad Co. v. Pontius, 19 O. S. 221 (1869).

Railroad Co. v. Berdan, 22 C. C. 326 (1901); aff'd, 68 O. S. 683.

Railway v. La Tourette, 2 C. C. 279; 1 C. D. 48 (1887).

Assent may be implied from failure to dissent within a reasonable time.

Muller v. Railway, 2 C. S. C. R. 280 (1872).

Before the enactment of this section it was held that assent of the shipper is not presumed, but must be proved.

Railroad Co. v. Barrett, 36 O. S. 448 (1881).

Gaines v. Transportation Co., 28 O. S. 418 (1876).

Mack v. Gt. Western Dispatch, 3 C. C. 36; 2 C. D. 22 (1888).

Where conditions are stamped on the bill after its execution, the assent of the shipper must be shown.

American, etc., Co. v. Packet Co., 5 N. P. 146; 8 L. D. 490 (Super. Ct. Cin.).

A shipper who fills out his own bills of lading on blanks furnished by the carrier is bound by the provisions thereof.

Shaffer v. Railway, 14 C. C. 488; 8 C. D. 66 (1897).

Cohn-Goodman Co. v. Wells Fargo & Co., 13 C. C. n. s. 467; 22 C.

D. 190 (1910); aff'd, no rep., 87 O. S. 458.

See Railroad Co. v. Seiberling Co., 8 C. C. 593; 4 C. D. 210 (1894).

Where the transferee of a bill of lading presents it to the carrier and accepts the goods, he is bound by a provision in the bill of lading for demurrage charges, and may be liable to the carrier therefor.

Traction Co. v. Railway Co., 8 C. C. n. s. 134; 18 C. D. 543 (1906).

Section 8993-10. (Carrier bound to deliver goods; when.)

A carrier, in the absence of some lawful excuse, is bound to deliver goods upon a demand made either by the consignee named in the bill for the goods, or if the bill is negotiable, by the holder thereof, if such demand is accompanied by—

(a) An offer in good faith to satisfy the carrier's lawful lien upon the goods.

(b) An offer in good faith to surrender, properly indorsed, the bill which was issued for the goods, if the bill is negotiable, and

(c) A readiness and willingness to sign, when the goods are delivered, an acknowledgement that they have been delivered, if such signature is requested by the carrier.

In case the carrier refuses or fails to deliver the goods in compliance with a demand by the consignee or holder so accompanied, the burden shall be upon the carrier to establish the existence of a lawful excuse for such refusal or failure. (May 22, 1911, 102 v. 139.)

Mere delay in delivery is not conversion of the goods. Wyler v. Railway, 6 N. P. n. s. 589 (1907).

For mere delay, as distinguished from conversion, the measure of damages is ordinarily the difference between the value of the goods when delivered and when they should have been delivered, together with reasonable expense caused by the delay. But in case of conver-

sion, if the consignee has not thereafter accepted the goods, the consignee may recover the value as of the time when the goods should have been delivered. *Railroad v. O'Donnell*, 49 O. S. 489 (1892).

Section 8993-11. A carrier is justified, subject to the provisions of the three following sections, in delivering goods to one who is

(a) A person lawfully entitled to the possession of the goods,

(b) The consignee named in a non-negotiable bill for the goods, or

(c) A person in possession of a negotiable bill for the goods by the terms of which the goods are deliverable to his order, or which has been indorsed to him or in blank by the consignee or by the mediate or immediate indorsee of the consignee. (May 22, 1911, 102 v. 140.)

Section 8993-12. (Carrier liable for wrongful delivery.)

Where a carrier delivers goods to one who is not lawfully entitled to the possession of them, the carrier shall be liable to any one having a right of property or possession in the goods, if he delivered the goods otherwise than as authorized by subdivision (b) or (c) of the preceding section; and, though he delivered the goods as authorized by either of said subdivisions, he shall be so liable if prior to such delivery he—

(a) Had been requested, by or on behalf of a person having a right of property or possession in the goods, not to make such delivery, or

(b) Had information at the time of the delivery that it was to a person not lawfully entitled to the possession of the goods.

A request or information to be effective within the meaning of this section must be given to an officer or agent of the carrier, the actual or apparent scope of whose duties includes action upon such a request or information, and must be given in time to enable the officer or agent to whom it is given, acting with reasonable diligence, to stop delivery of the goods. (May 22, 1911, 102 v. 140.)

Before the enactment of this section it was held that a carrier was bound to deliver the goods to the consignee. Delivery to a wrong person, not induced by some act or representation of the consignor, was not excused by any degree of care which the carrier might exercise.

Oskamp v. Southern Express Co., 61 O. S. 341 (1899).

Section 8993-13. (Delivery to purchaser of bill in good faith.) Except as provided in section 8993-26, and except when compelled by legal process, if a carrier delivers goods

for which a negotiable bill had been issued, the negotiation of which would transfer the right to the possession of the goods, and fails to take up and cancel the bill, such carrier shall be liable for failure to deliver the goods to any one who for value and in good faith purchases such bill, whether such purchaser acquired title to the bill before or after the delivery of the goods by the carrier, and notwithstanding delivery was made to the person entitled thereto. (May 22, 1911, 102 v. 140.)

Section 8993-14. (Exceptions.) Except as provided in section 8993-26, and except when compelled by legal process, if a carrier delivers part of the goods for which a negotiable bill has been issued and fails either—

(a) To take up and cancel the bill, or

(b) To place plainly upon it a statement that a portion of the goods has been delivered, with a description, which may be in general terms, either of the goods or packages that have been so delivered, or of the goods or packages which still remain in the carrier's possession, he shall be liable for failure to deliver all the goods specified in the bill, to any one who for value and in good faith purchases it, whether such purchaser acquired title to it before or after the delivery of any portion of the goods by the carrier, and notwithstanding such delivery was made to the person entitled thereto. (May 22, 1911, 102 v. 140.)

An intermediate carrier, which is required by statute to carry freight offered, is bound to take notice of the fact that a bill of lading was issued, and is liable for delivery of the goods without production of the bill of lading.

Bank of Commerce v. Railroad Co., 2 N. P. n. s. 403; 15 L. D. 32 (C. P. 1904).

Section 8993-15. (Effect of alteration.) Any alteration, addition or erasure in a bill after its issue, without authority from the carrier issuing the same, either in writing or noted on the bill, shall be void, whatever be the nature and purpose of the change, and the bill shall be enforceable according to its original tenor. (May 22, 1911, 102 v. 141.)

Section 8993-16. (Lost or destroyed negotiable bill. Delivery under order of court does not relieve carrier from liability, without notice.) Where a negotiable bill has been lost or destroyed, a court of competent jurisdiction may order the delivery of the goods upon satisfactory proof of such loss or destruction, and upon the giving of a bond with sufficient surety to be approved by the court to protect

the carrier or any person injured by such delivery from any liability or loss, incurred by reason of the original bill remaining outstanding. The court may also in its discretion order the payment of the carrier's reasonable costs and counsel fees.

The delivery of the goods under an order of the court, as provided in this section, shall not relieve the carrier from liability to a person to whom the negotiable bill has been or shall be negotiated for value without notice of the proceedings or of the delivery of the goods. (May 22, 1911, 102 v. 141.)

Section 8993-17. (Effect of "duplicate" on face of bill.) A bill upon the face of which the word "duplicate" or some other word or words indicating that the document is not an original bill is placed plainly shall impose upon the carrier issuing the same the liability of one who represents and warrants that such bill is an accurate copy of an original bill properly issued, but no other liability. (May 22, 1911, 102 v. 141.)

Section 8993-18. (When title no excuse from liability for refusal to deliver goods.) No title to goods or right to their possession asserted by a carrier for his own benefit, shall excuse him from liability for refusing to deliver the goods according to the terms of a bill issued for them, unless such title or right is derived directly or indirectly from a transfer made by the consignor or consignee after the shipment, or from the carrier's lien. (May 22, 1911, 102 v. 141.)

Section 8993-19. (Interpleader.) If more than one person claims the title or possession of goods, the carrier may require all known claimants to interplead, either as a defense to an action brought against him for non-delivery of the goods, or as an original suit, whichever is appropriate. (May 22, 1911, 102 v. 141.)

Section 8993-20. (Opposing claimants.) If some one other than the consignee or person in possession of the bill has a claim to the title or possession of the goods, and the carrier has information of such claim, the carrier shall be excused from liability for refusing to deliver the goods either to the consignee or person in possession of the bill, or to the adverse claimant, until the carrier has had a reasonable time to ascertain the validity of the adverse claim or to bring legal proceedings to compel all claimants to interplead. (May 22, 1911, 102 v. 141.)

Section 8993-21. (Defense.) Except as provided in the two preceding sections and in section 8993-11, no right or title of a third person, unless enforced by legal process, shall be a defense to an action brought by the consignee of a non-negotiable bill or by the holder of a negotiable bill against the carrier for failure to deliver the goods on demand. (May 22, 1911, 102 v. 142.)

Section 8993-22. (Liability of issuing carrier.) If a bill of lading has been issued by a carrier, or on his behalf by an agent or employe, the scope of whose actual or apparent authority includes the issuing of bills of lading, the carrier shall be liable to

- (a) The consignee named in a non-negotiable bill, or
- (b) The holder of a negotiable bill,

Who has given value in good faith relying upon the description therein of the goods, for damages caused by the non-receipt by the carrier or a connecting carrier of all or part of the goods or their failure to correspond with the description thereof in the bill at the time of its issue.

If, however, the goods are described in a bill merely by a statement of marks or labels upon them, or upon packages containing them, or by a statement that the goods are said to be goods of a certain kind or quantity, or in a certain condition, or it is stated in the bill that packages are said to contain goods of a certain kind or quantity or in a certain condition or that the contents or condition of the contents of packages are unknown, or words of like purport are contained in the bill, such statements, if true, shall not make liable the carrier issuing the bill, although the goods are not of the kind or quantity or in the condition which the marks or labels upon them indicate, or of the kind or quantity or in the condition they were said to be by the consignor. The carrier may, also, by inserting in the bills the words "shipper's load and count," or other words of like purport, indicate that the goods were loaded by the shipper and the description of them made by him; and if such statements be true, the carrier shall not be liable for damages caused by the improper loading or by the non-receipt or by the misdescription of the goods described in the bill. (May 22, 1911, 102 v. 142.)

See § 8993.

Custom of consignees to accept railway coal weight certificates.

See *Nimishilling, etc., Co. v. Railway*, 5 O. L. R. 455; 52 O. L. B. 569.

A carrier may refuse to receive an article not properly packed. But if received, due care must be exercised, and, if injured, the burden of

proof rests on the carrier to show that the injury was due to defective packing.

Express Co. v. Graham, 26 O. S. 595 (1875).

Section 8993-23. (No attachment after delivery to carrier.) If goods are delivered to a carrier by the owner, or by a person whose act in conveying the title to them to a purchaser for value in good faith would bind the owner, and a negotiable bill is issued for them, they cannot thereafter, while in the possession of the carrier, be attached by garnishment or otherwise, or be levied upon under an execution, unless the bill be first surrendered to the carrier or its negotiation enjoined. The carrier shall in no such case be compelled to deliver the actual possession of the goods until the bill is surrendered to him or impounded by the court. (May 22, 1911, 102 v. 142.)

Section 8993-24. (Injunction.) A creditor whose debtor is the owner of a negotiable bill shall be entitled to such aid from courts of appropriate jurisdiction by injunction and otherwise in attaching such bill, or in satisfying the claim by means thereof, as is allowed at law or in equity in regard to property which cannot readily be attached or levied upon by ordinary legal process. (May 22, 1911, 102 v. 142.)

Section 8993-25. (No lien except for freight, etc.) If a negotiable bill is issued the carrier shall have no lien on the goods therein mentioned, except for charges on those goods for freight, storage, demurrage, terminal, and switching charges, and expenses necessary for the preservation of the goods or incident to their transportation subsequent to the date of the bill, unless the bill expressly enumerates other charges for which a lien is claimed. In such case there shall also be a lien for the charges enumerated so far as they are allowed by law and the contract between the consignor and the carrier. (May 22, 1911, 102 v. 143.)

Demurrage, see note to § 521.

A connecting carrier, which has paid to the initial carrier its freight charges and expenses of unloading and unloading, is subrogated to the lien of the former carrier therefor.

Bennett Bros. Lumber Co. v. Robinson, 159 Fed. 910; 16 O. F. D. 65 (C. C. A. 1908).

Section 8993-26. (Not liable for delivery, after selling for carrier's lien.) After goods have been lawfully sold to satisfy a carrier's lien, or because they have not been claimed, or because they are perishable or hazardous, the

carrier shall not thereafter be liable for failure to deliver the goods to the consignee or owner of the goods, or to a holder of the bill given for the goods when they were shipped, even if such bill be negotiable. (May 22, 1911, 102 v. 143.)

Section 8993-27. (When bill negotiated by delivery.) A negotiable bill may be negotiated by delivery where, by the terms of the bill, the carrier undertakes to deliver the goods to the order of a specified person, and such person, or a subsequent indorsee of the bill, has indorsed it in blank. (May 22, 1911, 102 v. 143.)

Section 8993-28. (Negotiated by endorsement.) A negotiable bill may be negotiated by the indorsement of the person to whose order the goods are deliverable by the tenor of the bill. Such indorsement may be in blank or to a specified person. If indorsed to a specified person, it may be negotiated again by the indorsement of such person in blank or to another specified person. Subsequent negotiation may be made in like manner. (May 22, 1911, 102 v. 143.)

Former law. See *Emery Sons v. Bank*, 25 O. S. 360 (1874).
Jordan v. James, 5 Ohio 88 (1831).

Section 8993-29. (Transfer by delivery.) A bill may be transferred by the holder by delivery, accompanied with an agreement, express or implied, to transfer the title to the bill or to the goods represented thereby. A non-negotiable bill cannot be negotiated, and the indorsement of such a bill gives the transferee no additional right. (May 22, 1911, 102 v. 143.)

Section 8993-30. A negotiable bill may be negotiated by any person in possession of the same, however such possession may have been acquired if, by the terms of the bill, the carrier undertakes to deliver the goods to the order of such person, or if at the time of negotiation the bill is in such form that it may be negotiated by delivery. (May 22, 1911, 102 v. 143.)

Section 8993-31. (Title acquired by negotiated bill.) A person to whom a negotiable bill has been duly negotiated acquires thereby—

(a) Such title to the goods as the person negotiating the bill to him had or had ability to convey to a purchaser in good faith for value, and also such title to the goods as

the consignee and consignor had or had power to convey to a purchaser in good faith for value, and

(b) The direct obligation of the carrier to hold possession of the goods for him according to the terms of the bill as fully as if the carrier had contracted directly with him. (May 22, 1911, 102 v. 143.)

Cases prior to the enactment of this section. See Peitch Co. v. Banking Co., 20 C. C. n. s. 246 (1912).

Emery Sons v. Bank, 25 O. S. 360 (1874).

Jordan v. James, 5 Ohio 88 (1831).

Section 8993-32. (Rights when bill transferred but not negotiated.) A person to whom a bill has been transferred, but not negotiated, acquires thereby as against the transferor, the title to the goods, subject to the terms of any agreement with the transferor. If the bill is non-negotiable, such person also acquires the right to notify the carrier of the transfer to him of such bill, and thereby to become the direct obligee of whatever obligations the carrier ow(n)ed to the transferor of the bill immediately before the notification.

Prior to the notification of the carrier by the transferor or transferee of a non-negotiable bill, the title of the transferee to the goods, and the right to acquire the obligation of the carrier may be defeated by garnishment or by attachment or execution upon the goods by a creditor of the transferor, or by a notification to the carrier by the transferor or a subsequent purchaser from the transferor of a subsequent sale of the goods by the transferor.

A carrier has not received notification within the meaning of this section unless an officer or agent of the carrier. the actual or apparent scope of whose duties includes action upon such a notification has been notified; and no notification shall be effective until the officer or agent to whom it is given has had time with the exercise of reasonable diligence to communicate with the agent or agents having actual possession or control of the goods. (May 22, 1911, 102 v. 144.)

The transferee of a non-negotiable bill acquires such title as the transferor can then pass, except that the parties to the transfer may agree that only a qualified title shall so pass. Commission Co. v. Bank, 17 C. C. n. s. 463 (1911); aff'd, no rep. 88 O. S. 606.

Section 8993-33. (Rights when transferred for value by delivery.) Where a negotiable bill is transferred for value by delivery, and the indorsement of the transferor is essential for negotiation, the transferee acquires a right against the transferor to compel him to indorse the bill, unless a

contrary intention appears. The negotiation shall take effect as of the time when the indorsement is actually made. This obligation may be specifically enforced. (May 22, 1911, 102 v. 144.)

Section 8993-34. (Warranties; when transfer for value by endorsement or delivery.) A person who negotiates or transfers for value a bill by indorsement or delivery, including one who assigns for value a claim secured by a bill, unless a contrary intention appears, warrants—

- (a) That the bill is genuine,
- (b) That he has a legal right to transfer it;
- (c) That he has knowledge of no fact which would impair the validity or worth of the bill, and
- (d) That he has a right to transfer the title to the goods, and that the goods are merchantable or fit for a particular purpose whenever such warranties would have been implied, if the contract of the parties had been to transfer without a bill the goods represented thereby.

In the case of an assignment of a claim secured by a bill, the liability of the assignor shall not exceed the amount of the claim. (May 22, 1911, 102 v. 144.)

Section 8993-35. (Previous endorsers.) The indorsement of a bill shall not make the indorser liable for any failure on the part of the carrier or previous indorsers of the bill to fulfill their respective obligations. (May 22, 1911, 102 v. 144.)

Section 8993-36. (Payment to mortgagee no warrant as to quality or quantity.) A mortgagee or pledgee, or other holder of a bill for security, who in good faith demands or receives payment of the debt for which such bill is security, whether from a party to a draft drawn for such debt, or from any other person, shall not be deemed by so doing to represent or to warrant the genuineness of such bill or the quantity or quality of the goods therein described. (May 22, 1911, 102 v. 145.)

Section 8993-37. (Validity not impaired when negotiation was by fraud, etc.) The validity of the negotiation of a bill is not impaired by the fact that such negotiation was a breach of duty on the part of the person making the negotiation, or by the fact that the owner of the bill was deprived of the possession of the same by fraud, accident, mistake, duress or conversion, if the person to whom the bill was negotiated or a person to whom the bill was sub-

sequently negotiated gave value therefore in good faith without notice of the breach of duty or fraud, accident, duress or conversion. (May 22, 1911, 102 v. 145.)

Section 8993-38. (Effect of sale to purchaser, in good faith and for value.) Where a person having sold, mortgaged, or pledged goods which are in a carrier's possession, and for which a negotiable bill has been issued, or having sold, mortgaged, or pledged the negotiable bill representing such goods, continues in possession of the negotiable bill, the subsequent negotiation thereof by that person under any sale, pledge, or other disposition thereof to any person receiving the same in good faith, for value and without notice of the previous sale, shall have the same effect as if the first purchaser of the goods or bill had expressly authorized the subsequent negotiation. (May 22, 1911, 102 v. 145.)

Section 8993-39. (Bill shall indicate, what.) Where goods are shipped by the consignor in accordance with a contract or order for their purchase, the form in which the bill is taken by the consignor shall indicate the transfer or retention of the property or right to the possession of the goods as follows:

(a) Where by the bill the goods are deliverable to the buyer or to his agent, or to the order of the buyer or of his agent, the consignor thereby transfers the property in the goods to the buyer.

(b) Where by the bill the goods are deliverable to the seller or to his agent, or to the order of the seller or of his agent, the seller thereby reserves the property in the goods. But if, except for the form of the bill, the property would have passed to the buyer on shipment of the goods, the seller's property in the goods shall be deemed to be only for the purpose of securing performance by the buyer of his obligations under the contract.

(c) Where by the bill the goods are deliverable to the order of the buyer or of his agent, but possession of the bill is retained by the seller or his agent, the seller thereby reserves a right to the possession of the goods, as against the buyer.

(d) Where the seller draws on the buyer for the price, and transmits the draft and bill together to the buyer to secure acceptance or payment of the draft, the buyer is bound to return the bill if he does not honor the draft; and if he wrongfully retains the bill he acquires no added right thereby. If, however, the bill provides that the goods are deliverable to the buyer, or to the order of the buyer,

or is indorsed in blank or to the buyer by the consignee named therein, one who purchases in good faith, for value, the bill or goods from the buyer, shall obtain the title to the goods, although the draft has not been honored, if such purchaser has received delivery of the bill indorsed by the consignee named therein, or of the goods, without notice of the facts making the transfer wrongful. (May 22, 1911, 102 v. 145.)

Section 8993-40. (Draft with bill of lading attached; assumptions.) Where the seller of goods draws on the buyer for the price of the goods, and transmits the draft and a bill of lading for the goods, either directly to the buyer or through a bank or other agency, unless a different intention on the part of the seller appears, the buyer and all other parties interested shall be justified in assuming—

(a) If the draft is by its terms or legal effect payable on demand or presentation or at sight, or not more than three days thereafter (whether such three days be termed days of grace or not), that the seller intended to require payment of the draft before the buyer should be entitled to receive or retain the bill.

(b) If the draft is by its terms payable on time, extending beyond three days after demand, presentation or sight (whether such three days be termed days of grace or not), that the seller intended to require acceptance, but not payment of the draft before the buyer should be entitled to receive or retain the bill.

The provisions of this section are applicable, whether by the terms of the bill the goods are consigned to the seller, or to his order, or to the buyer, or to his order, or to a third person, or to his order. (May 22, 1911, 102 v. 146.)

Where an invoice for the price of the goods shipped is assigned by the consignor, together with the bill of lading, as security for a loan to the seller, the consignee can not set off against the assignee a claim against the consignor of which the assignee had no notice. *Peitch Co. v. Banking Co.*, 20 C. C. n. s. 246 (1912).

Section 8993-41. (Seller's lien nor right of stoppage in transitu, shall defeat right of purchaser for value.) Where a negotiable bill has been issued for goods no seller's lien or right of stoppage in transitu shall defeat the rights of any purchaser for value in good faith to whom such bill has been negotiated, whether such negotiation be prior or subsequent to the notification to the carrier who issued such bill of the seller's claim to a lien or right of stoppage in tran-

situ. Nor shall the carrier be obliged to deliver, or justified in delivering, the goods to an unpaid seller unless such bill is first surrendered for cancellation. (May 22, 1911, 102 v. 146.)

See *Railroad Co. v. Koontz*, 15 C. C. 288; 9 C. D. 102 (1897).

Page v. *Railroad Co.*, 4 West L. M. 644 (C. P. 1863).

Where goods have been stopped in transit the carrier acts at his peril in delivering them to either the consignor or the consignee. It may bring the goods into court and require the claimants to determine the right of possession.

Howe v. Railway, 18 C. C. 333; 10 C. D. 182 (1899).

A carrier is bound to obey notice from the shipper to stop car-load shipments at a designated point, and hold for further instructions, if not an unreasonable interference with the carrier's business. *Coal Co. v. Railway*, 4 Ohio App. 459, 25 C. C. n. s. 276 (1915); motion to certify record overruled. 13 O. L. R. 515.

Section 8993-42. (Rights of mortgagee or lien-holder.)

Except as provided in section 8993-41, nothing in this shall limit the rights and remedies of a mortgagee or lien-holder whose mortgage or lien on goods would be valid, apart from this act as against one who for value and in good faith purchased from the owner, immediately prior to the time of their delivery to the carrier, the goods which are subject to the mortgage or lien and obtained possession of them. (May 22, 1911, 102 v. 146.)

Section 8993-43. (Fraud. Penalty.) Any officer, agent or servant of a carrier, who, with intent to defraud, issues or aids in issuing a bill of lading knowing that all or any part of the goods for which such bill is issued have not been received by such carrier, or by an agent of such carrier, or by a connecting carrier, or are not under the carrier's control at the time of issuing such bill, shall be guilty of a crime, and, upon conviction, shall be punished for each offense by imprisonment in the penitentiary not exceeding five years, or by a fine not exceeding five thousand dollars, or by both. (May 22, 1911, 102 v. 147.)

Section 8993-44. (False statement. Penalty.) Any officer, agent, or servant of a carrier, who, with intent to defraud, issues or aids in issuing a bill for goods, knowing that it contains any false statement, shall be guilty of a crime, and, upon conviction, shall be punished for each offense by imprisonment in the penitentiary not exceeding one year, or by a fine not exceeding one thousand dollars, or by both. (May 22, 1911, 102 v. 147.)

Section 8993-45. (Unauthorized duplicate bills. Penalty.)

Any officer, agent, or servant of a carrier, who, with intent to defraud, issues or aids in issuing a duplicate or additional negotiable bill for goods in violation of the provisions of section 8993-6, knowing that a former negotiable bill for the same goods, or any part of them, is outstanding and uncanceled, shall be guilty of a crime, and, upon conviction, shall be punished for each offense by imprisonment in the penitentiary not exceeding five years, or by a fine not exceeding five thousand dollars, or by both. (May 22, 1911, 102 v. 147.)

Section 8993-46. (Penalty for transfer of negotiable bill for value, without title or mortgaged.) Any person who ships goods to which he has not title, or upon which there is a lien or mortgage, and who takes for such goods a negotiable bill which he afterwards negotiates for value with intent to defraud, and without disclosing his want of title or the existence of the lien or mortgage, shall be guilty of a crime, and, upon conviction, shall be punished for each offense by imprisonment in the penitentiary not exceeding one year, or by a fine not exceeding one thousand dollars, or by both. (May 22, 1911, 102 v. 147.)

Section 8993-47. (Penalty for negotiating bill for value, for goods not in possession.) Any person who, with intent to defraud, negotiates or transfers for value a bill, knowing that any or all of the goods which, by the terms of such bill, appear to have been received for transportation by the carrier which issued the bill, are not in their possession or control of such carrier, or of a connecting carrier, without disclosing this fact, shall be guilty of a crime, and, upon conviction, shall be punished for each offense by imprisonment in the penitentiary not exceeding five years, or by a fine not exceeding five thousand dollars, or by both. (May 22, 1911, 102 v. 147.)

Section 8993-48. (Penalty for obtaining bill falsely, when goods not delivered to carrier.) Any person who, with intent to defraud, secures the issue by a carrier of a bill, knowing that at the time of such issue, any or all of the goods described in such bill, as received for transportation, have not been received by such carrier, or an agent of such carrier, or a connecting carrier; or are not under the carrier's control, by inducing an officer, agent, or servant of such carrier falsely to believe that such goods have been received by such carrier, or are under its control, shall be

guilty of a crime, and, upon conviction, shall be punished for each offense by imprisonment in the penitentiary not exceeding five years, or by a fine not exceeding five thousand dollars, or by both. (May 22, 1911, 102 v. 147.)

Section 8993-49. (Aid in obtaining false bills. Penalty.)

Any person who, with intent to defraud, issues or aids in issuing a non-negotiable bill without the words "not-negotiable" placed plainly upon the face thereof, shall be guilty of a crime, and, upon conviction, shall be punished for each offense by imprisonment in the penitentiary not exceeding five years, or by a fine not exceeding five thousand dollars, or by both. (May 22, 1911, 102 v. 148.)

Section 8993-50. (Other laws applicable.) In any case not provided for in this act, the rules of law and equity, including the law merchant, and in particular the rules relating to the law of principal and agent, executors, administrators, and trustees, and to the effect of fraud, misrepresentation, duress, or coercion, accident, mistake, bankruptcy, or other invalidating cause, shall govern. (May 22, 1911, 102 v. 148.)

Section 8993-51. (Uniformity.) This act shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states which enact it. (May 22, 1911, 102 v. 148.)

Section 8993-52. (Definitions.) (1) In this act, unless the context or subject matter otherwise requires—

"Action" includes counter-claim, set-off, and suit in equity.

"Bill" means bill of lading.

"Consignee" means the person named in the bill as the person to whom delivery of the goods is to be made.

"Consignor" means the person named in the bill as the person from whom the goods have been received for shipment.

"Goods" means merchandise or chattels in course of transportation, or which have been or about to be transported.

"Holder" of a bill means a person who has both actual possession of such bill and a right of property therein.

"Order" means an order by indorsement on the bill.

"Owner" does not include mortgagee or pledgee.

"Person" includes a corporation or partnership, or two or more persons having a joint or common interest.

To "purchase" includes to take as mortgagee and to take as pledgee.

"Purchaser" includes mortgagee and pledgee.

"Value" is any consideration sufficient to support a simple contract. An antecedent or pre-existing obligation, whether for money or not, constitutes value where a bill is taken either in satisfaction thereof or as security therefor.

(2) A thing is done "in good faith," within the meaning of this act, when it is in fact done honestly, whether it be done negligently or not. (May 22, 1911, 102 v. 148.)

Section 8993-53. The provisions of this act do not apply to bills made and delivered prior to the taking effect thereof. (May 22, 1911, 102 v. 150.)

Section 8993-54. This act shall take effect on the first day of January, one thousand nine hundred and twelve. (May 22, 1911, 102 v. 150.)

Section 8994. (Forfeiture.) A railroad company, or agent or officer thereof, refusing to comply with the provisions of the next preceding section (8993) shall be liable to a penalty of fifty dollars, to be recovered by civil action against the company by which such agent or officer is employed, or to which such goods are offered for shipment. (R. S. Sec. 3378-4; May 8, 1894, 91 v. 207, § 2.)

Section 8994-1. (Liability for loss or damage to freight regardless of contract or rule of common carrier.) That any common carrier, railroad or transportation company receiving property at a point within the state of Ohio for transportation to a point within the state of Ohio, shall issue a receipt or bill of lading therefor and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass, and no contract, receipt, rule or regulation shall exempt such common carrier, railroad, or transportation company from the liability hereby imposed: Provided, that nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under existing law.

That the common carrier, railroad, or transportation company issuing such receipt or bill of lading shall be entitled to recover from the common carrier, railroad, or transportation company on whose line the loss, damage, or injury shall have been sustained the amount of such loss, damage

or injury as it may be required to pay the owners of such property as may be evidenced by any receipt, judgment, or transcript thereof. (May 15, 1911, 102 v. 113.)

This section does not prohibit a contract limiting the liability of the carrier to the agreed value of the property.

Cohn-Goodman Co. v. Wells Fargo & Co., 13 C. C. n. s. 467, 471, 473 (1910); aff'd, no rep., 87 O. S. 458.

Greenwald v. Barrett, 199 N. Y. 170.

Travis v. Wells Fargo & Co., 79 N. J. L. 85.

Bernard v. Adams Express Co., 205 Mass. 254.

But where the freight rate is not based on the value of the goods, and the limitation of liability is not in consideration of a reduced rate, the limitation of liability is invalid. Railway Co. v. Euclid Builders Supply Co., 11 Ohio App. 196; 30 O. C. A. 561 (1919).

A valid limitation of liability, made by the initial carrier, inures to the benefit of succeeding carriers.

Kansas City So. Ry. v. Carl, 227 U. S. 639 (1913).

A carrier can not evade the liability imposed by this section by a rule or regulation filed with the public utilities commission. Railroad Co. v. Steinberg, 94 O. S. 189 (1916).

An action against the initial carrier under this section may be prosecuted only against the initial carrier, and connecting carriers are not necessary or proper parties. Railway v. Dresbach, 8 Ohio App. 333; 28 O. C. A. 471 (1917).

This section does not abrogate the common law rights of a shipper against subsequent carriers whose negligence caused the loss, but both remedies cannot be prosecuted under one cause of action. Railway v. Dresbach, 8 Ohio App. 333; 28 O. C. A. 471 (1917).

In an action against the initial carrier to recover the value of articles stolen from a trunk during interstate transportation over several connecting lines, it was held that the burden was on the initial carrier to show not only that the loss did not occur on its line but also that proper care was exercised to prevent the theft. Penna. Co. v. Quinby, 7 Ohio App. 197; 27 O. C. A. 6 (1916); motion to certify record overruled, 14 O. L. R. 490.

Excessive freight charges caused by misrouting by a connecting carrier is a "loss, damage or injury" under the Carmack amendment. Railway v. Lumber Co., 1 Ohio App. 164; 21 C. C. n. s. 337 (1913).

Liability of initial carrier. Before the enactment of this section a carrier was liable where it contracted to transport freight over connecting lines. But where the contract was to carry freight over the initial carrier's line, only, and deliver it to connecting carriers, a stipulation in the contract was valid which exempted the initial carrier from liability for loss beyond its own line.

Railroad Co. v. Pontius, 19 O. S. 221 (1869).

Where goods were returned to the initial carrier in a slightly damaged condition, but capable of being repaired at small cost, and were by the initial carrier placed in a warehouse and left without attention, until worthless, the shipper not having been notified, the initial carrier was held liable for the value of the goods, less the damage originally sustained.

John Church Co. v. Railway Co., 5 N. P. n. s. 585; 18 L. D. 205 (C. P. 1907).

Where goods carried over connecting lines were refused by the consignee, and the shipper, in writing, appointed the initial carrier his agent to procure return of the goods, agreeing to indemnify the company against liability in so doing, the initial carrier was held not liable for

damage to the goods on the return, without its fault and not on its own line.

Erie Railroad Co. v. Cappell, 80 O. S. 128 (1909).

Where a consignee paid the entire freight charges to the railroad which delivered the goods, the goods having passed over several railroads and having been received in bad condition; and by agreement of the parties the consignee filed a claim for damages, the company was held to have recognized that there was but one contract for transportation, and was held liable.

Railway Co. v. Barron, Boyle & Co., 11 C. C. n. s. 602; 21 C. D. 142 (1908); *aff'd*, 80 O. S. 707; s. c., 8 N. P. n. s. 517; 19 L. D. 710.

Liability of connecting carrier. A carrier, receiving freight only by virtue of authority from a previous carrier, is bound to take notice of the authority of the latter at the time the goods are received. *Coal Co. v. Railway*, 4 Ohio App. 459, 25 C. C. n. s. 276 (1915); motion to certify record overruled, 13 O. L. R. 515.

Duty of carrier to trace goods not delivered. On demand of the shipper, it is the duty of a carrier to trace goods which have not reached the consignee. Where a carrier apparently acquiesces in such a demand but takes no action for a long period and the goods are finally destroyed through the burning of a warehouse, the carrier is liable.

Freiberg v. Railway Co., 11 C. C. n. s. 241; 20 C. D. 669 (1908); *aff'd*, 83 O. S. 482.

Section 8995. (Storage and warehouse certificate.) A railroad company, organized under the laws of this state, upon the receipt of iron ore or grain or other merchandise from any vessel, water-craft or other source for storage and deposit, duly consigned to such company, upon the request of the owner or owners of such ore, grain or other merchandise, with the written consent of the consignee, may issue to the owner or owners of such ore, grain or other merchandise, a certificate, receipt or voucher, which shall name the railway company by whom the ore or grain or other merchandise is held at the time such certificate, receipt or voucher is issued, to whom such ore, grain or other merchandise was consigned, the quantity held by such company, and so near as may be the quality or grade thereof, but not incurring any liability for the grade or quality, which certificate, receipt or voucher, shall be signed by the president or vice president of the company, and countersigned by the general agent thereof appointed for that purpose, or such other officer as may be appointed by such railroad company, and be transferable and negotiable by indorsement thereon, by the person or persons to whose order it is made payable. On the presentation of the certificate, receipt or voucher, so indorsed to such railway company at its general offices, by the holder or holders thereof and on demand, the company shall deliver to the holder or holders, the iron ore or grain or other merchan-

dise described therein, on the payment by such person or persons to the railroad company of all proper charges thereon. (R. S. Sec. 3378-1; February 22, 1889, 86 v. 52, § 1.)

Whether a warehouse maintained by a railroad company should be taxed as real or personal property depends upon its use.

Cincinnati v. Hynicka, 9 N. P. n. s. 273 (C. P. 1909).

A railroad company having goods on storage is liable for damage caused by an unprecedented flood where its own negligence, commingling with the act of God, was an active and cooperative element in causing the damage. *Railroad Co. v. Wuest*, 28 O. C. A. 385 (1915).

Section 8996. (Rates of fare and freight on branch roads.) A company may demand and receive for the transportation of passengers on a branch road, whose length does not exceed ten miles, a fare not exceeding six cents per mile, and for transportation of property such reasonable rates as from time to time may be fixed by the company or prescribed by law. (R. S. Sec. 3378; April 29, 1872, 69 v. 203, § 4.)

Section 8997. (When connections may be made.) When the track of a company crosses, connects or intersects the track of the same gauge of another company, either company may connect the tracks of the two roads so crossing, connecting or intersecting so as to admit the passage of cars from one road to another with facility and avoid the necessity of transferring^a freights from such cars. (R. S. Sec. 3340; February 24, 1891, 88 v. 45; April 15, 1857, 54 v. 133, § 5.)

Section cited.

W. Jefferson Creamery Co. v. Railroad, 8 O. L. R. 19 (R. R. Com. 1910); s. c., 10 N. P. n. s. 665.

See § 9002.

Power of public utilities commission to order track connections. § 614-42.

Section 8998. (When companies must switch cars of other companies.) When the tracks of one company lie contiguous to coal mines, stone quarries, manufacturing establishments, elevators, warehouses, navigable waters or side tracks, suitable for loading or unloading, it shall switch the cars of other companies, at the request of such companies, or the shippers, over and upon the tracks so lying by such mines, quarries, manufacturing establishments, elevators, warehouses, navigable waters or side tracks, for the purpose of unloading or loading grain or other freight into or from such elevators, warehouses, boats upon such navigable

waters, or side tracks without demurrage, for forty-eight hours. (R. S. Sec. 3340; February 24, 1891, 88 v. 45; April 15, 1857, 54 v. 133, § 5.)

Equal facilities to be furnished shippers. § 8990.

Penalty for violation of this section. § 9002.

A switching service within the meaning of §§ 8998 and 9000 is one which precedes or follows a transportation service, and applies only to a shipment upon which legal freight charges have been, or are to be, earned. *Lumber Co. v. Railway*, 92 O. S. 206 (1915); affirming, 4 Ohio App. 22; 21 C. C. n. s. 49; 25 C. D. 453; 16 N. P. n. s. 81; 14 N. P. n. s. 392.

A transportation service may be rendered within the terminal limits of a city, and where the carriage contract calls for a movement of a car from a point on one railroad to a point on another railroad, the companies are not limited in their charges by § 9000. *Lumber Co. v. Railway*, 92 O. S. 206 (1915).

This section does not require a railroad company to throw open its public or "team" tracks to other railroads.

Rheinstrom, etc., Co. v. Railway Co., 4 O. L. R. 755 (R. R. Com. 1907).

Pierce, etc., Co. v. Railroad Co., 6 O. L. R. 147 (R. R. Com. 1908).

Remedy of consignee or shipper. Mandatory injunction will lie to compel a railroad company to switch cars of other companies as required by this section.

Troy, etc., Co. v. Railway Co., 3 N. P. n. s. 412 (1903); aff'd, 72 O. S. 613.

See *Chicago, etc., R. Co. v. Suffren*, 129 Ill. 274 (1889).

The public utilities commission is without authority to act on an informal complaint, but may act upon a formal one. Rep. Atty. Gen. 1912, p. 650.

"Contiguous" tracks. The word "contiguous" in this section is limited by the phrase "suitable for loading or unloading". To be contiguous the tracks of the railroad company must be so located that the shipper or consignee may load or unload directly from car into warehouse.

Rheinstrom, etc., Co. v. Railway Co., 4 O. L. R. 755 (R. R. Com. 1907).

A side track located wholly upon a public street, which can be reached from a grain elevator by means of a spout eighteen feet long extending over the sidewalk and over a part of the street, is not "contiguous" to the elevator.

Pierce, etc., Co. v. Railroad Co., 6 O. L. R. 147 (R. R. Com. 1908).

Railway v. Hurd, 20 N. P. n. s. 10 (1916).

Demurrage. After forty-eight hours a demurrage charge may be imposed for delay in unloading.

Phillips v. Erie R. Co., 6 C. C. n. s. 505; 17 C. D. 486 (1905); affirming, 14 L. D. 706.

See note to § 8980.

A railroad company may refuse to switch cars where the consignee has refused or failed to pay proper demurrage charges for delay in unloading former cars.

Troy, etc., Co. v. Railway Co., 3 N. P. n. s. 412 (1903); aff'd, 72 O. S. 613.

Phillips v. Erie R. Co., 6 C. C. n. s. 505; 17 C. D. 486 (1905); affirming, 14 L. D. 706.

But not where the delay in unloading such former cars was caused by acts of the railway company.

Troy, etc., Co. v. Railway Co., 3 N. P. n. s. 412 (1903); aff'd, 72 O. S. 613.

Car service rules established by Railroad Commission.

Ohio Shippers Assn. v. Ann Arbor R. Co., 52 Bull. 279 (1907).

Section 8999. (When companies must transport cars of other companies.) When the tracks of two companies are so connected, either, when required, shall transport over its road to its destination thereon, any freight offered, in cars in which it is offered, at its local rates per mile as set forth in its freight tariff for the distance most nearly corresponding, and return the cars, with or without freight or unnecessary delay. (R. S. Sec. 3341; April 18, 1892, 89 v. 369; February 24, 1891, 88 v. 45; April 15, 1857, 54 v. 133, § 7.)

A railroad company must receive freight, at its regular stations, for transportation to any station on its own or connecting lines regardless of distance.

W. Jefferson, etc., Co. v. Railroad Co., 8 O. L. R. 10, 19 (R. R. Com. 1910); s. c., 10 N. P. n. s. 665.

Sections 8998 to 9000 relate only to the switching charge which the railroad companies may make each other on freight which one company receives from the other, and create no right of action against either of the companies in favor of individual shippers, if the switching charge is in excess of that provided.

Brick Co. v. Trust Co., 187 Fed. 63 (C. C. A. 1911).

Section 9000. (Rates for switching cars of other companies.) A company owning a track or tracks lying contiguous to coal mines, stone quarries, manufacturing establishments, elevators, warehouses, navigable waters or side-tracks, and within the proper terminal limits of or about a city or village, shall be entitled to receive from the company whose cars are so switched, loaded and unloaded at such mines, quarries, manufacturing establishments, elevators, warehouses, navigable waters or side-tracks, no more than one dollar per car for switching one-half mile or less on such tracks; for distances over one-half mile, and not exceeding two and one-half miles, not to exceed one dollar and fifty cents per car; for distances over two and one-half miles and not exceeding five miles, not more than two dollars per car; and for all distances of more than five miles, not more than three dollars per car. When such service is on the roads of two or more companies, then such charges shall be divided between the companies in proportion to the distances of each road. But each company shall be

entitled to at least one dollar for such service, regardless of distance, but there shall be no charge for returning empty cars from such mines, quarries, manufacturing establishments, elevators, warehouses, navigable waters or side-tracks. Such company may perform the service or do the switching work herein provided for, in the daytime. Whatever private side-tracks are or may be constructed, the company must switch cars thereon at the rates herein specified. (R. S. Sec. 3341; April 18, 1892, 89 v. 369; February 24, 1891, 88 v. 45; April 15, 1857, 54 v. 133, § 7.)

Sections 8998 to 9000 relate only to the switching charge which the railroad companies may make each other on freight which one company receives from the other, and create no right of action against either of the companies in favor of individual shippers, if the switching charge is in excess of that provided.

Brick Co. v. Trust Co., 187 Fed. 63 (C. C. A. 1911).

A switching service within the meaning of §§ 8998 and 9000 is one which precedes or follows a transportation service, and applies only to a shipment upon which legal freight charges have been, or are to be, earned. Lumber Co. v. Railway, 92 O. S. 206 (1915); affirming 4 Ohio App. 22; 21 C. C. n. s. 49; 25 C. D. 453; 16 N. P. n. s. 81; 14 N. P. n. s. 392.

A transportation service may be rendered within the terminal limits of a city, and where the carriage contract calls for a movement of a car from a point on one railroad to a point on another railroad, the companies are not limited in their charges by § 9000. Lumber Co. v. Railway, 92 O. S. 206 (1915).

Rates for transportation of cars from industry to team track, within same switching limits, or from one industry to another. Goodrich Co. v. Railway, 14 O. L. R. 337 (Pub. Ut. Com. 1914).

Private side tracks. A private side track is located on private property and not on a public street.

Pierce, etc., Co. v. Railroad Co., 6 O. L. R. 147 (R. R. Com. 1908).

See Troy, etc., Co. v. Railway Co., 3 N. P. n. s. 412, 413, 415 (1903); aff'd, 72 O. S. 613.

Johnson, etc., Co. v. Railroad Co., 1 N. P. n. s. 385; 14 L. D. 209 (C. P. 1904).

A shipper having a private side track is entitled to equal service, in the switching of cars arriving over connecting lines, that is accorded to others similarly situated.

Gill v. Railway, 6 O. L. R. 140 (R. R. Com. 1908).

But a shipper can not be given a lower rate because it owns the track on which cars are placed. Goodrich Co. v. Railway, 14 O. L. R. 337.

Car service associations. A car service association formed for the purpose of expediting the shipping business for the general public and of protecting the railroad companies composing it is legal.

Phillips v. Erie Ry., 14 L. D. 706 (C. P. 1904); aff'd, 6 C. C. n. s. 505; 17 C. D. 486 (1905).

Rules of a car service association imposing a reasonable demurrage charge for delay in unloading, and providing that the companies may refuse to switch other cars to a private siding until arrears of demurrage are paid by the owner of the siding, and that when cars are not unloaded

within the time limit the charge must be paid before unloading, are reasonable and valid.

Phillips v. Erie Ry., 14 L. D. 706 (C. P. 1904); aff'd, 6 C. C. n. s. 505; 17 C. D. 486.

See Troy, etc., Co. v. Railway Co., 3 N. P. n. s. 412 (C. P. 1903); aff'd, 72 O. S. 613.

Section 9001. (How distance computed.) The distance provided for in the next preceding section shall be computed from the general freight warehouse in such city or village, and from the siding used for the storage of cars nearest to where they may be required, outside municipalities. Nothing herein contained shall require a railway or railroad company now in operation to furnish its terminals and facilities at the rates herein named, to any similar company for a railroad to be built by it hereafter which does not afford similar terminals and reciprocal facilities. (R. S. Sec. 3341; April 18, 1892, 89 v. 369; February 24, 1891, 88 v. 45; April 15, 1857, 54 v. 133, § 7.)

Section 9002. (Penalty for overcharge.) A company which violates or permits to be violated any provision of sections eighty-nine hundred and ninety-seven to ninety hundred and one both inclusive or of sections eighty-nine hundred and seventy-seven and eighty-nine hundred and eighty, or which demands or receives a greater sum of money for the transportation of passengers or property, or for the service provided for in such sections eighty-nine hundred and ninety-seven to ninety hundred and one both inclusive than the sum allowed by law, shall pay to the party aggrieved for every such overcharge a sum equal to double the amount of the overcharge; and any officer, employe, or agent of any such company who violates, or permits to be violated, any of such provisions, or demands or receives such sum of money, shall be subject to the like penalty to the party aggrieved. In no case shall the amount paid be less than one hundred and fifty dollars to any bona fide claimant using the road of such company or demanding or receiving any such service in due course of business. (R. S. Sec. 3376; April 14, 1900, 94 v. 220; March 17, 1892, 89 v. 117; April 6, 1876, 73 v. 102, § 13.)

This section is constitutional.

Railroad Co. v. Cook, 37 O. S. 265 (1881).

A plaintiff in a pending action for statutory penalties has no such vested right to the penalties as to render unconstitutional as to him the repeal and amendment of the statute, when it is provided that it shall apply to all actions pending. The amendment of this section (94 v. 220) is constitutional.

Railway Co. v. Wells, 65 O. S. 313 (1901).

This section is penal in its nature and should be strictly construed.

Railway Co. v. Wells, 65 O. S. 313 (1901).

"Bona fide claimant." A "bona fide claimant" is one claiming in good faith. It is not necessary that the purchaser of a ticket should use or ride upon the ticket, in order to maintain an action under this section.

Penna. Co. v. O'Connell, 84 O. S. 218 (1911).

Railroad Co. v. Cook, 37 O. S. 265 (1881).

Amount of recovery. Jury trial. Where the facts admitted by the pleadings show that the plaintiff is entitled to recover, it is not error to refuse a jury trial to assess the damages. The statute fixes the amount of the recovery.

Railroad Co. v. Cook, 37 O. S. 265 (1881).

Before judgment, the penalty does not bear interest.

Railway Co. v. Furnace Co., 49 O. S. 102 (1892).

Penalties charged in each case.

See Railway Co. v. Moore, 33 O. S. 384 (1878).

Involuntary payment. Where a shipper is compelled to pay illegal rates to procure the transportation of his property, the payment is not such a voluntary payment as will preclude a recovery of the illegal charge, although paid monthly.

Peters v. Railroad Company, 42 O. S. 275 (1884).

Section 9003. (Separate actions for each violation.) A separate action shall be brought for each overcharge mentioned in the next preceding section, unless the party aggrieved give notice in writing at the time of such overcharge, except the first one, to the officer, agent or employe, of such railroad making or receiving such overcharge, of his intention to bring such action; and no judgment shall be rendered in any action for the penalties above provided, for more than one overcharge unless such written notice shall have been given by the party aggrieved. (R. S. Sec. 3376; April 14, 1900, 94 v. 220; March 17, 1892, 89 v. 117; April 6, 1876, 73 v. 102, § 13.)

This section was substituted for a prior provision for exemplary damages.

Railway Co. v. Wells, 65 O. S. 314 (1901).

The judgment can be rendered in any action for more than one overcharge, unless written notice is given.

Railway Co. v. Wells, 65 O. S. 313, 315 (1901).

Prior to the enactment of this section several causes of action for penalties could be joined.

Railroad Co. v. Cook, 37 O. S. 265 (1881).

Venue. An action brought by a passenger to recover the penalty under § 9002 for overcharge in the sale of a ticket should, under G. C. § 11271, be brought in the county where the ticket was purchased. The court of common pleas of the county of the passenger's destination has no jurisdiction.

Penna. Co. v. O'Connell, 84 O. S. 218 (1911).

The objection to the jurisdiction of the court is not waived by failure

to raise it by demurrer or answer. It may be raised for the first time in a proceeding in error.

Railroad Co. v. Hollenberger, 76 O. S. 177 (1907).

Section 9004. (When provisions do not apply.) The provisions of sections eighty-nine hundred and seventy-seven, eighty-nine hundred and eighty, ninety hundred and two, and ninety hundred and three shall not apply to a railroad in course of construction, the gross earnings of which are less than four thousand dollars per mile per annum, when such road is not owned or operated by companies operating another railroad. Such exemption shall not continue longer than five years after cars are run for the transportation of freight and passengers on such road. (R. S. Sec. 3377; April 6, 1876, 73 v. 102, § 13.)

See Ashley v. Railway Co., 5 O. L. R. 359, 362 (R. R. Com. 1907).
Railroad v. Furnace Co., 49 O. S. 102.

CHAPTER 6.

EMPLOYES.

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| § 9005. Engineers addicted to drink not to be employed. | § 9014. Agreements, etc., void; forfeiture. |
| § 9006. Forfeiture under preceding section. | § 9015. Defective machinery prima facie evidence of negligence. |
| § 9007. Hours of service of certain railroad employees. | § 9016. Superior officer and fellow servant defined. |
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Scrap Metal.

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| § 9019. How railroad scrap metal sold. |
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Section 9005. (Engineers addicted to drink not to be employed.) No person, company or corporation operating a railroad in whole or in part in this state directly, or by or through a representative, shall knowingly suffer or permit a person to run or in any capacity to operate a railroad locomotive on any part of his, their or its road in this state, who is intoxicated or in the habit of becoming intoxicated, or knowingly to continue the employment of a person in

such capacity after he becomes or is intoxicated, while in charge of such locomotive. (R. S. Sec. 3365-17; April 20, 1891, 88 v. 429, § 1.)

Intoxicated employees—personal injuries.

See Baltimore, etc., Ry. Co. v. Henthorne, 36 W. L. B. 62, 73 Fed. 634 (1896).

Section 9006. (Forfeiture under preceding section.) For every violation of the next preceding section, the company, person or corporation operating such road, shall forfeit and pay to the state two hundred dollars to be recovered in its name in an action to be prosecuted in any county through which the road runs, by the prosecuting attorney thereof, who shall be entitled to twenty-five per cent of the recovery, and the balance shall be paid into the county treasury. (R. S. Sec. 3365-17; April 20, 1891, 88 v. 429, § 1.)

Section 9007. (Hours of service of certain railroad employees.) A company operating a railroad over thirty miles in length, interurban or street railway, over four miles in length, shall not permit a conductor, engineer, fireman, brakeman, or trainman on a train, or a telegraph operator, a conductor, or motorman on a street railway, who has worked as such for fifteen consecutive hours, again to go on duty or perform work until he has had at least eight hours' rest, except in cases of detention of trains or cars caused by accident, unavoidable or otherwise. And such companies shall so regulate the hours of employment of their employees, that each employee shall have at least eight consecutive hours of rest in each period of twenty-four hours. (May 7, 1913, 103 v. 557; R. S. Sec. 3365-14; April 15, 1892, 89 v. 311, § 1; April 23, 1891, 88 v. 344; March 26, 1890, 87 v. 112.)

This section is constitutional.

Wheeling, etc., Co. v. Gilmore, 8 C. C. 658; 4 C. D. 366 (1894).

A part of original R. S. Sec. 3365-14 was held unconstitutional in Wheeling, etc., Co. v. Gilmore, 8 C. C. 658; 4 C. D. 366, and is omitted.

Under an earlier form of this section it was held that the fact that trainmen had been on duty for more than fifteen consecutive hours is not a violation of this section unless the company had permitted them to undertake the run without eight hours rest, subsequent to the next preceding run, and not then unless such preceding run occupied more than fifteen consecutive hours.

B. & O. Ry. v. Collins, 10 C. C. n. s. 486; 20 C. D. 110 (1907); aff'd, 79 O. S. 442.

Where a train is delayed by accident this section does not make it the duty of the company to provide other trainmen to relieve those on duty.

B. & O. Ry. v. Collins, 10 C. C. n. s. 486; 20 C. D. 110 (1907); aff'd, 79 O. S. 442.

Where an employe on the track was injured through his own negligence, the fact that the engineer of the locomotive which struck him had been on duty more than fifteen consecutive hours, in violation of this section, does not render the company liable. *Hill v. Railway*, 20 C. C. n. s. 236 (1912); aff'd, no rep. 88 O. S. 599.

Section 9007-1. (Seats for conductor and motorman.) That it shall be unlawful to operate in Ohio any electric, street or interurban railroad car unless it be provided at all times during operation with seats for the motorman and conductor. (107 v. 590, § 1.)

This section requires separate seats for motormen and conductors. But a street railway company may make reasonable regulations requiring motormen and conductors to stand while passing through congested districts. *Opins. Atty. Gen.* 1917, p. 970.

Section 9007-2. (Penalty for failure to provide seats.) A violation of section 1 hereof shall constitute a violation thereof by the president, general manager, general superintendent, or other officer in charge of operation, and shall be punishable by a fine of not less than fifty dollars nor more than one hundred dollars, or by imprisonment for not less than ten nor more than thirty days for each offense. An offense on any calendar day and as to any car shall be a separate and distinct offense from a violation on any other such day. (107 v. 590, § 2.)

Section 9007-3. (Prosecution.) It shall be the duty of the prosecuting attorneys of the various counties to prosecute violations of this act.

This act shall take effect from and after November 1, 1917. (107 v. 590, §§ 3, 4.)

Section 9008. (Forfeiture under preceding section.) A railroad company or corporation knowingly violating the provisions of the next preceding section shall be liable to a penalty of not less than five hundred nor more than one thousand dollars for the first offense, and for any subsequent offense, of not less than one thousand nor more than fifteen hundred dollars, to be recovered by civil action in the name of the state. (*R. S. Sec.* 3365-15; April 15, 1892, 89 v. 311, § 2; March 26, 1890, 87 v. 112.)

Section 9009. (Blocking of frogs.) Every railroad corporation operating a railroad or part of a railroad within this state, shall adjust, fill, or block all angles in frogs, switches and crossings on its roads and in its yards, divisional and terminal stations where trains are made up, with

sheet steel, wrought or malleable iron, or other metallic appliances, which shall be so placed and be of such design as will prevent the wedging of the feet of employes and other persons in such angles; and all such appliances or devices shall before installations be approved by the state railroad commission. (May 20, 1910, 101 v. 325; R. S. Sec. 3365-18; April 25, 1898, 93 v. 342, § 1; March 23, 1888, 85 v. 105.)

Frogs need not be blocked in a new switch while it is being constructed.

See *Hauss v. Lake Erie, etc., R. R. Co.*, 12 O. F. D. 613 (1901).

A person crossing a railroad track has the right to assume that the company has obeyed the law, unless, in the exercise of ordinary care, he learns or ought to learn that the contrary is true.

Pittsburg, etc., Ry. Co. v. Burroughs, 6 N. P. 37; 9 L. D. 324 (1899).

A manufacturing company, maintaining a number of tracks and a switch engine for its use in shifting cars in its yards, is not a "railroad corporation" within the meaning of this section. *Taggart v. Republic Co.*, 141 Fed. 910 (C. C. A. 1905).

An employe injured by reason of a non-compliance with this section may recover damages.

Narramore v. Railway Co., 42 W. L. B. 246; 96 Fed. 298 (1899).

Railroad Co. v. Lambright, 5 C. C. 433; 3 C. D. 213 (1891); s. c., 29 W. L. B. 359.

Failure to comply with this section is negligence as a matter of law.

Railroad Co. v. Kountz, 168 Fed. 832 (C. C. A. 1909).

This section is intended to protect not only employes who may step into unblocked angles, but also employes who are dragged or pushed therein by an engine.

Railroad Co. v. Kountz, 168 Fed. 832 (C. C. A. 1909).

Before the amendment of this section (101 v. 325) it was held that this section was limited to frogs in yards, divisional and terminal stations where trains are made up.

Railroad Co. v. Kountz, 168 Fed. 832 (C. C. A. 1909).

Where two railway companies receive cars from each other over a delivery track at a certain point, a person employed by one of them to take the number of its cars and to inspect their seals, as trains were made up at such place by the other, is an employe of the latter within the meaning of this section.

Atkyn v. Wabash, etc., Ry. Co., 41 Fed. 193; 23 W. L. B. 151; 6 O. F. D. 395 (1890).

Defenses. Contributory negligence.

Railroad Co. v. Ullom, 20 C. C. 512; 11 C. D. 321 (1898); aff'd, no rep., 64 O. S. 582.

Railway v. Craig, 80 Fed. 488 (C. C. A. 1897); 10 O. F. D. 469; 73 Fed. 642; 9 O. F. D. 589 (C. C. A. 1896).

Assumption of risk was held to be a defense to the company.

Johns v. Railway Co., 3 C. C. n. s. 545; 13 C. D. 442 (1902); aff'd, 69 O. S. 532; s. c., 7 N. P. 592; 10 L. D. 358.

Contra. Railroad Co. v. Ullom, 20 C. C. 512 (1899).

Narramore v. Railway Co., 96 Fed. 298; 42 W. L. B. 246 (1899).

Railway Co. v. Winslow, 10 C. C. 193; 4 C. D. 242 (1894).

The employe of the company charged with the duty of blocking the guard-rails, frogs, and switches is not a fellow servant of the other em-

ployes of the company. In such a case the acts of the servant are those of the master.

New York, etc., R. R. Co. v. Lambright, 5 C. C. 433; 3 C. D. 213 (1891); aff'd, no rep., 29 W. L. B. 359.

Impracticability of blocking.

Railway Co. v. Winslow, 10 C. C. 193; 4 C. D. 242 (1894).

Evidence. Evidence that after an accident a sufficient block was placed in the guard-rail without endangering trains is admissible to show that such block could be used with safety.

Cincinnati, etc., R. Co. v. Van Horne, 34 W. L. B. 183; 69 Fed. 139, 9 O. L. D. 28 (1895).

Proof of operation by company.

See Wheeling Ry. Co. v. Lewis, 33 W. L. B. 159 (1894).

Section 9009-1. (Penalty.) Whoever, owning, operating or controlling a railroad fails to comply with the provisions of the next preceding section shall be subject to a penalty of twenty-five dollars for each and every day of such failure, to be recovered in a civil action, in the name of the state, and paid into the state treasury. (May 20, 1910, 101 v. 326; see R. S. Sec. 3365-19, repealed 93 v. 343.)

Section 9010. (Relief association prohibited.) No company created, under and by virtue of the laws of this state or of any other state or country, having and operating a line or railway in this state, shall establish, maintain or assist in establishing or maintaining a relief association or society, the rules or by-laws of which require of a person or employe becoming a member thereof to enter into an agreement or stipulation, directly or indirectly, whereby he stipulates or agrees to surrender or waive a right of damages against any railroad company for personal injuries or death, or to surrender or waive, in case he asserts such claim for damages, any right whatever. (R. S. Sec. 3270; April 8, 1908, 99 v. 71; April 29, 1872, 69 v. 203, § 4.)

This section is constitutional.

State v. Railway, 13 C. C. n. s. 37 (1909).

This section does not apply to lines of railroad engaged in interstate commerce. State v. Penna. Co., 27 O. C. A. 172 (1911); aff'd, no rep. 88 O. S. 540.

A somewhat similar Iowa statute was held valid in C. B. & Q. Ry. v. McGuire, 219 U. S. 549 (1910).

See §§ 9012, 9013 and notes.

A relief department contract can not preclude an employe from maintaining an action for damages for personal injuries, but a suit for damages will preclude a recovery on the relief department contract, unless terminated as provided by the regulations of the relief department. Blaney v. Railroad Co., 7 Ohio App. 322; 28 O. C. A. 65 (1917).

The establishment of an employees' relief association is not ultra vires

nor contrary to public policy. Such association is not an insurance company.

State v. Railway Co., 68 O. S. 9 (1903).

Quo warranto lies to oust a relief association organized and conducted in violation of this section.

State v. Railway, 13 C. C. n. s. 37 (1909).

In an action by an injured employe for benefits from a relief department payable under its regulations if the disablement "renders the member totally unable to labor, or, when of a permanent character, to earn a livelihood in any employment", it was held that evidence of the loss of the right hand, and subsequent inability to secure employment during the period for which benefits were claimed, was sufficient to submit the case to the jury. *Hughes v. Railway*, 15 N. P. n. s. 604 (1914).

Section 9011. (Unlawful for railroad to limit liability as employer.) No railroad corporation or company owning and operating, or operating a railroad shall adopt or promulgate a rule or regulation for the government of its servants or employes, or make or enter into an agreement with a person engaged in or about to engage in its service, wherein such employe in any manner, promises or agrees to hold such corporation or company harmless, on account of an injury he may receive by reason of accident to, breakage, defect or insufficiency in the cars or machinery and attachments thereto belonging on cars owned, operated, or run by such corporation, or company being defective. (R. S. Sec. 3365-20; April 2, 1890, 87 v. 149, § 1.)

A rule which requires car repairers or inspectors, when at work under a car or train, to see for themselves that a certain flag or light signal is displayed at each end of the cars on which they are working, is a reasonable rule, providing for the safety of employes and not limiting the master's liability for negligence. An agreement by the employe, at the time of his employment, that he understood such rule and would obey it, is binding upon him.

Railroad Co. v. Ropp, 76 O. S. 449 (1907).

Constitutionality, see notes to §§ 9012, 9013.

Section 9012. (Unlawful for company to compel employe to join any company or association.) No corporation directly or indirectly shall compel or require an employe to join any company or association whatsoever, or withhold any part of an employe's wages or his salary for the payment of dues or assessments in any society or organization, or demand or require either as a condition precedent to securing employment or being employed. Such railroad company shall not discharge an employe because he refuses or neglects to become a member of any society or organization. If an employe is discharged, at any time within ten days after receiving a notice thereof, he may demand the reason of such discharge, and the railroad company thereupon

must give the reason to him in writing. (R. S. Sec. 3365-20; April 2, 1890, 87 v. 149, § 1.)

This section is constitutional. *Railroad Co. v. Bailey*, 99 O. S. 312 (1919); affirming, 25 C. C. n. s. 305.

Sections 9012, 9013 and 9014 do not conflict with the federal employers' liability act, nor impair its full effect and operation. *Railroad Co. v. Bailey*, 99 O. S. 312 (1919); affirming, 25 C. C. n. s. 305.

It has been held that this section does not apply where an employe voluntarily made application for membership in the company's relief department and agreed to be bound by its regulations.

Caldwell v. Railway Co., 14 L. D. 375 (C. P. 1904).

Dues, withheld from wages without consent of the employe, may be recovered. *Railroad Co. v. Bailey*, 99 O. S. 312 (1919).

Reason of discharge. That part of this section which requires a railroad company to furnish written reasons for the discharge of an employe is probably unconstitutional.

Railroad Co. v. Schaffer, 65 O. S. 414, 422-423 (1901); reversing 17 C. C. 77; 9 C. D. 158.

Wallace v. Railway Co., 94 Ga. 732; 34 W. L. B. 220.

See *Coppage v. Kansas*, 236 U. S. 1, 24 (1915).

Mattison v. Railway Co., 2 N. P. 276; 3 L. D. 526 (1895).

A discharged employe can not recover the penalty provided in § 9014 because of the failure of the company to give a written reason for his discharge.

Crall v. Railway Co., 7 C. C. 132; 3 C. D. 696 (1893).

Connell v. Railway Co., 14 L. D. 400 (C. P. 1902).

Where an employe leaves the service of a company of his own accord he is not entitled to a certificate to that effect under this section.

Editorial, 33 W. L. B. 109, 121

Section 9013. (Companies prohibited from demanding or receiving waivers.) No railroad company insurance society or association, or other person shall demand, accept, or enter into an agreement or stipulation with a person about to enter, or in the employ of a railroad company whereby he stipulates or agrees to surrender or waive any right to damages against a railroad company, thereafter arising for personal injury or death, or whereby he agrees to surrender or waive in case he asserts such right, any other right. (R. S. Sec. 3365-20; April 2, 1890, 87 v. 149, § 1.)

This section is constitutional. *Railroad Co. v. Bailey*, 99 O. S. 312 (1919).

In earlier cases in lower courts it was held unconstitutional in so far as it related to contracts voluntarily entered into by employes.

Caldwell v. Railway Co., 14 L. D. 375 (C. P. 1904).

Farrow v. Ry. Co., 7 N. P. 606; 5 L. D. 582 (C. P. 1895).

Shaver v. Penna. Co., 71 Fed. 931; 9 O. F. D. 221 (C. C. 1896).

See *Pierce v. Van Dusen*, 78 Fed. 693; 46 W. L. B. 102, 107; 9 O. F. D. 419 (C. C. A.).

Cox v. Railway, 1 N. P. 213; 2 L. D. 594; aff'd, 54 O. S. 497.

This section does not apply to a release of liability for injuries received prior to the release.

Bowers v. Railroad Co., 4 C. C. n. s. 479; 16 C. D. 518 (1904).

A contract between a sleeping car company and an employe by which the latter assumed all risks incident to her employment is void. *Railway Co. v. Kinney*, 95 O. S. 64 (1916); affirming, 7 Ohio App. 143; 26 C. C. n. s. 315.

Relief association contracts giving option to take benefits or damages. A relief department contract which does not stipulate that all claims for damages are waived, but requires the beneficiary to elect whether he will accept benefits from the relief fund, or rely on his right to sue the company for damages, is not interdicted by this section, nor is it against public policy.

Pittsburg, etc., Ry. Co. v. Cox, 55 O. S. 497 (1896).

State v. B. & O. Ry., 88 O. S. 539 (1913); s. c., 13 C. C. n. s. 37.

Shaver v. Pennsylvania Co., 71 Fed. 931; 9 O. F. D. 221 (1896).

Such a contract does not lack mutuality or consideration where the company as a part of the relief agreement, stipulates that it will make up deficiencies in the fund and assume the management of the fund, and do other things along that line.

Pittsburg, etc., Ry. Co. v. Cox, 55 O. S. 497 (1896).

Where the widow of a deceased member of a relief association, being the beneficiary named by him, accepts benefits from the association, she is not barred from bringing an action as administratrix for wrongful death, although the amount she should receive in the probate court on final distribution may be affected by her acceptance.

Baltimore, etc., R. Co. v. McCamey, 12 C. C. 543; 5 C. D. 631 (1896).

See *Cullison v. Baltimore, etc., R. R. Co.*, 4 N. P. 360; 7 L. D. 269 (1897).

Where a member of a relief department accepts benefits and signs a release of all damages, his right of action against the company will be defeated, if at the time he signed the release he was able to read and write and was in no manner prevented from reading the release, and was capable of understanding its effect.

Farrow v. Railway Co., 5 L. D. 582 (1895).

Baltimore, etc., R. Co. v. Bryant, 9 C. C. 332 (1895); 6 C. D. 418.

A rule of the relief department of a railroad company, providing for the submission of claims to the superintendent, and on appeal to a committee, the decision of which should be final, does not prevent the beneficiary from bringing an action at law after rejection of the claim by such committee.

Railroad Co. v. Stankard, 56 O. S. 224 (1897).

Railway engaged in interstate commerce. Membership by an employe in the voluntary relief department of a railway engaged in interstate commerce, and the receipt by him of benefits, is no defense to an action by the employe for injuries. The federal law controls.

Railway v. Sheets, 15 C. C. n. s. 305 (1912); aff'd, no rep. by divided court, 87 O. S. 476.

The act of Congress of 1908 was held to apply where the cause of action and receipt of benefits occurred after its enactment, although the membership contract was made prior to its enactment.

Railway v. Sheets, 15 C. C. n. s. 305 (1912); aff'd, no rep., 87 O. S. 476.

Section 9014. (Agreements, etc., void; forfeiture.) All rules, regulations, stipulations and agreements, declared unlawful by the next three preceding sections, are void. A

corporation, association or person violating, or aiding or abetting the violation of either of such sections, for each offense shall forfeit and pay to the person thus wronged or deprived of his rights thereunder, not less than fifty nor over five hundred dollars, to be recovered by a civil action. R. S. Sec. 3365-20; April 2, 1890, 87 v. 149, § 1.)

See notes to §§ 9012 and 9013.

Section 9015. (Defective machinery prima facie evidence of negligence.) No railroad corporation knowingly or negligently shall use or operate a car or locomotive that is defective, or upon which the machinery or attachments thereto belonging are in any manner defective. If an employe of such corporation receives injury by reason of a defect in a car or locomotive, or the machinery or attachments thereto belonging, owned and operated, or being operated by such corporation, it shall be deemed to have had knowledge of such defect before and at the time such injury is so sustained. When such defect is made to appear in the trial of any action brought by such employe, or his legal representative, against a railroad corporation for damages on account of injuries so received, that fact shall be prima facie evidence of negligence on the part of such corporation. (R. S. Sec. 3365-21; April 2, 1890, 87 v. 149, § 2.)

This section is constitutional, and provides a rule of evidence applicable to all cases on trial in this state, and to all railroad companies any part of whose line of railway extends into this state, whether the injury complained of was received within or without the state.

Pennsylvania Co. v. McCann, 54 O. S. 10 (1896).

See Lumber Co. v. Pierce, 235 U. S. 380 (1914).

Sections 9015-9018 known as the Metzger Act are not exclusive of the Norris Act (G. C. §§ 8657-8665). Railroad v. Connors, 261 Fed. 303 (C. C. A. 6th Cir. 1919); certiorari denied, 251 U. S. 557.

This section does not apply to a cause of action existing at the adoption of the act.

Railroad Co. v. Hedges, 63 O. S. 339 (1900); reversing 15 C. C. 254; 8 C. D. 265.

This section is a mere rule of evidence and applies to a cause of action, governed by federal law, which arose in another state, but on which suit is brought in Ohio.

Railway v. Sheets, 15 C. C. n. s. 305 (1912); aff'd, no rep. by a divided court, 87 O. S. 476.

Presumption and burden of proof of negligence. The burden of proving, by a preponderance of the evidence, the particular negligence alleged is at all times on the plaintiff. While proof of facts sufficient under this section to create a *prima facie* presumption of negligence casts upon the defendant the burden of producing evidence of equal weight or countervailing force to control or destroy such presumption, yet proof of such facts does not impose upon the defendant the burden of establishing affirmatively, by a preponderance of the evidence, that it was not negligent.

Klunk v. Railway, 74 O. S. 125 (1906).

Railway Co. v. Erick, 51 O. S. 146 (1894).

Railway v. Stewart, 2 Ohio App. 72; 21 C. C. n. s. 399; motion to certify record overruled, 11 O. L. R. 409.

See Railroad Co. v. Schomer, 171 Fed. 798 (C. C. A. 1909).

Shankweiler v. Railway, 148 Fed. 195; 15 O. F. D. 371 (C. C. A. 1906).

Railway v. Burris, 111 Fed. 882; 14 O. F. D. 182 (C. C. A. 1901).

Railway v. Stone, 2 C. C. n. s. 160; 14 C. D. 192 (1900); aff'd, no rep., 67 O. S. 528.

A company may overcome the presumption of negligence by showing that in fact it did not have such knowledge, and that it used due diligence to ascertain and remedy defects.

Railway Co. v. Erick, 51 O. S. 146 (1894).

Railway Co. v. Meyers, 12 C. C. 263 (1893); 4 C. D. 28.

Knighton v. Baltimore, etc., R. R. Co., 33 W. L. B. 216 (1894).

See Hill v. Lake Shore, etc., Ry. Co., 22 C. C. 291 (1901).

Inspection. The presumption of knowledge is removable by direct proof of inspection of such a character as a person of ordinary prudence would use under similar circumstances for the safety of himself or his employes.

Rawlins v. Railway Co., 4 O. L. R. 477; 17 L. D. 344 (C. P.).

Proof of the employment of careful and competent inspectors is not sufficient to overcome the presumption of negligence. Actual and proper inspection, or its equivalent, must be shown.

Felton v. Bullard, 94 Fed. 781; 42 W. L. B. 218 (C. C. A. 1899).

Railway Co. v. Erick, 51 O. S. 146 (1894).

Railway Co. v. Thompson, 82 Fed. 720 (1897).

Railroad Co. v. Johnson, 33 W. L. B. 248 (1895).

See Railway Co. v. Gilday, 16 C. C. 649; 9 C. D. 27 (1890).

Railroad Co. v. Schomer, 171 Fed. 798 (C. C. A. 1909).

Sufficiency of the inspection is, in general, a question for the jury.

Felton v. Bullard, 94 Fed. 781; 42 W. L. B. 248 (C. C. A. 1899).

Railroad Co. v. Schomer, 171 Fed. 798 (C. C. A. 1909).

See Railroad Co. v. Johnson, 33 W. L. B. 248 (1895).

This section makes no distinction between the cars owned by the company and foreign cars which it may operate, and the duty of inspection applies to both.

Felton v. Bullard, 42 W. L. B. 218 (1899).

See Pennsylvania Co. v. Meyers, 12 C. C. 263 (1893); 4 C. D. 28.

Pennsylvania Co. v. Snyder, 55 O. S. 342 (1896).

Hunt v. Caldwell, 22 C. C. 283 (1901).

Knowledge by employe of defect. This section does not dispense with the necessity of the plaintiff's alleging and proving want of knowledge of defects, or that, having such knowledge, he informed his superior and continued in the service, relying on a promise to remedy the defects.

Hesse v. Columbus, etc., R. R. Co., 58 O. S. 167 (1898).

Where a car is inspected and has the usual three X mark upon it indicating that it is defective and is to be repaired, a brakeman is not chargeable with notice if the mark can not be seen, as at night. If he should see the mark he is chargeable only with such defects as have been discovered by the inspectors.

Michigan Central Ry. Co. v. Butler, 3 C. C. n. s. 449; 13 C. D. 459 (1902); aff'd, no rep., 68 O. S. 662.

A contract which a railroad company required its brakemen to sign when employing them, making it their duty to inspect cars and appliances on which they were to work when in fact it would be impracticable for them to make such inspection, will not relieve the company.

Lake Shore, etc., Ry. Co. v. Gilday, 16 C. C. 649; 9 C. D. 27 (1890).

What constitutes a defective car or machinery. Where an accident occurs to an employe of a railroad company, as a result of the absence of an appliance upon the locomotive which it is customary to provide, the company is placed in the same position under this act as though the appliance had been furnished and was defective.

Crumley v. Cincinnati, etc., Ry. Co., 12 C. C. 164; 5 C. D. 353; s. c., 56 O. S. 781 (1897).

— **Held to be defective.**

Car with bent step.

O'Connell v. Penna. Co., 118 Fed. 989; 13 O. F. D. 786 (C. C. A. 1902).

Leaky valve in locomotive causing it to start.

Railway v. Raitz, 10 C. C. 70; 4 C. D. 18 (1894).

Broken tie rod, hanging over end of car in a situation likely to deceive a brakeman endeavoring to support himself on the grab iron.

Railroad Co. v. Schomer, 171 Fed. 798 (1909).

— **Held not defective.** Flat car without sides or ends.

Railway Co. v. Beard, 20 C. C. 681; 11 C. D. 406 (1898); aff'd, no rep. 56 O. S. 781.

Eyebolt in brake slightly longer than generally used. Brake chains longer than necessary.

Hunt v. Caldwell, 22 C. C. 283; 11 C. D. 562 (1901).

New coupling device proper in itself, although used without discarding older device.

Railway v. Henly, 48 O. S. 608 (1891).

Who is an employe. A person employed by one company to work in a yard shifting cars for it and another company under the usual arrangement between the companies for expenses is an employe of both companies.

Pittsburg, etc., R. Co. v. Johnston, 33 W. L. B. 248 (1895).

See note to § 8808.

Where the injured employe entered into the contract of employment and was injured out of the state, does this section apply when it changes the effect of the contract?

See *Pittsburg, etc., Ry. Co. v. Blair*, 11 C. C. 579 (1896); 5 C. D. 366; s. c., 55 O. S. 639.

Section 9016. (Superior officer and fellow servant defined.) In actions against a railroad company for personal injury to a person while in its employ, or for death resulting from such injury, arising from the negligence of such company, or any of its officers or employes, in addition to other liability, it shall be held that every person in the employ of such company, with actual power or authority to direct or control another employe thereof is not the fellow servant, but superior of such other employe. Every person, also, in the employ of such company who has charge or control of employes in a separate branch or department, is to be held to be the superior and not fellow servant of employes in another branch or department, who have no power to direct or control in the branch or department in

which they are employed. (R. S. Sec. 3365-22; April 2, 1890, 87 v. 150, § 3.)

This section is constitutional.

B. & O. R. Co. v. Hottman, 1 C. C. n. s. 17; 15 C. D. 140 (1903); aff'd, 70 O. S. 475.

Froelich v. Railway Co., 5 C. C. n. s. 6; 14 C. D. 359 (1903).

Pierce v. Van Dusen, 78 Fed. 693; 46 W. L. B. 102; 9 O. F. D. 419 (C. C. A. 1897).

Kane v. Erie R. Co., 133 Fed. 681; 2 O. L. R. 453; 14 O. F. D. 452 (C. C. A. 1904).

Erie R. Co. v. Kane, 155 Fed. 118.

Roe v. Railway, 13 L. D. 260 (C. P. 1902); aff'd, 4 C. C. n. s. 284.

See Erie R. Co. v. McCormick, 69 O. S. 45, 56 (1903).

Maltby v. Railway Co., 13 L. D. 280 (C. P. 1902).

This section applies to receivers.

Pierce v. Van Dusen, 78 Fed. 693; 46 W. L. B. 102 (C. C. A. 1897).

This section is in derogation of the common law and is not to be enlarged beyond its terms.

Railway Co. v. Shanower, 70 O. S. 166, 169 (1904).

A railroad company can not evade the liability imposed by this section by placing a dummy in nominal charge of every other employe on the train.

Kane v. Erie R. Co., 133 Fed. 681; 14 O. F. D. 452 (C. C. A. 1904).

"Authority to direct or control." Whether an employe of a company has authority to direct or control other employes of the same company is a question of fact to be determined in each case. This may be done, however, either by proof of express authority, or by showing the exercise of such authority to be customary, or according to the usual course of conducting the business of the particular company interested, or of railway companies generally.

Railroad Co. v. Margrat, 51 O. S. 130 (1894).

It seems this section would have no bearing on a case where the party alleged to have been negligent had no subordinates, and had no power to "direct or control any other employe." The existing law was not changed by this section except in so far as is specifically provided.

Felton v. Bullard, 42 W. L. B. 218 (1899).

Separate branch or department. The terms "branch" and "department" should not be limited so as to embrace merely those large divisions created for convenience in administering the affairs of the company. On the contrary, it is more reasonable to suppose that they relate to those minute ones which concern the daily duties of the employes.

Railroad Co. v. Margrat, 51 O. S. 130, 145 (1894).

An engineer in charge of a locomotive on one train of cars of a railroad company is in a branch or department of its service separate from that of a brakeman on another train of the same company, and therefore is his superior.

Railroad Co. v. Margrat, 51 O. S. 130 (1894).

See Pittsburg, etc., Ry. Co. v. Devinney, 17 O. S. 197 (1867).

But an engineer and a brakeman on the same train are in the same branch or department and are fellow servants, although by an accidental parting of the train the engineer and brakeman are left on one section of the train and the conductor on the other section.

Railway Co. v. Shanower, 70 O. S. 166 (1904).

Hill v. Railway, 22 C. C. 291; 12 C. D. 241 (1901).

Separate trains are separate branches or departments.

Kane v. Erie R. Co., 142 Fed. 682; 15 O. F. D. 188 (C. C. A. 1906); s. c., 118 Fed. 223 (C. C. A. 1902).

A station agent is in a separate branch or department from employes engaged in operating trains, and when he has no one in his department under his authority, he is not a fellow servant of an engineer.

Snyder v. Railway, 60 O. S. 487, 495 (1899).

The engineer in control of the machinery of a coal tippie and a "hooker" who hooks and unhooks the hoisting tackle are in the same department.

Froelich v. Railway Co., 5 C. C. n. s. 6; 14 C. D. 359 (1903).

It is not necessary that the superior, in the separate branch or department, should have control of all the employes in his department. A company is liable for the injury or death of a fireman through the negligence of the engineer of another train having authority over the fireman although such engineer is subject to the control of the conductor of the train.

Kane v. Erie R. Co., 142 Fed. 682; 15 O. F. D. 188 (C. C. A. 1906).

Held not to be fellow servants under this section. A "hostler," who takes charge of an engine when it arrives home, is the superior of a common laborer around the yard, assisting in caring for the engine.

Baltimore, etc., R. R. Co. v. Sutherland, 12 C. C. 309 (1894); 4 C. D. 115; s. c., 52 O. S. 676.

A yard brakeman is not the fellow servant of a conductor under whose control and direction he is placed.

Pierce v. Van Dusen, 46 W. L. B. 102 (1901).

A switchman in a yard whose duty it was to open such switches as he was notified to open by the different conductors and engineers in the yard, is acting in a separate branch or department from that of such conductors or engineers.

Lake Shore, etc., Ry. Co. v. Pero, 22 C. C. 130 (1901); aff'd, 65 O. S. 608.

A chief inspector of cars, having other inspectors under him, is not the fellow servant of a brakeman.

Railway Co. v. Erick, 51 O. S. 146 (1894); Pittsburg, etc., R. R. Co. v. Blair, 11 C. C. 579, 586 (1896); 5 C. D. 366.

See Felton v. Bullard, 94 Fed. 781 (1899); 42 W. L. B. 218.

A train dispatcher who has complete control of the movements of all trains on a division of a railroad is not a fellow servant of the engineer of a train running on such division.

Baltimore, etc., R. R. Co. v. Camp, 65 Fed. 952 (1895); 8 O. F. D. 391.

Crawford v. Railway, 12 L. D. 17; aff'd, 3 C. C. n. s. 144; 13 C. D. 207.

A yardmaster in charge of a railroad yard of the company, with full control over all its employes who have occasion to be in such yard in the discharge of their duties under their contract of employment with the company, with authority to select from the employes of such company the men who are to operate all trains sent out from such yard over the road of defendant, is by virtue of this section the "superior" and not the fellow servant of a brakeman.

McCann v. Pennsylvania Co., 10 C. C. 139 (1895); 6 C. D. 610; s. c., 54 O. S. 10.

See Pennsylvania Co. v. Fox, 10 C. C. 72 (1893); 4 C. D. 19.

A conductor of a train on which another conductor is riding on a free pass is not the fellow servant of such other conductor.

Lake Shore, etc., Ry. Co. v. Bycroft, 33 W. L. B. 160 (1895); s. c., 8 N. E. 588.

See Manville v. Cleveland, etc., R. R. Co., 11 O. S. 417 (1860).

An employe going home after a day's work stands in the same relation to the company as a person not an employe, and the defense of negligence of a fellow servant can not be interposed.

Columbus, etc., Ry. Co. v. O'Brien, 25 W. L. B. 90 (1891); s. c., 4 C. D. 515; 2 C. D. 681.

See Lake Shore, etc., Ry. Co. v. Mau, 9 C. C. 173 (1894); 4 C. D. 5.

An engineer with a fireman under him is not a fellow servant of a yard helper engaged in cleaning an ash pit.

Railway Co. v. Roe, 4 C. C. n. s. 284; 15 C. D. 628 (1903).

Nor of a brakeman on another train.

Railroad Co. v. Margrat, 51 O. S. 130 (1894).

Nor of a fireman on another train.

Kane v. Erie R. Co., 142 Fed. 682, 15 O. F. D. 188 (C. C. A. 1906).

Held to be fellow servants under this section. An engineer is the fellow servant of a brakeman on the same train.

Railway Co. v. Shanower, 70 O. S. 166 (1904).

Railway Co. v. Ranney, 37 O. S. 665 (1882).

Pittsburg, etc., Ry. Co. v. Lewis, 33 O. S. 196 (1877).

Hill v. Lake Shore, etc., Ry. Co., 22 C. C. 291 (1901).

See Railway v. Moore, 113 Fed. 269; 14 O. F. D. 35.

And of a telegraph operator at a station on the line.

Railroad Co. v. Camp, 65 Fed. 952; 8 O. F. D. 391 (1895).

See Crawford v. Railway, 12 L. D. 17; aff'd, 3 C. C. n. s. 144; 13 C. D. 207.

Snyder v. Railway, 60 O. S. 487 (1899).

The engineer in control of the machinery of a coal tippie and a hooker, who hooks and unhooks the hoisting tackle, are fellow servants where the engineer has no control over the hooker.

Froelich v. Railway Co., 5 C. C. n. s. 6; 14 C. D. 359 (1903).

Engineer and section foreman. Riter v. Railway, 17 C. C. n. s. 580 (1911); aff'd, no rep. 83 O. S. 515.

Two engineers on different locomotives. Railway v. Stark, 18 C. C. n. s. 226 (1908); aff'd, no rep. 81 O. S. 560.

OTHER LIABILITY. DECISIONS PRIOR TO ENACTMENT OF THIS SECTION.

From considerations of public policy, railroad companies are liable for injuries to their servants caused by the carelessness of those who are superior in authority and control over them.

Railway Co. v. Spangler, 44 O. S. 471, 478 (1886).

Little Miami R. R. Co. v. Stevens, 20 Ohio 415.

Cleveland, etc., R. R. Co. v. Keary, 3 O. S. 202.

Pittsburg, etc., Ry. Co. v. Lewis, 33 O. S. 196 (1877).

But for the negligence of a fellow servant a railway company was not liable, under the common law rule, where the company was free from negligence and had performed the duties imposed on it by law.

Railroad v. Fitzpatrick, 42 O. S. 318 (1884).

Railway v. Leech, 41 O. S. 388 (1884).

Railway v. Devinney, 17 O. S. 197 (1867).

Whaalen v. Railway, 8 O. S. 249 (1858).

It is against public policy for a railroad company to stipulate with its employes as a part of their contract of employment, that liability shall

not attach to it for injuries caused to its servants by the carelessness of other employes who are placed in authority and control over them.

Railway Co. v. Spangler, 44 O. S. 471 (1866).

Whether or not one servant is placed by a common master under the control of another servant, thereby creating the relation of superior and subordinate between them, must be determined from the evidence in each particular case.

Pittsburg, etc., Ry. Co. v. Lewis, 33 O. S. 196 (1877).

Failure to obey rules. The failure of an employe to obey a reasonable rule providing for his own safety, which he agreed to obey, is not excused by the presence or consent of another employe, who is his superior, but is not authorized to make or change such rule or contract.

Railroad Co. v. Ropp, 76 O. S. 449 (1907).

Where an action is brought against a railroad company by one of its employes to recover damages for personal injuries sustained by the enforcement of an order, made by the superintendent of the company, as to the management of a particular tram, which order was unreasonable and the enforcement of the same was dangerous to such employe, the fact that the negligence of a fellow servant of the injured person, while executing such order, contributed in producing the injury, affords no defense to the action.

Railway Co. v. Henderson, 37 O. S. 549 (1882).

See *Dick v. Railroad Co.*, 38 O. S. 389 (1882).

By what law governed. A contract of employment is governed by the laws of the state where made.

Alexander v. Pennsylvania Co., 48 O. S. 623 (1891).

Pittsburg, etc., Ry. Co. v. Bishop, 13 C. C. 380 (1896); 7 C. D. 73.

Ott v. Railway, 18 C. C. 395; 10 C. D. 85 (1899); aff'd, no rep., 62 O. S. 661.

Where the action is brought in Ohio the rules of evidence of this state control.

Penna. Co. v. McCann, 54 O. S. 10 (1896).

Held to be fellow servants. An engineer of a gravel train and an employe working on the same train.

Kumler v. Railroad Co., 33 O. S. 150 (1877).

A section hand and a fireman.

Whaalen v. Mad River, etc., R. R. Co., 8 O. S. 249 (1858).

Inspectors and brakeman.

Railroad Co. v. Fitzpatrick, 42 O. S. 318 (1884).

Columbus, etc., R. R. Co. v. Webb, 12 O. S. 475 (1861).

See *Lake Shore, etc., Ry. Co. v. Gilday*, 16 C. C. 649 (1890); 9 C. D. 27.

Felton v. Bullard, 94 Fed. 781.

Railway v. Lamphère, 9 C. C. 263; 4 C. D. 26.

Brakemen.

Hawks v. Lake Shore, etc., Ry. Co., 16 C. C. 377 (1896); 8 C. D. 414.

Conductor and car repairer.

Johnson v. Cleveland, etc., Ry. Co., 11 C. C. 553 (1896); 5 C. D. 290.

Company can not be held for failure of section boss to look up and have knowledge of time of trains so as to avoid collisions with section handcar.

Railway Co. v. Leech, 41 O. S. 388 (1884).

Held not to be fellow servants. An engineer is a superior of his fireman.

Jenkins v. Little Miami R. R. Co., 2 Dis. 49 (1858).

Railway v. Sutherland, 12 C. C. 309; 4 C. D. 115; aff'd, no rep., 52 O. S. 676.

A car repairer is not the fellow servant of the foreman of the repair gang as concerns giving notice of dangers to those working under cars.

Lake Shore, etc., Ry. Co. v. Lavalley, 36 O. S. 221 (1880).

A conductor is a superior of an engineer.

Little Miami R. R. Co. v. Stevens, 20 Oh. 415 (1851).

Lake Shore, etc., Ry. Co. v. Hunter, 13 C. C. 441 (1897); 7 C. D. 206.

Cleveland, etc., Ry. Co. v. Hudson, 22 C. C. 586 (1898).

But see Crawford v. Railway, 12 L. D. 17 (1901); aff'd, 3 C. C. n. s. 144; 13 C. D. 207.

A conductor is a superior of a brakeman.

Railway Co. v. Spangler, 44 O. S. 471 (1886).

Cleveland, etc., R. Co. v. Keary, 3 O. S. 201 (1854).

Cleveland, etc., Ry. Co. v. Hudson, 22 C. C. 586 (1898).

A yardmaster in charge of switch yards, subordinate to a general yard master, who in turn is subordinate to a trainmaster, and he to a superintendent, is not a vice-principal, but a fellow servant, in his relation to other employes engaged in switching in the yard.

Penna. Co. v. Fishack, 123 Fed. 465; 14 O. F. D. 86.

A railroad company is liable for the combined negligence of a superior and fellow servant of the plaintiff where the injury would not have resulted without the negligence of the superior.

Railway v. Mulcahy, 16 C. C. 204; 9 C. D. 82 (1898).

Assumed risk of negligence of superior. If an employe, with a full knowledge of an habitual and continued negligence of the company or his superior fellow employe in some particular matter, acquiesces therein, and continues in the service of the company, without any objection or effort toward a correction of the neglect, he thereby waives his right against the company and takes the risk upon himself.

Lake Shore, etc., Ry. Co. v. Knittal, 33 O. S. 468 (1878).

Section 9017. (Presumptive evidence.) Every railroad company operating a railroad which in whole or part is within this state shall be liable for all damages sustained by any of its employes by reason of personal injury or death of such employe:

1. When such injury or death is caused by a defect in any locomotive, engine, car, hand-car, rail, track, machinery or appliance required by such company to be used by its employes in and about the business of their employment, if such defect could have been discovered by reasonable and proper care, tests or inspection. Proof of such defect shall be presumptive evidence of knowledge thereof on the part of such company. An employe of such railroad company who is injured or killed as a result of such a defect, shall not be deemed to have assumed the risk occasioned thereby, although continuing in the employment of the company after knowledge of the defect; nor shall continuance in employment after such knowledge by an employe be deemed an act of contributory negligence.

2. While such employe is engaged in operating, running, riding upon or switching passenger, freight or other trains, engines or cars, and in the performance of his duties, and

when such injury was caused by the carelessness or negligence of any other employe, officer or agent of such company, in the discharge of or for failure to discharge his duties as such. (February 28, 1908, 99 v. 25, § 1.)

See also note to § 9018.

This act is unconstitutional as to all roads which are located partly in Ohio and partly in another state; but its provisions are separable and the act is valid as to roads which are wholly within the state.

Flemm v. Railway Co., 10 N. P. n. s. 273; 21 L. D. 152 (1910).

See Warren v. Hannon, 15 C. C. n. s. 289; 34 C. D. 11 (1912); aff'd, no rep. 89 O. S. 459.

This section applies to a cause of action under §10770.

Railway Co. v. Francis, 13 C. C. n. s. 167; 22 C. D. 189 (1910); aff'd, 83 O. S. 520.

This section applies where death of an engineer was caused by a defective locomotive and defective track.

Railway Co. v. Francis, 13 C. C. n. s. 167; 22 C. D. 189 (1910); aff'd, 83 O. S. 520.

This act and the act of congress (35 Stat. at L. 65), one applying to intrastate and the other to interstate commerce, furnish a universal rule applying to all actions. These acts abrogate the defense of negligence of a fellow servant.

Warren v. Hannon, 15 C. C. n. s. 289; 34 C. D. 11 (1912); aff'd, no rep. 89 O. S. 459.

But the defense of assumed risk is open to the defendant under the federal employers' liability act. In actions brought in a state court based on the federal employers' liability act, the duty of the employer and its breach must be determined according to the federal statutes as interpreted by federal courts, but the procedure is in accordance with the rules and practice of the state courts. Jones v. Railroad, 106 O. S. 408 (1922).

An iron plate used as a runway between a car and loading platform, without cleats to prevent slipping, as was usual, held to entitle employe injured thereby to recover. Railway v. Marullo, 17 C. C. n. s. 472 (1911); aff'd, no rep. 88 O. S. 528.

Section 9018. (Slight contributory negligence no bar to recovery.) In all actions hereafter brought against a railroad company operating a railroad in whole or part within this state, for personal injury to an employe or where such injuries have resulted in his death, the fact that he was guilty of contributory negligence shall not bar a recovery when such negligence was slight and that of the employer greater, in comparison. But the damages must be diminished by the jury in proportion to the amount of negligence attributable to such employe. All questions of negligence and contributory negligence shall be for the jury. (February 28, 1908, 99 v. 25, § 2.)

Constitutionality. See note to § 9017.

This section and § 9017 should be applied in the federal courts. These sections entirely abolish the defense of assumption of risk, and of contributory negligence, as an absolute defense in bar, and substitute therefor the rule of comparative negligence. Heskett v. Penna. Co., 245 Fed.

326 (C. C. A. Ohio 1917); *Railroad Co. v. White*, 187 Fed. 556 (C. C. A. 1911).

But an action by an injured employe against an interstate railroad carrier is governed by the federal employers' liability act to the exclusion of any applicable state statutes, although the pleadings contain no reference to the federal act, but the evidence shows that the train on which the injured employe was riding was, at the time of injury, engaged in interstate commerce. *Railroad Co. v. Slaven*, 236 U. S. 454 (1915); reversing, 88 O. S. 536.

This section assumes that there must be evidence tending to establish negligence on the part of the defendant. Where there is no such evidence it is the duty of the court to direct a verdict for the defendant. *Gutt v. Penna. Co.*, 20 C. C. n. s. 227.

But if there is any evidence of negligence on the part of the employer "no matter how slight or how strong", the question must be submitted to the jury. *Lewis v. Railway*, 89 O. S. 9, 13 (1913); *Heskett v. Penna. Co.*, 245 Fed. 326 (C. C. A. Ohio 1917).

Where the jury find that each party was guilty of negligence directly contributing to the injury, it is their duty, under § 9018, to determine, under appropriate instructions from the court, whether the contributory negligence of the plaintiff was slight and that of the defendant greater in comparison, and, if they so find, to diminish the damages in proportion to the negligence attributed to the plaintiff, if they return a verdict for the plaintiff. *Sherman v. Railway*, 1 Ohio App. 279; 20 C. C. n. s. 464 (1913).

This section does not apply to a cause of action which arose prior to its enactment. *Hill v. Railway*, 20 C. C. n. s. 236 (1912); aff'd, no rep. 88 O. S. 599.

SCRAP METAL.

Section 9019. (How railroad scrap metal sold.) No officer, agent, or employe of a company operating a railroad, except the superintendent, general managing agent or a receiver of the company, may sell or dispose of worn or scrap metal, iron, brass, or other metal owned by it. All sales and barter of such scraps or other metals made by any other officer, agent, or employe shall be null and void. No such superintendent, managing agent, or receiver shall sell or dispose of such scrap or other metals in quantities less than one ton, nor without delivering to the purchaser a bill of sale thereof, a copy of which shall be retained and filed in the office of such superintendent, agent, or receiver. (R. S. Sec. 3357; April 12, 1876, 73 v. 227, § 1.)

Section 9020. (Violation of preceding section.) If a superintendent, managing agent, or receiver of a company sells or disposes of railroad scrap metal in quantities less than one ton, or without delivering a bill of sale thereof to the purchaser, the company which he represents shall not thereafter be entitled to the benefit of the next three suc-

ceeding sections. (R. S. Sec. 3358; April 12, 1876, 73 v. 227, § 2.)

Section 9021. (Evidence of title of scrap.) The person, company, or firm to whom is offered for sale, pledge, or trade, worn or used links, pins, journal-bearings, or other worn, used, detached appendages of railroad equipment, or scrap metal of iron, brass, or steel appertaining thereto, or to a railroad track, before purchasing or dealing in it shall ascertain whether the ownership thereof is lawfully derived, by bill of sale, or otherwise, from a company, or the superintendent, managing agent or receiver thereof. When the right or title to such article of metal is drawn in question, in any suit, the person, company or firm dealing therein, his or its assignee, party thereto, must make prima facie proof of title and ownership so derived. (R. S. Sec. 3359; April 12, 1876, 73 v. 227, § 3.)

Section 9022. (When mixture deemed a confusion.) If it appears prima facie, from the evidence on the trial, that any of the articles or metals in controversy were unlawfully obtained, and mixed or confused with other scrap metal, it shall be deemed a confusion of goods, unless the party claiming against the title of the company establishes, prima facie, a lawful title from or through a railroad company to the residue. (R. S. Sec. 3360; April 12, 1876, 73 v. 227, § 4.)

Section 9023. (Company may replevy scrap.) By its proper officer or agent, or the receiver thereof, a company may claim to be the general owner of, and replevy any of the metals or articles mentioned in section ninety hundred and twenty-one, and metals with which they may have been confused, found in the possession of a person, firm or company, when there is good reason to believe that such metals or articles were unlawfully taken from a railroad company or its receiver. Instead of the usual averment as to ownership, in the affidavit for a writ of replevin, it shall be sufficient for the officer or agent of such company or the receiver, to aver that he believes such metals or articles were unlawfully taken from such company or some other company. The person, firm or company claiming in such action, the right or title to such metals or articles, prima facie shall prove a right or title thereto, lawfully derived as herein-before provided. In the absence of such proof, the company or receiver claiming such metals or articles shall be held to be the general owner thereof; but any other company or receiver, upon showing that part of such metals or articles

unlawfully were taken from it or him, shall be entitled to such part, upon payment of a proper share of the cost and expenses of replevying it. (R. S. Sec. 3361; April 12, 1876, 73 v. 227, § 5.)

Section 9024. (Liability of company or receiver.) If a company, or its receiver, replevies property under the next preceding section without reasonable cause to believe that it was unlawfully taken from some company or its receiver, such company or receiver shall be liable to the party entitled thereto, in any sum not exceeding double the value of the property so replevied, in addition to such damages as such party sustains thereby. (R. S. Sec. 3361; April 12, 1876, 73 v. 227, § 5.)

CHAPTER 7.

CONSOLIDATION.

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| § 9025. When companies may consolidate. | § 9039. Companies may dispose of stocks and bonds acquired by consolidation. |
| § 9026. Consolidation of domestic and foreign companies. | § 9040. Consolidated company may issue stock in lieu of purchase money. |
| § 9027. Consolidating of railroad companies. | § 9041. Property of company acquired by purchase vested in consolidated company. |
| § 9028. Proceedings to affect consolidation. | § 9042. Effect of consolidation. |
| § 9029. Effect of agreement to consolidate. | § 9043. To establish a principal office. |
| § 9030. Effect of agreement of consolidation as evidence. | § 9044. Actions against new company. |
| § 9031. Defects in consolidation agreements. | § 9045. Taxation of road partly in this state. |
| § 9032. How defects cured in certain consolidation agreements. | § 9046. Proof dispensed with. |
| § 9033. How defects cured in reference to stock. | § 9047. Two or more companies owning a road may divide and dispose of it. |
| § 9034. Stockholder refusing to consolidate. | § 9048. Proceedings when companies can not agree on a division. |
| § 9035. Provision applies only to stockholders of a domestic corporation. | § 9049. Cost of improvements. |
| § 9036. Notice of application of appointment. | § 9050. Who may purchase. |
| § 9037. Election of directors of consolidated company. | § 9051. Partition not compulsory. |
| § 9038. Property of old companies vests in new. | § 9052. Company selling interest may purchase or condemn land along route. |
| | § 9053. To what companies these provisions apply. |

Section 9025. (When companies may consolidate.) When the lines of road of railroad companies, in this state or any portion of such lines have been or are being so constructed as to admit the passage of burthen or passenger cars over any two or more of such roads continuously, without break or interruption, such companies may consolidate themselves into a single company. (R. S. Sec. 3379; March 30, 1877, 74 v. 71, § 1.)

When roads are connected.

See note to § 8807.

The lines of two railroad companies, which are in their general features parallel and competing, can not be connected for the carriage of freight and passengers over both "continuously" within the meaning of this section, and hence can not consolidate.

State v. Vanderbilt, 37 O. S. 590 (1881).

Burke v. Cleveland, etc., Ry. Co., 22 W. L. B. 11 (1889).

A state in granting a corporate privilege to its own citizens, or what is equivalent, in permitting a foreign corporation to become one of the constituent elements of a consolidated company, may impose such conditions as it seems proper, and that the acceptance of the franchise in either case implies a submission to the conditions without which the franchise could not have been obtained.

Ashley v. Ryan, 153 U. S. 436, 443 (1893); 8 O. F. D. 215; 49 O. S. 504, 527.

Consolidated railroad companies organized in pursuance of the consolidation act are corporations formed under a general law, within the meaning of the constitution, and as such subject to the limitations and reservations of the constitution; and the general assembly has power to alter and regulate rates of fare chargeable by such companies.

Shields v. State, 26 O. S. 86 (1875); s. c., 95 U. S. 319; 4 O. F. D. 471.

Powers of constituent companies pending consolidation. Corporations, which are parties to an agreement to consolidate, continue in the full enjoyment of their powers and franchises respectively, and may accept subscriptions to their capital stock at any time before consolidation is consummated by filing the agreement of consolidation with the secretary of state.

Mansfield, etc., R. R. Co. v. Brown, 26 O. S. 223 (1875).

Subscriptions to capital stock are to be construed with reference to consolidation statutes in force, and subscribers are bound thereby as if the statutes were a part of the contracts of subscription.

Mansfield, etc., R. R. Co. v. Brown, 26 O. S. 223 (1875).

Right of stockholders of constituent companies to enforce operation of roads.

See Port Clinton, etc., R. R. Co. v. Cleveland, etc., R. R. Co., 13 O. S. 544, 560 (1862).

Section 9026. (Consolidation of domestic and foreign companies.) A company organized in this state for the purpose of constructing, owning and operating a line of railway, or whose line of road is made or is in process of construction to the boundary line of this state, or to a point either in or out of the state, may consolidate its capital stock with that of a company in an adjoining state, organized for a like purpose, whose line of road has been projected, constructed or is in process of construction to the same point, when the roads so united and constructed will form a continuous line for the passage of cars. Roads running or to be constructed to the bank of a river which is not bridged, or to the tracks and property of a union depot company, the use of which is enjoyed by either of the companies so proposed to be consolidated, shall be held to be continuous

under this section. (R. S. Sec. 3380; April 18, 1890, 87 v. 218; April 22, 1885, 82 v. 150; March 30, 1877, 74 v. 71. § 1.)

A corporation created by the consolidation of a domestic with a foreign corporation, under co-operative legislation of the two states, becomes a corporation in each state.

Ashley v. Ryan, 49 O. S. 504, 529 (1892); s. c., 153 U. S. 436 (1893).

By a consolidation, whether of domestic corporations, or of a domestic with a foreign corporation, a new corporation is formed by the extinguishment of the old corporations.

Ashley v. Ryan, 49 O. S. 504, 529 (1892).

The shares of stock of a railroad company formed by the consolidation of an Ohio company with a foreign company are exempt from taxation by § 192. Opins. Atty. Gen. 1917, p. 542.

Notwithstanding the consolidation of two railroad corporations of different states, each retains its identity as a corporation of the state in which it was originally created; and in a suit against the consolidated corporation brought in one of such states, it can not obtain a removal to the federal courts on the ground that it is a citizen of the other state, although the consolidation was had under the laws of the latter.

Paul v. Baltimore, etc., R. R. Co., 44 Fed. 513 (1890).

Ohio, etc., R. R. Co. v. Wheeler, 1 Black (U. S.) 286 (1861).

This act may as properly be construed to mean the state adjoining the state in which the first company has its line of road, as the state adjoining the state in which the first company is incorporated, so as to enable, for example, an Ohio company to consolidate with Indiana and Illinois companies.

Adelbert College v. Toledo, etc., Ry. Co., 3 N. P. 15; 5 L. D. 14 (1894); s. c., 74 O. S. 483; reversed, 208 U. S. 38, 609.

See Union Trust Co. v. New York, etc., R. R. Co., 17 W. L. B. 176, 177 (1887).

Continental Trust Co. v. Toledo, etc., R. R. Co., 82 Fed. 642 (1897); 9 O. F. D. 321.

Toledo, etc., R. R. Co. v. Continental Trust Co., 95 Fed. 497 (1899).

"Continuous line." Where two railway companies owning lines of railroad, seeking consolidation, are connected by the tracks of a "union" company organized by several railway companies to secure union depot and terminal facilities, and where by law the interest of each company in the union company, in its capital stock, and in its property and effects of every kind, are deemed an appurtenance to the railroad of such proprietary company, and are not alienable except with and as part of the railroad of such proprietary company it will be held that the companies do unite and form a continuous line within the meaning of this section.

Burke v. Cleveland, etc., Ry. Co., 22 W. L. B. 11 (1889).

See note to § 8807.

De facto consolidation. Where two roads not coming under this section attempt and apparently complete consolidation by colorable proceedings in a formal way to the approval of the proper state officers, the certificate of incorporation, duly certified, being admitted to record in the office of the secretary of state, and its rights as a corporation having never been challenged by the state, it will be entitled to be considered at least a corporation de facto with power to mortgage its property, after it has acquired and disposed of valuable property and incurred numerous obligations.

See Toledo, etc., R. R. Co. v. Continental Trust Co., 99 Fed. 497 (1899).

Union Trust Co. v. New York, etc., R. R. Co., 17 W. L. B. 176 (1887).

A railroad company having possession of and operating property obtained through consolidation and foreclosures in which the consolidation was recognized as valid, is estopped to question the validity of the consolidation.

Adelbert College v. Toledo, etc., Ry. Co., 3 N. P. 15 (1894); s. c., 5 Dec. 14; s. c., 74 O. S. 483; reversed, 208 U. S. 38, 609.

Farmers' Loan Co. v. Toledo, etc., Ry. Co., 67 Fed. 50 (1895); s. c., 8 O. F. D. 435; 9 O. F. D. 230.

Former acts. Under the former acts the road was required to be in process of construction.

See *Mansfield, etc., R. R. Co. v. Stout*, 26 O. S. 241 (1875).

Union Trust Co. v. New York, etc., R. R. Co., 17 W. L. B. 176 (1887).

Section 9027. (Consolidating of railroad companies.)

A railroad company formed by the consolidation of a company or companies of this state, with a company or companies of another state, or states, may make a further consolidation with a company or companies of another state or states owning continuous, connected, but not parallel or competing lines. The constituent companies may fix by the agreement for consolidation the terms and conditions upon which it is to be made, which terms and conditions may include the payment or retirement of the preferred stock of either or any of the constituent companies, if they have such. If the new company issue preferred stock, the par value of the shares thereof may be fixed by the agreement of consolidation, or by the resolution for the issue thereof without regard to the par value of shares of the common stock of such company. (R. S. Sec. 3380a; May 2, 1902, 95 v. 354.)

Cited. *Mannington v. Railway Co.*, 8 O. L. R. 451, 467; 183 Fed. 133 (1910).

Section 9028. (Proceedings to affect consolidation.)

Consolidation shall be made under the conditions and restrictions following:

1. The directors of the several companies may enter into a joint agreement, under the corporate seal of each company, for the consolidation of the companies, prescribing the terms and conditions thereof, the mode of carrying it into effect, the name of the new company, the number of directors and other officers thereof, their places of residence, the amount of the capital stock of the new company agreed upon, the number of shares thereof, the amount of each share, and the manner of converting the capital stock of each constituent company into that of the new company, with such other details as they deem necessary to perfect the new organization and consolidation of the companies.

2. The agreement shall be submitted to the stockholders of each of the companies, at a meeting thereof called separately for the purpose of taking it into consideration. Due notice of the time and place of holding such meeting, and the object thereof, shall be given by written or printed notices addressed to each of the persons in whose names the capital stock of the companies stand on the books thereof, and by a like notice published in some newspaper in the city or village where such company has its principal office or place of business. But if all the stockholders are present at such meeting, in person or by proxy, such notice may be waived in writing. At the meeting of stockholders the agreement of the directors shall be considered, and a vote by ballot taken for its adoption or rejection. Each share of stock on which all the installments called for by the board of directors are paid, shall entitle the holder thereof to one vote. Ballots shall be cast in person or by proxy. If two-thirds of all the votes cast are for the adoption of the agreement, that fact shall be certified thereon by the secretary of each of the companies, and the agreement so adopted, or a certified copy thereof shall be filed in the office of the secretary of state. All consolidation agreements heretofore entered into and ratified by such companies substantially in manner as in this section prescribed, shall be as valid as if entered into and ratified by virtue of this section. (R. S. Sec. 3381; April 22, 1885, 82 v. 150; R. S. 1880; March 30, 1877, 74 v. 71, § 2.)

Consolidation of street railway companies. § 9127 et seq.

Mining, etc., companies, § 10139.

This section applies to the consolidation of a domestic corporation and a foreign corporation.

Ashley v. Ryan, 49 O. S. 504, 528 (1892).

Agreement for consolidation. The agreement of the directors of the consolidating companies is fatally defective if it does not state the number and residence of the new directors. This provision of the statute is mandatory.

State v. Vanderbilt, 37 O. S. 590, 654 (1882).

See Trester v. Mo. Pac. R. R. Co., 33 Neb. 171 (1891).

The agreement may require constituent companies to enter the consolidation free from debt.

Railway Co. v. Bank, 68 O. S. 582 (1903).

And may provide that of the stock apportioned to one of the constituent companies enough shall be sold to pay its floating debt, and the remainder distributed among the preferred and common stockholders in proportion to the relative value of each stock.

Railway Co. v. Bank, 68 O. S. 582 (1903).

A separate agreement between stockholders of the constituent companies may be incorporated by reference. A provision that all property matters, not specifically adjusted in the agreement of consolidation, should be adjusted pursuant to a separate agreement theretofore made by the

holders of a majority of the stock of each constituent company, is within the powers of the directors, and such separate agreement constitutes a part of the agreement of consolidation.

Railway Co. v. Bank, 68 O. S. 582 (1903).

The directors are not only expressly empowered to agree upon the manner of converting the capital stock of each of the companies into that of the new company, but they are invested with the widest discretion as to the details of the consolidation, which may not be specifically included in the words of the statute.

Railway Co. v. Bank, 68 O. S. 582, 597 (1903).

The companies may agree upon the number and amount of shares of the proposed consolidated company, may classify such new stock into "common" and "preferred," and may issue a greater or less number of shares than that of the aggregate of the constituent companies to secure a just and equitable division of property between the shareholders of the companies.

Burke v. Cleveland, etc., Ry. Co., 22 W. L. B. 11 (1889).

Where bonds were issued by a company, which afterward was consolidated with another under a stipulation that said bonds should be protected by the new company, the holders of such bonds have a lien on the property of the company.

See Compton v. Railway Co., 45 O. S. 592 (1888).

Where a contract of consolidation provided: "The consolidated company shall not issue any evidences of funded debt, or execute any lease of railway property which may entail fixed charges, except by the consent of a majority in interest of the holders of the said preferred stock, to be expressed in writing under their signatures respectively," etc., it was held that it did not conflict with §§ 8660 or 8709.

Burke v. Cleveland, etc., Ry. Co., 22 W. L. B. 11, 15 (1889).

Where one clause of the contract of consolidation is illegal, and can be separated from the legal parts, the consolidation will not be enjoined, and the parties will be left to litigate the question as to legality of the clause when occasion requires it.

Burke v. Cleveland, etc., Ry. Co., 22 W. L. B. 11, 16 (1889).

The agreement should accurately describe the capital of the constituent companies. Bonds should not be designated as capital stock although § 8801 permits companies in process of consolidation to issue bonds instead of preferred stock. *Rep. Atty. Gen.* 1913, p. 80.

Stockholders' meeting. This section requires notice to be given to the persons "in whose name the capital stock of the companies stands on the books thereof." It does not provide for notice to, or require participation by, a person who has a concealed equity in stock. A pledgee who has not had the stock transferred to his name on the corporate books is not entitled to notice.

Railway Co. v. Bank, 68 O. S. 582, 599 (1903).

Liability of consolidated company to unregistered pledgee. Where the joint agreement provided that certain stock of the consolidated company should be distributed to one of the constituent companies, part of which should be sold to pay the floating indebtedness of that company, and the balance distributed among the stockholders of such company, which agreement was assented to by the registered owners of certain pledged stock of such constituent company, but without the knowledge of the pledgee of their stock, who held certificates assigned in blank, without a transfer; and the agreement was performed by the consolidated company by delivering the stock to "agents and proxies" designated by the constituent company and its stockholders, to carry out the joint agreement; the consolidated company is not liable for a conversion of the stock

after delivering to the "agents and proxies." A provision in the certificates of the pledged shares that they are transferable on the books of that company only on surrender of the certificates is not violated by such a distribution of stock by the consolidated company.

Railway Co. v. Bank, 68 O. S. 582.

For cases involving similar facts.

See Robison v. Railway Co., 13 L. D. 1; s. c., 5 N. P. 293; 7 L. D. 312.

Fuller v. Railway Co., 8 N. P. 605; 11 L. D. 574 (C. P. 1901).

Powers of constituent companies. Under this section the parties to a consolidation agreement continue in the full exercise of their franchises and powers, and may accept subscriptions to their capital stock at any time before consolidation is consummated by filing the agreement of consolidation with the secretary of state.

Mansfield, etc., R. R. Co. v. Brown, 26 O. S. 223 (1875).

Stock issued by a constituent company after consummation of the consolidation is spurious.

Worthington v. C. C. Ry., 9 C. C. n. s. 433; 19 C. D. 321 (1904); aff'd, 75 O. S. 626.

Suit to enjoin consolidation. To a suit to enjoin a consolidation of two railroad companies, and incidentally to enjoin one corporation from voting, on the question of consolidation, stock which it owns in the other, and to enjoin the latter from permitting such stock to be voted, the former corporation is an indispensable party. But on the issue of consolidation, the former is not an indispensable party.

A suit to enjoin a consolidation because of alleged violation of the federal anti-trust laws cannot be entertained by a state court.

Where a stockholder in a corporation seeking consolidation having only 1/1000 of 1 percent of its stock, all of which was acquired after the consolidation agreement had been made, sought to enjoin the consolidation, it was held that "the court of equity will be strict in requiring the plaintiff to point out with precision and certainty in what respects the law is about to be violated and to show, clearly and positively, substantial and irreparable injury to its private rights." General Investment Co. v. Railway, — U. S. —; 67 L. Ed. 108 (1922); s. c., 250 Fed. 160; 269 Fed. 235.

Section 9029. (Effect of agreement to consolidate.)

When the agreement is made and perfected, as provided in the next preceding section, and it or a copy thereof filed with the secretary of state, the several companies parties thereto shall be deemed and taken to be one company, possessing within this state all the rights, privileges, and franchises, and subject to all the restrictions, disabilities, and duties, of a railroad company. (R. S. Sec. 3382; April 10, 1856, 53 v. 143, § 3.)

The consolidated company does not succeed to the rights, etc., of the constituent companies until the election of its first board of directors.
§ 9038.

Mansfield, etc., Co. v. Brown, 26 O. S. 223 (1875).

By the consolidation of companies, whether of Ohio companies, or Ohio and foreign companies, a new corporation is formed which succeeds to all the property of the original companies and assumes their liabilities.

Ashley v. Ryan, 49 O. S. 504, 529 (1892).

Wabash, etc., Ry. Co. v. Ham, 114 U. S. 587, 595 (1884).

Shields v. Ohio, 95 U. S. 319 (1880); s. c., 4 O. F. D. 471.

Lee v. Sturges, 46 O. S. 153, 169 (1889).

A railroad corporation formed by the consolidation of an Ohio Company with a company or companies of another state or states, under cooperative legislation in the different states, becomes one company with a status in each state, possessing in Ohio all the rights, privileges and franchises, and subject to the restrictions and disabilities of an Ohio company. Pollitz v. Commission, 96 O. S. 49 (1917).

"The nominal existence of the several constituent companies is terminated, but their substantial existence is perpetuated by being merged in the consolidated company." Trust Co. v. Traction Co., 106 O. S. 577 (1922); s. c., 20 N. P. n. s. 219.

So far as concerns unpaid dissenting stockholders, the old companies may be deemed in existence after the filing of the agreement.

Railway Co. v. Garrett, 50 O. S. 405, 417 (1893).

Boehmke v. Traction Co., 88 O. S. 156, 161 (1913).

It is only as to creditors that constituent companies remain alive. Stock issued by a constituent company, after consolidation, is spurious.

Worthington v. Railway Co., 9 C. C. n. s. 433; 19 C. D. 321 (1904); aff'd, 75 O. S. 626.

A decree against a company formed by the consolidation of companies of several states may be made against the whole road, and not merely against so much as is in the state.

Scofield v. Railway Co., 43 O. S. 571, 621 (1885).

Section 9030. (Effect of agreement of consolidation as evidence.) A copy of the agreement and act of consolidation, duly certified by the secretary of state, shall be received in the courts of this state as prima facie evidence of the existence of the several companies parties to it, prior to and at the time of the execution of the agreement, of the consolidation of the companies, as specified in the agreement, that such consolidation was authorized by the laws of the several states within which the several companies were chartered, and into which the consolidated road extends, and of all the facts, statements, and covenants set forth and recited in the agreement and act of consolidation, and in the certificate endorsed thereon. (R. S. Sec. 3391; February 19, 1858, 55 v. 8, § 1.)

Section 9031. (Defects in consolidation agreements.) If the agreement for the consolidation of railroad companies heretofore filed in the office of the secretary of state is defective by reason of the omission of a statement either of the number of the directors or other officers, or their places of residence, or the number of shares of capital stock as required in such agreement by the laws of this state, such defect may be cured by filing in the office of the secretary of state a certificate signed by the president and the secretary of the consolidated company named in such agreement

under its corporate seal, setting forth the omitted statements, which shall thereupon be considered a part of the agreement of consolidation, the same as if originally incorporated therein, and such agreement and all rights, remedies, powers, duties, and acts thereunder be construed accordingly. Such agreement and certificate and copies thereof, duly certified by the secretary of state, shall be held and received in all courts and other places as constituting the agreement of the consolidation of such companies to all intents and purposes, as if no such omission or defect had ever existed in such agreement. (R. S. Sec. 3282-1; April 7, 1882, 79 v. 126, § 1.)

Section 9032. (Curing defects in railroad agreements. Certificate of consolidated company.) If the agreement or certified copy thereof for the consolidation of railroad companies, heretofore filed in the office of the secretary of state, is defective by reason of the omission of a statement of the place of residence of the directors, or the number and places of residence of the other officers, as required in such agreement by the laws of this state, but when in pursuance of such agreement an election of directors has been had, and other officers have been elected or appointed, all such defects in such agreement, and any defect in the certificates thereon, may be cured by filing in the office of the secretary of state a copy of the proceedings of the election duly certified by the secretary of the consolidated company, under its corporate seal, to be such copy, and the certificate signed by the president and secretary of the consolidated company under its corporate seal, setting out the respective places of residence of the directors first elected, and of the officers first elected or appointed at the time they were so elected or appointed, which shall thereupon be considered a part of the agreement of consolidation the same as if originally incorporated therein. Upon filing such certified copy of the proceedings and certificate, all such defects existing prior to the filing of such certified copy of the proceedings and certificate, shall be cured, and the several acts of such company shall be held valid, and the agreement and all rights, remedies, powers, duties, and acts thereunder be construed accordingly. The agreement, proceedings and certificate, and copies thereof, duly certified by the secretary of state, shall be held and received in all courts and other places as constituting the agreement of consolidation of such companies, to all intents and purposes as if no omission ever existed in such agreement or the cer-

tificate thereto. (May 20, 1910, 101 v. 326; R. S. Sec. 3382-2; January 20, 1887, 84 v. 3.)

Section 9033. (How defects cured in reference to stock.)

If the agreement or a certified copy thereof for the consolidation of railroad companies heretofore filed in the office of the secretary of state, states the number of shares of the capital stock of the new company, and the amount of each share, but is defective by reason of the omission of a statement of the amount of the capital stock of the new company agreed upon as required by the laws of this state in such agreement, such defect may be cured by filing in the office of the secretary of state a certificate signed by the secretary of such consolidated company, under its corporate seal, setting out the amount of the capital stock of the new company agreed upon, which shall be ascertained by multiplying the number of shares of capital stock named in the agreement by the amount of each share named in the agreement in dollars, as shown in the original agreement or the certified copy thereof filed in the office of the secretary of state, and which certificate shall thereupon be considered a part of the agreement of consolidation the same as if originally incorporated therein. Upon filing such certificate such defect shall be cured and such consolidation and the several acts of the company shall be held valid, and the agreement and all rights, remedies, powers, duties, and acts thereunder be construed accordingly. Certified copies of such certificate and the agreement of consolidation, duly certified by the secretary of state, shall be held and received in all courts and other places as constituting the agreement of consolidation of such companies, to all intents and purposes, as if no omission or defect had ever existed in such agreement. (R. S. Sec. 3382-3; February 18, 1887, 84 v. 29, § 1a.)

Section 9034. (Stockholder refusing to consolidate shall be paid market value; conditions. Disagreement as to value of stock or amount of damages; right of appeal to public utilities commission. Duties and powers of public utilities commission upon submission of question for arbitration. Dissatisfied stockholder may file suit in common pleas court. Defining "stockholder".) A stockholder who refuses to convert his stock into that of the consolidated company, shall be paid, in accordance with the provisions of this section, either the full market value thereof at the date of the making of the agreement of consolidation by the directors, without regard to any depreciation or appreciation in consequence of such consolidation, or damages, if any, to him because of

the proposed consolidation, if he voted for the rejection of the agreement of consolidation and if, previous to such consolidation he so requires: Provided, however, that if the market price at the date of the making of the agreement of consolidation by the directors is abnormally enhanced or depressed by unfair combinations or by an illegal monopoly or by any other wrongful act, other evidence than the market sales at that time may be resorted to for the purpose of showing the fair value of the stock. If a stockholder so refusing to consolidate and the board of directors of the company desiring to consolidate cannot agree as to the value of such stock, or as to the amount of such damages, the parties, or either of them, may at any time within 30 days after the adoption of the agreement of consolidation by the stockholders as in section 9028 provided, or at any time before completion of consolidation if said completion be effected after said period of 30 days, apply by petition to the public utilities commission for a submission of the questions to arbitration by said commission. Upon reasonable notice to the parties, the public utilities commission shall thereupon proceed to arbitrate the questions and shall appraise said stock and ascertain the full market value thereof at the date of the making of the agreement of consolidation by the directors, and shall also estimate and determine the damage, if any, to such stockholder by the proposed consolidation if he be required to convert his stock. After notice, hearing and determination, the commission shall make an order directing the said company to pay such stockholder, on or before a day named, either the full market value of such stock as so appraised and ascertained, or the amount of damages, if any, so estimated and determined. Said company may, at its election either pay to the said stockholder the amount of damages so found and awarded, if any, or the value of the stock so ascertained and determined, or may deposit the amount with the common pleas court of the county in which it has its principal place of business. No right to payment for the value of his stock or for damages because of the proposed consolidation shall be claimed by or accrue to any stockholder who has not voted for the rejection of the agreement of consolidation at the meeting of stockholders held for that purpose pursuant to section 9028, and who does not in addition thereto, previous to such consolidation notify, in writing, the company of his refusal to convert his stock and of his demand for payment of the full market value thereof, or for damages, and who

does not, in the event of failure to agree with the directors of the company in respect to the value of the stock or the amount of damages to be paid, apply, to the public utilities as herein provided, and no action affecting a railroad consolidation shall be brought by or on behalf of any private person except in accordance with the provisions of this section. After application or petition to the public utilities commission, as herein provided, the dissenting stockholder may not recant his action in this regard nor insist upon conversion of his stock or the payment of damages except pursuant to the order of the commission or to the judgment of the court as in this section provided. But if such conditions as to voting, notice and application to the public utilities commission are observed, the stockholder's rights shall not affect the completion of the consolidation, and shall not be affected by such completion, except that the right to payment for the value of the stock, or of damages, shall not accrue until the completion of the consolidation by filing the agreement or a certified copy thereof in the office of the secretary of state, as provided in section 9028, and such right, subject to the provisions of this section, shall continue after the completion of the consolidation as aforesaid and shall not be defeated by such event, and shall be enforceable either against the consolidated company or against the constituent company against which claim is made, and the existence of such constituent company shall be continued after consolidation so far as may be necessary to give effect to this law. Upon the payment or deposit of the value of the stock so appraised and ascertained, as aforesaid, the stockholder shall transfer the said stock to the company making the payment, to be disposed of by the directors of said company or of the consolidated company, or to be retained for the benefit of the remaining stockholders. Upon the payment or deposit of the amount of the damages so estimated and determined, the stockholders shall be required to convert his stock as provided in the agreement for consolidation approved by the stockholders. If said company does not comply with said order within the time limit in such order, or if any stockholder is dissatisfied with the order, said stockholder or any person for whose benefit such order was made, may at any time within thirty days after expiration of the time limit in such order, file in the common pleas court of the county in which the principal office of said company is located in this state, or in the common pleas court of Franklin county, a petition setting forth briefly the causes for

which he claims damages, and the order of the commission in the premises. Such suit in the common pleas court shall proceed in all respects like other civil suits for damages, except that on the trial of such suit the findings and order of the commission shall be prima facie evidence of the facts therein stated. Due credit shall be allowed for all amounts paid or deposited by the company and the company shall have the right to recover back all amounts paid or deposited in excess of final judgment. The jurisdiction vested in the probate court in respect to the matters covered by this section is hereby abolished and repealed and all such jurisdiction is conferred upon, transferred to and vested in the common pleas courts as herein provided; all cases pending in the probate court shall be deemed pending in and be transferred forthwith to said common pleas court of Franklin county; and all matters covered by this section which have been submitted to arbitration and are now pending in the hands of arbitrators appointed by or under the authority of the probate court, shall be deemed pending before and shall forthwith be transferred to the public utilities commission.

The word "stockholder" as above used shall be limited to mean and construed as meaning a bona fide holder of record at the time of the agreement for the consolidation by the directors. (110 v. 228; R. S. Sec. 3388; March 15, 1892, 89 v. 88; April 4, 1890, 87 v. 159; April 10, 1856, 53 v. 143, § 10.)

See § 8713.

The remedy provided by this section does not bar a suit by a stockholder to enjoin an illegal combination. *General Co. v. Railway*, 250 Fed. 160 (C. C. A. Ohio 1918); s. c., 269 Fed. 235; — U. S. —, 67 L. Ed. 108.

"Market value." Market value under this section is properly ascertained by evidence of sales of stock. Value of the corporate property and earning power of the corporate business are not elements for consideration. *Society v. Railway Co.*, 28 O. C. A. 454 (1918).

The right to consolidate on the vote of two-thirds of the stock is a part of the contract of each stockholder and the company and other stockholders, and if a stockholder does not assent he must sell his shares as provided by statute.

Burke v. Cleveland, etc., Ry. Co., 22 W. L. B. 11, 16 (1889).

Under the act of 87 v. 159 it was held that a dissenting stockholder could compel the submission to arbitration of the question of the value of his stock, and that an agreement to arbitrate was not required.

Railway Co. v. Garrett, 50 O. S. 405 (1893).

A failure to make a demand before the consolidation agreement is filed with the secretary of state (§§ 9028, 9029) or a failure to make an attempt to agree with the company does not defeat the right of a dissenting stockholder.

Railway Co. v. Garrett, 50 O. S. 405 (1893).

It is the duty of a company proposing to consolidate to ascertain who, if any, of its stockholders refuse to convert their stock and to cause the value of the stock of dissenting stockholders to be ascertained and paid.

Railway Co. v. Garrett, 50 O. S. 405 (1893).

Section 9035. (Provision applies only to stockholders of a domestic corporation.) In cases of the consolidation of railway corporations of this with those of another state, as by law provided for, the provisions of the next preceding section shall apply only to stockholders in Ohio companies, and not to those of a foreign corporation; it being the intent to have their rights determined by the law of the states creating them. (R. S. Sec. 3388a; March 15, 1892, 89 v. 88.)

Section 9036. (Notice of application of appointment.) In all such cases of arbitration the party desiring it must give the opposite party at least ten days' notice of his intention to apply to the judge for the appointment of arbitrators which notice shall be served in the manner provided for the service of a summons and shall specify the time and place for the hearing of the application. In cases of non-residents the notice shall be by publication, for four consecutive weeks, in some newspaper printed in the county. (R. S. Sec. 3390; April 10, 1856, 53 v. 143, § 11.)

Section 9037. (Election of directors of consolidated company.) The stockholders at the meeting called to consider the agreement, after its adoption, shall appoint a time and place for the election of the directors and other officers for the new company, notice of which must be given by the secretary of each of the companies in some newspaper printed, or of general circulation at the place of the principal office of each company, at least three weeks previous thereto. But if at each meeting all the stockholders of the constituent companies are present, either in person or by proxy, in writing or by resolution they may waive such notice, and consent to hold such meeting and election at any time. It shall be conducted in the manner prescribed by the stockholders at such meeting. (R. S. Sec. 3383; April 22, 1885, 82 v. 150; 53 v. 143, § 4.)

The election of directors under this section is unauthorized until the agreement has been filed with the secretary of state. The consolidating companies continue for the purpose of holding and controlling all rights and franchises until the election is had. The divesting of the old and the investing of the new corporations are simultaneous.

Mansfield, etc., R. R. Co. v. Brown, 26 O. S. 223 (1875).

At the meeting provided for by this section the stockholders have no corporate duty to perform; therefore, the fact that some of the stock-

holders have been enjoined from participating in such a meeting does not constitute a ground for the appointment of a receiver of either of the consolidating companies, for such persons could act only in the capacity of stockholders.

Railway Co. v. Jewett, 37 O. S. 649 (1882).

Section 9038. (Property of old companies vests in new.)

Upon the election of the first board of directors for the company created by the agreement of consolidation, all the rights, privileges, franchises of each company to the agreement, and all property, debts due on account of subscriptions for stock, or other things in action, are to be deemed transferred to and vested in such new company, without further act or deed. All property, rights of way, and other interests, shall be as effectually the property of the new company as they were of the companies parties to the agreement. Title to real estate either by deed, gift, grant, or by appropriation under the laws of this state, shall not revert or be impaired by reason of the consolidation. But rights of creditors, and liens upon the property of either company, shall be preserved unimpaired, and the respective companies deemed to be in existence to preserve them. Debts, liabilities, and duties of either company, thenceforth shall attach to the new company, and be enforced against it to the same extent as if such debts, liabilities, and duties had been contracted by it. (R. S. Sec. 3384; April 10, 1856, 53 v. 143, § 5.)

The property of the constituent companies does not vest in the consolidated company until the election of the first directors.

Mansfield, etc., R. Co. v. Brown, 26 O. S. 223 (1875).

Liability for debts of constituent companies. It is competent for the directors to agree that the constituent companies shall enter the consolidation free from debt, although if they do not do so the liabilities of such companies will attach to the new company under this section.

Railway Co. v. Bank, 68 O. S. 582, 597 (1903).

The new consolidated company is liable for the torts of the original company.

Boehmke v. Traction Co., 88 O. S. 156 (1913).

A dissenting stockholder may prosecute his claim against the new company which takes the property of the old company charged with the payment of its debts.

Railway Co. v. Garrett, 50 O. S. 405, 417 (1893).

An agreement by a constituent company to maintain a water course is binding on the consolidated company.

Bell v. Railway, 3 C. C. 31; 2 C. D. 19.

Under the former stockholders' double liability law, a creditor of a constituent company was entitled to subject the statutory liability of stockholders of the new corporation.

Marriott v. Railway, 16 L. D. 135 (1905); s. c., 8 C. C. n. s. 495; 10 C. C. n. s. 573; 20 C. D. 419.

For rights of creditors of a corporation on sale of its entire assets, see note to § 8710.

How liability enforced. General creditors have no lien upon the property of constituent companies before consolidation, nor afterward unless such lien is established by judgment and execution.

Greene v. Railroad Co., 62 O. S. 67, 79 (1900).

The consolidated company holds its property acquired by such consolidation in its own right, and not in trust for the constituent companies, and such property can not be reached by creditor's bill.

Greene v. Woodland, etc., R. R. Co., 62 O. S. 67 (1900).

But it has been held that an agent of the consolidated company may be guilty of contempt of court for forcibly preventing a levy on property transferred by a constituent company, under an execution issued on a judgment against such constituent company.

State v. Brimson, 46 W. L. B. 275 (Sup. Ct. without rep., 1901).

Where a suit was commenced against a constituent company, and an answer filed in its name by the attorneys for the consolidated company, the plaintiff was permitted to amend his petition and substitute the consolidated company as defendant. *Boehmke v. Traction Co.*, 88 O. S. 156 (1913).

Equitable lien for debts of old company. On the consolidation of companies under this act the new company takes the property in its own right, subject only to the payment of the debts of the constituent companies. This liability is created by statute, and an equitable lien results as a consequence.

Compton v. Railway Co., 45 O. S. 592 (1888).

See *Continental Trust Co. v. Toledo, etc.*, R. R. Co., 86 Fed. 929 (1898).

Contra, Wabash, etc., Co. v. Ham, 114 U. S. 595 (1884).

Wabash, etc., Co. v. Adelbert College, 208 U. S. 38 (1908).

This equitable lien is a result of the proceedings under which the new company acquired its title to the property, and of it the creditors of the new company have, in law, the same notice they have of prior mortgages on the same property.

Compton v. Railway Co., 45 O. S. 592 (1888).

Where the consolidation agreement undertakes to protect certain unsecured debts of one of the constituent companies an equitable lien is established on the property of the old company to the extent of the debt.

Compton v. Railway Co., 45 O. S. 592 (1888).

Contra, Wabash, etc., Co. v. Ham, 114 U. S. 595 (1884).

See *Wabash, etc., Co. v. Adelbert College*, 208 U. S. 38, 44 (1908).

Compton v. Jesup, 68 Fed. 263 (1895).

Tysen v. Wabash Ry. Co., 15 Fed. 763 (1883).

Bonds and mortgages of constituent companies. Consolidation does not discharge the lien of a mortgage on the property of a constituent company.

Railway Co. v. Lynde, 55 O. S. 23, 56 (1896); *aff'd*, 172 U. S. 493.

Bonds of a constituent company which are negotiated after such constituent company went out of existence, but before maturity of the bonds, are protected by this section.

Railway Co. v. Lynde, 55 O. S. 23, 56, 57 (1896); *aff'd*, 172 U. S. 493.

A mortgage by a constituent company covering after-acquired property, in the absence of countervailing reasons, will cover property acquired by the consolidated company, although the mortgage does not expressly cover property subsequently acquired by "successors" of the mortgagor. Property substituted by a lessee for mortgaged property removed may also come under the mortgage.

But the mortgage does not attach to property conveyed to the consolidated company by other constituent companies, on the con-

solidation, unless so agreed and expressed in the terms of consolidation. *Trust Co. v. Traction Co.*, 106 O. S. 577 (1922); s. c., 20 N. P. n. s. 219.

Where mortgage creditors of a constituent company seek to set aside a transfer of its assets to the consolidated company, or to assert a first lien on such assets, on the ground that they were induced by fraud to surrender their lien, the trustee of a mortgage executed by the consolidated company, on all its assets, is a necessary party.

Union, etc., Co. v. Hess, 6 O. L. R. 372; 159 Fed. 889; 16 O. F. D. 73 (C. C. A. 1908).

An action to enforce a lien upon the property of a consolidated railroad company, based upon an amount alleged to be due on equipment bonds issued by a constituent company, is an action not upon a liability created by statute, nor upon a written agreement, but is solely for equitable relief and the period of limitation of such actions is ten years from the date when the cause of action accrues, and the cause of action accrues as to each installment when the same matures; the right to enforce the lien as to subsequently accruing installments of interest, or as to the principal of the bonds, can not be said to have accrued prior to the time when such installments and principal respectively matured.

Adelbert College v. Toledo, etc., Ry. Co., 3 N. P. 15 (1894); 5 Dec. 14; s. c., 74 O. S. 483; 208 U. S. 44, 642.

Miscellaneous. Subscriptions to the stock of constituent companies made after the enactment of this section pass to the consolidated company; and suits may be brought thereon by the consolidated company.

Mansfield, etc., R. R. Co. v. Brown, 26 O. S. 223 (1875).

Mansfield, etc., R. R. Co. v. Stout, 26 O. S. 241 (1875).

It is only as to creditors that constituent companies remain alive after a consolidation is consummated. Stock issued by a constituent company after the consolidation is spurious.

Worthington v. Railway Co., 9 C. C. n. s. 433; 19 C. D. 321 (1904); aff'd, 75 O. S. 626.

Where the transfer agent of a consolidated company transfers stock in a constituent company to secure his personal debt, and promises to exchange such stock for stock in the consolidated company, such promise is not admissible against the consolidated company in an action to compel the exchange.

Worthington v. Railway, 9 C. C. n. s. 433; 19 C. D. 321 (1904); aff'd, no rep., 75 O. S. 626.

Rescission of transfer to consolidated company. Where a consolidated company executed a mortgage to a trustee, to secure a bond issue, such trustee is a necessary party to an action brought by mortgage creditors of a constituent company who allege that they were induced by fraud to surrender their lien, and seek to set aside the transfer of assets to the consolidated company, or to assert a first lien on such assets.

Union, etc., Co. v. Hess, 6 O. L. R. 372 (U. S. C. C. A. 1908).

Appointment of receiver on rescission of sale of all the capital stock of a corporation.

See *National Salt Co. v. United Salt Co.*, 8 N. P. 325; 11 L. D. 348 (C. P. 1901); s. c., 12 L. D. 386.

Section 9039. (Companies may dispose of stocks and bonds acquired by consolidation.) A consolidated railroad company formed by the consolidation of a railroad company or companies created by or existing under the laws of this state, and any other state or states, with a railroad com-

pany or companies of this state or of another state, may take, hold, pledge or otherwise dispose of under such terms and agreements as the board of directors of such consolidated railroad company prescribes, the stock and bonds of any other company acquired upon consolidation or received by virtue of any purchase or lease or operating contract heretofore or hereafter made or executed, and may maintain and operate a railroad purchased under authority of law, and lease or contract to operate a part or all of a railroad constructed or in the course of construction by another company of this state or of another state, if the line of road covered by such lease or operating contract is connected with a line of road of such consolidated railroad company, on such terms as the companies agree upon. (R. S. Sec. 3384a; April 11, 1890, 87 v. 183.)

Section 9040. (Consolidated company may issue stock in lieu of purchase money.) When a consolidated railroad company described in the next preceding section is in possession of or operating in connection with or extension of its own railroad line or lines, any other railroads or railroad in this state, or any other state or states under purchase, conveyance, lease, contract, or agreement, such consolidated railroad company may take a surrender or transfer of the whole or a part of the capital stock of the company, conveying, leasing, or owning such railroad, from one or more stockholders, and issue in exchange therefor the like additional amount of its own capital stock at par, or on such other terms and conditions as are agreed upon by the directors of the consolidated railroad company. (R. S. Sec. 3384b; April 11, 1890, 87 v. 183.)

Section 9041. (Property of company acquired by purchase vested in consolidated company.) When the whole of such capital stock is so surrendered or transferred, and a certificate thereof filed in the office of the secretary of state, under the common seal of the consolidated railroad company to which such surrender or transfer shall have been made, the estate, property, rights, privileges, and franchises of the company whose stock was so surrendered or transferred, thereupon shall vest in and be held and enjoyed by such consolidated company to whom the surrender or transfer was made, as fully and entirely, without change or diminution, as they before were held and enjoyed and be managed and controlled by the board of directors of such consolidated company to which such surrender or transfer shall have been made. The two companies thenceforth shall

be consolidated and be one company under the corporate name of such consolidated company, without any other formalities or proceedings. (R. S. Sec. 3384b; April 11, 1890, 87 v. 183.)

Section 9042. (Effect of consolidation.) Nothing in the two next preceding sections shall relieve such consolidated company from paying the fee provided by law in case a corporation files a certificate for an increase of its capital stock. The rights of a stockholder not surrendering or transferring his stock, shall not be affected hereby, nor existing liabilities or the rights of creditors of the company whose stock has been so surrendered or transferred, be affected by this or such preceding sections. (R. S. Sec. 3384b; April 11, 1890, 87 v. 183.)

This section, in requiring the consolidated company to pay a percentage fee on the capital stock acquired, is constitutional.

Ashley v. Ryan, 153 U. S. 436; 8 O.F. D. 215; s. c., 49 O. S. 504 (1892).

Where the transfer agent of a consolidated company transfers stock in a constituent company to secure his personal debt, and promises to exchange such stock for stock in the consolidated company, such promise is not admissible against the consolidated company in an action to compel the exchange.

Worthington v. Railway, 9 C. C. n. s. 433; 19 C. D. 321 (1904); aff'd, no rep., 75 O. S. 626.

Section 9043. (To establish a principal office.) As soon as convenient after the consolidation, the new company shall establish a principal office at some point in this state on the line of its road, but may change it at pleasure. Public notice of such establishment or change shall be given in some newspaper. This section and other laws respecting the residence of directors or corporations, the keeping of a principal or general office, and the records of corporations, shall not apply to consolidated railroad companies formed by the consolidation of a company or companies created by or existing under the laws of this state and any other state or states, with a railroad company or companies of this state or of any other state. The election for directors of such consolidated companies may be held at the principal office of the company, whether located in this or any other state under the laws of which the consolidated company was created. But at least two directors of such consolidated company must be residents of this state, and a general office of the company maintained within this state, of which notice shall be given as above provided. (R. S. Sec. 3385; April 11, 1890, 87 v. 184; April 10, 1856, 53 v. 143, § 6.)

See § 8744.

Inheritance tax on stock in consolidated company; see note to § 5348-2, and Opins. Atty. Gen. 1920, p. 952; 12 Dept. Rep. 603.

Section 9044. (Actions against new company.) Suits may be brought and maintained against the new company in the courts of this state, for all causes of action, in the same manner as against other companies. (R. S. Sec. 3386; April 11, 1890, 87 v. 184; April 10, 1856, 53 v. 143, § 6.)

Section 9045. (Taxation of road partly in this state.) That part of the road of such consolidated company in this state, and all its real and personal property therein, shall be listed for taxation and taxed in the same manner as the road and property of other railroad companies in this state. To ascertain the proportion of the rolling machinery subject to taxation here, the officer listing it shall ascertain the value of all the rolling machinery of the company, and return a sum bearing such proportion to the value of the whole, as the length of the line of such road in this state bears to the length of the whole line. (R. S. Sec. 3387; April 10, 1856, 53 v. 143, § 8.)

Section 9046. (Proof dispensed with.) It shall not be necessary to produce or prove the charters of the companies, parties to such consolidation, the laws of the several states under and by virtue of which such consolidation was effected, or the original articles of consolidation, in any suit brought to charge such consolidated company with a liability of either of the companies, parties to the act of consolidation. (R. S. Sec. 3392; February 19, 1858, 55 v. 8, § 2.)

Section 9047. (Two or more companies owning a road may divide and dispose of it.) When two or more railroad companies, are owners in common of the whole or a part of a railroad situate within this state, and by reason of inequality in the amount of business done thereon by each company, require a different degree and extent of improvement and development, such companies may enter into any arrangement they agree upon, for enlarging, improving, developing or increasing the facilities of such road or any part thereof. In pursuance of such agreement, or otherwise, they may make such division of the railroad and appurtenances thereon, and execute and deliver each to the other, or to any other railroad company having authority to purchase it, such deed or deeds of conveyance for the whole or part of such railroad, as is agreed upon between

such companies. Nothing herein shall impair the lawful lien of any creditor upon the railroad as conveyed. (R. S. Sec. 3392-1; April 11, 1883, 80 v. 111, § 1.)

Section 9048. (Proceedings when companies cannot agree on a division.) If such companies are unable to agree upon an equitable plan for improving and developing, or for the division and sale of the railroad and appurtenances or part thereof so owned in common, either company from time to time may file with the state railroad commission a statement, under its seal, of the character and estimated cost of any addition, or change in the nature of the roadbed, right of way, main or side track or tracks, bridges, culverts, buildings, structures, fixtures, or appurtenances or either or any part thereof of such railroad, or part thereof, desired by such company, and of its inability to agree with the other joint owner or owners in respect to making them. Upon receipt of such statement the commission within thirty days of its filing, shall appoint a time when the owners of such railroad or part thereof may be heard respecting the reasonableness and necessity of such proposed additions or improvements, and give due notice in writing of the time and place of such hearing to each of the owners. Such commission may make such order in respect to the reasonableness or necessity of the whole or any part of such additions or improvements, as well as the manner in which they are to be made, and the periods within which they shall be paid for, as to it seems proper, and its decision in the matter shall be final. (R. S. Sec. 3392-2; April 11, 1883, 80 v. 111, § 2.)

Section 9049. (Cost of improvements.) The cost of such additions or improvements, unless otherwise agreed between the joint owners, shall be paid by them in proportion to their ownership in the joint property, irrespective of the amount of traffic which each owner may then have passing over such railroad. If either owner fails or refuses to pay the share of cost due from it on the basis herein fixed, or within the period or periods fixed by such commission, suit may be entered and judgment taken against that party. Such judgment shall be a valid lien upon the interest in such railroad or part thereof owned jointly of such party in default, and may be sold at public sale as in other cases upon execution. (R. S. Sec. 3392-3; April 11, 1883, 80 v. 111, § 3.)

Cited, *Stewart v. Railway*, 53 O. S. 151.

Section 9050. (Who may purchase.) A railroad company having authority to own or operate a railroad in this state, may purchase such interest at such sale, and enjoy and exercise in respect thereto, all the rights, privileges and franchises which were exercised or enjoyed by the company owning it up to the time of sale. The compulsory power of enforcing additions or improvements provided for in this and the two preceding sections shall not extend to local or terminal depot or shop grounds or facilities, the joint use of which is not needed by all the joint owners. (R. S. Sec. 3392-3; April 11, 1883, 80 v. 111, § 3.)

Section 9051. (Partition not compulsory.) Nothing in the four preceding sections shall be held to imply or confer a right or power of compulsory partition of the joint property against the will of either of the joint owners; but it may be sold upon execution as therein provided. (R. S. Sec. 3392-4; April 11, 1883, 80 v. 112, § 4.)

Section 9052. (Company selling interest may purchase or condemn land along route.) If, pursuant to the agreement or to the proceedings above provided for, either company sells or conveys or suffers to be sold or conveyed, its interest in the railroad or part thereof so owned in common, such company may acquire by purchase or condemnation, such land as is needed to enable it to construct, maintain and operate, a railroad along and adjacent to such part of its chartered route as was so sold or conveyed, and it shall have and enjoy all rights and franchises in respect to such newly acquired railroad as were held and enjoyed in respect to the railroad sold or conveyed. (R. S. Sec. 3392-5; April 11, 1883, 80 v. 112, § 5.)

Section 9053. (To what companies these provisions apply.) Section ninety hundred and forty-seven to ninety hundred and fifty-two both inclusive, shall apply in case one or more companies or owners in common has leased its interest in the portion of railroad owned in common, and the lessee of such interest may unite with the lessor in the agreement provided for in such section ninety-hundred and forty-seven or with such lessor and owner be compelled to make or pay for the addition and improvements contemplated therein. (R. S. Sec. 3392-6; April 11, 1883, 80 v. 112, § 6.)

CHAPTER 8.

SALES AND RECEIVERS.

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PRIVATE SALE.

Section 9054. (Company may sell roadbed and right of way.) A company, owning in whole or part a roadbed and right of way for a railroad within this state, including those acquired by purchase at judicial sale, which, from lack of means, or other cause is unable to complete the construction of the proposed line of road thereon, may sell, assign and transfer it, or a part thereof, to any other company incorporated under the laws of Ohio, with authority to construct and operate a railroad over the same route, or any part thereof, which transfer shall include all work done upon such line of road, with all material furnished therefor, not exempted by the terms of the grant, and all rights, privileges, and easements, as fully as they are or may be possessed by the company making the transfer, and to the same extent, vest the title of and the right to enjoy them in such grantee. (R. S. Sec. 3409; May 5, 1868, 65 v. 142, § 1; May 7, 1869, 66 v. 334, §§ 1, 2.)

A railroad company can not acquire a parallel and naturally competing railway, although under construction and not completed. § 8807.

State v. Railway Co., 13 C. C. n. s. 145; 22 C. D. 147 (1910).

This section is a part of every subscription to stock, and a sale by the company of a part of its road under this section does not release the subscriber except when, and as, provision is made therefor by statute.

Armstrong v. Karshner, 47 O. S. 276 (1890).

This section confers no authority on railway companies to sell subscriptions to their stock along with their roads when they find it impossible to complete the same, from lack of means. And if it were attempted to transfer a conditional subscription to the company purchasing the road, such company could not by performing the condition precedent fix the liability of the subscriber.

Railroad Co. v. Hinsdale, 45 O. S. 556 (1888).

A railroad company, having acquired title to lands for railroad purposes by grant or proceedings in appropriation, may sell to another corporation for like railroad purposes all or a part of the same. Such a sale is not an abandonment of the premises unless such was the intention.

Garlick v. Railway Co., 67 O. S. 223 (1902).

See *Platt v. Penna. Co.*, 43 O. S. 228 (1885).

Penna. Co. v. Platt, 47 O. S. 366 (1890).

Power to sell property generally.

See *Donner v. Dayton, etc., R. Co.*, 1 C. S. C. R. 130 (1871).

The purchaser of a railroad, whether at judicial sale or otherwise, has no right to operate it for his own private purposes to the exclusion of the public. *State v. Black Diamond Co.*, 97 O. S. 24 (1917).

Section 9055. (Transfer to be by deed.) Such transfer shall be by deed, executed by the president of the company grantor, in the manner provided by law for the conveyance of real estate, and for such consideration as the parties agree upon. (R. S. Sec. 3410; May 5, 1868, 65 v. 142, § 2.)

See § 8761.

Section 9056. (Two-thirds in interest of stockholders must consent.) Before such transfer may be made, the president of the company shall call a meeting of its stockholders, at some convenient point on the line, or at a terminus of the road, of which he shall cause at least thirty days' notice to be published, in some newspaper printed or in general circulation in each county in which such roadbed and right of way are situated. By a concurrent vote of two-thirds in interest of the stock represented thereat by the owners thereof, in person, or by proxy, the meeting may declare by resolution the inability of the company to complete its line of road, prescribe the terms of the proposed transfer of its roadbed and right of way, and direct the president of the company to execute the deed. All such proceedings, resolutions, and directions shall be duly recorded in the proper record of the company, and a copy thereof delivered to the grantee. They also shall be recited in the deed. (R. S. Sec. 3411; May 5, 1868, 65 v. 142, § 3.)

Section 9057. (What interest dissenting stockholder may retain.) No transfer shall be made against the dissent of any stockholder, expressly declared and filed in writing at such meeting, without the guaranty of the company grantee that it will issue to him certificates of its capital stock, equal in amount to his pro rata interest as a stockholder of the grantor, in the amount for which the property is sold. (R. S. Sec. 3412; May 5, 1868, 65 v. 142, § 4.)

Conditional subscribers to stock do not acquire any rights under this section until the happening of the contingency upon which payments on the subscription are made dependent.

Railroad Co. v. Hinsdale, 45 O. S. 573 (1888).

Armstrong v. Karshner, 47 O. S. 276, 299 (1890); § 8791.

Section 9058. (Title vests in grantee.) The title to the property transferred, with the right to use, occupy and enjoy it for all purposes proper in the construction, maintenance, and operation of a railroad thereon, shall pass to and vest in the company grantee, by the execution of such deed, to the same extent as the granting company might or could use, occupy, and enjoy it. (R. S. Sec. 3413; May 5, 1868, 65 v. 142, § 5; May 3, 1873, 70 v. 245, § 1.)

Section 9059. (Certain rights of way forfeited.) Where upon an unfinished road, a right of way, or part thereof, remains for ten years unused for railroad purposes, it shall be held forfeited, and shall revert to the owner of the land, unless at least twenty miles of the road have been completed by the company during that period, or, unless an average of one thousand dollars per mile has been expended for construction before the expiration of such period. (R. S. Sec. 3414; May 5, 1868, 65 v. 142, § 6; April 22, 1898, 93 v. 207.)

Abandonment of easement. See note to § 8759:

EQUIPMENT CONTRACTS.

Section 9060. (Certain contracts of sale void unless recorded.) No contract of, or for the sale of railroad equipment, rolling stock, or other personal property to be used in or about the operation of a railroad, by the terms of which the purchase money, in whole or part, is to be paid in the future, and wherein it is stipulated or conditioned that the title to the property sold shall not vest in the vendee, but shall remain in the vendor until the purchase money has been fully paid, shall be valid against creditors or innocent

purchasers for value, unless recorded, or a copy thereof filed, in the office of the secretary of state. When the contract is so recorded, or a copy thereof so filed, the title to the property sold, or contracted to be sold, shall not vest in the vendee, but remain in the vendor until the purchase money has been fully paid; and such stipulation or condition shall be and remain valid, notwithstanding the delivery of the property to, and its possession by the vendee. (R. S. Sec. 3378a; March 16, 1882, 79 v. 45.)

The general conditional sales statutes (G. C. §§ 8568-8570) do not apply to conditional sales of railroad equipment, which are specially provided for by § 9060 et seq.

Metropolitan Trust Co. v. Railroad Co., 93 Fed. 702 (C. C. 1899).

Metropolitan Trust Co. v. Equipment Co., 108 Fed. 913; 13 O. F. D. 643 (C. C. A. 1901).

The seller of equipment to a railroad company, retaining the title as security for the purchase price, is entitled, on a foreclosure of a mortgage covering all of the railroad property, to take back the property, or, in case the mortgagee elects to retain it, to a first lien thereon for the balance due, without deduction for expenditures for preservation or improvement, made by the railroad company or its receiver.

Metropolitan Trust Co. v. Equipment Co., 108 Fed. 913; 13 O. F. D. 643 (C. C. A. 1901); s. c., 93 Fed. 702 (C. C. A. 1899).

Where the agreement states that the property described is leased at a fixed rental, and that title to the property shall not vest in the railroad company, but shall remain in said trustees until the terms of the agreement shall be fully complied with, it comes within this section as a lease or a contract of sale, or a contract for the sale of railroad equipment.

Union Trust Co. v. New York, etc., R. R. Co., 17 W. L. B. 176, 180 (1887).

Where the court appoints receivers of the property of a railroad company, and directs them to join the company in the execution of a lease, consolidating former leases of rolling stock, the terms of which have not yet expired, the purpose and provisions of which consolidated lease are to provide a lower monthly rental and extend the period of the leases—but leaving the title to the rolling stock in the lessors, with conditions of forfeiture for nonpayment of the rentals and other breaches of the covenants, such consolidated lease is not a sale of the rolling stock to the receivers, and the lessors are entitled to a preference over the bonded indebtedness of the railroad company, only for the rentals which accrue after execution of such consolidated lease and during the existence of the receivership.

Central Trust Co. v. Ohio Southern R. R. Co., 17 C. C. 633 (1898); 9 C. D. 317.

Section 9061. (Parties may provide for a conditional sale in a lease.) In any written contract for the renting, leasing, or hiring of such property to be so used, it shall be lawful to stipulate or provide for a conditional sale of the property at the termination of such renting, leasing, or hiring, and to stipulate or provide that the rental reserved as paid, or when paid in full, shall be applied and treated as purchase money. In such contract it shall be lawful to

stipulate or provide that the title to such property shall remain in the lessor or vendor until the purchase money has been fully paid, notwithstanding delivery to and possession by the other party; subject, however, to the requirement as to recording or filing contained in the next preceding section. (R. S. Sec. 3378b; March 16, 1882, 79 v. 45.)

A contract purporting to be a lease of equipment to a railroad company, which executes so-called "lease warrants", on the payment of which the railroad company is to become the owner, is in legal effect a conditional sale.

Metropolitan Trust Co. v. Equipment Co., 108 Fed. 913; 13 O. F. D. 643 (C. C. A. 1901); s. c., 93 Fed. 702.

Section 9062. (Secretary of state to file contracts.) The secretary of state, when so requested, and upon being paid the proper fees, shall record any such contract, and shall file in his office a copy of any such contract, when it is delivered to him for that purpose. For every such copy so filed he shall be entitled to receive one dollar. (R. S. Sec. 3378c; March 16, 1882, 79 v. 45.)

Section 9063. (Construing application of preceding sections.) The provisions of the sections ninety hundred sixty, ninety hundred sixty-one and ninety hundred sixty-two of the General Code shall extend and apply, not only to contracts made with a railroad company, as vendee or lessee, but also to all contracts which may be made with any interurban or street railroad company or corporation, or other company, corporation, or person as vendee or lessee, by which any such interurban or street railroad company, or corporation, or other corporation, company or person shall undertake to purchase, rent, lease or hire any railroad, interurban or street railroad equipment, cars, rolling stock, or other personal property, designed for use on, or in connection with, a railroad or railroads, interurban or street railroad or railroads, in this or other states. (May 20, 1910, 101 v. 323; R. S. Sec. 3378d; April 12, 1889, 86 v. 255.)

RECEIVER AND JUDICIAL SALES.

Section 9064. (Receiver.) When a line of railroad, the whole or part of which lies within this state, by order of court, has been placed in the hands of a receiver, who has taken charge of and is operating it for the purpose of carrying passengers, freight, and doing such other things as ordinarily belong to the running and management of railroads, in his official capacity, such receiver may sue or be

sued in the courts of this state without leave previously granted. No person shall act as such receiver unless he is a resident citizen of this state. (R. S. Sec. 3415; March 12, 1872, 69 v. 31, § 1.)

Cited, Cleveland, etc., R. R. Co. v. Orme, 1 C. C. 511; 1 C. D. 285 (1885).

Suits by receivers. A receiver of a railroad company is a competent party plaintiff in a suit to restrain ditch proceedings against the company, commenced and prosecuted after his appointment as such receiver.

Caldwell v. Trustees, 2 C. C. 10 (1886); 1 C. D. 332.

A foreign receiver of a corporation, with no other title to its assets than that derived from his appointment in a suit brought in another state to adjudicate and enforce liens and subject its assets and property to the claims of creditors, can not maintain an action in Ohio for the collection of its assets, either in his own name or in that of the corporation.

Leman v. MacLennan, 7 C. C. n. s. 205; 18 C. D. 137 (1905); aff'd, 75 O. S. 643.

But where, in another state, trustees under a mortgage sought to enforce their rights on a railroad and its equipment and pending an application for a receiver, a creditor of the same state attached rolling stock temporarily in Ohio; a receiver subsequently appointed on such application, with authority to take possession of all property including that attached, was permitted to maintain an action to recover possession.

Bank v. McLeod, 38 O. S. 174 (1882).

Suits against receivers. This section authorizes suits to be brought against the receiver of a railroad, and the same prosecuted to final judgment without leave of court; in other words, such suits stand upon the same footing and entitle those bringing them to the same rights and privileges as if leave had been granted, and no more. But this section does not authorize a levy or sale of property in possession of the receiver without leave of court.

Croy v. Marshall, 3 C. C. 489 (1888); 2 C. D. 280.

Where property is improperly in the possession of a receiver the remedy of a creditor is by application to the court appointing such receiver for an order requiring the receiver to release it.

Croy v. Marshall, 3 C. C. 489; 2 C. D. 280 (1888).

Where a plaintiff in an action against a railroad company, whose property is then in the hands of a receiver (appointed by the same court) to which action such receiver is not a party, recovers against the company a money judgment, the same is not void or invalid on the ground that the court had no jurisdiction. Such judgment is valid as against the company, and operates as a lien on its lands, and may be enforced after the discharge of the receiver.

Mather v. Cincinnati, etc., Ry. Co., 3 C. C. 284 (1888); 2 C. D. 161.

This section can not affect the power of a federal court to pass on a motion for leave to sue a receiver appointed by it.

Hayes v. Columbus, etc., Ry. Co., 34 W. L. B. 2; 67 Fed. 630; 9 O. F. D. 85 (1895).

Suit by state against receiver for taxes.

See Treasurer v. Dale, 60 O. S. 180 (1899).

A receiver operating a railroad is liable, in his official capacity, for negligence.

Meara v. Receivers, 20 O. S. 137 (1870).

Potter v. Bunnell, 20 O. S. 150 (1870).

Where leave to sue a receiver is required, notice of the application

for such leave need not be given the parties in the action in which the receiver was appointed. Notice to the receiver is sufficient.

Potter v. Bunnell, 20 O. S. 150 (1870).

Satisfaction of judgment against receiver.

See § 9066 and note.

Miscellaneous. Nonresident receivers.

See Caldwell v. Pittsburg, etc., R. Co., 33 W. L. B. 134 (1894).

Bayne v. Brewer Pottery Co., 82 Fed. 390; 10 O. F. D. 538 (1897).

A receiver is not the agent of the corporation.

Consolidated Coal Co. v. Cincinnati, etc., R. R. Co., 10 W. L. B. 42 (1883).

Section 9065. (When action brought; service.) Actions may be brought against the receiver or receivers of a steam railroad or of any electric railway, whether such electric railway be a street railway or an interurban railway, in any county through or into which such railroad or railway is constructed. Service of summons may be made on the receiver, or superintendent of the road, or a ticket or freight agent in the employment of or acting for the receiver. No service made upon such agent shall be valid, unless his office or place of business is in the county where the suit is brought. (106 v. 135; R. S. Sec. 3416; March 12, 1872, 69 v. 31, § 2.)

Cited, Railroad Co. v. Orme, 1 C. C. 513; 1 C. D. 285 (1885).

Service on receiver, §§ 11231, 11233.

Section 9066. (Application of funds; lien.) The earnings of a railroad in the hands of a receiver, and all other money which comes into his hands as receiver, shall be applied first to pay costs and expenses of the suit in which he was appointed, and the expenses of operating and managing the road, including materials and supplies procured by him therefor, and liabilities incurred by him in such operation and management. Judgments recovered against a receiver for injuries to person or property, or for wages of employes or work done or materials furnished while he is operating or managing the road, shall be a lien on the funds in his hands as receiver, but shall affect him only in his trust capacity, and not individually. (R. S. Sec. 3417; March 12, 1872, 69 v. 31, § 3.)

Satisfaction of a judgment rendered against a receiver in an action for the recovery of damage for personal injuries can only be obtained out of the fund in his hands, as may be directed by the court appointing him.

Meara v. Receivers, 20 O. S. 137 (1870).

See Mining Co. v. Railway, 10 W. L. B. 42.

The state is not included in this section, and the superiority of its claim for taxes is not thereby affected.

Treasurer v. Dale, 60 O. S. 180 (1899).

Section 9067. (When receiver must deposit money.)

When the line of a railroad operated by a receiver is wholly within this state, all money which comes into his hands, whether from operating the road or otherwise, shall be kept and deposited in such place within this state as the court directs, until properly disbursed. If a part of the road lies in another state, the receiver shall be required to deposit in this state at least such share of the funds in his hands as is proportioned to the value of the property of the company within this state. (R. S. Sec. 3418; March 12, 1872, 69 v. 31, § 4.)

Section 9068. (Certain roads may be sold at judicial sale.) The real and personal property, road-bed, right of way, fixtures, and franchises of a railroad company in this state which has not completed, nor conveyed by deed of trust, or mortgage, any part of its road, and which is insolvent, and whose property is in the hands of a receiver appointed by a court of competent jurisdiction, may be sold at judicial sale; and the title thereto, with all the rights, liberties, faculties, and franchises, shall pass by such sale, and vest in the purchaser thereof, as fully as they had been possessed, exercised, and enjoyed by such company. (R. S. Sec. 3420; May 4, 1868, 65 v. 192, § 1.)

Section 9069. (Receiver must petition therefor.) Before such sale shall be ordered, the receiver shall file in such court his petition therefor, in which he shall set forth the names of the creditors of the company, with the sums due to each, as nearly as can be ascertained, a statement of its assets, exclusive of its road-bed, rights of way, and franchises, and a pertinent description, in general terms, of the road-bed, right of way, and property so sought to be sold, and cause notice thereof to be published, for six consecutive weeks, in some newspaper printed and of general circulation in each of the counties wherein any part of the road-bed is situated. Before the distribution of the proceeds of the sale, any creditor may appear and set up his claim by answer, and have it determined by the court, if it is omitted from or inaccurately stated in the petition. (R. S. Sec. 3421; May 14, 1868, 65 v. 192, § 2.)

Section 9070. (Order for appraisement.) On proof of the publication of such notice, and being satisfied that a sale is necessary to pay the indebtedness of the company, the court shall order the sale of such road, road-bed, rights of way, property, and franchises, on such terms of payment

as it deems proper, and issue its order to the receiver, commanding him that he cause them to be appraised by commissioners, selected by the court, skilled in the construction and value of such road-beds as they may be called upon to appraise, having the qualifications of a freeholder, not less than three in number, and consisting of at least one from each county in which any part of the road-bed is situated. Such proceedings shall be had under the order as are provided by law in sales of real estate made by judicial order in other cases, so far as they are applicable. (R. S. Sec. 3422; May 14, 1868, 65 v. 192, § 3.)

Section 9071. (Notice of sale to be published.) Before such sale is made, notice thereof shall be given by publication, for six consecutive weeks in some newspaper published and of general circulation in each of the counties through or in which such road is located, and also in some newspaper published and of general circulation in each of the cities of New York and Cincinnati, for at least thirty days prior to the day of sale. The sale shall not be made for less than two-thirds of the appraised value of the property and rights, unless, upon their having been twice offered and not sold the court in its discretion orders a reappraisement. (R. S. Sec. 3423; May 14, 1868, 65 v. 192, § 4.)

Deposits filed with bids should be returned to the bidder in case he does not buy the property.

Feike v. Cincinnati, etc., Ry. Co., 3 C. C. 72; 2 C. D. 41; s. c., 27 W. L. B. 75 (1887).

Section 9072. (Confirmation of sale and deed.) When a sale is made and reported to the court, if satisfied that it was conducted according to law, and its order, the court shall confirm the sale, and order the receiver to execute and deliver to the purchaser a deed of conveyance for the road, road-bed, rights of way, real estate, fixtures, and franchises so sold. (R. S. Sec. 3424; May 14, 1868, 65 v. 192, § 5.)

Where a tract of land was not sold, or intended to be sold, and not paid for, but, by mistake, was included in the report of sale, such mistake may be corrected in equity against the purchaser or his heirs even after confirmation of the sale and the execution of the deed.

Stites v. Wiedner, 35 O. S. 555 (1880).

Section 9073. (How proceeds distributed.) The proceeds of the sale, after paying the costs and expenses thereof and the unpaid expenses of the trust against the company, shall be distributed pro rata among all its creditors. (R. S. Sec. 3425; May 14, 1868, 65 v. 192, § 6.)

Section 9074. (Who may purchase property.) A company organized under the laws of this state may purchase such property. Any number of persons not less than five may purchase such road, road-bed, rights of way, property, and franchises at such sale, and, on filing a transcript of the decree of confirmation in the office of secretary of state, they shall become a corporation of this state, amenable to its process and, with perpetual succession by such name as they assume, be subject to the law regulating such corporations, and shall hold the property, rights, and franchises so purchased free from liability for the debts of the original corporation. (R. S. Sec. 3426; May 14, 1868, 65 v. 192, § 7.)

Cited, *Rice v. Norfolk, etc., Ry. Co.*, 153 Fed. 497, 501 (1907).

Section 9075. (How purchaser may acquire franchise.) The purchaser of a railroad, situated wholly or partly within this state, sold pursuant to judicial proceedings, may acquire the franchise to be a corporation originally vested in the company which held the road prior to such sale, by grant of such company, under such terms and conditions as are agreed upon by the directors of the company, with the consent of stockholders owning two-thirds of the stock. Such grant shall be in the form required by law to convey real estate, and shall pass such franchise to the persons or company becoming the owner, by the purchase of such railroad. No grant may be made unless provision is made for granting to the stockholders in the original company stock in the reorganized company, upon equal terms with the stockholders thereof, and it is acceptable to the directors making it. (R. S. Sec. 3419; April 13, 1865, 62 v. 169, § 1.)

This section is a general law within the meaning of article 1, section 2 of the constitution.

Ohio v. Sherman, 22 O. S. 411 (1872).

Where a special charter, not subject to repeal or amendment, is transferred under this section, the new charter granted by implication, being granted under the present constitution, would be subject to alteration and repeal.

Ohio v. Sherman, 22 O. S. 411 (1872).

The effect of a transfer under this section is a surrender or abandonment of the old charter by the corporators, and a grant de novo of a similar charter to the so-called transferees or purchasers.

Ohio v. Sherman, 22 O. S. 411, 428 (1872).

In an action brought to determine the priority of liens on, and for the sale of a railroad, neither lienholders nor general creditors can question the legality of the incorporation of the railway company, or the validity of mortgages of such company upon the ground of such illegality.

Hatry v. Painesville, etc., Ry. Co., 1 C. C. 426 (1886); 1 C. D. 238; aff'd, 23 W. L. B. 281.

A charter can not be sold in the absence of statutory authority.

Atkinson v. Marietta, etc., R. R. Co., 15 O. S. 21 (1864).

Stockholders' liability after transfer.

See *Ohio v. Sherman*, 22 O. S. 411 (1872).

An individual, who purchases a railroad at judicial sale, may organize a corporation to operate, or sell to another railroad company, or he may "junk" it, but he is not authorized to operate it himself or sell it to a mining company. *Townsend v. Walters*, 15 O. L. R. 382 (Pub. Ut. Com.); *State v. Coal Co.*, 97 O. S. 24 (1917).

Section 9076. (Purchaser at judicial sale may sell road, grant to be recorded.) The purchaser or purchasers of the property, road-beds, rights of way, fixtures and franchises of a railroad company in this state, situated wholly or in part in this state, sold pursuant to judicial order, judgment, or decree, and which sale is confirmed by the court making the order of sale, may sell such property or any part thereof. The title thereto, with all the rights, liberties, faculties, and franchises shall pass by such sale and vest in the purchaser or purchasers thereof, as fully as if they had been possessed, exercised and enjoyed by such railroad company. The grant thereof in the form by law required to pass real estate, shall be recorded in the record of deeds of the county or counties in which such property is situated, and the rights and franchises are or may be exercised. (R. S. Sec. 3426a; March 11, 1880, 77 v. 60.)

Section 9077. (Any number of persons may purchase, and incorporate.) A railroad company organized or existing under the laws of this state may become the purchaser of such property, as provided in the preceding section. Any number of persons may purchase such road, roadbeds, rights of way, property and franchises, as provided herein, either directly at such judicial sale or by grant from the purchasers at such sale. On filing a copy of such deed or grant in the office of the secretary of state, with articles of incorporation executed in accordance with the law respecting the creation of corporations for profit, they, and such persons as associate with them, not less than five in number, shall become a corporation with perpetual succession by such name as they assume to themselves, with capacity to maintain and operate such railroads, whether located wholly within this state, or partly within this state and partly in another state or states. (R. S. Sec. 3426b; April 24, 1890, 87 v. 270; March 11, 1880, 77 v. 60.)

Section 9078. (May issue stock and bonds to pay purchase price.) Such corporation shall have authority to provide for the purchase price of the railroad and other property so bought by the issue of its capital stock, preferred

or common, and bonds secured by mortgage or otherwise, bearing interest at a rate not exceeding seven per cent per annum. Stock and bonds heretofore or hereafter issued as such purchase price, in amounts the incorporators, in good faith, agreed on, shall be valid, and taken as fully paid for by the transfer to the corporation of such railroad and property, and also by such issue of stock or bonds, to raise the necessary means suitable to improve such railroad property and equipment for the uses and purposes for which it is employed. In the operation and maintenance of its railroad, such corporation shall be entitled to all the rights, and be subject to all the obligations and restrictions imposed upon railroad companies by the laws of this state. (R. S. Sec. 3426b; April 24, 1890, 87 v. 270; March 11, 1880, 77 v. 60.)

CHAPTER 9.

REORGANIZATION.

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| § 9079. When proceedings for reorganizations may be had. | § 9091. Mortgaged property may be sold without appraisal. |
| § 9080. Meeting of creditors and proceedings. | § 9092. Creditors may agree on capitalization. |
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| § 9082. Property of new company. | § 9094. Other creditors may sign the agreement. |
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Section 9079. (When proceedings for reorganizations may be had.) When the proceedings are pending in any court for the sale of the road of a railroad company, under a mortgage or deed of trust, and two-thirds in interest of the creditors and two-thirds in interest of the stockholders of the company agree, in writing, upon a plan for the readjustment or capitalization of the debt and stock of the company, the court shall render judgment against the company for the amount due and in arrear upon such securities, which judgment, from its rendition, shall be a lien on all the property embraced in such securities, and all the franchises and powers of the company including its franchises to be and act as a corporation, conferred by the charter and the amendments to the charter of the company. Upon a sale had under such judgment, and a purchase at such sale by

trustees, on behalf of the parties to such agreement, appointed by the agreement, all the property so bound by the judgment, including such franchises, shall vest in such trustees. But such agreement shall provide that the unsecured debts of the company incurred for repairs or running expenses, shall be paid in money, or bonds of the reorganized company, of the highest class issued, as hereinafter provided. A copy of the agreement shall be filed in such court before the rendition of the judgment. (R. S. Sec. 3393; April 11, 1861, 58 v. 70, § 1.)

The lien of a judgment recovered for injuries sustained by the misconduct of agents of the reorganized company is, under § 9085, superior to that of a mortgage executed by the company.

King v. Atlantic, etc., Co., 12 C. D. 551 (1886).

Powers of committee. Sharpe v. Oil Co., 232 Fed. 703 (C. C. A. Ohio, 1917).

Claims of unsecured creditors. Keetch v. Stowe, 205 Fed. 887 (C. C. A. Ohio, 1913).

Construction of agreement.

Hatry v. Painesville, etc., Ry. Co., 1 C. C. 426; 1 C. D. 238 (1886); aff'd, 23 W. L. B. 281.

Constitutionality of act of 1863.

Mather v. Cincinnati, etc., Ry. Co., 3 C. C. 284; 2 C. D. 161 (1888).

Section 9080. (Meeting of creditors and proceedings.)

As soon as practicable after the sale, the trustees shall call a meeting of the parties to the agreement by a notice signed by a majority of the trustees, or of their survivors, and published not less than once a week, for four consecutive weeks in a newspaper printed in the cities of New York and Philadelphia, and in a newspaper printed in each county on the line of the railroad, specifying the day, place, and object of such meeting—the place to be on the line of the road. At such meeting, each of the parties to the agreement shall be entitled to vote according to the provisions thereof, but not exceeding one vote for every fifty dollars of the par value of the debt or stock of such party, according to a list of voters and their respective interests, which shall be prepared by the majority of the trustees, who may act as judges of the election. By a majority in interest of the persons present, in person or by proxy, such meeting may retain or change the name of the company, decide, for the time being, the amount of its capital, the number of shares into which it is to be divided, fix the number of directors, their term of office, elect such directors, a majority of whom shall be residents of the state or states, in which such railroad is situated, and do all things necessary or proper to reorganize the company. But any creditors shall be entitled to become a party to the agreement, either at or before the

meeting herein provided for. A stockholder shall be entitled to become a party thereto at any time within one year after such meeting. (R. S. Sec. 3394; April 11, 1861, 58 v. 70, § 2.)

Where a railroad corporation reorganizes under the act of April 11, 1861, and, in the agreement therefor, it is stipulated that certain bonds of the original company shall be assumed by the new company, and the holder thereof entitled to vote at all meetings of stockholders, upon conditions specified, which he performs, the new company becomes liable to pay the bonds, and the holders thereof entitled to vote, without further action on the part of the new company.

State v. McDaniel, 22 O. S. 354 (1872).

In a corporation reorganized under this act, it is not necessary that the directors should be stockholders. The statute only requires them to be residents of the state, and in the absence of a statute requiring it, the discretion of the stockholders in electing directors is not limited to stockholders.

State v. McDaniel, 22 O. S. 354 (1872).

See § 8661.

Section 9081. (What to be certified to the secretary of state.) A certificate, under the common seal of the company, specifying its name, and the railroad which it is to hold, maintain, and operate, shall be filed in the office of the secretary of state. A copy thereof duly certified, in all courts and places, shall be evidence of a compliance with all the conditions and provisions of the two preceding sections, and of the due reorganization and existence of the company. (R. S. Sec. 3395; April 11, 1861, 58 v. 70, § 3.)

Section 9082. (Property of new company.) Upon such reorganization, and a conveyance by the trustees, or of such of them as are vested with the legal title, or their survivors, the railroad and other property, franchises and things purchased, and the franchises, powers, faculties, privileges, and immunities which were possessed and enjoyed by the original company, or by any company with which it had been consolidated, shall pass to and be vested in the company as reorganized; and they, and all property and things which the reorganized company thereafter acquires, except as hereinafter provided, shall be taken, held, and disposed of for the use and benefit of the creditors and stockholders of the company, who become such upon and after the reorganization, according to their respective rights, but subject to the powers of the company, and in no wise chargeable in respect to any debt, liability, or claim of any creditor or stockholder which subsisted prior to the sale and reorganization. All property of the original company not embraced in the sale, upon the reorganization shall be vested in the company as reorganized, in trust for all parties interested

therein as creditors, stockholders or otherwise. (R. S. Sec. 3396; April 11, 1861, 58 v. 70, § 4.)

Cited, *Rice v. Norfolk, etc., Ry.*, 153 Fed. 501 (1907).
Constitutionality. See note to § 9075.

Section 9083. (Powers of new company.) Such company likewise shall have power, within six months after the organization, to assume such debts or liabilities of the original company, make such adjustments or exchanges with any bondholder of the original company, and, within one year, with any stockholder, as it may deem expedient. For such purpose, the company may use bonds or stock which it is authorized to issue or create. It may make and issue such bonds, payable at times and places, and bearing rates of interest not exceeding six per cent per annum, as it deems expedient, and secure the payment of bonds which it issues or assumes to pay, by mortgages or deeds of trust of its railroad, or other property, and may include therein with its road all its cars, other rolling stock, equipments, machinery, tools, implements, fuel, materials, and other things then held or thereafter acquired for constructing, operating, or repairing the road, or for repairing or replacing its equipment or appurtenances, as part and parcel of the road, and as constituting with the road one property. It also may include in such mortgage or deeds of trust all franchises held by the company, connected with or related to the road, and all its other corporate franchises, which franchises, including the franchise to be a corporation, in case of sale by virtue of such mortgage or deed of trust, or of any judgment specified in the following section, shall pass to the purchasers, so as to enable them to reorganize the company in the manner hereinbefore provided. Such company may issue capital stock to such amount it deems proper, not exceeding a limit fixed by agreement with the trustees purchasing, and may establish preferences in respect to dividends, in favor of any class of the stock, in such order and manner as it deems expedient, not exceeding the limits fixed by such agreement. If authorized by the agreement, it may confer on holders of bonds which it issues or assumes to pay, the right to vote at meetings of stockholders, not exceeding one vote for every fifty dollars of the par amount of the bonds, as was provided for in the agreement, which right, once fixed, shall attach to and pass with such bonds, under such regulations as the by-laws may prescribe, to the successive holders thereof, but shall not subject the holder to assessment by the company, or to lia-

bility for its debts, or entitle him to dividends. (R. S. Sec. 3397; April 11, 1861, 58 v. 70, § 5.)

Section 9084. (Issue of stock or securities.) In cases of railroad companies organized or reorganized under the laws of this state, wherein the organization or reorganization agreement provides and stipulates that any class of creditors, bondholders or stockholders of the original company, shall in any wise be restricted or limited, in participation in profits, dividends, or in respect to liens or the right to vote as the holders of stock or securities in the reorganized company, such reorganized company, its directors and officers, shall issue the certificate of stock or securities into which the original stock, securities or debts may be convertible, bearing upon the face of each plainly and distinctly set forth, such restrictions or limitations so that purchasers may be advised of the terms thereof, and holders of stock or securities created under such reorganization agreements, hereafter may have only such restricted or limited rights, liens, participation in profits, dividends, and right to vote thereon, as in such agreements, certificate of stock or securities are set forth. (R. S. Sec. 3397a; March 19, 1887, 84 v. 142.)

Section 9085. (Lien of mortgages.) The lien of the mortgages and deeds of trust authorized by section ninety hundred and eighty-three shall be postponed to the lien of judgments recovered against the company, after its reorganization, for labor thereafter performed for it, or materials or supplies thereafter furnished to it, or damages, losses, or injuries thereafter suffered or sustained by the misconduct of its agents, or in any action founded on its contracts or liability as a common carrier thereafter made or incurred. (R. S. Sec. 3398; April 11, 1861, 58 v. 70, § 6.)

Cited, *Stewart v. Railway Co.*, 53 O. S. 151, 172 (1895).

This section is constitutional.

King v. Thompson, 110 Fed. 319; 13 O. F. D. 696; 46 W. L. B. 210 (C. C. A. 1901).

This section applies to foreign corporations.

King v. Thompson, 110 Fed. 319; 13 O. F. D. 696; 46 W. L. B. 210 (C. C. A. 1901).

A judgment for personal injuries is, under this section, prior to a previously recorded mortgage.

King v. Thompson, 110 Fed. 319; 13 O. F. D. 696; 46 W. L. B. 210 (C. C. A. 1901).

A claim for personal injuries is not a lien under this section until reduced to judgment. Where such a claim is not reduced to judgment until more than a year after the property had been sold in a foreclosure proceeding under a mortgage executed under this act, the judgment does not become a lien on the property.

Jeffrey v. Moran, 101 U. S. 285 (1879).

It was further held in the above case that the judgment was not a lien on the fund arising from the sale of the property.

The lien of a judgment recovered for injuries is not extinguished by the foreclosure of a mortgage, where the judgment creditor was not made a party to the suit.

King v. Railroad Co., 12 C. D. 551 (1886).

This section should be fairly construed so as to effect the purpose for which it was enacted.

Farmers' Loan, etc., Co. v. Cincinnati, etc., R. R. Co., 21 W. L. B. 275 (1889).

Where the holder of a judgment for materials and supplies claims a priority over mortgages existing before the supplies were furnished, the burden of proof is on such claimant to show that he has obtained a judgment and that the cause of action upon which it was obtained was such as to come within the terms of this section.

Farmers' Loan, etc., Co. v. Cincinnati, etc., R. R. Co., 21 W. L. B. 275 (1889).

In an original action to obtain a judgment for the value or price of the supplies furnished, other lienholders are not necessary or proper parties. The question of priority can be properly determined in a subsequent action to marshal liens.

Farmers' Loan, etc., Co. v. Cincinnati, etc., R. R. Co., 21 W. L. B. 275 (1889).

Claims for supplies furnished under this section may be assigned and judgment thereon taken by the assignee, who thereupon obtains all the rights of the original claimant.

Farmers' Loan, etc., Co. v. Cincinnati, etc., R. R. Co., 21 W. L. B. 275 (1889).

Section 9086. (Lien for labor performed.) In an action against a railroad company, domestic or foreign, operating a railroad in this state, when it is or was for the purpose of recovering judgment against the corporation for labor done for, or supplies furnished to it, or for damages or losses, or injuries suffered or sustained by the misconduct of its agents, or the suit is founded on the company's contract or liability as a common carrier; if, when reduced to judgment by virtue of statute or the principles of equity, it would become a lien upon the property of such company, prior to the lien of a mortgage or deed of trust, legally made under the laws of this state, such judgments shall be a prior lien upon such property, notwithstanding its sale or conveyance by virtue of a judgment or decree of foreclosure for breach of the terms and conditions of such mortgage or deed of trust. (R. S. Sec. 3398a; February 17, 1882, 79 v. 11.)

See §§ 8343, et seq. and 8376 et seq.

Section 9087. (How such lien enforced.) A party prosecuting such action in order to avail himself of the provisions of the preceding section, before the day fixed for the

sale of the property of such railroad under judgment or decree of foreclosure and sale, shall file with the clerk of the court wherein the judgment or decree was rendered, a notice in writing, setting forth the title of his action, the court wherein pending, the amount of his claim, the date from which he claims interest thereon, the probable amount of costs, and that he claims that the judgment sought by him to be recovered would, when obtained, become a lien prior in law or equity to the lien of the judgment or decree of foreclosure and sale. Before the day of sale, or at the time thereof, he also shall serve a certified copy of such notice upon the officer or other person making such sale, who, prior to offering the property for sale, shall read such notice publicly at the time and place of sale, and with his return of sale, return the copy of notice with the endorsement of his proceedings thereunder upon it to the court. (R. S. Sec. 3398b; February 17, 1882, 79 v. 11.)

Section 9088. (Court to retain amount of lien.) On the return of the officer or other person making such sale, before confirming it and ordering distribution of the funds arising therefrom, the court shall retain in its custody or under its control, a sufficiency of such proceeds applicable to distribution to the claimants under the liens of the mortgage or deed of trust, to satisfy any judgment which may be recovered in the action provided for in section ninety hundred and eighty-six when ended and determined. (R. S. Sec. 3398c; February 17, 1882, 79 v. 11.)

Section 9089. (In case judgment recovered.) Within sixty days after the determination of the action referred to in section ninety hundred and eighty-six, the party claiming such priority of lien, if he has recovered judgment against such railroad company, shall file his answer and cross-petition in the action pending in the court holding the fund as above provided, setting forth his claim thereto, and such court shall make the proper orders necessary to the determination of the questions of priorities and distribution of the retained fund, as in the preceding section provided. (R. S. Sec. 3398d; February 17, 1882, 79 v. 11.)

Section 9090. (Provisions applicable to certain other companies.) The provisions of this chapter shall extend to and apply to companies whose railroads are partly within and partly without this state. A domestic company possessing such a railroad, may exercise without this state all its powers, privileges, faculties, and franchises. A foreign

corporation possessing a railroad which is partly in another state and partly within this state, may here exercise and enjoy all its powers, privileges, faculties, and franchises, for the purposes of such road and its business, not inconsistent with the laws of this state. Mortgages and deeds of trust made by such corporation upon its railroad, equipments, or other property within this state, shall operate in the manner and with like effect as provided with respect to companies so reorganized. But such part of the railroad as is within this state is subject to taxation, and to all regulations of law, as are railroads of this state in like cases, and the corporation owning it shall be subject to all duties in respect thereto imposed by law, and may sue and be sued in all cases and in the manner that a company of this state might sue or be sued. (R. S. Sec. 3399; April 11, 1861, 58 v. 70, § 7.)

There is not only no law of Ohio prohibiting the ownership and use of railroads in the state by foreign corporations, and no public policy of the state to be contravened thereby, but there is abundant legislation directly to the contrary. Where the act incorporating a foreign corporation gives it the power to condemn and appropriate private property, if its road is partly in this state and partly in a foreign state, it may exercise and enjoy within this state all its powers, privileges, faculties, and franchises, for the purpose of said railroad and its business not inconsistent with the laws of this state. This section clearly gives the right to condemn and appropriate private property in Ohio to all railroad corporations of other states, which have the power of condemnation and appropriation given them in their charters of incorporation, where their roads lie partly within this state.

State v. Sherman, 22 O. S. 411, 434 (1872).

The legislature has power to attach the conditions of this section and § 9085 to the right of foreign corporations to mortgage railroad property within the state.

King v. Thompson, 110 Fed. 319; 13 O. F. D. 696; 46 W. L. B. 210 (C. C. A. 1901).

A foreign corporation is expressly authorized by § 8759 to appropriate property. Railway Co. v. Barger, 30 O. C. A. 65 (1919); s. c., 28 O. C. A. 92; affirming, 21 N. P. n. s. 97. See also Bogard v. Detroit, etc., Ry. Co., 45 W. L. B. 224 (1901).

Bogard v. Detroit, etc., Ry. Co., 45 W. L. B. 224 (1901).

A foreign railroad company which enters the state over a bridge owned by it, and forming a part of its line, is a railroad "partly in such other state and partly within this state" within the meaning of this section, although the bridge is used for other travel.

L. & N. Ry. v. Taylor, 50 Bull. 20 (Ins. Ct. 1904).

A foreign railroad company, by leasing and operating in this state the property of an Ohio corporation, does not thereby become an Ohio corporation.

Railroad Co. v. Cary, 28 O. S. 218 (1876).

Railroad v. Stringer, 32 O. S. 468 (1877).

Railroad Co. v. Koontz, 104 U. S. 5.

See note to § 194.

This section does not authorize a foreign telephone company to appropriate property.

Telephone Co. v. Columbus Grove, 8 C. C. n. s. 81; 18 C. D. 131 (1905).

Power of foreign railroad company to hold stock in Ohio corporations.

See Mannington v. Railway, 9 N. P. n. s. 641, 665 (1910); s. c., 183 Fed. 133; 8 O. L. R. 451; 16 O. F. D. 552.

Section 9091. (Mortgaged property may be sold without appraisement.) Railroads, and other property mortgaged therewith by such company, if the court deems it expedient, may be sold without appraisement, at judicial sales under judgments upon such mortgage. But in such case, to prevent sacrifices and protect the interests of all concerned, the court shall fix a minimum sum below which no sale shall be made. In order to fix that amount, if it deems it expedient to do so, the court may refer the subject to a master, with instructions to take testimony, and report the sum. (R. S. Sec. 3400; April 11, 1861, 58 v. 70, § 8.)

Section 9092. (Creditors may agree on capitalization.) When judicial proceedings are pending in a court for the sale of a railroad, and it is in the hands of a receiver appointed by such court, two-thirds in interest of each class of mortgagees, or holders of the bonds issued under a mortgage, and two-thirds in interest of all other classes of creditors of such company, and the owners of two-thirds of the shares of the stock thereof, may agree in writing upon a plan for the adjustment of such indebtedness, by capitalization or otherwise. (R. S. Sec. 3401; April 7, 1863, 60 v. 55, § 1.)

In so far as this section applies to debts created before its passage, it is unconstitutional.

Mather v. Cincinnati Ry. Co., 3 C. C. 284; 2 C. D. 161 (1888).

Section 9093. (Notice of agreement to be published.) When such agreement is made, and filed in the office of the secretary of state, he shall cause public notice thereof to be given in a newspaper of general circulation published in each of the cities of Columbus, Cincinnati and Cleveland, and also in a newspaper of general circulation published in each of the counties through or in which the road is located, which publication shall be made immediately after the agreement is filed, and be continued for six consecutive weeks. The cost thereof shall be paid by the company. (R. S. Sec. 3402; April 7, 1863, 60 v. 55, § 2.)

Section 9094. (Other creditors may sign the agreement.) A duplicate of such agreement shall be kept at the principal

office of the company. All persons in interest, not parties thereto, shall be at liberty, for four months after the date of the first publication, to appear and become a party to such agreement, either in person or by proxy, by signing it, and thereby secure its benefits. (R. S. Sec. 3403; April 7, 1863, 60 v. 55, § 3.)

Section 9095. (Rights of creditors who do not sign agreement.) Persons in interest who fail to become parties to the agreement within such time thereafter shall be entitled to the same rights, interest, estate, remedy, liens, and action, and none other, which parties in interest of like class and amount who signed the agreement obtained by, and under it. But if a person in interest fails for six years after the publication of the notice mentioned in the second preceding section, to apply at the principal office of the company, either in person or by proxy, to become a party in interest in the agreement, such person, unless an infant, or insane, shall be barred of all interest, claim, right or action under the agreement, or otherwise. In case of such disability the rights above enumerated shall be extended for two years after the termination of the disability. (R. S. Sec. 3404; April 7, 1863, 60 v. 55, § 4.)

Section 9096. (Court to make order as to costs.) When such agreement is made, filed, notice of it given, and proof thereof made, or offered to be made, in the court in which the proceedings are pending, the court shall dismiss the proceedings. But it may make such order or decree touching the costs and expenses thereof as it deems just. (R. S. Sec. 3405; April 7, 1863, 60 v. 55, § 5.)

Section 9097. (Agreement may be with each interest.) Such agreement is not required to be between the several interests above specified, but may be between each interest separately, and the railroad company. (R. S. Sec. 3406; April 7, 1863, 60 v. 55, § 7.)

Section 9098. (When road used by two companies.) If the railroad involved in such judicial proceedings is used, in whole or part, by such company in common with another railroad company, on the same track, between points on the line common to both, and within the limits of the termini established by their charters, the company owning the railroad, if it can be done without impairing the usefulness thereof to it, for a period of years, for an annual rent, may lease or sell for a fixed sum, to the company to which

the line of road, in whole or part, is common, an undivided interest in it upon such terms and conditions as they agree upon. Such lease or sale shall be reported to and approved by the court. When so made and approved, the lessee or vendee thereof shall hold such interest free from any previous lien thereon. (R. S. Sec. 3407; April 7, 1863, 60 v. 55, § 8.)

Where by the purchase of an undivided interest under this section, a tenancy in common becomes established, partition can not be compelled by either party under the statutes in relation to partition or in equity. *Railway Co. v. Railroad Co.*, 38 O. S. 614 (1883).

Section 9099. (Stocks or bonds held in a fiduciary capacity.) When a portion of the stock or bonds of a company is held by the state, or a county, township, city or village, or by an executor, administrator, guardian, or otherwise in a fiduciary capacity, the governor, county commissioners, township trustees, council, or other authority of the municipal corporation, or person holding in fiduciary capacity, may become parties to an agreement for the reorganization of such company, and may control, exchange, or manage such stock or bonds according to the terms of the agreement and receive new stock or bonds to be issued in place of the original stock or bonds, which shall be held on the same terms, and subject to all liens, which attached to the original stock or bonds. (R. S. Sec. 3408; April 11, 1861, 58 v. 70, § 9; April 7, 1863, 60 v. 55, § 6.)

See *Commissioners v. Nichols*, 14 O. S. 260.

CHAPTER 10.

STREET AND INTERURBAN.

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- § 9149-4. Abutting owner may construct and maintain fence, when.
- § 9149-5. Injury to domestic animal prima facie evidence of failure to comply with law.
- § 9149-6. Center aisle, length of car in street and interurban cars required.
- § 9149-7. Certain officers deemed violators.
- § 9149-8. Fine and imprisonment.
- § 9149-9. Prosecution.
- § 9149-10. When act shall take effect.

Section 9100. (Authority to construct a street railway.)

Street railways, with single or double tracks, side-tracks, and turn-outs, may be constructed or extended within or without, or partly within and partly without, any municipal corporation. Offices, depots, and other necessary buildings therefor, also may be constructed. (R. S. Sec. 3437; February 10, 1870, 67 v. 10, § 1.)

Sections § 9100 et seq. relate to street railways wherever located. Sections 3768 et seq. relate to street railway lines wholly within municipalities.

In case of conflict between the general provisions of this chapter and the provisions of § 3768 et seq. the more specific provisions of § 3768 et seq. will prevail.

C. C. C. & St. L. Ry. v. Urbana, etc., Ry., 5 C. C. n. s. 583; 16 C. D. 180 (1903); aff'd, no rep., 73 O. S. 364.

See also Reynolds v. Cleveland, 2 C. C. n. s. 139, 150; 14 C. D. 215 (1902); aff'd, no rep., 76 O. S. 619.

Hamilton v. Street Railroad, 5 N. P. 457; 8 L. D. 174.

A provision in a franchise, granted by a suburban village, that, in the event of its annexation to a neighboring city, the rate of fare should not exceed five cents, is binding. *Interurban Co. v. Cincinnati*, 93 O. S. 109 (1915).

What is a "street railway?" The difference between a "railroad" and a "street railway" consists in the use, not in the motive power.

Clement v. Cincinnati, 16 W. L. B. 355 (1886).

To constitute a "street railway" the rails should be laid to conform to the grade and surface of the street, the space between the rails being filled in, and so constructed that the public is not excluded from any part of the street.

McMaken v. C. & H., etc., Co., 5 N. P. 367; 5 L. D. 364.

Williams v. City Electric St. R. Co., 41 Fed. 556 (1890).

Schaaf v. Cleveland, etc., Co., 66 O. S. 215 (1902).

Dietz v. C. & M. Traction Co., 4 N. P. 399; 6 L. D. 513.

See also *Street Ry. Co. v. Cumminsville*, 14 O. S. 523, 545 (1863).

Cincinnati St. Ry. Co. v. Snell, 54 O. S. 197, 205-206.

State v. Dayton Traction Co., 18 C. C. 490; 10 C. D. 212 (1899); affirmed, 64 O. S. 272.

Columbus D. & N. Traction Co. v. Marriot, 47 O. L. B. 347.

G. C. § 3775.

Interurban railway as a street railway.

See note to § 9117.

Powers of street railway companies.

To furnish medical attendance. A street railway company can not make a valid contract to perform medical services; but may agree to furnish or pay for medical attention to persons injured on its line.

Youngstown, etc., Railway Co. v. Kessler, 84 O. S. 74 (1911)

To carry freight. An urban railway company may make a valid traffic agreement with an interurban railway company, under G. C. § 9120, for the transportation of freight over streets.

State v. Dayton Traction Co., 64 O. S. 272 (1901); affirming, 18 C. C. 490; 10 C. D. 212.

A franchise authorizing the transportation of freight over streets does not authorize the use of a street as a station for unloading freight.

Newark v. Ohio Electric Ry., 13 N. P. n. s. 487 (1912).

To make private agreement as to fare. An agreement with the proprietor of a resort, located beyond municipal limits, to carry passengers thereto for a specified fare, while other railways are excluded from the resort, is valid.

Humphrey Co. v. Cleveland Ry. Co., 9 N. P. n. s. 609; 20 L. D. (1910).

A contract between an interurban railroad and a landowner, for a specified rate of fare to a nearby city, in consideration of a right of way along a public highway in front of the landowner's property, was held valid and not abrogated by the subsequent enactment of the public utilities commission act. *Taylor v. Niles*, 2 Ohio App. 293; 21 C. C. n. s. 391 (1913). See § 614-19. *Contra*, *King Powder Co. v. Thrasher*, 20 N. P. n. s. 401.

To appropriate property.

§§ 9108, 9115, 9118-2.

Contracts with street railway as to operation are made in contemplation of existing laws and ordinances.

Cemetery v. Cincinnati St. Ry. Co., 11 C. C. n. s. 429; 21 C. D. 51.

Loop on private property under agreement construed to be a revocable license.

Cemetery v. Cincinnati St. Ry. Co., 11 C. C. n. s. 429; 21 C. D. 51 (1908).

Mueller v. Cincinnati Traction Co., 6 O. L. R. 596; 19 L. D. 504 (1909).

Conflicting franchise rights of telephone and street railway companies. The primary purpose of streets is travel and transportation. Where the franchise rights of a telephone company conflict with those of a street railway company, the latter are, in general, paramount.

Railway Co. v. Telephone Assn., 48 O. S. 390 (1891).

Route. The line may fork and be but one route.

Aydelott v. Cincinnati, 11 C. C. 11, 17; 4 C. D. 86 (1893).

Extensions may run at right angles with original track.

Belle v. Glenville, 5 C. C. n. s. 461; 17 C. D. 181 (1904); aff'd, no rep., 73 O. S. 392, 397; 75 O. S. 574.

An application for a franchise may be for two routes in the alternative, leaving it to the municipality to grant either one.

Simmons v. Toledo, 5 C. C. 124, 141; 3 C. D. 64 (1889).

See Somers v. Cincinnati, 8 Am. L. R. 612, 622.

See also note to § 3768.

Wires over private property. Ejectment will lie to compel the removal of high tension wires erected by an interurban railway over private property without consent of the owner. Saner v. Railway, 7 Ohio App. 238; 28 O. C. A. 255 (1916).

Section 9101. (Who to grant right to construct.) The right to construct or extend such railway within or beyond the limits of a municipal corporation, may be granted only by its council, by ordinance; the right to construct such railway without the limits of a municipal corporation may be granted only by the county commissioners, by an order entered on their journal. (October 22, 1902, 96 v. 31, § 29; Bates' Stats. § 1536-183.)

Franchises within municipalities, see § 3768 et seq.

Franchises generally, see note to § 3714.

Section 9120 is not intended as a limitation on this section.

Hamilton v. Railway, 5 N. P. 457; 8 L. D. 174.

Hamlets in existence when municipal code of 1902 took effect became villages. Consent of such a village necessary to construction of street railroad.

Railroad v. North Bend, 70 O. S. 46 (1904).

Where the trustees of a hamlet had granted a franchise on a street, which was also a state road, the county commissioners can not enjoin operation thereunder.

Commissioners v. A. B. & C. Ry., 21 C. C. 769; 11 C. D. 664 (1896).

See In re Newburgh Twp., 15 C. C. 78; 8 C. D. 24 (1897).

Over county bridge within municipality. The council may make a grant for extension over existing tracks which run over a bridge, within the municipality, but built by the county commissioners.

State v. Cincinnati, etc., Co., 19 C. C. 79; 10 C. D. 418 (1899).

Franchise in parks. A municipality has no power to grant a franchise for a street railway in a public park donated to the municipality for park purposes only, to revert to the donor, if used for other purposes.

Cleveland City Cable Ry. v. Barriss, 33 W. L. B. 314 (1895).

See Mathers v. Cincinnati, 3 W. L. B. 551, 709 (1878).

County commissioners may recover damages under G. C. § 2424 from street railway company occupying county road without permission.

Citizens, etc., Co. v. Commissioners, 56 O. S. 1 (1897); affirming, 9 C. C. 183; 6 C. D. 290.

Without municipalities a franchise must be granted by the county commissioners. A franchise from a municipality permitting an extension beyond the municipal limits does not dispense with the necessity of a grant from the commissioners.

Commissioners v. Railway, 9 C. C. 183; 6 C. D. 290 (1895); aff'd, 56 O. S. 1.

Dietz v. Traction Co., 4 N. P. 399; 6 L. D. 513.

A grant by the county commissioners, when accepted, is a contract.

State v. C. E. Ry. Co., 15 C. C. 200; 8 C. D. 474 (1897).

Traction Co. v. Ohio, 245 U. S. 574 (1918); reversing, 93 O. S. 466, and affirming, 2 Ohio App. 113; 15 C. C. n. s. 577; 24 C. D. 262.

A franchise by county commissioners, silent as to its duration, granted at a time when there were no provisions of the state constitution of statutes limiting its duration, and no prior adjudication by its courts to the contrary, is perpetual and can not be annulled by the commissioners. Traction Co. v. Ohio, 245 U. S. 574 (1918); reversing, 93 O. S. 466, and affirming, 2 Ohio App. 113; 15 C. C. n. s. 577; 24 C. D. 262.

A grant made by county commissioners is not affected by the subsequent annexation of the territory to a municipality.

Belle v. Glenville, 5 C. C. n. s. 461; 17 C. D. 181 (1904); aff'd, no rep., 73 O. S. 392; 75 O. S. 574.

Although the franchise from the municipality for that part of the street railway originally within municipal limits had by its terms included the street to the "corporation line". Railway v. Springfield, 15 N. P. n. s. 241, 249; 24 L. D. 277 (1913); aff'd, no rep. by court of appeals.

Under a franchise granted by county commissioners upon and along the side of a public highway, the interurban railway is not the owner in fee of the strip of land on which its tracks are laid. Dayton Co. v. Scott, 101 O. S. 13 (1920).

The grant of a franchise in a public highway does not confer the exclusive use of the portion of the highway on which the tracks are constructed. Fairchild v. Railway, 101 O. S. 261 (1920).

A franchise granted by county commissioners may be assigned by the grantee, although the word "assignee" or "assigns" is not used.

State v. Traction Co., 2 Ohio App. 113; 15 C. C. n. s. 577; 24 C. D. 262; reversed, no rep. 93 O. S. 460; judgment of reversal reversed and court of appeals affirmed, 245 U. S. 574.

Where municipal limits are extended over a street railway, built under a franchise from county commissioners, which required certain macadam paving, the municipality can not assess against the street railway, the cost of other paving, although the franchise from the municipality for the portion of the track within the municipal limits provided that the cost of paving ordered by the municipality should be so assessed. Railway v. Springfield, 15 N. P. n. s. 241; 24 L. D. 277 (1913); aff'd, no rep. by court of appeals.

But in such a case the municipality may compel the street railway company to relocate its line. *Ib.*

Miscellaneous.

Electrolysis. The operation of a single trolley electric system, contemplated by its franchise, causing injury to municipal water pipes, will not be enjoined, unless operation is negligent.

Dayton v. City Ry. Co., 6 C. C. n. s. 41; 16 C. D. 736 (1904); affirming, 12 L. D. 258.

Building moved across tracks. Rights and liabilities.

Traction Co. v. Sterling, 9 C. C. n. s. 200; 19 C. D. 227 (1906)."

Illegal contract by councilman with company. A member of a council can not recover under a contract with a street railway for services in procuring rights of way over streets.

Railroad Co. v. Morris, 10 C. C. 502; 6 C. D. 640 (1895).

Adverse possession of streets by company. Rights under.

Cincinnati v. Columbus, etc., Co., 17 W. L. B. 192 (1886).

INJUNCTIONS.

See also note to § 3714.

Solicitor or taxpayer may enjoin exercise of invalid franchise. The exercise of an invalid franchise may be enjoined, at the suit of the solicitor or a taxpayer, under G. C. § 4311 or § 4314.

Cincinnati St. R. Co. v. Smith, 29 O. S. 291 (1876).

Knorr v. Miller, 5 C. C. 609; 3 C. D. 297 (1891); affirmed, no rep., 27 W. L. B. 64.

Haskins v. Cincinnati, 4 W. L. B. 1126 (1880).

Rogers v. Railway Co., 12 L. D. 136 (1901).

See *Buning v. Cincinnati St. Ry. Co.*, 1 C. C. 323; 1 C. D. 178 (1886).

The motive of a taxpayer in bringing such a suit is immaterial. It is no defense that he is acting for the benefit of competing railways.

Raynolds v. Cleveland, 2 C. C. n. s. 139; 14 C. D. 215 (1902); affirmed, no rep., 76 O. S. 619.

Traction Co. v. Parish, 67 O. S. 181, 189 (1902).

Isom v. Low Fare Ry. Co., 10 C. C. n. s. 89; 19 C. D. 583 (1907); affirmed, no rep., 77 O. S. 638.

Compare, *Gallagher v. Johnson*, 31 W. L. B. 24.

To render a grant invalid, the defects or irregularities must be in some matter which is jurisdictional, or of such a nature that equity and justice require interference by the courts.

Sloane v. Peoples, etc., Ry. Co., 7 C. C. 84; 3 C. D. 674 (1891).

Defects in a street railway franchise can not be cured by an amendment to the granting ordinance which merely sets forth the facts as to the publication of notice before bids were received, and declares that the publication was sufficient to meet the requirements of the granting ordinance.

Raynolds v. Cleveland, 8 C. C. n. s. 278; 18 C. D. 463 (1906); aff'd, on the ground of laches, 77 O. S. 631.

Failure to procure the consents required by §§ 9105 and 3770 is not such a defect as will render the grant invalid at the suit of a taxpayer, who is not an abutting owner. Only abutting owners may complain on that ground.

Sommers v. Cincinnati, 8 Am. L. R. 612.

Simmons v. Toledo, 5 C. C. 124; 3 C. D. 64 (1889).

Glidden v. Cincinnati, 30 W. L. B. 213.

Lima v. Cramer, 5 N. P. n. s. 113; 17 L. D. 245 (1906).

Harrison v. Mt. Auburn, etc., Co., 17 W. L. B. 265.

Hamilton v. C. & H., etc., Co., 5 N. P. 457; 8 L. D. 174.

Suit by abutting owner. An abutting owner, as such, can not complain of defects in a grant, other than failure to procure consents required by § 9105 and § 3770.

Glidden v. Cincinnati, 30 W. L. B. 213.

Barney v. Mt. Adams, etc., Ry. Co., 30 W. L. B. 286.

Raynolds v. Cleveland, 2 C. C. n. s. 139, 154; 14 C. D. 215 (1902).

Ireton Bros. v. Ft. Wayne, etc., Co., 2 N. P. n. s. 317; 15 L. D. 129 (1904).

Sloane v. Peoples, etc., Co., 7 C. C. 84, 89; 3 C. D. 674 (1891).

Dietz v. Traction Co., 4 N. P. 399; 5 L. D. 513.

See Sanfleet v. Toledo, 10 C. C. 460; 8 C. D. 711 (1893).

See note to § 9105.

Suit by railroad to prevent crossing of tracks. A steam railroad company may raise the question whether the notice required by § 3769 has been given, where the street railway proposes to cross its tracks.

C. C. & St. L. Ry. v. Urbana, etc., Ry., 5 C. C. n. s. 583; 16 C. D. 180 (1903); aff'd, no rep., 73 O. S. 364.

Unsuccessful bidder or competitor. An unsuccessful bidder, who does not sue as a taxpayer or an abutting owner, can not enjoin occupation of streets.

Johnson v. West Side St. Ry. Co., 10 W. L. B. 345.

Mathers v. Cincinnati, 3 W. L. B. 709 (1878).

Nor can a competing company enjoin the exercise of a franchise on the ground of interference with its franchise.

Circleville, etc., Co. v. Buckeye Gas Co., 69 O. S. 259 (1903); affirming, 1 C. C. n. s. 259; 14 C. D. 684.

Section 9102. (Grantee not to be released from obligation.) After such grant, or the renewal of any grant has been made, by general or special ordinance, or the order of county commissioners, neither the municipality nor commissioners shall release a grantee from any obligations or liabilities imposed by the terms of the grant, or renewal of any grant, during the term for which such grant or renewal was made. (October 22, 1902, 96 v. 31, § 29; Bates' Stats. § 1536-183.)

See § 3771.

A purchaser of a street railway at judicial sale assumes the obligation of the original grantee of the franchise to operate the road. Gress v. Fort Loramie, 100 O. S. 35 (1919); reversing, 21 N. P. n. s. 81.

Release of obligation or liability. A modification of the contract, made in good faith for the better accommodation of the public, is not void.

Clement v. Cincinnati, 16 W. L. B. 355 (1886).

Cleveland v. Cleveland City Ry. Co., 194 U. S. 517 (1904).

Cleveland v. Cleveland Electric Ry. Co., 201 U. S. 529 (1906).

A grant of a franchise in good faith by county commissioners to an interurban company, wherein certain obligations in a former franchise as to fare and service are relinquished is not void under § 9102

if the considerations are substantial and advantageous to the public. *State ex rel. v. McClure*, — O. S. — (Syl. 21 O. L. R. 76).

A sum due a municipality as car license fees can not be released except on payment of the full amount. The principles of account stated and accord and satisfaction, based on a less amount, do not apply.

Cincinnati St. Ry. Co. v. Cincinnati, 8 N. P. 80; 11 L. D. 15.

In the absence of legislative authority a street railway company can not relieve itself of franchise obligations by a lease or traffic arrangement granting the joint use of its tracks to another company. *Quigley v. Toledo Co.*, 89 O. S. 68 (1913).

That operation of a railway is unprofitable is no excuse for failure to give adequate service. *Columbus Co. v. Columbus*, 249 U. S. 399; 17 O. R. R. 119 (1919); affirming, 253 Fed. 499; 16 O. R. R. 376; *Cincinnati v. Railway*, 14 N. P. n. s. 420 (1913). See also *Ferguson v. Transit Co.*, 4 O. L. R. 750; 52 W. L. B. 197 (Railroad Commission, 1907).

Remedies to enforce franchise obligations.

See note to § 3714.

Forfeiture of bidder's deposit. A deposit by grantee of franchise, to secure performance of obligations, may be forfeited to municipality as liquidated damages.

Hattersly v. Waterville, 4 C. C. n. s. 242; 16 C. D. 226 (1904); aff'd, no rep., 74 O. S. 466.

In a bond given by the grantee of a franchise conditioned upon the construction of a railway within the time specified and to save the city harmless from claims for damages, the penal sum was held to be a penalty and not liquidated damages. *Elyria v. Railway*, 23 C. C. n. s. 578 (1912).

Section 9103. (Right to occupy tracks of existing companies.) No right shall be given by such municipal or county authorities to occupy the track, single or double, or other structure, of existing street railways for more than one-eighth of the distance between the termini of the route, as actually constructed, operated and run over, of the company or person to whom such grant is made. But in granting permission to extend existing routes in cities, the cities and companies owning such route shall have all the rights and powers which they possess under existing laws and contracts. (October 22, 1902, 96 v. 31, § 29; Bates' Stats. § 1536-183.)

Municipality may grant franchise over existing tracks. Subject to the limitations of this section a municipality may grant a franchise over existing tracks belonging to another company, but the grantee must appropriate the right to use such tracks before taking possession.

Street Ry. Co. v. Street Ry. Co., 50 O. S. 603 (1893).

Kinsman, etc., Co. v. Broadway, etc., Co., 36 O. S. 239 (1880).

Hamilton, etc., Co. v. Hamilton, etc., Co., 69 O. S. 402 (1903).

See note to § 3768.

For right to appropriate use of tracks, see § 9108.

Pleading compliance with this section. A petition in an appropriation proceeding which alleges that eight times the amount of track, sought to be appropriated, has been built and placed in operation, shows compliance with this section.

Toledo Cons., etc., Co. v. Toledo Elec., etc., Co., 12 C. C. 337; 5 C. D. 643 (1893).

Computation of one-eighth of trackage. The entire line, without as well as within the municipality, should be used as a basis for computation. State v. Cincinnati, etc., Co., 19 C. C. 79, 89; 10 C. D. 418 (1899).

Abutting owners can not complain of a grant over existing tracks on the ground that the length of new track is insufficient under this section. Sanfleet v. Toledo, 10 C. C. 460; 8 C. D. 711 (1893).

Consents of abutting owners are not necessary for a franchise to operate cars solely over existing tracks.

State v. Cincinnati, etc., Co., 19 C. C. 79; 10 C. D. 419 (1899).

Broadway, etc., Co. v. Brooklyn, etc., Co., 10 W. L. B. 72.

Mt. Auburn, etc., Co. v. Neare, 54 O. S. 153 (1896).

Lima v. Cramer, 5 N. P. n. s. 113; 17 L. D. 245 (1906).

Section 9104. (Extensions to be constructed as new.)

No extension of a street railway located wholly outside of a city, or of one wherever located, which is built in pursuance of a right obtained from authority other than that of a municipal corporation, shall be made within the limits of such city, except as a new route. (October 22, 1902, 96 v. 31, § 29; Bates' Stats. § 1536-183.)

See Cleveland, etc., Ry. v. Urbana, etc., Ry., 5 C. C. n. s. 583; 16 C. D. 180 (1903); aff'd, no rep., 73 O. S. 364.

The validity of a grant made by county commissioners, in territory outside of a municipality, is not affected by the subsequent annexation of such territory to a municipality.

Belle v. Glenville, 5 C. C. n. s. 461; 17 C. D. 181 (1904); aff'd, no rep., 73 O. S. 392, 397; 75 O. S. 574.

Railway v. Springfield, 15 N. P. n. s. 241, 249 (1913).

Extensions within municipalities, § 3777.

Section 9105. (Consent of owners of abutting property.)

No such grant shall be made until there is produced to council, or the commissioners, as the case may be, the written consent of the owners of more than one-half of the feet front of the lots and lands abutting on the street or public way, along which it is proposed to construct such railway or extension thereof; and the provisions of all ordinances of the council relating thereto, have in all respects been complied with, whether the railway proposed is an extension of an old or the granting of a new route. (R. S. Sec. 3439; April 15, 1908, 99 v. 103; April 18, 1883, 80 v. 173; R. S. 1880; April 29, 1868, 65 v. 112, § 3.)

Consents for extensions, see note to § 3777.

CONSENTS.

Statutes requiring, are constitutional. Sections 9105, 3770 and 3777, requiring the written consents of abutting owners, are constitutional and valid, unless nullified by the adoption of additional laws or a municipal charter under Art. XVIII, §§ 2 or 7 of the constitution. *Carpenter v. Cincinnati*, 92 O. S. 473 (1915); reversing, 22 C. C. n. s. 65.

Are jurisdictional to grant. A majority of consents by the feet front is a condition precedent to jurisdiction to pass a street railway ordinance.

Traction Co. v. Parish, 67 O. S. 181, 192 (1902).

Roberts v. Easton, 19 O. S. 78 (1869).

Sommers v. Cincinnati, 8 Am. L. R. 612.

Although tracks of another company are already in the street.

Sanfleet v. Toledo, 10 C. C. 460; 8 C. D. 711 (1893); aff'd, no rep., 54 O. S. 620.

Requisite for each street. Consents of the owners of a majority of the frontage on each street on which the railway is to be constructed are requisite.

Mt. Auburn, etc., Ry. Co. v. Neare, 54 O. S. 153 (1896); affirming, 29 W. L. B. 171.

Sommers v. Cincinnati, 8 Am. L. R. 612.

See *Rapp v. Cincinnati, etc., Co.*, 12 W. L. B. 119.

This requirement can not be avoided by action of the council in changing the name of a street, along which consents could not be secured, to the name of another street, along which consents were secured.

Carpenter v. Traction Co., 13 N. P. n. s. 81 (1912).

The street contemplated by this section is an existing street. Promised consents of owners of property which will abut upon a proposed street, not yet established by ordinance, and the property for which has not been acquired by the municipality, are insufficient. *Carpenter v. Traction Co.*, 18 N. P. n. s. 1 (1915).

Not required to operate over existing tracks. Consents need not be obtained where the grant is to operate solely over existing tracks.

State v. Cincinnati, etc., Co., 19 C. C. 79; 10 C. D. 418 (1899).

Broadway, etc., Co. v. Brooklyn, etc., Co., 10 W. L. B. 72.

Mt. Auburn, etc., Co. v. Neare, 54 O. S. 153 (1896).

Lima v. Cramer, 5 N. P. n. s. 113; 17 L. D. 245 (1906).

Railway v. Railway, 6 C. C. 362; 3 C. D. 493; aff'd, 50 O. S. 603.

See *Sanfleet v. Toledo*, 10 C. C. 460; 8 C. D. 711 (1893); affirmed, 54 O. S. 621.

G. C. §§ 9106, 3770.

Except where the existing tracks occupy the street without right.

Isom v. Low Fare Ry. Co., 10 C. C. n. s. 89; 19 C. D. 583 (1907).

Municipal charter dispensing with necessity for consents. Under Article XVIII of the constitution, a home rule municipal charter may authorize the grant of a street railway franchise without the consents of abutting owners. *Billings v. Railway*, 92 O. S. 478 (1915).

WHO ENTITLED TO BENEFIT OF CONSENTS.

New road. Consents inure to benefit of lowest bidder. Can not be limited to one bidder or person. The consents of abutting owners to the construction of a new line, by whomsoever obtained, inure to the benefit of the lowest bidder.

Forest City Ry. Co. v. Day, 73 O. S. 83 (1905); reversing 5 C. C. n. s. 393.

Isom v. Low Fare Ry. Co., 10 C. C. n. s. 89, 98; 19 C. D. 583 (1907); aff'd, no rep., 77 O. S. 638.

State ex rel. v. Bell, 34 O. S. 194, 197 (1877).

Knorr v. Miller, 5 C. C. 609; 3 C. D. 297 (1891); affirmed, 27 W. L. B. 64.

Mathers v. Cincinnati, 3 W. L. B. 551.

A consent can not, by its terms, be limited to the party to whom given. The limitation is void, and the consent good as a consent to the construction of the road by the lowest bidder.

Forest City Ry. Co. v. Day, 73 O. S. 83 (1905).

Extension of existing line. Consents for the extension of an existing line inure only to persons to whom given, and assigns.

Isom v. Low Fare Ry. Co., 10 C. C. n. s. 89, 99; 19 C. D. 583 (1907); aff'd, no rep., 77 O. S. 638.

NATURE OF CONSENTS. RIGHTS OF ABUTTING OWNERS.

Consents are not property rights, but rights personal to each abutting owner, who is free to give or withhold such consent.

Traction Co. v. Parish, 67 O. S. 181 (1902); reversing 13 C. D. 527.

Forest City Ry. Co. v. Day, 73 O. S. 83 (1905).

Can not be appropriated. Consents are not property rights which may be appropriated under the power of eminent domain.

Traction Co. v. Parish, 67 O. S. 181 (1902).

Purchased consents are valid.

Traction Co. v. Parish, 67 O. S. 181 (1902).

Cleveland v. Cleveland City Ry., 3 C. C. n. s. 563; 13 C. D. 373 (1902); reversing 12 L. D. 623.

See Transit Co. v. Traction Co., 12 L. D. 1; s. c., 69 O. S. 402.

May be withdrawn. Consents may be withdrawn, even when induced by a money consideration, at any time before the granting ordinance has been read the second time.

G. C. § 9107.

Cleveland v. Cleveland City Ry., 3 C. C. n. s. 563; 13 C. D. 373 (1902); reversing 12 L. D. 623.

Simmons v. Toledo, 8 C. C. 535; 4 C. D. 69; aff'd, no rep., 51 O. S. 626.

See Hume v. Traction Co., 13 L. D. 70 (1902).

BY WHOM CONSENTS MAY BE GIVEN.

Owner or authorized agent. The "owner" must hold at least a freehold estate. A consent signed by a tenant for years is insufficient.

Rapp v. Cincinnati, etc., Co., 12 W. L. B. 119.

Consents must be signed by the abutting owner, or in his name by his authorized agent. A consent signed by a husband, in his own name, where his wife owns the property and does not consent, is insufficient and should not be received or counted.

Simmons v. Toledo, 8 C. C. 535; 4 C. D. 69 (1890); aff'd, no rep., 51 O. S. 626.

Rapp v. Cincinnati, etc., Co., 12 W. L. B. 119.

See Day v. Railway, 5 C. C. n. s. 393; 17 C. D. 60; reversed, 73 O. S. 83.

A consent signed by an agent in his own name, without authority, is invalid and can not be counted, although ratified by the owner after passage of the granting ordinance.

Sommers v. Cincinnati, 8 Am. L. R. 612.

The authority of an agent may be given by parol.

Simmons v. Toledo, 8 C. C. 535; 4 C. D. 69 (1890); aff'd, no rep., 51 O. S. 626.

Life tenant and remainderman. A life estate is a freehold interest, and a consent signed by a life tenant is valid.

Ireton Bros. v. Ft. Wayne, etc., Co., 2 N. P. n. s. 317; 15 L. D. 129 (1904).

Rapp v. Cincinnati, etc., Co., 12 W. L. B. 119.

A consent signed by a remainderman in his own name was held valid when the remainderman had charge of the property for the life tenant.

Simmons v. Toledo, 8 C. C. 535; 4 C. D. 69 (1890).

See also *Widow* below.

Tenants in common. A tenant in common, who may desire to vote adversely to his cotenants, is entitled to vote the number of feet front which his undivided interest proportionately represents.

Simmons v. Toledo, 8 C. C. 535; 4 C. D. 69 (1890).

Day v. Railway, 5 C. C. n. s. 393; 17 C. D. 60; reversed, 73 O. S. 83.

But see *Ronnebaum v. Mt. Auburn, etc., Ry.*, 29 W. L. B. 338.

Rapp v. Cincinnati, etc., Co., 12 W. L. B. 119.

Infants. A consent, signed by a minor is of no effect.

Schwab v. Hamilton, etc., Co., 13 L. D. 116 (1902).

Vendor and vendee. A consent given by a vendor, of which the vendee had knowledge at the time of purchase, and not withdrawn by the vendee, is valid.

Simmons v. Toledo, 8 C. C. 535; 4 C. D. 69; (1890); aff'd, 51 O. S. 626.

See *Day v. Railway*, 5 C. C. n. s. 393; 17 C. D. 60; reversed 73 O. S. 83.

A vendee in possession under a land contract may give a valid consent.

Day v. Railway, 5 C. C. n. s. 393; 17 C. D. 60 (1904); reversed on other grounds, 73 O. S. 83.

A consent given by a vendor with the consent of the vendee is valid.

Day v. Railway, 5 C. C. n. s. 393; 17 C. D. 60 (1904); reversed on other grounds, 73 O. S. 83.

Ancestor and heir. A consent signed by an ancestor, during his life, is valid where his heirs have knowledge of the consent, but do not withdraw it.

Day v. Railway, 5 C. C. n. s. 393; 17 C. D. 60 (1904); reversed on other grounds, 73 O. S. 83.

Executor. An executor with discretionary power to convey the property, can not sign a valid consent unless the legal title of the property has been devised to him.

Rapp v. Cincinnati, 12 W. L. B. 119.

Guardian. A consent signed by a guardian, without an order of the probate court, is invalid.

Rapp v. Cincinnati, 12 W. L. B. 119.

See *Day v. Railway*, 5 C. C. n. s. 393; 17 C. D. 60 (1904); reversed, 73 O. S. 83.

Trustees. A consent given by trustees under a will, having full control and management of the property, is valid.

Simmons v. Toledo, 8 C. C. 535, 556; 4 C. D. 69 (1890); aff'd, 51 O. S. 626.

The omission of the word "trustee" after the signature of the trustee

does not invalidate the consent.

Rapp v. Cincinnati, 12 W. L. B. 119.

Widow. Dower interest.

See Schwab v. Hamilton, etc., Co., 13 L. D. 116 (1902).

Rapp v. Cincinnati, etc., Co., 12 W. L. B. 119.

Partnership. A consent signed by one partner in the firm name is valid, although the land is not used for partnership purposes.

Schwab v. Hamilton, etc., Co., 13 L. D. 116 (1902).

Simmons v. Toledo, 8 C. C. 535; 4 C. D. 69; aff'd, no rep., 51 O. S. 626.

Corporation. Authority from the board of directors is requisite.

Rapp v. Cincinnati, etc., Co., 12 W. L. B. 119.

See Day v. Railway, 5 C. C. n. s. 393; 17 C. D. 60; reversed, 73 O. S. 83.

County property. The county commissioners have authority to execute consents for county property.

Nearing v. Toledo, etc., Ry., 9 C. C. 596; 6 C. D. 664 (1893).

Property owned by the municipality. The council may give a valid consent for a municipality, for abutting property owned by it.

Emerson v. Forest City Ry. Co., 8 C. C. n. s. 560; 14 C. C. n. s. 478; 18 C. D. 683; 23 C. D. 34 (1906); affirmed, no rep., 77 O. S. 596.

Ireton Bros. v. Traction Co., 2 N. P. n. s. 317; 15 L. D. 129 (1904).

WHEN AND HOW PRODUCED. FOR HOW LONG VALID.

Time of filing. Consents need not be obtained prior to the publication of notice of the application.

Sloane v. Peoples, etc., Co., 7 C. C. 84; 3 C. D. 674 (1891).

Nor before the introduction of the ordinance. Cincinnati v. Hillenbrand, 103 O. S. 286, 299 (1921).

But they must be filed with the council before the granting ordinance is passed or becomes effective

Sommers v. Cincinnati, 8 Am. L. R. 612, 618.

Where a grant fails, as to a part of the route, for lack of proper consents, the municipality may make a new grant for that part, when proper consents are filed. Such grant is valid under the original application, notice and bids.

Sanfleet v. Toledo, 10 C. C. 460; 8 C. D. 711 (1893); affirmed, 54 O. S. 620.

How produced. Filing with the council is sufficient. The consents need not be entered on its records.

Sanfleet v. Toledo, 10 C. C. 460; 8 C. D. 711 (1893); affirmed, 54 O. S. 620.

Ireton Bros. v. Traction Co., 2 N. P. n. s. 317, 325; 15 L. D. 129.

Life of consents. When once acted upon by the council, in granting a valid franchise, consents lose their vitality and can not be used again as the basis of a second grant to another company. But if the franchise is invalid, the consents may, if not withdrawn, be used again for the purpose of making a valid grant.

Isom v. Low Fare Ry. Co., 10 C. C. n. s. 89, 99; 19 C. D. 583 (1907); affirmed, no rep., 77 O. S. 638.

Sanfleet v. Toledo, 10 C. C. 460; 8 C. D. 711 (1893); affirmed, 54 O. S. 620.

Smith v. Columbus, etc., Co., 8 N. P. 1, 6.

See Roberts v. Easton, 19 O. S. 78, 88 (1869).

Day v. Railway, 5 C. C. n. s. 393; 17 C. D. 60 (1904); reversed 73 O. S. 83.

TERMS AND CONDITIONS.

Form and contents. A consent must be in writing and signed by the owner or his authorized agent. A consent by telegram is valid.

Simmons v. Toledo, 8 C. C. 535; 4 C. D. 69; (1890); aff'd, 51 O. S. 626.

Schwab v. Traction Co., 13 L. D. 116.

It need not specify the mode and manner of construction and operation.

Sloane v. Peoples, etc., Ry., 7 C. C. 84; 3 C. D. 674 (1891).

Consent to single track not consent for double track railway. Consents for the construction of a single track railway can not be counted as consents for a double track.

Roberts v. Easton, 19 O. S. 78 (1869).

Motive power. Consents for a railway with animal power are not consents for an electric railway.

Sanfleet v. Toledo, 10 C. C. 460; 8 C. D. 711; aff'd, 54 O. S. 620.

Additional switch. Consents for the original construction of a street railway are not consents for the subsequent construction of additional switches. New consents are requisite.

Horner v. Columbus, etc., Ry., 29 W. L. B. 387 (1893).

Chestnut v. Railway, 15 L. D. 336; aff'd, 76 O. S. 567.

Chambers v. Cleveland, etc., Co., 5 C. C. n. s. 298; 17 C. D. 193 (1904); aff'd, no rep., 73 O. S. 348.

Change of route after consent given. A consent for one specified route is not a consent for another and different route.

Neare v. Mt. Auburn, etc., Co., 29 W. L. B. 171; 4 N. P. 475; aff'd, 54 O. S. 153.

Ireton Bros. v. Traction Co., 2 N. P. n. s. 317, 321; 15 L. D. 129 (1904).

See Day v. Railway, 5 C. C. n. s. 393; 17 C. D. 60; reversed 73 O. S. 83.

But a change by an interurban road, whereby, for one square, the street is abandoned for a private right of way to avoid sharp curves, is not fraudulent per se against abutting owners.

Ireton Bros. v. Traction Co., 2 N. P. n. s. 317; 15 L. D. 129 (1904).

Conditional consents. A consent given upon condition that construction be commenced and completed within a certain time is upon a condition subsequent and effective only between its signer and the grantee of the franchise. Such condition does not prevent the council from acting upon the consent.

Simmons v. Toledo, 8 C. C. 535; 4 C. D. 69 (1890); aff'd, no rep., 51 O. S. 626.

Only the persons giving conditional consents may take advantage of a violation of the conditions. Abutting owners who did not consent can not complain of such violations.

Barney v. Mt. Adams, etc., Co., 30 W. L. B. 286 (Cin. Super. Ct.).

RIGHT OF ACCESS.

In absence of statute requiring consents abutting owners in municipalities have right of access only. So long as his right of ingress and egress is not materially interfered with, an abutting owner in a municipality can not prevent the construction and operation of a street railway, if permission has been duly given by the municipal authorities.

Traction Co. v. Parish, 67 O. S. 181, 191 (1902).

Isom v. Low Fare Ry. Co., 10 C. C. n. s. 91; 19 C. D. 583 (1907); aff'd, no rep., 77 O. S. 638.

Street Ry. v. Cummins ville, 14 O. S. 523 (1863).

Interference with right of access.

See also § 8765 and notes.

Held not to constitute. Tracks which leave ten feet between the curb and the nearest track.

Barney v. Mt. Adams, etc., Co., 30 W. L. B. 286, 288.

Double tracks so located that wagons can not stand at right angles with the curb while being loaded and unloaded.

Miller v. Columbus Ry. Co., 13 L. D. 418 (1902).

Sells v. Columbus St. Ry. Co., 28 W. L. B. 172 (1892).

Oviatt v. Akron St. Ry. Co., 2 N. P. 84; 3 L. D. 252 (1895).

Trolley poles.

Mt. Adams, etc., Co. v. Winslow, 3 C. C. 425; 2 C. D. 240 (1888).

See Simmons v. Toledo, 8 C. C. 535; 4 C. D. 69 (1890).

Tracks laid close to sidewalk at corner so that, in turning the corner, the body of the car extends over the sidewalk.

Powell v. Columbus, etc., Co., 10 N. P. n. s. 266; 20 L. D. 313 (1910).

Held to constitute. Water thrown upon land by construction.

A. B. & C. Ry. v. Keck, 13 C. D. 57.

Tracks laid within two or three feet from the sidewalk in front of stores.

Street Ry. v. Cumminsville, 14 O. S. 523, 543 (1863).

See Schaaf v. Railway Co., 66 O. S. 215 (1902).

Tracks laid on one side of a highway without conforming to the grade, and without filling in between the rails.

McMacken v. C. & H., etc., Co., 5 N. P. 367; 5 L. D. 358.

Temporary interference incident to the construction of a street railway can not be complained of by abutting owner.

Glidden v. Cincinnati, 30 W. L. B. 213.

Estoppel by written consent. An abutting owner, who has given his written consent, can not complain of the additional burden, but if his easement of access is interfered with in the construction of the railway he is entitled to an injunction.

Powell v. Railway Co., 10 N. P. n. s. 266; 20 L. D. 313 (1910).

Transit Co. v. Traction Co., 12 L. D. 1, 4 (1901); s. c., 69 O. S. 402.

Liability to abutting owners, for injuries to trees in highway.

A. B. & C. Ry. v. Keck, 13 C. D. 57.

Keefe v. Cleveland City R. Co., 8 N. P. 466; 11 L. D. 568.

Rights of street railway and abutting owners in streets limited. A street railway can not lawfully occupy the track in front of business premises for an unreasonable time, nor can an abutting owner occupy the tracks for an unreasonable time so as to interfere with movement of cars.

Miller v. Columbus Ry. Co., 13 L. D. 418 (1902).

See Traction Co. v. Sterling, 9 C. C. n. s. 200; 19 C. D. 227 (1906).

STREET RAILWAY AS AN ADDITIONAL BURDEN.

In municipalities. The construction and operation of a street railway upon a street is a proper street use, and not a new or additional burden entitling abutting owners to compensation.

Billings v. Railway, 92 O. S. 478 (1915).

Trolley poles do not render the use a new or additional burden.

Simmons v. Toledo, 8 C. C. 535; 4 C. D. 69 (1890).

Sells v. Columbus St. Ry., 28 W. L. B. 172 (1892).

Akron, etc., Transit Co. v. Erie R., 7 C. C. n. s. 199, 202; 18 C. D. 36 (1905).

Railway v. Winslow, 3 C. C. 425; 2 C. D. 240 (1888).

Interurban railways outside of municipalities. An interurban railway, with T rails, built entirely on one side of a highway, between improved farms and the roadway, the company having authority to operate an unlimited number of cars for passengers, mail and freight, is an additional burden similar to that of a steam railroad.

Schaaf v. Cleveland, etc., Co., 66 O. S. 215 (1902).

Chestnut v. Columbus, etc., Ry., 15 L. D. 336 (1905); affirmed, 76 O. S. 567.

Miller v. Columbus Ry. Co., 13 L. D. 418 (1902).

A steam railroad is an additional burden.

Lawrence R. R. Co. v. Williams, 35 O. S. 168 (1878).

An additional switch laid in the highway subsequent to construction of road is an additional burden.

Chambers v. Cleveland, etc., Co., 5 C. C. n. s. 298; 17 C. D. 193 (1904); aff'd, no rep., 73 O. S. 348.

Chestnut v. Columbus, etc., Ry., 15 L. D. 336 (1905); aff'd, no rep., 76 O. S. 567.

Estoppel by consent. An abutting owner, who has signed a written consent, is estopped from complaining of the additional burden.

Powell v. Columbus, etc., Co., 10 N. P. n. s. 266; 20 L. D. 313 (1910).

INJUNCTION AGAINST CONSTRUCTION OF ROAD WITHOUT VALID CONSENTS.

Suit by abutting owner. Where a franchise is granted without the required number of valid consents, the construction of the railway may be enjoined at the suit of an abutting owner.

Roberts v. Easton, 19 O. S. 78 (1869).

Mt. Auburn, etc., Ry. Co. v. Neare, 54 O. S. 153 (1896).

Lack of valid consents is, as a general rule, the only ground upon which an abutting owner, as such, may complain. Other defects in a grant may be attacked only by the public.

Glidden v. Cincinnati, 30 W. L. B. 213.

Sloane v. Peoples, etc., Co., 7 C. C. 84, 89; 3 C. D. 674 (1893).

Barney v. Mt. Adams, etc., Ry. Co., 30 W. L. B. 286.

Raynolds v. Cleveland, 2 C. C. n. s. 139, 154; 14 C. D. 215 (1902).

Ireton Bros. v. Ft. Wayne, etc., Co., 2 N. P. n. s. 317; 15 L. D. 129 (1904).

Dietz v. C. & M. V. Traction Co., 4 N. P. 399.

An abutting owner on one street can not complain of lack of consents of owners of property on other streets.

Toledo Cons., etc., Co. v. Toledo Elec., etc., Ry., 6 C. C. 362, 387; 3 C. D. 493; aff'd, 50 O. S. 603.

Mathers v. Cincinnati, 3 W. L. B. 709.

An abutting owner may enjoin interference with his property right of ingress and egress.

Street Ry. v. Cummins, 14 O. S. 523 (1863).

Powell v. Columbus, etc., Ry., 10 N. P. n. s. 266; 20 L. D. 313 (1910).

The motive of an abutting owner in bringing suit is immaterial. It is no defense that he is acting for the benefit of competing railways.

Traction Co. v. Parish, 67 O. S. 181, 189 (1902).

Isom v. Low Fare Ry. Co., 10 C. C. n. s. 89; 19 C. D. 583 (1907); affirmed, no rep., 77 O. S. 638.

A plaintiff, not in possession of abutting property, and whose ownership is doubtful, is not entitled to an injunction. His ownership must first be established at law.

Swing v. Cincinnati, etc., Traction Co., 15 L. D. 70 (Cin. Super. Ct., Gen. Term, 1904).

An abutting owner can not object to the operation of cars over exist-

ing tracks, on the ground that the length of new track is insufficient under G. C. § 9103.

Sanfleet v. Toledo, 10 C. C. 460; 8 C. D. 711 (1893); affirmed, 54 O. S. 620.

Where an interurban road outside of municipalities constitutes an additional burden, abutting owners may enjoin its construction until compensation is made.

Schaaf v. Cleveland, etc., Co., 66 O. S. 215 (1902).

Burden of proof. The action of a council in granting a franchise is not conclusive as to the number of valid consents. An abutting owner may raise the question.

Roberts v. Easton, 19 O. S. 78 (1869).

Sommers v. Cincinnati, 8 Am. L. R. 612.

But the presumption is in favor of the action of the council. The burden of proof is upon the abutting owner to show lack of valid consents. Simmons v. Toledo, 8 C. C. 535; 4 C. D. 69 (1890); aff'd, 51 O. S. 626. Ireton Bros. v. Ft. Wayne, etc., Co., 2 N. P. n. s. 317; 15 L. D. 129 (1904).

Schwab v. Traction Co., 13 L. D. 116, 120 (1902).

Cincinnati College v. Nesmith, 2 C. S. C. R. 24 (1870).

Hamilton v. Railroad, 5 N. P. 457; 8 L. D. 174.

Joinder of parties. Owners of property abutting on the same street may join as plaintiffs, but they may not join with owners of property on other streets.

Glidden v. Cincinnati, 30 W. L. B. 213.

Suit by solicitor or taxpayer. An injunction suit by a solicitor or taxpayer can not be predicated upon a lack of valid consents. Abutting owners, only, may complain on that ground.

Glidden v. Cincinnati, 30 W. L. B. 213.

Simmons v. Toledo, 5 C. C. 124; 3 C. D. 64 (1889); aff'd, 30 W. L. B. 392.

Lima v. Cramer, 5 N. P. n. s. 113; 17 L. D. 245 (1906).

Sommers v. Cincinnati, 8 Am. L. Rec. 612.

Harrison v. Mt. Auburn, etc., Co., 17 W. L. B. 265.

Hamilton v. C. & H., etc., Co., 5 N. P. 457; 8 L. D. 174.

Nor can a solicitor base an action in quo warranto on such ground.

State v. Oakwood, etc., Ry., 11 C. C. n. s. 263; 20 C. D. 632 (1908); aff'd, no rep., 81 O. S. 502.

State v. Railway, 19 C. C. 79; 10 C. D. 418 (1899).

MISCELLANEOUS.

Right of abutting owners to prevent abandonment of part of line.

Bickerstaff v. Steubenville, etc., Co., 5 O. L. R. 539 (Railroad Commission 1907).

Cemetery v. Street Ry., 11 C. C. n. s. 429; 21 C. D. 51 (1908).

License for temporary tracks is not a grant and may be given by a municipality without consents.

Mathers v. Cincinnati, 3 W. L. B. 551, 709 (Cin. Super. Ct.).

PUBLICATION OF NOTICE.

Notice under § 3769 unnecessary for grant to construct extension.

Railway Co. v. Railway Co., 5 C. C. n. s. 583, 596, 597; 16 C. D. 180 (1903); aff'd, no rep., 73 O. S. 364.

State ex rel. v. Cincinnati, etc., Co., 19 C. C. 79 (1899).

Sommers v. Cincinnati, 8 Am. L. Rec. 612.

See § 3777.

Section 9106. (When written consent not required.) But when such grant is made by the council of a municipal corporation, either for a new route or as an extension of an existing route, in case the number of tracks thereon or part thereof is not increased beyond the number for which consents originally were obtained, on and along any part of a street or public way upon which a street railway has been operated within one year preceding under a grant or renewal of a grant which has expired or within two years will expire, or when such a grant is made by the council of a municipal corporation or the commissioners of a county on and along any part of a street or public way upon the order or finding of any court of competent jurisdiction, or a judge thereof, in a hearing upon or growing out of a grade crossing elimination proceedings, in which hearing such court or judge has determined that the reasonable and practical solution of the manner of eliminating a grade crossing requires that such a street or interurban railway shall be re-located or re-routed for a certain distance fixed by the court, it shall not be necessary to produce to the council or commissioners any written consents from the owners of the lots and land abutting on such part of a street or public way. (107 v. 533; R. S. Sec. 3439; April 15, 1908, 99 v. 103; April 18, 1883, 80 v. 173; R. S. 1880; April 29, 1868, 65 v. 112, § 3.)

Section 9107. (When property owner cannot withdraw consent.) Nothing contained in the preceding section shall permit a person owning property abutting on a street along, in or over which a street railway is about to be constructed, to withdraw his consent after an ordinance granting the right to construct and operate it has been read the second time, if at least thirty days elapsed since the first reading thereof, in the council or other body authorized to make the grant. (R. S. Sec. 3439a; May 10, 1902, 95 v. 475.)

Except as prohibited by this section, an abutting owner may withdraw his consent, even when induced by a money consideration.

Cleveland v. Cleveland City Ry. Co., 3 C. C. n. s. 563; 13 C. D. 373 (1902); reversing, 12 L. D. 623.

Simmons v. Toledo, 8 C. C. 535; 4 C. D. 69 (1890).

See Hume v. Hamilton, etc., Co., 13 L. D. 70 (1902).

Section 9108. (Appropriation of property.) When the council or commissioners make such grant, the company or person to whom it is made may appropriate property necessary therefor, if the owner fails expressly to waive his claim to damages by reason of the construction and operation of the railway. (R. S. Sec. 3440; April 16, 1892, 89 v.

349; April 11, 1890, 87 v. 178; March 27, 1866, 63 v. 55, § 4; March 24, 1864, 61 v. 53, § 1; S. & S. 136; S. & S. 137.)

Procedure in appropriation cases see § 11038 et seq.

What property may be appropriated. Use of existing tracks may be.

Street Ry. Co. v. Street Ry. Co., 50 O. S. 603 (1893).

Consents of abutting owners under §§ 9105 and 3770 can not be.

Traction Co. v. Parish, 67 O. S. 181 (1902).

See § 9109.

County road.

See Railroad Co. v. Commissioners, 56 O. S. 1, 8 (1897).

APPROPRIATION OF USE OF EXISTING TRACKS.

Right of. A street railway, having a franchise to use the existing tracks of another street railway, may, under this section, appropriate such tracks to its use.

Street Railway Co. v. Street Railway Co., 50 O. S. 603 (1893); aff'g, 6 C. C. 362; 3 C. D. 493.

See Traction Co. v. Traction Co., 47 W. L. B. 854.

Railway v. Railway, 26 W. L. B. 172.

Sections 9120 and 9130 conferring power to make traffic agreements do not interfere with the right to appropriate use of existing tracks.

State v. C. & H., etc., Ry., 19 C. C. 79; 10 C. D. 418 (1899).

Successive proceedings. The appropriation of a part of existing tracks is not a bar to a proceeding to appropriate other portions.

Toledo Consol., etc., Co. v. Toledo Elec., etc., Co., 12 C. C. 367; 5 C. D. 643 (1893).

Appropriating company not joint owner of tracks. The appropriating company does not acquire a joint ownership in the tracks, and is not entitled to compensation from another company subsequently acquiring right to use the same.

Toledo Electric, etc., Co. v. Toledo, etc., Co., 10 C. C. 168; 6 C. D. 578 (1895); reversing 7 N. P. 211; 1 L. D. 33.

Measure of compensation.

See Toledo Cons., etc., Co. v. Toledo Elec., etc., Co., 6 C. C. 362; 3 C. D. 493 (1892); (affirmed, 50 O. S. 603, except as to measure of compensation which was reserved for re-argument and afterwards dismissed by consent. 31 W. L. B. 348).

Toledo Cons., etc., Co. v. Toledo Elec., etc., Co., 12 C. C. 367; 5 C. D. 643 (1893).

Power of council to fix compensation. The council has no power to fix the compensation to be paid except when that right is reserved in the franchise of the owner of the tracks.

Kinsman, etc., Co. v. Broadway, etc., Co., 36 O. S. 239, 252 (1880).

Pleading and evidence.

Necessity for appropriation. The appropriating company need not show necessity for use of the tracks. The action of the council in granting the franchise is, in the absence of fraud, conclusive.

Toledo Cons., etc., Co. v. Toledo Elec., etc., Co., 6 C. C. 362; 3 C. D. 493 (1892); affirmed, 50 O. S. 603.

Compliance with § 9103. That eight times the amount of track sought to be appropriated has been constructed and placed in operation satisfies the requirements of § 9103.

Toledo Cons., etc., Co. v. Toledo Elec., etc., Co., 12 C. C. 361; 5 C. D. 643 (1893).

Toledo Cons., etc., Co. v. Toledo Elec., etc., Co., 6 C. C. 362; 3 C. D. 493 (1892); affirmed, 50 O. S. 603.

Miscellaneous. The petition need not set out the length of time the existing tracks will be used.

Toledo Cons., etc., Co. v. Toledo Elec., etc., Co., 12 C. C. 367; 5 C. D. 643 (1893).

The appropriating company need not prove proceedings preliminary to the grant of its franchise, such as the application, notice and consents.

Toledo Cons., etc., Co. v. Toledo, Elec., etc., Co., 6 C. C. 362, 387; 3 C. D. 493 (1892); affirmed, 50 O. S. 603.

But it must show the grant of a franchise from the municipality.

Railway Co. v. Stoneware Co., 51 W. L. B. 421.

Injunction against use without appropriation. The grantee of a franchise over existing tracks may be enjoined from taking possession without appropriating the right of use.

See Hamilton, etc., Co. v. Hamilton, etc., Co., 69 O. S. 402 (1903).

Kinsman, etc., Co. v. Broadway, etc., Co., 36 O. S. 239 (1880).

But a company which has parted with its interest in the tracks is not entitled to an injunction, where the right of use has been appropriated against the company in possession.

Metropolitan, etc., Co. v. Toledo, etc., Co., 9 C. C. 664; 6 C. D. 733 (1893).

RIGHT TO CROSS TRACKS OF STEAM OR STREET RAILROADS WITHOUT APPROPRIATION.

In municipalities. A street railway, authorized to lay tracks in a street which crosses a steam railroad, may, on such streets, cross the tracks of the steam railroad without compensation.

C. & H. Electric St. Ry. v. C. H. & I. R. Co., 21 C. C. 391, 396; 12 C. D. 113 (1898); aff'd, no rep., 64 O. S. 550.

Railway Co. v. Railway Co., 5 C. C. n. s. 583, 588; 16 C. D. 180 (1903); aff'd, no rep., 73 O. S. 364.

Akron, etc., Transit Co. v. Erie R. Co., 7 C. C. n. s. 199, 201; 18 C. D. 36 (1905).

Street tracks of another street railway may be crossed without compensation.

Metropolitan, etc., Co. v. Toledo, etc., Ry., 9 C. C. 664; 6 C. D. 733 (1893).

For railroad crossings not on streets, see § 8834.

Without municipalities the right to cross railway tracks must be acquired by agreement or court decree.

G. C. § 8834 et seq.

Dayton, etc., R. Co. v. Dayton, etc., Traction Co., 1 N. P. n. s. 296; 14 L. D. 143 (1903); affirmed, 4 C. C. n. s. 329; 16 C. D. 1; reversed on other grounds, 72 O. S. 429.

Section 9109. (Appropriation of property of turnpike or plank road.) Such power to appropriate may be exercised, for the purpose of constructing a street railway along a highway occupied by a turnpike or plank road company when the person, persons or company authorized to construct such railway cannot agree with the turnpike or plank

road company on the terms and conditions upon which the highway may be occupied, and if such appropriation will not unnecessarily interfere with the reasonable use of the highway by the turnpike or plank road company. Nothing in the foregoing provisions shall affect the rights of property owners to give or withhold their consent concerning the right of way for street railways upon any street or road. (R. S. Sec. 3440; April 16, 1892, 89 v. 349; April 11, 1890, 87 v. 178; March 27, 1866, 63 v. 55, § 4; March 24, 1864, 61 v. 53, § 1.)

Consents of property owners can not be appropriated.
Traction Co. v. Parish, 67 O. S. 181 (1902).

Section 9110. (Oath in appropriation proceedings.) In case of appropriation of property for such purpose, the oath to be administered to the jury shall be as follows: "You and each of you do solemnly swear that you will justly and impartially assess, according to your best judgment, the amount of compensation which is due to (here name the owner or owners), by reason of the appropriation of the street or avenue (as in the statement described), irrespective of any benefit from any improvement proposed by such (here name the company, individual, or company of individuals), and that you will in assessing damages that may accrue to (here name the owner or owners), by reason of the appropriation, other than the compensation, further ascertain how much less valuable the lot or lots of such (here name the owner or owners), will be in consequence of such appropriation." (R. S. Sec. 3442; March 27, 1866, 63 v. 55, § 5.)

Section 9111. (How compensation ascertained.) The jury, in ascertaining such compensation or damages, shall determine the amount thereof without reference to the distinction between a public and a private nuisance, and the effect of such distinction upon the right of such owner or owners to claim compensation or damages, and, if requested, the court shall so direct the jury. (R. S. Sec. 3442; March 27, 1866, 63 v. 55, § 5.)

Measure of compensation.

(Land) Lorain St. Ry. Co. v. Sinning, 17 C. C. 649; 6 C. D. 753 (1895).

Use of existing tracks, see note to § 9108.

See also note to § 11053.

Section 9112. (Consent of authority controlling public road.) If the public road along which the railway is to be

constructed is owned by a person or company, or is within the control or management of the board of public works or other public officer, such person, company, or officer may agree with the person or company constructing the railway as to the terms and conditions upon which the road may be occupied. (R. S. Sec. 3441; February 19, 1870, 67 v. 10, § 1.)

Cited, *State ex rel. v. Taylor*, 55 O. S. 61, 66 (1896).

This section applies to state and county roads under the control of county commissioners. The term "officer" includes a board of county commissioners.

Railroad Co. v. Commissioners, 56 O. S. 1, 7 (1897).

Where the trustees of a hamlet had, prior to 1902, granted a franchise on a street which was also a state road, the county commissioners can not enjoin operation thereunder.

Commissioners v. A. B. & C. Ry., 21 C. C. 769; 11 C. D. 664 (1896).

A turnpike company has no power to enter into a contract for a railway which interferes with the right of access of abutting owners.

McMacken v. C. & H., etc., Co., 5 N. P. 367; 5 L. D. 358.

The public utilities commission, in fixing a reasonable rate of fare between points on an interurban railroad, need not adopt a rate between other points fixed in a franchise to the same railroad. *Stark County v. Traction Co.*, 102 O. S. 124 (1921).

Section 9113. (Terms and conditions of construction, etc.) Council, or the commissioners, as the case may be, may fix the terms and conditions upon which such railways may be constructed, operated, extended, and consolidated. (R. S. Sec. 3443; February 19, 1870, 67 v. 10, § 1; May 7, 1869, 66 v. 140, § 1.)

See § 3768 and 9101.

This section does not authorize a municipality, by penal ordinance, to prescribe the qualifications of motormen and conductors.

Columbus, etc., Co. v. Columbus, 10 N. P. n. s. 161; 20 L. D. 555 (1910).

The council may fix the rate of fare from the municipality to a point outside of its limits. *Railway Co. v. Cincinnati*, 93 O. S. 109 (1915).

A franchise may provide for annual payments to the municipality. *Opins. Atty. Gen.* 1918, p. 795.

Section 9114. (Free transportation of police and firemen.) Upon the granting of franchises to traction companies throughout this state for the use of streets, roads and highways for the transportation of passengers, it must be provided, as one of the considerations for such use of the public highways, that such traction companies shall carry free as passengers on any and all regular cars, policemen and firemen, when on duty and in uniform. (March 15, 1909, 100 v. 14, § 1.)

Section 9115. (Appropriation of property by directors.)

When it is deemed necessary by a majority of the directors of a domestic or foreign corporation owning or operating a street railway in a municipality to appropriate private property therein, in order to avoid dangerous or difficult curves or grades, or unsafe or unsubstantial grounds or foundations or to extend or shorten its railway line, or to provide land on which to extend its power plant, such corporation may appropriate so much private property as is necessary for the extension of such power plant, or the construction, operation, and maintenance of the tracks, poles, supports, wires, cables and necessary appliances of such railway other than power houses, machine shops, stations or substations in the manner and subject to the provisions of law for the appropriation of private property by corporations. (April 7, 1904, 97 v. 106, § 1.)

Section 9116. (Change of location of any portion of railway.)

For the purposes above provided such corporation may change the location of any part of its railway, and for the purpose of making such change, it shall have all the rights, powers, and privileges to enter upon private land and make surveys necessary to effect such change as fully as railroad companies are by law permitted to do. (April 7, 1904, 97 v. 106, § 2.)

Change of location.

Ireton Bros. v. Traction Co., 2 N. P. n. s. 317; 15 L. D. 129 (1904).

Bickerstaff v. Steubenville, etc., Traction Co., 5 O. L. R. 539; 53 W. L. B. 29 (Railroad Commission 1907).

Ashley v. Railway, 5 O. L. R. 359; 52 W. L. B. 496 (1907).

Spring Grove v. Railway, 11 C. C. n. s. 429; 21 C. D. 51 (1908).

Section 9117. (Construction of street railroads outside of municipalities.)

Companies incorporated under section eighty-six hundred and twenty-five, for such purpose, may construct, maintain and operate electric street railroads, or street railroads using other than animal power as a motive power, for the transportation of passengers, packages, express matter, United States mail, baggage and freight upon the highways in this state outside of municipalities, or upon private rights of ways. (R. S. Sec. 3443-8; May 10, 1902, 95 v. 539; May 17, 1894, 91 v. 285.)

Held constitutional.

Dietz v. C. & M. V. Traction Co., 4 N. P. 399; 6 L. D. 513.

This section does not modify, limit or repeal §§ 9100, 9101 and 9102, nor define a different kind of street railroad.

Hamilton v. C. & H., etc., Ry., 5 N. P. 457; 8 L. D. 174.

Sections 9117-9122 relate to electric railways outside of municipalities. Interurban Co. v. Cincinnati, 93 O. S. 108, 116 (1915).

Motive power should be clearly stated in articles of incorporation.
See Rep. Atty. Gen. (1909-1910) 99.

INTERURBAN RAILROAD. WHETHER A "RAILROAD" OR A "STREET RAILWAY."

The distinction between an interurban railway and a railroad is said to lie, not in its motive power, but in the frequency of service rendered, number of stops made and the character of its business. *State v. Railway*, 18 N. P. n. s. 393; 26 L. D. 264 (1916).

Statutory classification as a "street railway." Under certain statutes interurban railroads have been classed as street railways and provisions of such statutes relating to "railroads" held not applicable to interurbans. Under sections 9117 to 9122.

Ohio Electric Ry. Co. v. Ottawa, 85 O. S. 229 (1912); reversing, 13 C. C. n. s. 561; 22 C. D. 197.

State v. Traction Companies, 64 O. S. 272 (1901).

Statutes imposing excise taxes.

Electric St. R. Co. v. Lohe, 68 O. S. 101, 109, 110 (1903).

§ 5490 (101 v. 409, orig. G. C. § 5488; R. S. 2780-17).

See *Railway v. Poland*, 10 N. P. n. s. 617; 21 L. D. 630 (C. P. 1910); aff'd, no rep., 88 O. S. 596, 597.

Providing for mechanic's liens on railroads.

Bridge Co. v. Iron Co., 59 O. S. 179 (1898).

G. C. § 3245.

Providing for construction of railroad and highway crossings, prior to the amendment of §§ 8874 and 8897 in 1913.

Commissioners v. Traction Co., 75 O. S. 548 (1907).

In re *Avon Beach, etc.*, R. Co., 3 N. P. n. s. 561; 16 L. D. 87 (C. P. 1905).

Providing for the crossing of one railroad by another.

C. & H., etc., Co. v. C. & H., etc., Co., 21 C. C. 391; 12 C. D. 113 (1898).

D. & U. Ry. v. D. & M. Traction Co., 4 C. C. n. s. 329; 16 C. D. 1 (1903); affirming, 1 N. P. n. s. 218, 296; 14 L. D. 17; reversed, on other grounds, 72 O. S. 429.

Rapid Ry. Co. v. Cincinnati, etc., Ry., 48 O. L. B. 245.

See also *Cleveland, etc., Co. v. Urbana, etc., Co.*, 5 C. C. n. s. 597; 16 C. D. 180 (1903).

Columbus, etc., Traction Co. v. Marriott, 47 O. L. B. 357 (Probate Court).

Rep. Atty. Gen. (1909-10) 261.

Under § 3762 permitting municipalities to require a railroad to light a portion of its track.

Ohio Electric Railway v. Ottawa, 85 O. S. 229 (1912); reversing, 13 C. C. n. s. 561; 22 C. D. 197 (1910).

Under § 8806 authorizing railroad companies to give assistance to other like companies. *Trust Co. v. Railway*, 18 N. P. n. s. 298 (1915).

An interurban railway can not, by amendment of its articles, acquire authority to construct and operate a commercial railroad. Opins. Atty. Gen. 1917, p. 1756.

When a "railroad." The law of negligence governing the standing on a platform of a moving interurban car outside of a municipality is the same as in the case of steam cars.

Electric St. R. Co. v. Lohe, 68 O. S. 101, 109, 110 (1903).

The construction of an interurban railroad on one side of a highway, outside of a municipality, for the transportation of passengers, freight

and mail, is an additional burden on the highway similar to that imposed by steam railroads.

Schaaf v. Railway Co., 66 O. S. 215 (1902).

See *Railway v. Poland*, 10 N. P. n. s. 617; 21 L. D. 617 (C. P. 1910).

Weber v. Stark Electric Co., 13 L. D. 194 (1902).

In the public utilities commission acts an interurban railroad is classed as a "railroad." §§ 501, 614-2.

Is a "railroad" under G. C. § 540. *H. V. Ry. Co. v. Commission*, 107 O. S. 43 (1923).

In the grade crossing acts the term "railroad" includes interurban railroads. §§ 8874, 8897.

A commercial railroad does not become an interurban railway, as to any part of its business, by installing electric cars for passengers with frequent stops, when the train service is no more frequent than prior to electrification. *Opins. Atty. Gen.* 1915, p. 865.

Section 9118. (Occupancy and use of public highways.)

Such companies may occupy and use for their tracks, cars, necessary fixtures and appliances, the public highways outside of cities and villages with the consent of the public authorities in charge of or controlling such highways, and with the written consent of the majority, measured by the front foot, of the property holders abutting on each of such highways. (May 17, 1894, 91 v. 285, § 2; R. S. § 3443-9.)

Grant of franchise in public highway does not confer exclusive use of the portion of highway on which tracks are constructed. *Fairechild v. Railway*, 101 O. S. 261 (1920).

When an additional burden. An interurban railway, with T rails, built entirely on one side of a highway, between improved farms and the roadway, the company having authority to run an unlimited number of cars, for passengers, mail and freight, is an additional burden similar to that of a steam railroad.

Schaaf v. Cleveland, etc., Co., 66 O. S. 215 (1902).

Chestnut v. Columbus, etc., Ry., 15 L. D. 336 (1905); aff'd, no rep., 76 O. S. 567.

Miller v. Columbus Ry. Co., 13 L. D. 418 (1902).

An additional switch laid in the highway subsequent to construction of road is an additional burden.

Chambers v. Cleveland, etc., Co., 5 C. C. n. s. 298; 17 C. D. 193 (1904); aff'd, no rep., 73 O. S. 348.

Chestnut v. Columbus, etc., Ry., 15 L. D. 336 (1905); aff'd, no rep., 76 O. S. 567.

Consents, rights and remedies of abutting owners.

See note to § 9105.

Must give adequate service. An interurban railway may be compelled to furnish adequate service, so long as its franchise is not abandoned.

Ferguson v. Dayton, etc., Transit Co., 4 O. L. R. 750 (Railroad Commission 1907).

Crossing tracks of street, interurban or steam railroads, outside of municipalities.

See § 8834.

Duration of franchise when no time stipulated therein. See note to § 3714.

Assessment for street improvements. An interurban railway operating upon a public highway under a franchise is not subject to assessments for improvement of such highway as an owner of property abutting thereon. *Railway Co. v. Scott*, 101 O. S. 13 (1920).

Section 9118-1. (Crossings, other than steam railway. Petition.) Whenever it is deemed necessary by a majority of the directors of any such railway company to cross the streets, avenues, alleys, ways, or any part thereof, of any municipality, or any public highway outside of a municipality, whether the same be under the control of public authorities or a private company, or a person or persons, the council of such municipality, or the public officers or authorities owning or having charge of such highways outside of municipalities, shall have power to agree with such company as to the manner and mode of such crossing and the compensation to be paid therefor; if the parties fail to agree, such company may file its petition in the common pleas court of the county in which the proposed crossing is situated, and in such cause if the crossing be within a municipality, such municipality, shall be defendant; if the crossing be outside a municipality, the public authorities owning or having charge of such highway, shall be defendants. Summons shall be served and the rule days and the rights of the defendant to plead shall be the same as in civil actions in such court. Such petition shall set forth the action of the company declaring the necessity for crossing the highway and the inability of the company to agree with the council or other public officers or authorities owning or having charge of said highway; and the court of common pleas thereupon shall have jurisdiction of the parties and of the subject matter of the petition and may proceed to examine the matter offered by evidence, by reference to a master commissioner or otherwise, and upon the final hearing of said cause the court shall enter its decree fixing the manner and mode of such crossing and the compensation, if any, to be paid therefor by the company, and upon compliance with the terms of said decree the company shall have the right to construct and maintain said crossing in accordance with the order in said cause. (May 10, 1910, 101 v. 375.)

This section is constitutional. *Rocky River v. Railway*, 18 C. C. n. s. 354 (1911).

Section 9118-2. (Appropriation of real estate.) Where the tracks of any such road extend into or through any municipality and it is deemed necessary by such company to

enter upon and use any private property within such municipality for the construction and maintenance of either passenger stations or freight depots to be used in the operation of such road, such company shall have the right to appropriate private property within municipalities for such purposes. (May 10, 1910, 101 v. 376.)

Section 9119. (Appropriation of property.) Street, interurban or suburban railroads using other than steam as motive power, when necessary may enter upon and use private property in the construction, alteration and operation of its road or any part thereof and for such purposes shall have all of the rights and powers of appropriation, outside of municipalities, that steam railroad companies possess. (R. S. Sec. 3443-10; May 10, 1910, 101 v. 322; May 10, 1902, 95 v. 538; May 17, 1894, 91 v. 285.)

An interurban railway must obtain a franchise before appropriating property.

S. E. Ohio, etc., Co. v. Diamond, etc., Co., 51 O. L. B. 421 (Probate Court).

The word "construction" in this section is not limited to the original building of the line, but applies where the road is relocated and reconstructed in conformity to the general route prescribed in its articles of incorporation. Reusch v. Traction Co., 19 C. C. n. s. 1; 24 C. D. 540 (1912); aff'd, no rep. 89 O. S. 456.

"Alteration" in this section includes relocation of the road. Reusch v. Traction Co., 19 C. C. n. s. 1; 24 C. D. 540 (1912); aff'd, no rep. 89 O. S. 456.

Pleading and proof.

See S. E. Ohio, etc., Co. v. Diamond, etc., Co., 51 O. L. B. 421.

Columbus, etc., Co. v. Cole, 47 O. L. B. 66.

Prior to amendment of this section it was held in several probate courts that interurban railways could not appropriate private lands, except where it was impossible to use a highway.

Columbus, etc., Ry. Co. v. Cole, 47 W. L. B. 547 (1902).

Columbus, etc., Ry. Co. v. Marriott, 47 W. L. B. 357 (1902).

Power to appropriate use of urban tracks.

See §§ 3779, 9108.

State v. C. & H., etc., Ry., 19 C. C. 79; 10 C. D. 418 (1899).

Section 9119-1. (Street, interurban, light, heat or power companies authorized to appropriate trees.) Street, suburban or interurban railroads using other than steam as motive power, and companies furnishing electricity for light, heat or power purposes, whenever necessary, in the alteration, operation or maintenance of electric high potential transmission lines and wires outside of municipalities, to protect the same from interference or injury that might be caused by trees or branches that may be located so near thereto that said trees or branches might by falling or otherwise come in contact with said wires, shall have the power to appropriate

such trees or the branches thereof, except that in case of shade trees now or hereafter located in front of residences or along the highway, said companies may appropriate only such portions of the branches thereof that fail to clear wires located fifty feet from the ground. The powers of appropriation herein granted shall be exercised in the same manner and according to the same procedure as that provided for the appropriation of property by corporations generally. (106 v. 337.)

Section 9120. (Leases, purchases and traffic arrangements.) Such companies may lease, purchase, or make traffic arrangements with any other street railway company as to so much of its tracks and other property as is necessary or desirable to enable them to enter or pass through a city or village, upon the terms and conditions applicable to other street railways. Any existing street railway company, owning or operating a road shall receive the cars, freight, packages or passengers of any other road, upon the same terms and conditions as they carry for the general public. (May 17, 1894, 91 v. 286, § 4; R. S. Sec. 3443-11.)

This section is not intended as a limitation on § 9101.

Hamilton v. Railway, 5 N. P. 457; 8 L. D. 174.

Neither this section nor §§ 9130 to 9133 require an exchange of transfers between the urban and interurban railways, in the absence of an ordinance imposing such obligation.

Railway Co. v. Cincinnati, 75 O. S. 196 (1906); reversing, 3 N. P. n. s. 489; 16 L. D. 220.

Where new transmission lines are built by the lessee partly on railroad rights of way and partly on separate property, such separate property becomes an appurtenance to the contiguous railroad property, and all such transmission lines become fixtures and covered by after-acquired property clauses in mortgages of the lessor. Trust Co. v. Traction Co., 106 O. S. 577 (1922); s. c., 20 N. P. n. s. 219.

A street railway company making an agreement as authorized by statute, for the joint use of its tracks, is liable for negligence of the lessee or licensee thereon. This section does not provide exemption from such liability. Quigley v. Toledo Co., 89 O. S. 68 (1913).

Stock control of urban by interurban railway company; unfair contract for new equipment at expense of urban company. See Mansfield Co., 3 Ohio App. 253; 21 C. C. n. s. 95 (1914).

Rentals paid by one company to another can not be deducted from gross earnings in making excise tax returns under § 5418. Traction Co. v. State, 94 O. S. 24 (1916).

Carriage of freight. This section authorizes an urban street railway company to make a traffic agreement with an interurban railway for the carriage of freight.

State v. Dayton Traction Co., 64 O. S. 272 (1901); affirming, 18 C. C. 490; 10 C. D. 212.

A franchise authorizing the transportation of freight over streets, does not authorize the use of a street as a station for unloading freight.

Newark v. Ohio Electric Ry., 13 N. P. n. s. 487 (1912).

Traffic agreements. Where a city street railway company takes cars of an interurban company, at the terminus of the city company, and operates them on its own tracks, the interurban company retaining no control over the cars and there being no contract under § 9130 et seq., the cars become those of the city company and are subject to regulation by the city council. *Stafford v. Railway*, 20 C. C. n. s. 129 (1912).

An agreement of the kind last mentioned differs from the contract involved in *Traction Co. v. State*, 94 O. S. 24, and payments made by the interurban company to the city company may be deducted from gross earnings under § 5418, *Opins. Atty. Gen.* 1916, p. 1371.

Where, after consolidation of urban and interurban railroads, a portion of the interurban tracks were abandoned, and the interurban cars were operated over the tracks of the urban company, a perpetual easement attaches to the tracks so jointly used in favor of the interurban utility, and upon dissolution, a decree should be entered providing for perpetual joint traffic upon terms and conditions usual and customary. *Trust Co. v. Traction Co.*, 106 O. S. 577 (1922); s. c., 20 N. P. n. s. 219.

Other traffic agreements. See *Toledo, etc., Co. v. Toledo Traction Co.*, 17 C. C. 22; 9 C. D. 828 (1898).

Toledo, etc., Co. v. Toledo Traction Co., 15 C. C. 190; 8 C. D. 204 (1897).

Cincinnati v. Railway, 3 N. P. n. s. 489; 16 L. D. 220 (1905); reversed, 75 O. S. 196.

Power to appropriate tracks.

See §§ 3779, 9108.

State v. C. & H., etc., Ry., 19 C. C. 79; 10 C. D. 418 (1899).

"Terms and conditions."

See *Cincinnati v. Railway*, 13 N. P. n. s. 265 (C. P. 1912).

Section 9121. (Consolidation.) Such street railway companies may consolidate on the terms and conditions applicable to the consolidation of railroad companies. But no increase of fare shall be allowed on any street railway route by reason of such consolidation. (R. S. Sec. 3443-12; May 17, 1894, 91 v. 286, § 5.)

For lien of after-acquired property clause of mortgages given by constituent companies on property of consolidated company, see *Trust Co. v. Traction Co.*, 106 O. S. 577; s. c., 20 N. P. n. s. 219.

Section 9121-1. (Authority to secure loan by mortgage.) Corporations organized for the purpose of owning or operating street, interurban or electric railroads may borrow money without regard to the amount of their capital stock, and issue their notes or coupon or registered bonds therefor, bearing any rate of interest authorized by law, and may secure the payment of the same by a mortgage or other instrument in writing upon their real or personal property or both. It shall be sufficient record of such mortgage or in-

strument, if it be recorded in the office of the recorder of deeds in each county wherein the real or personal property therein described is situated or employed. So recorded, it shall be a good and substantial lien upon all of such property, from the date of its record in each of such counties. (May 31, 1911, 102 v. 467.)

See §§ 8705 to 8709.

A purchaser of a street railway at judicial sale assumes the obligation of the original grantee of the franchise to operate the road. *Gress v. Fort Loramie*, 100 O. S. 35 (1919); reversing, 21 N. P. n. s. 81.

A mortgage by a constituent company covering after-acquired property, in the absence of countervailing reasons, will cover property acquired by the consolidated company, although the mortgage does not expressly cover property subsequently acquired by "successors" of the mortgagor. Property substituted by a lessee for mortgaged property removed may also come under the mortgage.

But the mortgage does not attach to property conveyed to the consolidated company by other constituent companies, on the consolidation, unless so agreed and expressed in the terms of consolidation. *Trust Co. v. Traction Co.*, 106 O. S. 577 (1922); s. c., 20 N. P. n. s. 219.

Section 9122. (Regulations and powers.) Such companies shall be subject to the regulations provided for street railways and have all the powers, in so far as they are applicable, that other street railway companies possess. (May 17, 1894, 91 v. 286, § 6; R. S. Sec. 3443-13.)

Construed as showing a legislative intention to classify interurban railroads as street railways.

Ottawa Elec. Ry. Co. v. Ottawa, 85 O. S. 229 (1912).

See also *Interurban Co. v. Cincinnati*, 93 O. S. 108, 117.

The term "such companies" apparently refers to the companies mentioned in §§ 9115 and 9117.

Ottawa v. Electric Ry., 13 C. C. n. s. 562; 22 C. D. 197; reversed, 85 O. S. 229.

An interurban railway may construct an extension or branch within municipality.

Railway Co. v. Railway Co., 5 C. C. n. s. 583, 597; 16 C. D. 180 (1903); aff'd, no rep., 73 O. S. 364.

Right to change location to avoid dangerous grades.

Bickerstaff v. Steubenville, etc., Traction Co., 5 O. L. R. 539 (Railroad Commission, 1907).

See § 9115.

Section 9123. (Watchmen.) When street railways are operated by electricity, cable, compressed air, or motive power other than horses or mules, in a municipality, the council thereof by ordinance may require the owners or operators of such railways to place watchmen at street crossings, intersections or corners which such council deem dangerous; and also provide for the enforcement of such ordi-

nances by penalties in the way of fine or imprisonment, or both, to be imposed upon the owner, officer, or operator of such railways, or by a penalty of not exceeding one hundred dollars per day, which may be recovered by such municipalities in a civil suit against the owners or operators of any such railway failing to place such watchman as is required. (R. S. Sec. 3443a; April 16, 1892, 89 v. 346.)

Where a traction company agreed to pay all expenses which might be "lawfully required" by the municipality or state in maintaining a flagman at a crossing, it was held not liable where the railroad company by agreement with the municipality stationed a flagman at the crossing in consideration of the repeal of a speed ordinance.

Rapid Transit Co. v. Erie R. Co., 7 C. C. n. s. 199; 18 C. D. 36 (1905).

Section 9124. (Repairs at crossings; stopping of cars at crossings.) When the tracks of two street railways cross each other or in any way connect at a common grade, when one or both such railways use other than horse power for propelling their cars, the crossings shall be made and kept in repair at the joint expense of the companies owning the tracks. All cars used on such railways must come to a full stop, not nearer than ten feet nor further than fifty feet from the crossing, and not cross until the way is clear. When two or more cars approach the crossing at the same time the car or cars on the road first built shall have precedence. (May 4, 1891, 88 v. 581, § 1; R. S. Sec. 3443-5.)

Street railway crossings over railroads. § 3775.

Section 9125. (Full stop when approaching steam railway crossing; exception.) When the tracks of a street railway cross the tracks of a steam railroad at grade, the company operating the line of street cars shall cause its cars to stop not nearer than ten (10) nor farther than fifty (50) feet from the crossing, and before they start to cross the steam railroad tracks, also cause a person in its employ to go ahead of the car or cars and see that the way is clear for the passage thereof and free from danger. Such street railway cars shall not proceed to cross until signalled to do so by such person so employed, or the way is clear for their passage over the tracks; provided, however, that when the tracks of a street or interurban railway cross the tracks of an industrial railroad or a switch track or a spur track of a steam railroad over which passenger cars or trains are not operated, the public utilities commission of Ohio may, upon application of the company owning or operating such street or interurban railway and notice to the company owning or operating such industrial railroad or switch track or spur

track of the hearing of such application, permit such street or interurban railway to operate its cars over and across such industrial railroad or switch track or spur track without first causing its cars to stop or an employee to go ahead of the same, and may prescribe such duties upon the company owning or operating such industrial railroad or switch track or spur track for the protection of the public as shall be just and reasonable under the circumstances. (106 v. 541; 88 v. 582, § 2; R. S. Sec. 3443-6.)

This section does not relieve the motorman from the duty of exercising care.

Cincinnati, etc., Co. v. Holbrook, 12 C. C. n. s. 234 (1909).

Nor does it relieve the steam railroad from operating its gates so as to indicate to the motorman whether the track is clear.

Kopp v. B. & O. S. W. Ry., 6 C. C. n. s. 103; 1 C. C. n. s. 596 (1903);
aff'd, no rep., 71 O. S. 484.

The requirements of this section apply to crossings having gates and a watchman as well as other crossings.

Street Ry. Co. v. Murray, 53 O. S. 570 (1895); affirming, 9 C. C. 291; 6 C. D. 413.

Where car is not stopped and gates are not lowered, both street railway company and railroad company are liable.

Toledo Cons., etc., Ry. v. Fuller, 17 C. C. 562; 8 C. D. 134 (1894).

Duty when car operated by one man only.

Street Ry. Co. v. Murray, 53 O. S. 570 (1895).

Collision, prima facie case.

See Toledo Cons., etc., Ry. v. Fuller, 17 C. C. 562; 8 C. D. 134 (1894).

Street Ry. Co. v. Murray, 53 O. S. 570 (1895).

When not a regular stopping place, conductors and motormen are not required as a matter of law, before starting, to look for passengers getting on or off the car.

Packard v. Toledo Traction Co., 22 C. C. 578 (1901).

Requirement of crossing frogs at crossings of street railways over railroads.

§ 3775.

Railway Co. v. Railroad Co., 21 C. C. 391; 12 C. D. 113 (1898);
aff'd, no rep., 64 O. S. 550.

Section 9126. (Forfeiture under preceding sections.)

Every person in charge of a street car or cars who wilfully fails to comply with the provisions of the two preceding sections, or to bring the car or cars he has in charge to a stop, or before the way is clear, or signaled so to do, causes them to cross the steam railroad tracks, shall be personally liable to a person injured by reason of such failure to a penalty of one hundred dollars, to be recovered by civil action at the suit of the state, in the court of common pleas of a county wherein such crossing or connection is. The company in whose employ such person is, as well as the person himself shall be liable in damages to any person or persons so injured in person or property. (May 4, 1891, 88 v. 582, § 3; R. S. Sec. 3443-7.)

Section 9127. (Consolidation of street railway companies.) When the lines or authorized lines of road of street railway corporations or companies meet or intersect, or conveniently can be operated from one power house, or a power house or houses owned, under lease or operated by one of such corporations or companies, or when such line of a street railway corporation or company, and that of an inclined plane railway or railroad company or corporation, or any railway operated by electricity conveniently may be connected, to be operated to mutual advantage, or when such line of a street railway corporation or company and that of an inclined plane railway or railroad company or corporation or the railway of any company operated by electricity conveniently can be operated from one power house or a power house owned, under lease or operated by one of such street railway corporations or companies or inclined plane railway or railroad companies or corporations or by any company or corporation, the railway of which is operated by electricity, such corporation or companies, or any two or more of them, if they are not competing lines, may consolidate themselves into a single corporation. (May 10, 1902, 95 v. 510, § 2; April 22, 1896, 92 v. 277; April 18, 1892, 89 v. 406; May 1, 1891, 88 v. 493; R. S. Sec. 2505b; Bates' Stats. § 3443-16.)

Consolidation of railroad companies.

See § 9025 et seq.

This section is constitutional.

Cincinnati St. R. Co. v. Horstman, 72 O. S. 93 (1905).

Rights of creditor of constituent company.

Greene v. Woodland Ave., etc., Co., 62 O. S. 67 (1900).

Rights of pledgee of stock of constituent company.

Railway Co. v. Bank, 68 O. S. 582 (1903).

A corporation formed by the consolidation of two or more companies holds the property acquired by such consolidation in its own right and not in trust for the constituent companies.

Greene v. Woodland Ave., etc., Co., 62 O. S. 67 (1900).

Agreement of consolidation may require constituent companies to enter consolidated company free of debt.

Railway Co. v. Bank, 68 O. S. 582 (1903).

Stock of constituent company issued after consolidation has been completed is spurious.

Worthington v. Cleveland City Ry., 9 C. C. n. s. 433; 19 C. D. 321 (1904); affirmed, 75 O. S. 626.

Competing lines. See Mansfield Co., 3 Ohio App. 253; 21 C. C. n. s. 95 (1914).

Section 9128. (To what companies provisions do not apply.) The above provision as to competing lines shall not apply to such companies or corporations whose lines are nearby or wholly situated in a city of this state, or road of

any street railway company or corporation organized in this state is made, or is in process of construction to the boundary line of the state, or to a point within or without the state. Such corporation or company may consolidate its capital stock with that of any corporation or company, or corporations and companies in an adjoining state, the line or lines of whose road or roads have been made or are in process of construction to the same point or points, in the manner and with the effect provided by law for the consolidation of railroad companies. (May 10, 1902, 95 v. 510; April 22, 1896, 92 v. 277; April 18, 1892, 89 v. 406; May 1, 1891, 88 v. 493; R. S. Sec. 2505b; Bates' Stats. Sec. 3443-16.)

This section is constitutional.

Cincinnati St. R. Co. v. Horstman, 72 O. S. 93 (1905).

Section 9129. (Consolidation of electric road companies.)

When the lines of a road of any street railway or railroad company, organized under the laws of this state are constructed or in process of construction, and are or will be operated by electricity, and connect, or will or can be made to connect with the lines of another street railway or railroad company formed by the consolidation of companies organized under the laws of this state, or by the consolidation of a company organized under the laws of this state and a company organized under the laws of an adjoining state, whose lines of road are constructed or in process of construction, and are or will be operated by electricity, so that cars may pass over such lines of roads continuously, without break or interruption, such street railway or railroad company and such consolidated street railway company or railroad company, may consolidate themselves into a single company in the same manner and with like effect as is provided by law for the consolidation of railroad companies. Companies owning and operating competing lines of road shall not consolidate under the foregoing provisions, but this limitation does not apply to companies whose lines of road are nearly or wholly situated in a municipal corporation of this state. (May 6, 1904, 97 v. 570, § 2; Bates' Stats. Sec. 3443-16a.)

Section 9130. (Interurban road may contract for use of tracks in cities.) When a railway company is incorporated and organized under the laws of this state for the purpose of building, acquiring, owning, leasing, operating and maintaining a railway or railways to be operated by electricity

or other motive power from one municipal corporation or point in the state, to another municipal corporation, corporations, or point in this state, it may agree with a street railway company, or companies, owning or operating a street railway or railways in such municipal corporation or corporations, and the street railway company or companies may so agree with such railway company that its passenger cars may be run and propelled over and along the track or tracks of such street railway company or companies, on such terms as may be agreed upon, in the manner, upon the conditions and for the length of time that the cars owned or operated by such street railway company or companies are operated in such municipal corporation or corporations. (R. S. Sec. 2505c; Bates' Stats. Sec. 3443-17; May 21, 1894, 91 v. 379.)

See note to § 9133.

Municipal franchise to interurban railway companies.

See §§ 3778, 3780.

A street railway company making an agreement, as authorized by statute, for the joint use of its tracks, is liable for negligence of the lessee or licensee thereon. This section does not provide exemption from such liability. *Quigley v. Toledo R. & L. Co.*, 89 O. S. 68 (1913).

A clause in a contract for the use of tracks, exempting the city company from liability for loss or damage incurred by the operation of the interurban cars over its tracks, does not relieve the city company from liability for damages caused by the negligence of the city company. *Bridge & Railway Co. v. Traction Co.*, 7 Ohio App. 241; 29 O. C. A. 5 (1916).

Appropriation of right to use tracks of city street railway.

See § 3779.

Neither this section nor § 9120 requires an exchange of transfers between the urban and interurban railways, in the absence of an ordinance imposing such obligation.

Railway Co. v. Cincinnati, 75 O. S. 196 (1906); reversing, 3 N. P. n. s. 489; 16 L. D. 220.

An interurban road can not, under a traffic agreement to run its own cars over the tracks of an urban railway, run the cars of a third company over such tracks.

Toledo, etc., Co. v. Toledo Traction Co., 17 C. C. 22; 9 C. D. 828 (1898).

See *Toledo, etc., Co. v. Toledo Traction Co.*, 15 C. C. 190; 8 C. D. 204 (1897).

A common carrier, owning its tracks, is liable to its passengers for an injury received in a collision between its car and the car of another company which it admits to the joint use of its track, though the collision may result wholly from the negligence of the latter company.

Light Co. v. Montgomery, 81 O. S. 426 (1910).

An interurban railway entering a municipality over the tracks of another company is bound by the rules of that company, as to speed at crossings.

Interurban, etc., Co. v. Hines, 13 C. C. n. s. 168 (1910).

Section 9131. (Privileges and obligations of the street railway apply.) While they are running and being operated

over and along the track or tracks of such street railway company or companies in such municipal corporation, the cars of such railway company shall be entitled to the privileges and subject to the obligations enjoyed and imposed by and upon the cars of such street railway company or companies owning or operating its cars in such municipal corporation. They shall be operated only by the motive power which operates the cars of such street railway company or companies. When authorized by not less than two-thirds in amount of the stockholders of each company proposing to enter into such arrangement and agreement, ratified by a majority of the directors and executed by the proper officers thereof, such arrangement and agreement shall give to such railway company full authority to operate its cars on the tracks of such street railway company or companies in such municipal corporation or corporations. (R. S. Sec. 2505c; Bates' Stats. Sec. 3443-17; May 21, 1894, 91 v. 379.)

Section 9132. (Not necessary to obtain additional grant.)

It shall not be necessary for such railway company, in case it uses in such municipal corporation or corporations, only the tracks of a street railway company or companies owning or operating a street railway or railways therein, to obtain an additional grant, franchise or right, except by such agreement with such street railway company or companies. (R. S. Sec. 2505c; Bates' Stats. Sec. 3443-17; May 21, 1894, 91 v. 379.)

Section 9133. (Fare charged within city.) The fare charged by such railway company for transporting passengers within such municipal corporation or corporations, shall not be greater than that fixed in the franchise or franchises held or owned by such street railway company or companies. When there is a public park or cemetery on the line of such railway, within one mile of, and owned by, such municipal corporation, such company for such fare must so transport passengers to and from such park or cemetery the same as if either was within the limits of such corporation. (R. S. Sec. 2505c; Bates' Stats. Sec. 3443-17; May 21, 1894, 91 v. 379.)

Where interurban cars are turned over to a city company, at its terminus, and are operated by the latter company on its tracks as its own cars, the interurban company having no control over the cars and there being no contract under §§ 9130-9133, the limitation of this section does not apply. *Stafford v. Railway Co.*, 20 C. C. n. s. 129 (1912).

This section does not require an exchange of transfers between urban

and interurban railways, in the absence of an ordinance imposing such obligation.

Railway Co. v. Cincinnati, 75 O. S. 196 (1906); reversing, 3 N. P. n. s. 489; 16 L. D. 220.

The tender of a five dollar bill in payment of a five cent fare, change being requested, is unreasonable.

Anthony v. Cincinnati Traction Co., 3 O. L. R. 377 (1905).

Where a franchise granted by a village provided for a reduced rate of fare in the event of its annexation to a neighboring city, the street railway may be enjoined from charging a fare in excess of the stipulated rate. Interurban Co. v. Cincinnati, 93 O. S. 108 (1915).

A street railway company making an agreement, as authorized by statute, for the joint use of its tracks, is liable for negligence of the lessee or licensee thereon. This section does not provide exemption from such liability. Quigley v. Toledo Co., 89 O. S. 68 (1913).

Section 9134. (Lease or purchase electric, or gas light, heat, power or fuel company.) A corporation or company maintaining and operating a street railway, or a railroad operated by electricity, may lease or purchase all the property, and all the franchises, rights, and privileges of any company organized for the purpose of supplying electricity, or natural or artificial gas, or both electricity and natural or artificial gas, for power, light, heat or fuel purposes, or which has been engaged in such business in whole or part in any municipality within this state, the latter being hereby vested with corresponding power to let or sell, upon such terms and conditions as may be agreed upon between the corporation and company. No such lease or purchase may be perfected until a meeting of the stockholders of each of the companies has been called for that purpose by the directors thereof, on thirty days' notice to each stockholder, at such time and place and in such manner as is provided for the annual meetings of the companies and the holders of at least two-thirds of the stock of each company in person or by proxy, at such meeting, or at any properly adjourned meeting assent thereto. (R. S. Sec. 2505e; Bates' Stats. Sec. 3443-18; May 6, 1902, 95 v. 390; April 19, 1898, 93 v. 139.)

A corporation may be organized to operate an interurban railway and to furnish electric light and power.

Rep. Atty. Gen. 1910-1911, p. 261.

See also, State v. Taylor, 55 O. S. 61 (1896).

Section 9135. (Dissenting stockholder.) A stockholder who refuses to assent to such lease or sale and so signifies by notice in writing to the lessee or purchaser within ninety days thereafter shall be entitled to demand and receive compensation in the manner provided for the compensation of stockholders dissenting from the sale or lease of a steam

railroad. (R. S. Sec. 2505e; Bates' Stats. Sec. 3443-18; May 6, 1902, 95 v. 390; April 19, 1898, 93 v. 139.)

See §§ 8810 to 8812 and 8713 to 8717.

Section 9136. (Liabilities of the company leased or purchased.) A company so leasing or purchasing the property, rights and franchises of an electric light and power company, or natural or artificial gas company, or electric light and power and natural or artificial gas company, shall have all the rights, power and authority of the company whose property rights and franchises are so leased or purchased. But the liability of an electric light and power company, or natural or artificial gas company, or electric light and power and natural or artificial gas company, shall in no manner be affected by such lease or sale. (R. S. Sec. 2505e; Bates' Stats. Sec. 3443-18; May 6, 1902, 95 v. 390; April 19, 1898, 93 v. 139.)

Section 9137. (May acquire property of other companies.) A corporation or company organized for street railway purposes, may lease or purchase any street railroad, or railroads, or railroad operated as such and by electric power inclined railroad or railroads, together with all the property, and the franchises, rights and privileges respecting the use and operation of such railroad or railroads, situated or existing in whole or part in this state, constructed and held by any other corporation or company, corporations or companies, the latter being hereby invested with corresponding power to let or sell on such terms and conditions as are agreed upon between the corporations or companies. (R. S. Sec. 2505a; Bates' Stats. Sec. 3443-15; April 23, 1898, 93 v. 214; April 22, 1896, 92 v. 277; May 1, 1891, 88 v. 493.)

This section is constitutional.

Cincinnati St. R. Co. v. Horstman, 72 O. S. 93 (1905).

A company operating a street railway, under a license from another company, may be liable for injuries caused by a horse becoming frightened by flashes of light from defective electric appliances, although installed by such other company. *Kirkbride v. Railway*, 22 C. C. n. s. 495 (1907); *aff'd*, no rep. 79 O. S. 448.

Liability of purchaser for debts, contracts and liabilities of vendor. *Pfisterer v. Traction Co.*, 89 O. S. 172; *Taylor v. Niles*, 2 Ohio App. 293, 21 C. C. n. s. 391.

Section 9138. (Agreements with other companies.) Two or more of such corporations or companies may enter into any agreement for their common benefit consistent with and calculated to promote the objects for which they were created. No such lease or purchase shall be perfected until a

meeting of the stockholders of each of the companies has been called for that purpose by the directors thereof, on thirty days' notice to each stockholder at such place and in such manner, as is provided for annual meetings of the companies, and the holders of at least two-thirds of the stock of each company, in person or by proxy, at such meeting, or at any properly adjourned meeting, assent thereto. Any stockholder who refuses to assent to such lease or sale and so signifies by notice in writing to the lessee or purchaser within ninety days thereafter, shall be entitled to demand and receive compensation in the same manner and by such proceedings as are provided for the sale of stock of a stockholder dissenting to a sale or lease of a steam railroad. (R. S. Sec. 2505a; Bates' Stats. Sec. 3443-15; April 23, 1898, 93 v. 214; April 22, 1896, 92 v. 277; May 1, 1891, 88 v. 493.)

This section is constitutional.

Cincinnati St. R. Co. v. Horstman, 72 O. S. 93 (1905).

An agreement with the proprietor of a resort, located beyond municipal limits, to carry passengers thereto for a specified fare, while other companies are excluded from the resort, is valid.

Humphrey Co. v. Cleveland Ry. Co., 9 N. P. n. s. 609; 20 L. D. 510 (1910).

Section 9139. (Fare can not be increased.) When a lease or purchase is made as above provided, there shall be no increase of the existing rates of fare by reason thereof, nor shall any fare be charged upon any of the separate routes so leased or purchased in excess of the fare charged over such separate routes prior to the lease or purchase thereof. When a lease or purchase is made as herein provided, the fare charged for one continuous route or ride in the same general direction over all such leased or purchased lines within any municipal corporation, shall not exceed the maximum fare charged over any one of such lines prior to such lease or purchase. (R. S. Sec. 2505a; Bates' Stats. Sec. 3443-15; April 23, 1898, 93 v. 214; April 22, 1896, 92 v. 277; May 1, 1891, 88 v. 493.)

This section is constitutional.

Cincinnati St. R. Co. v. Horstman, 72 O. S. 93 (1905).

Remedy when excessive fares charged.

See State v. Toledo Ry. & Lt. Co., 3 C. C. n. s. 285; 13 C. D. 603 (1904); reversed, 73 O. S. 356.

Section 9140. (Powers of inclined plane railway company.) An inclined plane railway company may construct, operate, and maintain an inclined plane railway, for the conveyance of passengers and freight, or either, with such offices, depots, and other buildings as it deems necessary,

and also establish and maintain a park or pleasure grounds, and for such purpose acquire and hold real estate. (R. S. Sec. 3444; April 12, 1876, 73 v. 229, § 2.)

Construed.

Cincinnati v. Cincinnati Inc. Plane Ry., 30 W. L. B. 321.

Louisville Trust Co. v. Cincinnati, 73 Fed. 716.

Louisville Trust Co. v. Cincinnati, 76 Fed. 296.

Section 9141. (How street crossings to be made.) When the part of the railway of such company which is operated by steam power crosses a public street or highway, it must pass either over or under such street or highway, and shall be constructed in a manner and at such distance above or below it as not to obstruct the ordinary use of the street or highway. (R. S. Sec. 3445; April 12, 1876, 73 v. 229, § 10.)

Section 9142. (Elevated railroads.) A city owning or having charge of any public road, street, alley, way, or ground of any kind, or any part thereof, may grant to any railroad company, street railroad company, suburban railroad company or interurban railroad company the right to construct, maintain and operate by electricity, any elevated railroad along and over such public road, street, alley, way or ground, except a public landing, or across them subject to existing laws concerning crossings, so far as they are applicable, and to erect and maintain therein the necessary tracks, piers, stays, supports and stations, and the approaches therefor, which stations shall be on a level with the track, and when necessary to construct tunnels for such railroad under such roads, streets, alleys, ways or grounds or to construct, maintain and operate by electricity any underground railroad, along and under such public roads, streets, alleys, ways or grounds, and to erect and maintain stations, stairways and approaches therefor, and also to construct suitable terminals and way stations. (R. S. Sec. 3283b; March 23, 1909, 100 v. 70; May 9, 1908, 99 v. 452.)

Section 9143. (Elevated structures and crossings must not obstruct travel. Subways must not impair streets nor prevent use of sewers, etc.) Such elevated structures and crossings shall be of such height and construction as not to prevent substantially the ordinary use of, and traffic upon, such roads, streets, alleys, ways, or grounds, whether by pedestrians, vehicles, street cars or otherwise, except temporarily when necessary in the construction of the elevated structures and crossings. Such tunnels for elevated railroads or subways for underground railroads shall be con-

structed as not to impair the stability of the roads, streets, alleys, or public grounds, or prevent the use of any sewers, street railway tracks and appliances, pipes, wires, and conduits used for any purpose in the streets, alleys, ways or grounds except temporarily when necessary in the construction of the tunnels or subways, except as hereinafter provided. And such elevated structures and crossings and such tunnels and subways shall be constructed in accordance with general plans approved by the director of public service of the municipality. All such work of construction shall be subject to the supervision and control of the director of public service. (May 29, 1911, 102 v. 129; R. S. Sec. 3283b; March 23, 1909, 100 v. 70; May 9, 1908, 99 v. 452.)

Section 9143-1. (Changes and removals. Filing of plans and specifications required. Approval, notice, hearing, bond. Director may modify or reject plans. Sewer, water pipe, etc., may be located in subway without compensation. Cost, damage and expense.) The council may grant to the company the right to move, change, elevate, depress, relocate and reconstruct at its sole expense any sewer, sewer connection, catch-basin, water pipe, water connection, natural or artificial gas pipes or connections, hydrants, conduits, pipes, wires, street railway tracks and appliances, poles, whether for street railway, electric lighting, heating, power, telegraph, telephone, signal service, or any other purpose, or any other obstruction, which may be encountered in the construction of the underground railroad.

Any such company shall before proceeding to move, change, elevate, depress, relocate, or reconstruct any such sewer, sewer connection, catch basin, water pipe, water connection, natural or artificial gas pipes or connections, hydrants, pipes, wires, conduits, poles and street railway tracks or appliances, or other obstructions, file with the director of public service of the municipality detailed plans and specifications for all of said work. No such work shall be commenced unless such plans and specifications shall first be approved by the director of public service of such municipality, after notice and hearing, and unless such company shall file with the director of public service a bond in such amount and with such sureties as the director of public service may determine, conditioned to indemnify and save harmless the owners of any such sewer, sewer connection, catch basin, water pipe, water connection, natural or artificial gas pipes or connections, hydrants, pipes, wires, conduits, poles or street railway tracks or appliances, and the owners of any other property situated in, on, under, or

near any such road, street, alley, way, or public ground, from all cost and expense of such work and damages resulting from injuries done thereby. Such director of public service may change, modify or reject any such plans or specifications, and such work of construction shall be performed under the supervision and control of the director of public service.

If such plans and specifications shall locate any such sewer, sewer connection, catch basin, water pipe, water connection, natural or artificial gas pipe or connection, hydrants, pipes, wires, conduits, or any other structures within the gallery, subway or tunnel of such underground railroad, the owners of the same shall be entitled to use such space within such gallery, subway, or tunnel, without compensation for such use and occupancy, except a reasonable charge to defray the actual cost of maintenance; provided, however, that if any such sewer, pipe, conduit or other conductor shall be of greater capacity than that existing prior to the construction of such underground railroad, the underground railroad shall be entitled to charge for the increased capacity of such conductor and not otherwise. All cost, damage, and expense, incidental to the work of removing, supporting, readjusting and reconstructing any such sewer, sewer connection, catch basin, water pipe, water connection, natural or artificial gas pipes or connections, hydrants, pipes, wires, conduits, poles, street railway tracks or appliances, or other structures, and all cost of supervision by the city shall be borne by and paid for by such elevated or underground railroad. Nothing contained in this act shall authorize the permanent removal or exclusion from any such road, street, alley, way or ground of any such sewer, sewer connection, catch basin, water pipe, water connection, natural or artificial gas pipe or connections, hydrants, pipes, wires, conduits, poles, street railway tracks or appliances, and other structures, authorized to be located therein, except when suitable facilities for such services have been otherwise provided for therein, or to prevent the practical construction, repair, operation and use of the same. (May 29, 1911, 102 v. 179.)

Section 9143-2. (When the grant of such right and privileges deemed valid.) Any ordinance of any city purporting to grant the rights or privileges, or any of them, contained in this act to any company, and which grant has been accepted and on account thereof money has been expended in good faith, is hereby declared to be as valid and effective as if the power in said city to so grant such rights and

privileges had been expressly enumerated in the general municipal corporation act. (May 29, 1911, 102 v. 180.)

Section 9143-3. (Right to lease space in tunnel or subway.) The council may authorize the company to lease space in its tunnel or subway, for the purpose of placing pipes, conduits, tubes and wires for artificial or natural gas, water, sewer, heating, telegraph, telephone, signal service, United States mail, electricity for light, heat and power purposes, to any company which has been duly authorized by the municipality to engage in and which company is actually engaged in the business in connection with which the use of such space is to be made; provided that such lease shall be made and such space occupied in such manner and on such terms and conditions, as the council may determine and approve. And the council shall have the right to place, or cause to be placed in such tunnel or subway any pipes, lines and conduits for any of its service, including those above named, without charge, except for cost of construction, provided that such placing shall not interfere with the company's use of the subway. (May 29, 1911, 102 v. 180.)

Section 9144. (Terms of grant.) Such grant shall only be made upon such terms and conditions as are agreed upon by the council of the city, and the company; and every such grant shall provide for the rate of fare within the limits of such municipality. (110 v. 70; R. S. Sec. 3283b; March 23, 1909, 100 v. 71; May 9, 1908, 99 v. 452.)

Section 9145. (Appropriation of property.) After such grant has been made such company may appropriate private property necessary for the use and enjoyment of the grant, including terminals and way stations, for the purpose of constructing and operating its road in the manner and upon the terms provided by law for the appropriation of private property by corporations. (R. S. Sec. 3283b; March 23, 1909, 100 v. 71; May 9, 1908, 99 v. 452.)

Section 9146. (Damages to other property.) Every company which constructs an elevated track upon or a tunnel or an underground railroad below such roads, streets, alleys, ways or grounds, shall be responsible for injuries done thereby to private or public property, lying upon or near such streets, alleys, ways or grounds, which may be recovered by civil action brought by the owner before the proper court at any time within two years from the completion of the

road. (R. S. Sec. 3283b; March 23, 1909, 100 v. 71; May 9, 1908, 99 v. 452.)

Section 9147. (Purchase of road by city.) Every city making a grant as provided in the five next preceding sections, may provide in such grant, upon such terms and conditions as are agreed upon by the council of the city, and the company, for the ultimate purchase and ownership by the city of such road or any part thereof. (R. S. Sec. 3283c; May 9, 1908, 99 v. 453.)

Section 9148. (Company to notify authorities of acceptance or rejection of grant.) Every railroad, street railroad company, suburban railroad company or interurban railroad company, to whom a grant has been made as above provided shall notify in writing the authorities making the grant of its rejection or acceptance of the grant at a time fixed by them at the time of making the grant. If after a grant has been made as above provided, and accepted by any railroad, street railroad company, suburban railroad company or interurban railroad company, within sixty days after such acceptance there is filed with the mayor of the city making the grant a petition protesting against it and signed by such a number of the electors of the city qualified to vote at the last preceding general election, as equals ten per cent of the number of votes cast for mayor at the last preceding election for mayor, he shall certify such fact to the proper election officials. (R. S. Sec. 3283d; March 23, 1909, 100 v. 71; May 9, 1908, 99 v. 453.)

Section 9149. (Submission of grant to electors.) The officials in charge of such general election, in accordance with the statutes relating to elections, shall arrange, provide for and conduct the submission of such question to such electors. The question whether the grant shall be made shall be submitted to the electors of such city at the next succeeding general election occurring more than thirty days after the expiration of such sixty days. The ballots at such election if the grant be for the construction of elevated tracks shall read "Elevated Railroad Grant—Yes". "Elevated Railroad Grant—No". If the grant be for the construction of underground tracks they shall read "Underground Railroad Grant—Yes". "Underground Railroad Grant—No". If the grant be for the construction of partly elevated and partly underground tracks, they shall read "Elevated and Underground Railroad Grant—Yes", "Elevated and Underground Railroad Grant—No". If at such

election a majority of the votes cast on such question be against such grant, it shall be ineffective and void. (R. S. Sec. 3283d; March 23, 1909, 100 v. 71; May 9, 1908, 99 v. 453.)

Section 9149-1. (Air brakes required on urban and inter-urban cars.) That from and after January 1, 1924, it shall be unlawful in the state of Ohio, for any corporation, company, person or persons owning or controlling the same, to operate, use or run or permit to be run, used or operated for carrying passengers or freight on an urban or inter-urban railroad or street car line, any car propelled by electricity, or any car, cars or train of cars drawn by any car or cars propelled by electricity not equipped, in addition to the hand brake in use on such car, cars or train of cars with an air or electric power brake so that the same can be operated and controlled by the motorman in charge of and operating such car, cars or train of cars.

It shall be the duty of the public utilities commission of Ohio to enforce this act. (109 v. 142; 101 v. 209.)

See *Uncapher v. West*, 100 O. S. 202 (1919), for evidence held insufficient to show that compliance with this section was "impossible".

Section 9149-3. (Electric railroads operating cars along third rail required to maintain fences, crossings and cattle-guards. Exception.) That every company or person having the control or management of an electric, interurban, or street railroad, which operates its cars by electricity conducted through or along a third rail, shall construct, or cause to be constructed, and maintain in good repair on each side of its right of way through which such third rail extends, a fence sufficient to turn stock; and such company or person shall cause to be maintained at every point where any public road, street, lane, or highway crosses such railroad, safe and sufficient crossings, and on each side of such crossings cattle-guards sufficient to prevent domestic animals from going upon said railroads; and every such company or person shall be liable for all damages sustained in person or property in any manner by reason, of any neglect or carelessness in the construction or maintenance of any such fence, crossing or cattle-guard, whether such damage be sustained from the contact of said domestic animals with said cars or from contact with, or by reason of, electricity passing through or along such third rail. Provided, however, that the provisions of this act shall not require the building and maintenance of such fence between the right-

of-way of such electric, interurban, or street railway, and the right-of-way of any steam or electric railway where said rights-of-way are parallel and abut upon each other, and such steam or electric railway maintains a fence on the opposite side of its right-of-way. (April 25, 1913, 103 v. 197, § 1.)

Section 9149-4. (Abutting owner may construct and maintain fence, when.) If any such company or person neglect or refuse to construct and maintain such fence as provided in the preceding section, the owner of any land abutting on the line of the right-of-way of such person or company may construct the fence thereon as herein provided for, so far as his lands abut on the right-of-way; and when he has completed the same, he may present for payment, to the ticket agent of the company at the station nearest the track so fenced, an itemized statement of the expenses thereof; and if such person or company neglect or refuse for thirty days to pay such account, such land owner may recover the reasonable cost of such fence from the owner of the road, in any court of competent jurisdiction. (April 25, 1913, 103 v. 198, § 2.)

Section 9149-5. (Injury to domestic animal prima facie evidence of failure to comply with law.) If any domestic animal shall receive any injury or be killed upon such right-of-way, either by coming in contact with a moving car, or by reason of the electricity contained in or passing through a third rail of such railroad, such injury or death shall be prima facie evidence that the person or company operating said railroad has failed to comply with the requirements of this act. (April 25, 1913, 103 v. 198, § 3.)

Section 9149-6. (Center aisle, length of car in street or interurban cars required.) That it shall be unlawful for each and every street or interurban railroad company in said state, or its president, general manager, general superintendent, or other officer in charge of operation, to permit or cause to be operated in the state of Ohio any car for the carriage of passengers, or upon which passengers are carried, not having parallel with the tracks upon which such car is being operated a center aisle running the length of the car and suitable for quick and easy passage to and fro on the part of the employees of such company and the traveling public. (107 v. 602, § 1.)

Section 9149-7. (Certain officers deemed violators.) A

violation of this act [§§ 9149-6 to 9149-10] shall be deemed a violation hereof by the president, general manager, general superintendent, or other officer in charge of operation, of any such company. (107 v. 602, § 2.)

Section 9149-8. (Fine and imprisonment.) Any violation of this act [§§ 9149-6 to 9149-10] shall be punishable with a fine of fifty dollars, coupled with imprisonment for not less than 10 days, nor more than thirty days, and each day's violation shall constitute a separate and distinct offense apart from violation on any other day or days. (107 v. 602, § 3.)

Section 9149-9. (Prosecution.) It shall be the duty of the prosecuting attorneys of the various counties to prosecute violations of this act. (107 v. 602, § 4.)

Section 9149-10. (When act shall take effect.) This act [§§ 9149-6 to 9149-10] shall go into effect on and after April 1, 1920. Provided, however, that on and after ninety days after the filing of this act with the secretary of state, it shall be unlawful to put into the service of any street or interurban railroad, within the state, any car or cars other than those said railroad companies now have in service, unless they be constructed and equipped as provided in this act. And beginning with April 1, 1917, said companies shall reconstruct and equip each year thirty-three and one-third per cent. of such of their cars as do not meet the requirements set out in this act, so that they will be in conformity with the said requirements, thus having by April 1, 1920, no cars in service that do not meet the requirements of this act. (107 v. 602, § 5.)

CHAPTER 11.

POLICEMEN.

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| § 9150. Commission for special policemen; fee required. | § 9154. Compensation. |
| § 9151. Oath of office; certified copy filed with clerk of courts; powers and liabilities. | § 9155. When powers cease. |
| § 9152. Power of police to enforce regulations and make arrests. | § 9156. When conductor a policeman. |
| § 9153. When police to wear badges. | § 9157. When conductor may eject passenger. |
| | § 9158. When conductor may arrest passenger. |
| | § 9159. Forfeiture for violation of two preceding sections. |

Section 9150. (Commissions for special policemen; fee required.) Upon the application of any bank or building and loan association, or of a company owning or using a railroad,

street railroad, suburban or interurban railroad in this state, the governor may appoint and commission such persons as the bank, building and loan association or railroad company designates or as many thereof as he may deem proper, to act as policemen for and on the premises of such bank, building and loan association or railroad, or elsewhere, when directly in the discharge of their duties. Policemen so appointed shall be citizens of this state and men of good character. They shall hold office for three years, unless for good cause shown, their commission is revoked by the governor, or by the bank, building and loan association or railroad company, as provided by law. Not more than one such policemen shall be appointed for each five miles of a street, suburban or interurban railroad. A fee of five dollars for each commission, shall be paid at the time the application is made, and this amount shall be returned if for any reason a commission is not issued. (109 v. 40; R. S. Sec. 3427; April 24, 1904, 97 v. 392; February 18, 1885, 82 v. 51; R. S. 1880; March 18, 1867, 64 v. 60, §§ 1, 2.)

Constitutionality.

See *Railway Co. v. Railroad Co.*, 30 O. S. 604 (1877).

A railroad policeman is not entitled to compensation from the public treasury under G. C. § 12385 for transporting prisoners to the workhouse. Rep. Atty. Gen. 1913, p. 319.

The right of railroad police to carry concealed weapons is conditioned upon their giving bond under G. C. § 12819. Rep. Atty. Gen. 1913, p. 1547; Opins. Atty. Gen. 1915, p. 1517.

The bond should be filed in the county in which the policeman's duties are chiefly performed. Opins. Atty. Gen. 1915, p. 1517. Compare Rep. Atty. Gen. 1914, p. 1.

A railway policeman is entitled to a reward offered by county commissioners for an arrest and conviction, where the offense charged does not concern the employer railway and was not committed on its premises. Rep. Atty. Gen. 1914, p. 107.

Section 9151. (Oath of office; certified copy filed with clerk of courts; powers; liabilities.) Before entering upon the duties of his office, each policemen so appointed shall take and subscribe an oath of office, which shall be endorsed on his commission. A certified copy of such commission shall be issued by the governor upon the payment of a fee of fifty cents for each copy so furnished, and, with the oath, shall be recorded in the office of the clerk of the common pleas court in the county in which such bank or building and loan association is located and in each county through or into which the railroad runs for which such policeman is appointed, and intended to act. Policemen so appointed and commissioned severally shall possess and exercise the powers, and be subject to the liabilities of policemen of cities in the several

counties in which they are authorized to act while discharging the duties for which they are appointed. (109 v. 40; R. S. Sec. 3428; February 18, 1885, 82 v. 51; R. S. 1880; March 18, 1867, 64 v. 60, § 3.)

A railway police officer may make an arrest, without a warrant, for intoxication in a public place or for disorderly conduct. Such an arrest is not illegal and does render the railway company liable for false imprisonment.

Erie Railroad Co. v. Reigherd, 7 O. L. R. 485 (U. S. C. C. A. 1909).

A policeman appointed and commissioned under §§ 9150 and 9151 is a public officer, deriving his authority from the state, although his salary is paid by the railroad company; and his acts will be presumed to have been performed in his capacity as such until such presumption is overcome by sufficient evidence.

Railway Co. v. Fieback, 87 O. S. 254 (1912); reversing, 13 C. C. n. s. 369; 22 C. D. 74.

A railroad company is not liable for the wrongful acts of an officer, appointed and commissioned under §§ 9150 and 9151, while acting by virtue of such office, unless such wrongful acts occurred in the performance of an act which was outside of the public duties of a policeman, and which was authorized or ratified by such company.

Railway Co. v. Fieback, 87 O. S. 254 (1912); reversing, 13 C. C. n. s. 369; 22 C. D. 74.

Sternberger v. Railway, 24 N. P. n. s. 97 (1922).

G. C. § 3024, prohibiting police officers from receiving witness fees, applies to railroad policemen. Rep. Atty. Gen. 1912, p. 262.

Section 9152. (Power of police to enforce regulations and make arrests.) A company which avails itself of the provisions of the two preceding sections may make needful regulations to promote the public convenience and safety in and about its depots, stations, and grounds, not inconsistent with law, and print and post them conspicuously upon its depots or station buildings. Such policemen shall enforce and compel obedience thereto. The keeper of jails, lockups, or station-houses in such counties shall receive persons arrested for the commission of an offense against such regulations or the laws of the state, upon or along the railroad or premises of such company to be dealt with according to law. (R. S. Sec. 3429; March 18, 1867, 64 v. 60, § 3.)

Section 9153. (When police to wear badges.) Except while acting in the discharge of duty as a detective for such railroad, every such policeman when on duty as heretofore specified, in plain view, shall wear a metallic shield with the word "police" and the name of the railroad for which he is appointed inscribed thereon. (R. S. Sec. 3430; February 18, 1885, 82 v. 51; R. S. 1880; March 18, 1867, 64 v. 60, § 4.)

Section 9154. (Compensation.) The compensation of such policemen shall be paid by the company for which they

respectively are appointed, and at such rates as may be agreed upon by the parties. (R. S. Sec. 3431; March 18, 1867, 64 v. 60, § 5.)

Section 9155. (When powers cease.) When a company no longer requires the services of a policeman so appointed, it may file a notice to that effect, under its corporate seal, attested by its secretary, in the several offices where the commission of such policeman is recorded, which shall be noted by the clerk upon the margin of the record where the commission is recorded, and thereupon the power of such policeman shall cease. (R. S. Sec. 3432; March 18, 1867, 64 v. 60, § 6.)

Section 9156. (When conductor, ticket agent and special policeman are police officers.) The conductor of every train carrying passengers, and the ticket agent and special policemen employed in or about an interurban or steam railway station are hereby invested with the powers, duties and responsibilities of police officers while on duty on such train, or on such car or cars, or in or about such interurban or steam railway station, and may wear the badge of a special policeman. (108 (Pt. 1) v. 136; R. S. Sec. 3433; 97 v. 84; 73 v. 166, § 1.)

See note to § 9157.

Section 9157. (When conductor may eject passenger.) When a passenger is guilty of disorderly conduct, or uses obscene language, or plays a game of cards or chance for money or other thing of value, on a passenger train or the car or cars of an interurban railroad carrying passengers, the conductor of such train or car or cars shall stop his train, car or cars at the place where such offense is committed, or at the next stopping place therefor, and eject such passenger from the train or car or cars, using only such force as may be necessary. The conductor may command the assistance of employes of the company, person, firm or corporation owning or operating such road or roads and of the passengers on such train, car or cars, to assist in such removal. But before doing so he shall tender to the passenger such proportion of the fare he paid as the distance he then is from the place to which he paid fare bears to the whole distance for which his fare is paid. (R. S. Sec. 3434; 97 v. 84; 73 v. 166, § 2.)

Ejection from train for refusal to pay fare.

See note to § 8977.

The expulsion of a person may be at a place other than a railroad depot, or usual stopping place, provided care is taken not to expose him to serious injury or danger.

Railroad Co. v. Skillman, 39 O. S. 445 (1883).

Whether it is due and proper care to attempt to remove a person from a car, while the same is in motion, is a question of fact for the jury and not of law for the court.

Healey v. City, etc., R. R. Co., 28 O. S. 23 (1875).

Liability of company.

See § 9158.

The provisions of §§ 9156 and this section are for the purpose of enabling a railroad company to protect other passengers as well as to protect the property of the company.

B. & O. Ry. v. Reed, 12 C. C. n. s. 177; 21 C. D. 521 (1909).

A railroad company is liable for an assault by a conductor upon a passenger whose conduct is peaceable and who is not violating any of the rules of the company.

B. & O. Ry. v. Reed, 12 C. C. n. s. 177; 21 C. D. 521 (1909).

Traction Co. v. Graybill, 8 C. C. n. s. 469; 19 C. D. 95 (1906).

When the force used to eject amounts to wanton assault, the fact as to whether the plaintiff was rightfully or wrongfully upon the train is not an element in the question of mere recovery.

Toledo, etc., Ry. Co. v. Marsh, 17 C. C. 379 (1898); 9 C. D. 548.

Cincinnati, etc., R. R. Co. v. Boyer, 18 C. C. 327 (1897); 10 C. D. 199.

Where one is wrongfully ejected from a railway train, even in the absence of use of excessive force by the servants of the railroad company, and whether or not the relation of the parties originated in contract, he may seek his remedy as for tort.

Toledo, etc., Ry. Co. v. Marsh, 17 C. C. 379 (1898); 9 C. D. 548.

See Pittsburg, etc., Ry. Co. v. Reynolds, 55 O. S. 370 (1896).

Complaints from fellow passengers, made at the time, as to the conduct of the person ejected are admissible.

United Power Co. v. Matheny, 81 O. S. 204.

Damages. Where a person is wrongfully ejected, it is error to charge that he can only recover the price of the ticket, and for the labor of walking to the place of destination. The jury may in such a case take into consideration the place where the plaintiff was left, the circumstances under which it was done, the humiliation, disgrace, and injury to his feelings, in having the train stopped and being compelled to leave the coach and train in a public manner.

Lake Shore, etc., Ry. Co. v. Teed, 14 C. C. 356 (1895); 6 C. D. 339.

Fright and terror as elements of damage.

See Traction Co. v. Rosnagle, 84 O. S. 310.

Punitive damages may be recovered when the acts of the conductor are malicious or wanton.

B. & O. Ry. v. Reed, 12 C. C. n. s. 177; 21 C. D. 521 (1909).

Traction Co. v. Graybill, 8 C. C. n. s. 469; 19 C. D. 95 (1906).

But this doctrine being capable of great practical abuse, the giving it in charge to the jury in a case clearly not warranting its application, tends to mislead them; and where, in such a case, a verdict for damages is obviously exorbitant, it is error in the court to refuse to set it aside, and award a new trial.

Pittsburg, etc., R. R. Co. v. Slusser, 19 O. S. 157 (1869).

See Atlantic, etc., Ry. Co. v. Dunn, 19 O. S. 170 (1869).

United Power Co. v. Matheny, 81 O. S. 204.

Words of provocation may be considered in mitigation of punitive but not compensatory damages.

Railway Co. v. De Pascale, 70 O. S. 179 (1904).

Section 9158. (When conductor may arrest passengers.)

When a passenger is guilty of an offense on a passenger train or the car or cars of an interurban railroad carrying passengers, the conductor of such train, car or cars, may arrest and take him before a magistrate having cognizance of such offense, in any county in which such train, car or cars runs, and file an affidavit before such magistrate, charging him with the offense. But in no case shall the liability of a railroad company for damages caused by the conduct of its conductor be affected by the provisions of this and the next preceding section. (R. S. Sec. 3435; April 15, 1904, 97 v. 84; April 11, 1876, 73 v. 166, § 3.)

Section 9159. (Forfeiture for violation of two preceding sections.) A conductor having charge of a passenger train or of the car or cars of any interurban railroad carrying passengers within this state, who wilfully neglects his duty as required by the two preceding sections, or fails to use all the means in his power to carry out their requirements, shall be deemed guilty of negligence of official duty, and on conviction thereof, before any court of competent jurisdiction, shall be fined not less than five nor more than twenty-five dollars. (R. S. Sec. 3436; April 15, 1904, 97 v. 84; April 11, 1876, 73 v. 166, § 4.)

PART XVIII.

PUBLIC SERVICE CORPORATIONS OTHER THAN RAILROADS

- CHAPTER 1. Union Depot.
- CHAPTER 2. Telegraph and Telephone.
- CHAPTER 3. Ship-Canal.
- CHAPTER 4. Turnpike or Plankroad.
- CHAPTER 5. Bridge.
- CHAPTER 6. Gas and Water.

CHAPTER 1.

UNION DEPOT COMPANIES.

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| § 9160. Articles of incorporation. | § 9167. Liabilities. |
| § 9161. What articles shall specify. | § 9168. Certain laws applicable to company. |
| § 9162. Where filed and recorded; certified copy evidence of existence; powers and privileges. | § 9169. Power to borrow money and mortgage property. |
| § 9163. How stock owned and powers. | § 9169-1. Interurban depot and terminal companies. |
| § 9164. Directors. | § 9169-2. Powers. |
| § 9165. By-laws, rules and regulations. | § 9169-3. Powers. |
| § 9166. Authority to arrest. | § 9169-4. Charges. Maximum charge. |
| | § 9169-5. Power to borrow money. |

Section 9160. (Articles of incorporation; powers under.)

The presidents of two or more railroad companies running railroads to the same city, or village, by the consent and under the direction of their respective boards of directors, or any number of persons, not less than five, a majority of whom shall be residents of this state, may file articles of incorporation in the office of the secretary of state for the purpose of purchasing or leasing depot grounds, and locating, constructing and maintaining a common or union station house, passenger or freight depot, or both, and terminal and connecting tracks for the use of steam railroads, or of both steam and electric railroads. Such company may acquire such depot grounds, structures, terminal and connecting

tracks, by lease or otherwise. Such company may also acquire, by lease, purchase or otherwise, and may construct, maintain and operate in connection with its terminals and station, a terminal railroad with two or more tracks connecting the railroads of one or more companies, and may also construct and maintain warehouses, stores, office buildings, hotels and other structures for the accommodation of the public, and may operate or lease said depot grounds, union station house, passenger or freight depot, tracks, terminal railroad, warehouses, stores, office buildings, hotels or other structures, or any part thereof. (108 (Pt. 2) v. 1141; 106 v. 317; 101 v. 171; R. S. Sec. 3446; 65 v. 63, § 1; S. & S. 122.)

A railroad company is authorized by G. C. § 9163 to acquire and hold stock in a union depot company and in a union railroad connecting the companies using the depot.

State v. Railway Co., 12 C. C. n. s. 49, 57; 21 C. D. 175 (1909).

Mannington v. Railway, 8 O. L. R. 451, 473; 183 Fed. 133; 16 O. F. D. 522 (U. S. C. C. 1910).

A union depot company, organized under this chapter may grant to a transfer company the exclusive right to use a designated portion of its depot grounds for the purpose of standing its vehicles and soliciting thereon the patronage of incoming passengers.

A rule of the depot company is reasonable which excludes therefrom others engaged in a like business, except for the purpose of delivering or receiving passengers who have previously employed them, so long as the transfer company furnishes adequate service and does not charge more than others.

State v. Depot Company, 71 O. S. 379 (1904).

Snyder v. Depot Company, 19 C. C. 369; 10 C. D. 645 (1899); reversing 7 N. P. 64; 9 L. D. 631 (1899).

State v. Brown, 7 N. P. 133; 10 L. D. 28.

Donovan v. Penna. Co., 199 U. S. 279 (1905).

Section 9161. (What articles shall specify.) The articles of incorporation shall specify:

1. The name assumed by such company;
2. The names of the companies, when the presidents of such companies incorporate under this act [§§ 9160 to 9169], and the city or village where such depot, terminals, connection tracks and structures to be operated in connection therewith are to be constructed;
3. The amount of capital stock necessary to obtain a site and construct, maintain and operate such depot, terminals, tracks and other structures;
4. When such company shall be incorporated by individuals as herein provided, the organization thereof shall be in the manner provided by law for the creation of corporations generally. (106 v. 317; 101 v. 171; R. S. § 3447; April 3, 1868, 65 v. 63, § 1; S. & S. 122.)

Section 9162. (Where filed and recorded; certified copy evidence of existence; powers and privileges.) Such articles, signed by the presidents in behalf of the railroad companies, with the corporate seals of the companies annexed thereto, or any number of persons, not less than five, a majority of whom shall be residents of this state, shall be forwarded to the secretary of state, who shall record and preserve them in his office. A copy thereof, duly certified by him, shall be evidence of the existence of such company; and thereafter it may contract and be contracted with, sue and be sued, locate and acquire rights of way and depot grounds and terminals, and appropriate so much land as is deemed necessary for such depot, tracks and terminals, and shall have all the powers given to railroads by the laws of this state, for the purpose of acquiring, constructing and operating its depot, tracks and terminals. Such company shall not be subject to the provisions of sections 9169-1 to 9169-4, both inclusive, of the General Code. (106 v. 318; 101 v. 171; R. S. § 3447; April 3, 1868, 65 v. 63, § 1; S. & S. 122.)

Section 9163. (Use of streets, alleys, etc. Filing of maps showing construction. Agreement and acceptance.) The companies whose boards of directors authorize the filing of the articles of incorporation, or assent thereto, shall each be held to own and be liable to pay an equal proportion of the capital stock, or when such union depot and terminal companies are organized by any number of persons, not less than five, the stock thereof may be acquired and held by such railroad companies as agree to use said union depot and terminals, in such proportions as said railroad companies may agree upon, and the provisions of the law authorizing railroad companies to enter upon and appropriate lands for depots, work shops, side tracks and materials therefor, shall be applicable to such union depot company, whether organized by the presidents of two or more railroad companies or by not less than five individuals, as provided in this chapter; and any municipality in which such company is located, owning or having charge of any public road, street, alley, way or ground of any kind, except a public landing, may grant to such union depot and terminal company the right to construct, maintain and operate by elevated, surface and underground tracks, so far as may be necessary to carry out the purpose of said union depot and terminal company, along, over and under said public roads, streets, alleys, ways or grounds, subject to existing laws concerning crossings so

far as the same may be applicable, and to erect and maintain therein the necessary tracks, piers, stays, supports and stations, and the approaches for the same, and also to construct suitable terminals and way stations; provided that before making such grant said union depot and terminal company shall file with the city or village, maps showing the location and character of the construction, and said grant shall provide for such manner of construction so that the ordinary use of and traffic upon said roads, streets, alleys, ways or grounds, whether by pedestrians, vehicles, street cars or otherwise, except temporarily when necessary in the construction of such structure, shall not be interfered with; and said grant shall further provide that any tunnel construction shall not impair the stability of said roads, streets, alleys, ways or grounds, or prevent the use of any sewers, water pipes, gas pipes, and conduits used for such purposes, or for telephone or telegraph purposes in said streets, alleys, ways or grounds, except temporarily when necessary in the construction of said tunnels.

Said grant can only be made upon such terms and conditions as are agreed upon by the council of the city and the company; and said grants shall provide for its acceptance by such union depot and terminal company within the time to be fixed by the council of the municipality. (109 v. 78; 101 v. 171; R. S. § 3448; 65 v. 63, § 2; S. & S. 122.)

A railroad company may own stock in a union depot company.

State v. H. V. Railway Co., 12 C. C. n. s. 49, 57; 21 C. D. 175 (1909).

Section 9164. (By-laws, rules and regulations.) The president of each railroad company which enters into such arrangement shall, ex officio, be a director in the union company, unless the board of directors of such company appoints some other person as director; or when such union depot and terminal companies are organized by any number of persons, not less than five, the board of directors of such companies shall be elected by the stockholders. All questions which affect the pecuniary liabilities and expenditures, the election of officers, appointment of agents and employes, shall be regulated by the by-laws, rules and regulations of such companies, which shall not be inconsistent with the charter of the company and the general laws of the state. The board shall keep a record of its proceedings which shall be open to the inspection of the stockholders. (May 7, 1910, 101 v. 172; R. S. § 3449; April 3, 1868, 65 v. 63, § 3; S. & S. 122.)

Section 9165. (By-laws, rules and regulations.) The board may pass by-laws, rules, and regulations for its government, not inconsistent with the charters of the companies and for the regulation of the depot, depot grounds, and the business thereof. It shall appoint such officers and agents as are necessary; and adopt, and post conspicuously in the passenger depot, such rules and regulations as will control the conduct of all runners, solicitors, hackmen, and drivers of vehicles. (R. S. § 3450; April 3, 1868, 65 v. 63, § 3; S. & S. 122.)

A union depot company may grant to a transfer company the exclusive right to use a designated portion of its depot grounds for the purpose of standing its vehicles and soliciting thereon the patronage of incoming passengers. A rule of the depot company is reasonable which excludes therefrom others engaged in a like business, except for the purpose of delivering passengers or receiving passengers who have previously employed them, so long as the transfer company furnishes adequate service and does not charge more than others.

State v. Depot Co., 71 O. S. 379 (1904).

Snyder v. Depot Co., 19 C. C. 369; 10 C. D. 645 (1899).

Donovan v. Penna. Co., 199 U. S. 279 (1905).

A city ordinance prohibiting hackmen from soliciting patronage on any railroad platform or railroad ground is a reasonable and proper regulation.

Moerder v. Fremont, 19 C. C. 394 (1899); 10 C. D. 501.

See State v. Brown, 7 N. P. 133; 10 L. D. 28 (1899).

But a city ordinance making it unlawful for the driver of a vehicle to permit his vehicle to stand in front of a designated station "unless the permission to stand has been granted by the person having the supervision over said passenger station" is invalid. Cincinnati v. Cook, 107 O. S. 223 (1923).

Section 9166. (Authority to arrest.) The officers and agents of the company shall have the same authority to arrest and bring to justice pickpockets, thieves, and persons who violate the public peace, or who violate any rules and regulations so posted, and persons who commit crimes and misdemeanors on the depot grounds, as by law constables possess within their respective townships. (R. S. Sec. 3450; April 3, 1868, 65 v. 63, § 3; S. & S. 122.)

Section 9167. (Liability of company.) The company controlling and operating such union depot and terminal property shall be liable to the public and persons who contract with such company, for all contracts made and damages caused by it, and for all damages, costs, and expenses which arise from the fault or neglect of its officers and employees. (May 7, 1910, 101 v. 173; R. S. § 3451; April 3, 1868, 65 v. 63, § 4; S. & S. 123.)

Section 9168. (Certain laws applicable to company.) All laws for the protection of railroads and their property, and relating to or enforcing the duties and obligations of officers, agents, and employes of railroad companies to the public and to railroad companies, or to either, shall be applicable to the railroad tracks, property, officers, agents, and employes of such union company. (R. S. Sec. 3452; April 3, 1868, 65 v. 63, § 5; S. & S. 123.)

Section 9169. (Power to borrow money and mortgage property.) Any such company may borrow money for the purpose of raising means to carry out the powers conferred by the law authorizing the incorporation of union depots, without reference to the amount of stock of such company, and also issue coupons or other bonds payable to bearer, bearing interest not exceeding the highest contract rate of interest allowable in this state at the time, to be payable semi-annually; it also may mortgage its franchises, property and revenues of every kind, then owned or subsequently acquired, to secure the payment of such loan and interest, or of such bonds and interest; the stockholders thereof may jointly and severally guarantee the payment of any notes or bonds the company lawfully issues, and it may dispose of the same at such rate of premium or discount as the directors deem best for its interests, and it shall be sufficient to record any such mortgage securing such loan or bonds in the real estate records of the county where the depot and tracks are constructed. (109 v. 79; 101 v. 173, R. S. § 3453; 92 v. 118; 65 v. 191, § 1; S. & S. 123.)

UNION INTERURBAN TERMINALS.

Section 9169-1. (Depot company organization.) Any five or more persons, the majority of whom are citizens of the state of Ohio, may become a body corporate for the purpose of constructing, maintaining and operating union electric interurban terminals and depots and connecting tracks. Such companies may be organized in the manner provided by law for the creation of corporations generally. (May 7, 1910, 101 v. 168.)

Section 9169-2. (Powers.) Such companies shall have power to appropriate private lands for the purpose of connecting their main tracks, terminals and depots with their own and the tracks of any other interurban electric railway company; for acquiring depot sites; for the construc-

tion of main tracks to avoid dangerous or difficult curves or grades or unsafe or unsubstantial grounds or foundations, or to extend or shorten their railway lines. The power to appropriate property herein provided for, shall be exercised in the manner provided for the exercise of such power by railroad companies. (May 7, 1910, 101 v. 168.)

Section 9169-3. (Powers.) Such companies shall have power to receive grants from the council of a municipality for the use of its streets or alleys upon the same terms as street railways and said grant shall continue as long as the grants and renewal or reletting thereof to any interurban or street railway connecting with the same; to construct, maintain and operate railway lines upon the streets or alleys of a municipality to connect its depot with other street or interurban railways; to build, keep, maintain and operate union electric interurban terminals and depots for electric cars and trains; to contract for the use of their tracks for the operation of the cars of any interurban, street or other electric railway company and for furnishing them terminal depot facilities; and any interurban, street or other electric railway company shall have power to contract with such union interurban terminal and depot company for the use of their tracks and for terminal depot facilities. (May 7, 1910, 101 v. 168.)

Section 9169-4. (Maximum charge.) All charges made by such union interurban and depot companies for the use of their tracks and terminal depot facilities shall be on the same basis against each company and no preference in charges shall be given one company over another.

In no event shall such union interurban terminal and depot company charge any interurban street, or other electric railway company, for the use of the passenger terminal station to exceed one cent for each passenger hauled by such companies within the municipal limits. (May 7, 1910, 101 v. 168.)

Section 9169-5. (Power to borrow money.) Such company may borrow money for the purpose of raising means to carry out the powers conferred upon it by law without reference to its capital stock, and issue its notes or coupon or registered bonds therefor, bearing any rate of interest authorized by law, and secure the payment of the same by a mortgage of its real or personal property, or both. (May 7, 1910, 101 v. 168.)

CHAPTER 2.

TELEGRAPH AND TELEPHONE COMPANIES.

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| § 9170. Powers of companies. | § 9185. Transmitting and delivery of messages. |
| § 9170-1. Use of highway. | § 9186. Transmission of a forged dispatch. |
| § 9171. May acquire or construct other lines. | § 9187. Removal of telegraph structures. |
| § 9172. May appropriate land. | § 9188. Company may appropriate other land. |
| § 9173. Limitation of authority to appropriate. | § 9189. When another corporation may enforce repairs. |
| § 9174. Land held by another corporation. | § 9190. When companies may consolidate. |
| § 9175. Land held by a railroad company. | § 9191. Chapter applies to telephone companies. |
| § 9176. Limitation. | § 9192. Electric light, power and automatic package carrier companies. |
| § 9177. Land lying in more than one county. | § 9193. Must have consent of municipality. |
| § 9178. Appropriation proceedings by telegraph companies. | § 9194. Any penalty cumulative. |
| § 9179. Compensation only for damages. | § 9195. Powers of electric light and power companies. |
| § 9180. May construct lines any place that will not incommode the public. | § 9196. Prior contracts declared valid. |
| § 9181. Taxation. | § 9197. Ordinances, validity of. |
| § 9182. Must receive and transmit dispatches of other lines. | § 9198. Consent, by whom to be given. |
| § 9183. When company to forward dispatches. | |
| § 9184. When agent to indorse dispatch. | |

Section 9170. (Powers of companies.) A magnetic telegraph company may construct telegraph lines, from point to point, along and upon any public road by the erection of the necessary fixtures, including posts, piers and abutments necessary for the wires; but shall not incommode the public in the use thereof. (R. S. Sec. 3454; May 1, 1852, 50 v. 274, § 47; S. & S. 299.)

This chapter applies to telephone companies, § 9191.

Application of chapter (except §§ 9178 and 9179) to electric light, power and automatic package carriers, see § 9192.

Telegraph, telephone and electric light companies are public utilities (§§ 614-2, 614-3) and are subject to the jurisdiction of the public utilities commission (§ 614-3).

Powers of telegraph, telephone, etc., companies. A telegraph company is not authorized by U. S. Rev. Stats., §§ 5263-5268, to use the streets of a municipality for the installation of a district telegraph and messenger system.

Toledo v. Telegraph Co., 107 Fed. 10 (C. C. A. 1901).

A municipality has no power to fix rates to be charged by a telephone company for service. Nor has the probate court jurisdiction under § 9178 to fix such rates.

Farmer v. Telephone Co., 72 O. S. 526 (1905).

State v. Telephone Co., 72 O. S. 60 (1905).

Macklin v. Telephone Co., 1 C. C. n. s. 373; 14 C. D. 446 (1902), aff'd, 70 O. S. 507.

State v. Telephone Co., 14 C. C. 273; 7 C. D. 536 (1897).

Schedule of rates are required to be printed and filed with the public utilities commission, §§ 614-16 to 614-620.

Rates must be reasonable, §§ 614-12 to 614-14.

Power of public utilities commission to fix rates, see §§ 614-21 to 614-23.

Construction of lines in streets and highways.

Within municipalities. Power to occupy the streets of a municipality by a telephone or telegraph company is derived from the state by virtue of § 9170 et seq., and not from municipal authorities.

Farmer v. Telephone Co., 72 O. S. 526 (1905).

Telephone Co. v. Cincinnati, 73 O. S. 64, 81 (1905).

But such right to occupy streets is conditioned upon the company's agreeing with the municipality as to the mode of use; or, failing to agree, upon an order of the probate court under § 9178.

State v. Telephone Co., 11 C. C. 55; 5 C. D. 311 (1895). (For subsequent opinion in same case see 14 C. C. 273; 7 C. D. 536 (1897).)

Penalty for stringing wires without consent of municipality, see § 12644.

U. S. Rev. Stats., § 5263 et seq., do not authorize a telegraph company to construct its lines in streets without consent of the municipality.

Toledo v. Telegraph Co., 107 Fed. 10 (C. C. A. 1901); s. c., 121 Fed. 734 (C. C. A. 1903); 103 Fed. 746; 44 W. L. B. 238 (C. C. 1900).

See Telegraph Co. v. Railway, 94 Fed. 234; 10 O. F. D. 94 (C. C. 1899).

Telegraph Co. v. Penna. Railroad, 195 U. S. 540 (1904).

U. S. Rev. Stats., § 5263, is permissive only and is not intended to interfere with the proper control and regulation of highways by the states, counties or municipalities having them in charge.

Ganz v. Telegraph Co., 140 Fed. 692 (C. C. A. 1905).

Daily v. State, 51 O. S. 348 (1894).

The right of a telegraph or telephone company to construct its line in a street is subject to the limitation that such use of the street "shall not incommode the public in the use thereof."

Ganz v. Telegraph Co., 140 Fed. 692 (C. C. A. 1905).

Daily v. State, 51 O. S. 348 (1894).

Monahan v. Telephone Co., 7 N. P. 95; 9 L. D. 532 (C. P. 1898).

Underground conduits, see § 9198 and note.

A provision in an agreement between a municipality and a telephone company, fixing the rates for telephone service, is not binding on the telephone company, although the company thereby obtained a benefit which it would not have otherwise obtained in a mode of use of the streets.

Farmer v. Telephone Co., 72 O. S. 526 (1905).

Macklin v. Telephone Co., 1 C. C. n. s. 373; 14 C. D. 446 (1902); (affirmed, Findley v. Telephone Co., 70 O. S. 507).

But where the franchise includes a right to use underground conduits as well as an overhead system, telephone rates may be regulated in the franchise ordinance. Columbus v. Telephone Co., 13 Ohio App. 232, 28 O. C. A. 102 (1917); Columbus v. Commission, 103 O. S. 79 (1921).

Refusal of a telephone company to permit the municipality to fix its rentals is not a failure of the company to agree upon the mode of use of streets under § 9178.

State v. Telephone Co., 14 C. C. 273; 7 C. D. 536 (1897).

Rights on expiration of franchise.

See *State v. Telephone Co.*, 14 C. C. 273; 7 C. D. 536 (1897); s. c., 11 C. C. 55; 5 C. D. 311 (1895).

Gas Co. v. Akron, 81 O. S. 33.

A franchise for telephone conduits, not accepted by the company, may be revoked by the council. *State v. Norwood*, 23 C. C. n. s. 145 (1915). See also *Cincinnati v. Electric Co.*, 26 W. L. B. 104 (1890).

A franchise, illegally passed, may be valid as a license, and the construction of a line thereunder will not be enjoined at the suit of another telephone company. *Telephone Co. v. Telephone Co.*, 16 N. P. n. s. 177 (1914).

An agreement in a franchise ordinance, providing for underground conduits, requiring the company to pay a percentage of its gross receipts to the municipality for the use of its general expense fund, to which the company assented, though under protest, is not invalid as an assessment for general revenue in the nature of a tax. *Telephone Co. v. Columbus*, 88 O. S. 466 (1913); affirming, 10 N. P. n. s. 433; 21 L. D. 273.

Certificate of necessity from public utilities commission, when essential, see § 614-52.

Outside of municipalities. County commissioners can not grant permission to construct lines along public roads, except subject to the limitation of this section and § 9180 that such use of the road "shall not incommode the public in the use thereof."

Ganz v. Telegraph Co., 140 Fed. 692 (C. C. A. 1905).

The statutes of Ohio grant to telegraph companies secondary and subordinate rather than co-ordinate rights, with travelers.

Daily v. State, 51 O. S. 348, 358 (1894).

Underground conduits outside of municipalities, see § 9170-1.

Lines on inter-county highways and market roads. See Opins. Atty. Gen. 1916, p. 691

Joint use of poles. An electric light company, which erected its pole lines in streets before municipalities were authorized by law to grant franchises therefor, and which occupies streets merely by license of the municipality, can not enjoin other companies from stringing wires on its poles, under an ordinance of the municipality granting such right to the other companies, upon payment of a fair proportion of the cost of erection thereof.

Brush, etc., Co. v. Jones, etc., Co., 5 C. C. 340; 3 C. D. 168 (1891); aff'd, no rep., 29 W. L. B. 72.

See *Street Railway v. Light & Power Co.*, 10 C. C. 531; 4 C. D. 43 (1894); reversed without report, 51 O. S. 633.

An ordinance requiring companies, which by ordinance have acquired the right to erect poles, to permit other companies to string wires thereon, was held not to apply to a company which had acquired its right to erect poles by an order of the probate court.

Power Co. v. Electric Co., 23 W. L. B. 137 (Super. Ct. Cin.).

See *Brush, etc., Co. v. Jones, etc., Co.*, 5 C. C. 340; 3 C. D. 168 (1891).

A municipality can not compel an electric light company to permit the municipality to string wires on its poles, in the absence of a franchise stipulation to that effect. 12 O. L. R. 554 (Atty. Gen. 1915); Rep. Atty. Gen. 1912, p. 1783; Rep. Atty. Gen. 1914, p. 1750.

Removal or change of location of lines. When may be compelled. Permission to use streets and highways can not be granted by public authorities to a telegraph company, except subject to the statutory limitation that such use "shall not incommode the public in the use thereof."

A grant of permission will not preclude the public authorities from ordering a change of location of the lines, when, through changed conditions, their location incommodes the public. Such order for a change of location will not be interfered with by the courts unless an abuse of discretion is shown.

Ganz v. Telegraph Co., 140 Fed. 692 (C. C. A. 1905).

Power of municipality to permit private company to string wires on poles owned by municipality.

See *Columbus v. Columbus, etc., Co.*, 4 N. P. n. s. 329; 17 L. D. 291 (C. P. 1906); same case, 78 O. S. 392).

Whether the grantee of a franchise, to erect poles and string an unlimited number of wires thereon, may permit other persons to string wires on such poles is doubtful.

In *Newman v. Avondale*, 31 W. L. B. 123 (C. P.) it was held that the grantee had a right to license others to string wires on its poles, without the consent of the municipality.

But in *Toledo v. Telegraph Co.*, 107 Fed. 10 (C. C. A. 1901), it was held that a telegraph company could not authorize others to use its poles, without the consent of the municipality.

(See 103 Fed. 746; 44 W. L. B. 238, for opinion of the lower court; and 121 Fed. 734, for a subsequent opinion of the court of appeals.)

When two companies engaged in enterprises calling for the use of wires to carry electricity arrange for the joint use of a pole to sustain them, each company is, with respect to such use, charged with the same duty toward employees of the other as to its own.

Gas Co. v. Arch Deacon, 80 O. S. 27 (1909).

Telephone Co. v. Parmenter, 8 N. P. n. s. 147, 152; 19 L. D. 471 (C. P. 1908).

Where lines are constructed in a highway, without consent of an abutting owner, and without compensation first being made, such abutting owner is entitled to an injunction against maintenance and an order of removal.

Callen v. Electric Light Co., 66 O. S. 166 (1902).

Smith v. Telegraph Co., 2 C. C. 259; 1 C. D. 457 (1886).

Removal when land required by a corporation owner for other purposes, see § 9187.

Temporary removal, to enable building to be moved along or across street.

See *Telephone Co. v. Parmenter*, 8 N. P. n. s. 147; 19 L. D. 471 (1908).

Telephone Co. v. Swartz, 15 C. C. n. s. 529 (1912).

Ouster of company from streets. Where an agreement between a municipality and telephone company for the use of streets, has expired by limitation, the municipality can not oust the company until it is made to appear that no agreement for further use can be made, and that the company, after such failure to agree, delays unreasonably to apply to the probate court under § 9178.

State v. Telephone Co., 14 C. C. 273; 7 C. D. 536 (1897). (For prior opinion in same case, see 11 C. C. 55; 5 C. D. 311.)

In a quo warranto proceeding to oust a telephone company from streets occupied under an order of the probate court (§ 9178) on the ground that the company has established rates exceeding those prescribed by the court, on application of the company, the company is not estopped from denying the jurisdiction of the court to prescribe rates.

State v. Telephone Co., 72 O. S. 60 (1905).

Conflicting rights of telephone companies, street railways and others. The dominant purpose for which streets in a municipality are dedicated is to facilitate public travel and transportation, and a franchise granted

to a telephone company to operate its lines along such street is subordinate to the rights of the public for the purposes of travel and transportation.

Railway Co. v. Telegraph Ass'n, 48 O. S. 390 (1891).

The fact that a telephone company operated its lines upon certain streets, prior to the operation of an electric street railway thereon, will not give the telephone company a right paramount to that of the public to adopt and use the most approved mode of travel thereon; and if the operation of the electric railway disturbs the working of the telephone system, the remedy of the latter will be to readjust its methods so as to meet the conditions created by the operation of such electric railway.

Railway Co. v. Telegraph Ass'n, 48 O. S. 390 (1891).

A change in location of poles and wires, which "incommode the public," may be ordered by public authorities although the inconvenience to the public may be caused in part by the operation of a street railway, constructed subsequently to the poles and wires.

Ganz v. Telegraph Co., 140 Fed. 692 (C. C. A. 1905).

Where it is necessary to move a telephone line, temporarily, to enable a building to be moved across the street, the expense of moving the wires must be borne by the house mover.

Telephone Co. v. Parmenter, 8 N. P. n. s. 147; 19 L. D. 471 (C. P. 1908).

Competing telephone companies, see G. C. § 614-52.

Liability. Where a pole is located by a telephone company in a road in such a position as to incommode the public, and unreasonably obstruct public travel, the company may be liable for an injury caused by a vehicle striking against the pole, where the driver was in the exercise of due care.

Monahan v. Telephone Co., 7 N. P. 95; 9 L. D. 532 (C. P. 1898).

Rights and remedies of abutting owners.

Additional servitudes. Poles and wires in a street constitute an additional servitude for which abutting owners are entitled to compensation.

Callen v. Electric Light Co., 66 O. S. 166 (1902).

But abutting owners can not compel the removal of poles, although trunk lines are carried thereon. Smith v. Central Power Co., 103 O. S. 681 (1921).

Underground conduits constitute an additional servitude.

Burns v. Telephone Co., 10 C. C. n. s. 307; 20 C. D. 74 (1907); aff'd, no rep., 76 O. S. 589.

But see, Stone v. Light Co., 9 N. P. n. s. 545; 20 L. D. 130 (C. P. 1909).

§§ 9198, 12645.

Additional cross arms placed on existing poles are not an additional burden. Smith v. Central Power Co., 23 N. P. n. s. 55 (1920).

Moving lines, to a location nearer to the side of the road than before, pursuant to an order from the state, is an additional burden. Bowman v. Telegraph Co., 23 N. P. n. s. 118 (1920).

Consent of the municipal authorities, to the construction of lines, does not affect the rights of abutting owners.

Callen v. Electric Light Co., 66 O. S. 166 (1902).

McLean v. Electric Light Co., 9 W. L. B. 65 (C. P. 1883).

Mantell v. Telephone Co., 20 C. C. 345; 11 C. D. 274 (1900).

See Stone v. Light Co., 9 N. P. n. s. 545; 20 L. D. 130 (C. P. 1909).

U. S. Rev. Stats. § 5263 does not authorize the taking of property rights of abutting owners, without compensation being first made.

Daily v. State, 51 O. S. 348 (1894).

See Ganz v. Telegraph Co., 140 Fed. 692 (C. C. A. 1905).

Appropriation of rights of abutting owners.

See note to § 9172.

Injury to trees.

See § 9173 and note.

Remedies of abutting owners. An abutting owner may enjoin the construction of pole lines, until compensation and damages shall be assessed and paid or secured.

Schaaf v. Railway Co., 66 O. S. 215 (1902).

Where poles are placed in a street without the knowledge of an abutting owner, and to the injury of his property, appreciable in character and amount, the owner is entitled to an injunction against maintenance and an order for removal of the same.

Callen v. Electric Light Co., 66 O. S. 166 (1902).

Smith v. Telegraph Co., 2 C. C. 259; 1 C. D. 457 (1886).

Mantell v. Telephone Co., 20 C. C. 345; 11 C. D. 274 (1900).

But where poles are being erected in order to furnish street lighting, under a contract with the municipality, an abutting owner is not entitled to an injunction, although a portion of the current to be carried over the lines is for private use, provided the additional use does not impair the owner's property. *Huss v. Toledo Co.*, 25 C. C. n. s. 44; 26 C. D. 181 (1915).

An abutting owner, who has submitted or consented to the maintenance of poles and wires, is not entitled to an injunction against the placing of the wires in underground conduits, which are being substituted for the overhead system.

Burns v. Telephone Co., 10 C. C. n. s. 307; 20 C. D. 74 (1907); aff'd, no rep., 76 O. S. 589.

An abutting owner can not enjoin the stringing of an additional wire on a pole which had been continuously used for nine years.

Wirth v. Telegraph Co., 7 C. C. 290; 4 C. D. 601 (1893).

Action for damages.

See *Telegraph Co. v. Smith*, 64 O. S. 106 (1901).

Action to compel appropriation.

See §§ 11084, 11085.

Railroad Co. v. Williams, 35 O. S. 168 (1878).

Kramer v. Railroad Co., 53 O. S. 436 (1895).

Railway v. Pouchot, 4 C. C. 187; 2 C. D. 492; aff'd, 51 O. S. 571.

Estoppel. An abutting owner is not estopped from asserting his property rights in the highway, by not resisting the erection of the lines at the time of construction. Mere acquiescence, for less than twenty-one years, does not work a transfer of such property rights to the telegraph company.

Daily v. State, 51 O. S. 348 (1894).

But acquiescence and failure to object may be a defense to a proceeding by the abutting owner to compel a removal of the line.

Daily v. State, 51 O. S. 348, 363, 364 (1894).

See *Burns v. Telephone Co.*, 10 C. C. n. s. 307; 20 C. D. 74 (1907); aff'd, no rep., 76 O. S. 589.

Wirth v. Telegraph Co., 7 C. C. 290; 4 C. D. 601 (1893).

Consent of an abutting owner to the construction of a line, followed by the construction and maintenance of the line, may be binding on the grantee of such abutting owner.

Telephone Co. v. Hughes, 14 C. C. n. s. 468 (1911); aff'd, no rep., 88 O. S. —.

Wirth v. Telegraph Co., 7 C. C. 290; 4 C. D. 601 (1893).

Remedies of company. A telephone company having constructed a

line in a highway, under an express agreement with the owner, may enjoy the destruction of such line by the grantee of such owner.

Telephone Co. v. Hughes, 14 C. C. n. s. 468; 23 C. D. 406 (1911).

Section 9170-1. (Use of highway.) A magnetic telegraph company may, subject to such reasonable regulations as the commissioners of the county may prescribe, construct telegraph lines and fixtures necessary for containing and protecting them beneath the surface of any public highway outside the limits of a municipal corporation, but shall not incommode the public in the use thereof. (May 31, 1911, 101 v. 432.).

Underground conduits within municipalities, see § 9198 and note.

Section 9171. (May acquire or construct other lines.) Such company may construct, own, use, and maintain a line or lines of magnetic telegraph, whether described in its original articles of incorporation or not, and whether such line or lines are wholly within or partly beyond the limits of this state. It also may join with another company or association in conducting, leasing, owning, using, or maintaining such line or lines, upon terms agreed upon between the directors or managers of the respective companies. Such companies may own and hold any interest in such line or lines, or become lessees thereof on such terms as they agree upon. But no such company or companies and the owner or owners of rights of way, shall contract for the exclusive use thereof for telegraphic purposes. (R. S. Sec. 3455; April 15, 1880, 77 v. 264; R. S. 1880; March 31, 1865, 62 v. 72, § 6; S. & S. 154.)

Right to permit other companies to string wires on poles, without consent of municipality, see note to § 9170, *joint use of poles*.

Contracts between local and long distance companies for exclusive interchange of business. A contract between a telephone company operating a local exchange, and a telephone company operating long distance lines, for the physical connection of lines and interchange of business for ninety-nine years, where partly performed, of material benefit to the party seeking its avoidance, and where the other party upon faith of, and in performance of, said contract, has made large expenditures, is held by state courts to be valid and binding.

U. S. Telephone Co. v. Middlepoint Home Tel. Co., 13 C. C. n. s. 337; 22 C. D. 17 (1910); affirming, 7 N. P. n. s. 425; 19 L. D. 202; affirmed, no report, 86 O. S. 319.

Such contracts, however, are held by federal courts to be invalid.

U. S. Telephone Co. v. Central, etc., Co., 202 Fed. 66 (C. C. A. 1913); affirming, 171 Fed. 130.

Such contract for exclusive interchange of business originating on the lines of one and destined to points reached by the other is within the purview of § 9171 and is not obnoxious to public policy, under the ruling of the state courts.

U. S. Telephone Co. v. Middlepoint, etc., Co., 13 C. C. n. s. 337; 22 C. D. 17 (1910); affirmed, no report, 86 O. S. 319; s. c., 7 N. P. n. s. 425; 19 L. D. 202.

Section 9182 requiring telegraph companies to receive and transmit dispatches from and for other lines, and made applicable to telephone companies by § 9191 does not apply to through verbal communication requiring physical connection of independent telephone lines.

U. S. Telephone Co. v. Middlepoint, etc., Co., 13 C. C. n. s. 337; 22 C. D. 17 (1910); aff'd, no rep., 86 O. S. 319.

Injunction is a proper remedy to restrain specific threatened acts in violation of such contract.

U. S. Telephone Co. v. Telephone Co., 13 C. C. n. s. 337; 22 C. D. 17 (1910); aff'd, 86 O. S. 319.

Power of public utilities commission to order connections, see § 614-63.

Contracts providing for discrimination in furnishing service. This section does not authorize a contract between two telephone companies providing that neither will operate in the territory of the other, or connect with each other's competitors. Such a contract is against public policy and illegal.

Telephone Co. v. Telephone Co., 12 N. P. n. s. 289 (C. P. 1911).

See also §§ 614-15.

A contract between a telephone company and the owner of telephone instruments providing that in the use of such instruments by the company discrimination shall be made as between telegraph companies is void as against public policy as declared by statute.

State v. Telephone Co., 36 O. S. 296 (1880).

Section 9172. (May appropriate land.) Such company may enter upon any land, held by an individual or a corporation, acquired by purchase or appropriation, or in virtue of any provision in its charter, for the purpose of making preliminary examinations and surveys, with a view to the location and erection of lines of magnetic telegraph, and appropriate so much thereof as is deemed necessary for the erection and maintenance of its telegraph poles, piers, abutments, wires, and other necessary fixtures, stations and the right of way over such lands and adjacent lands sufficient to enable it to construct and repair its lines. (R. S. Sec. 3456; March 31, 1865, 62 v. 72, § 1; S. & S. 153.)

The words "such company" in this section refers to an Ohio corporation and does not confer the right of appropriation upon a foreign corporation. A foreign telegraph company can not maintain a suit in federal court to appropriate a right of way for its lines in Ohio.

Telegraph Co. v. Railway Co., 94 Fed. 234; 10 O. F. D. 94 (C. C. 1899).

Telephone Co. v. Columbus Grove, 8 C. C. n. s. 81; 18 C. D. 131 (1905).

U. S. Rev. Stats. § 5268, does not authorize a telegraph company to appropriate a right of way. Such appropriation can only be made by virtue of a law of the state where the property is situated.

Telegraph Co. v. Railway Co., 94 Fed. 234; 10 O. F. D. 94 (C. C. 1899).

Telegraph Co. v. Railroad, 195 U. S. 540 (1904).

A telephone company seeking to appropriate property must prove

its incorporation according to law, including the due and legal election of directors.

Telephone Co. v. Cincinnati, 73 O. S. 64 (1905).

What property may be appropriated.

Property of railroad company or other corporation, §§ 9174, 9175.
Use of streets, §§ 9178, 9179.

An abutting owner has a property interest in the street which can not be taken, against his will, without compensation being made in money or a deposit of money.

Callen v. Electric Light Co., 66 O. S. 166 (1902).

Tannian v. Telegraph Ass'n, 1 N. P. n. s. 81; 13 L. D. 730 (1903);
aff'd, no rep., 71 O. S. 478.

Smith v. Telegraph Co., 2 C. C. 259; 1 C. D. 457 (1886).

Mantell v. Telephone Co., 20 C. C. 345; 11 C. D. 274 (1900).

McLean v. Electric Light Co., 9 W. L. B. 65 (C. P. 1883).

Telephone Co. v. Cush, 14 L. D. 148 (C. P. 1903).

An abutting owner is entitled to compensation for injury to shade trees.
Daily v. State, 51 O. S. 348 (1894).

An abutting owner may enjoin the construction of poles and wires until compensation and damages shall be assessed and paid or secured.

Schaaf v. Railway Co., 66 O. S. 215 (1902).

See also, as to remedies of abutting owners, note to § 9170.

Compensation. For charge to jury prescribing method of fixing compensation for easement for poles, see Ohio Co. v. Guttridge, 59 Bull. 354.

A former statute (R. S. § 3461-2), providing for appraisers to assess the compensation, was held unconstitutional.

Telephone Co. v. Cush, 14 L. D. 148 (C. P. 1903).

Measure of compensation for railroad property, see note to § 9175.

Section 9173. (Limitation of authority to appropriate.)

Without the consent of the owner thereof, in writing, no such company shall enter a building or edifice, or use or appropriate any part thereof, or erect a telegraph pole, pier, or abutment in a yard or inclosure within which an edifice is situated, nor, in cases not hereinafter provided for, erect a telegraph pole, pier, abutment, wires, or other fixtures, so near to an edifice as to occasion injury thereto, or risk of injury, in case such pole, pier, or abutment be overthrown, nor injure or destroy any fruit or ornamental tree. (R. S. Sec. 3457; March 31, 1865, 62 v. 72, § 1; S. & S. 153.)

This section limits the right of occupation by the telegraph company, so that it may not interfere with buildings or enclosures of the owner.

Railway Co. v. Cable Co., 68 O. S. 306, 317 (1903).

This section does not authorize a competing telephone company to intervene in, or prosecute error to, a proceeding in probate court under § 9178 where it does not appear that its lines will be affected by the order.

Telephone Co. v. Telephone Co., 11 N. P. n. s. 424; 21 L. D. 241 (C. P. 1911).

Appropriation for the purpose of distributing wires.

See Telephone Co. v. Chagrin Falls, 1 N. P. n. s. 534, 539; 14 L. D. 449 (C. P. 1904).

Injury to trees. An abutting owner of property outside of a municipality, whose title extends to the center of the road, has a property interest in shade trees planted partly on his land, and partly in the line of the highway.

Daily v. State, 51 O. S. 348 (1894).

Such an abutting owner may enjoin the trimming of his trees, or the maintaining of the line in front of his premises, until compensation has been made. *Reynard v. Telephone*, 16 N. P. n. s. 191; 26 L. D. 313 (1913).

Employees of a telegraph company who heedlessly, recklessly and carelessly injure such trees may be criminally prosecuted under G. C. § 12490.

Daily v. State, 51 O. S. 348 (1894).

Where trees are trimmed to string wires for street lighting and for no other purpose whatever, it has been held that the abutting owner can not recover.

Ginsburg v. Union, etc., Co., 9 O. L. R. 18 (C. P. 1911).

In an action for damages for the wrongful cutting of shade trees, an oral license from a tenant not authorized to give it, and instructions from the company to its employees, if given in good faith, are competent to defeat exemplary damages, but not competent to prevent the recovery of full compensation.

Telegraph Co. v. Smith, 64 O. S. 106 (1901).

Section 9174. (Land held by another corporation.)

When lands sought to be appropriated for lines of magnetic telegraph are held by a corporation incorporated under a law of this state, whether by purchase or in virtue of an appropriation authorized by its charter or the law of this state, the right of the company to appropriate the lands is limited to such use of them as will not, in a material degree, interfere with the practical uses to which the company is authorized to put the lands under its charter. No company shall erect poles, piers, abutments, wires, or other necessary fixtures, in such close proximity to another line of magnetic telegraph authorized by law to be constructed as to interfere mechanically with its practical working. (R. S. Sec. 3458; March 31, 1865, 62 v. 72, § 2; S. & S. 153.)

In a proceeding to appropriate a part of the right of way of a railroad company, it is necessary for the probate court to determine and enter of record that the use will not, in any material degree, interfere with the practical uses to which the railroad company is authorized to put such right of way. The burden of proof of such fact is upon the telegraph company. Until such determination the probate court has no jurisdiction to order an appropriation and impanel a jury to assess the compensation.

Railway Co. v. Cable Co., 68 O. S. 306 (1903); reversing, 22 C. C. 555; 8 N. P. 121; 11 L. D. 52.

The measure of compensation to the railroad company is the amount of decrease in the value of the use of the right of way for railroad purposes, which will result from the easement appropriated and used by the telegraph company.

Railway Co. v. Cable Co., 68 O. S. 306 (1903).

This section does not authorize a competing telephone company to intervene in, or prosecute error to, a proceeding in probate court under § 9178, where it does not appear that its lines will be affected by the order.

Sidney Telephone Co. v. Farmers Telephone Co., 11 N. P. n. s. 424; 21 L. D. 241 (C. P. 1911).

Section 9175. (Land held by a railroad company.) The right of such company to use lands held by a railroad company, for the permanent structures of such telegraph, shall be limited to land which lies within five feet of the outer limits of the right of way thereof, if it is practicable to erect the line within those limits. When the company seeks to appropriate lands that lie beyond those limits, its petition shall set forth facts showing that it is impracticable to erect its line within such limits, and designate, either by a survey and map, or by reference to monuments, or by other means of easy identification, the place or places where the company seeks to establish the line. If it be controverted by the railroad company, the probate court shall determine whether the erection of the line at the place or places designated, in any material degree will interfere with the practical uses to which such railroad company is authorized to put the land. If satisfied that it will so interfere, the court shall reject the petition, or require the structure to be erected at such other place or places as it directs. (R. S. Sec. 3459; March 31, 1865, 62 v. 72, § 3; S. & S. 154.)

In a proceeding to appropriate a part of the right of way of a railroad company, it is necessary for the probate court to determine, and enter of record, that the use will not, in any material degree, interfere with the practical uses to which the railroad company is authorized to put such right of way. The burden of proof of such fact is upon the telegraph company. Until such determination the probate court has no jurisdiction to order an appropriation and impanel a jury to assess the compensation.

Railway Co. v. Cable Co., 68 O. S. 306 (1903); reversing 22 C. C. 555; 8 N. P. 121; 11 L. D. 52.

The measure of compensation to the railroad company is the amount of decrease in the value of the use of the right of way for railroad purposes, which will result from the easement appropriated and used by the telegraph company.

Railway Co. v. Cable Co., 68 O. S. 306 (1903); reversing, 22 C. C. 555; 8 N. P. 121; 11 L. D. 52.

Section 9176. (Limitation.) Nothing in this chapter shall be construed to authorize any company to appropriate the use of the track or rolling stock of a railroad company for transporting poles, materials, or the employes of such telegraph company, or for any other purpose. (R. S. Sec. 3459; March 31, 1865, 62 v. 72, § 3; S. & S. 154.)

Section 9177. (Land lying in more than one county.) Proceedings to appropriate lands to the use of such a company, against a defendant whose adjoining or continuous

lands lie in more than one county, may be instituted in any county in which any part of the lands lie, and the damages shall be assessed, in one proceeding, in respect of all the lands of the defendant sought to be appropriated, whether lying in the county wherein the court is sitting, or in other counties. (R. S. Sec. 3460; March 31, 1865, 62 v. 72, § 4; S. & S. 154.)

Section 9178. (Appropriation proceedings by telegraph company.) When lands authorized to be appropriated to the use of such company are subject to the easement of a street, alley, public way, or other public use, within the limits of a city or village, the mode of use shall be such as is agreed upon between the municipal authorities of the city or village and the company. If they can not agree, or the municipal authorities unreasonably delay to enter into an agreement, in a proceeding instituted for the purpose, the probate court of the county shall, subject to the provisions of section eleven thousand forty-six of the General Code, direct in what mode the telegraph line shall be constructed along such street, alley, or public way, so as not to incommode the public in the use of it. (May 18, 1910. 101 v. 289; R. S. § 3461; March 31, 1865, 62 v. 72, § 5; S. & S. 154.)

This section should be read in connection with § 9172.

Zanesville, etc., Co. v. Zanesville, 20 C. C. 34, 38; 10 C. D. 783 (1900); affirmed, 64 O. S. 67.

This section does not apply to electric light companies, § 9192.

Electric Light Co. v. Electric Light Co., 5 C. C. 340, 345; 3 C. D. 168 (1891).

This section is constitutional.

Zanesville v. Telephone Co., 64 O. S. 67 (1901); affirming, 20 C. C. 34; 10 C. D. 783; overruling, 63 O. S. 442.

Agreement for use of streets.

See also note to § 9170, *Construction of lines in streets and highways*.

A municipality has no power to fix the rates for telephone service. A provision in an agreement for the occupation of streets, fixing the rates is not binding on the telephone company although the rates were fixed at the solicitation of the company and the company thereby obtained a benefit which it would not otherwise have obtained in a mode of use of the streets.

Farmer v. Telephone Co., 72 O. S. 526 (1905).

Macklin v. Telephone Co., 1 C. C. n. s. 373; 14 C. D. 446 (1902); (affirmed, Findley v. Telephone Co., 70 O. S. 507).

See Telephone Co. v. Los Angeles, 211 U. S. 264; 6 O. L. R. 610 (1908).

A stipulation in the ordinance requiring the company to pay a percentage of its gross receipts to the municipality, for the use of its general expense fund, to which the company assented, although under protest, is not an assessment for general revenue in the nature

of a tax. *Telephone Co. v. Columbus*, 88 O. S. 466 (1912); affirming, 10 N. P. n. s. 433; 21 L. D. 273.

Failure to agree. Failure to agree must appear as a predicate to a proceeding under this section.

Telephone Co. v. Cincinnati, 73 O. S. 64, 77 (1905).

Where there has been no legal election of directors of a telephone company, it can not establish a failure to agree since a corporation can only act through its legally constituted officers.

Telephone Co. v. Cincinnati, 73 O. S. 64, 77 (1905).

A petition which does not show specific questions of difference between the company and the municipality, but merely alleges that they have failed to agree on the mode of use of the streets, and prays for a general judgment directing the mode of use, does not state facts justifying an order or judgment in its favor.

Telephone Co. v. Cincinnati, 73 O. S. 64 (1905).

Refusal of a telephone company to permit the municipality to fix its rates is not a failure of the company to agree upon the mode of use of streets under this section.

State v. Telephone Co., 14 C. C. 273; 7 C. D. 536 (1897).

Rejection by the municipality of an ordinance containing illegal provisions is not a failure to agree.

In re *Co-operative Tel. Co.*, 41 W. L. B. 271; 9 L. D. 831 (Probate Court).

Where an agreement for the use of streets has expired by limitation, the municipality can not oust the company from such use until it appears that no agreement can be made, and that the company, after such failure to agree, delays unreasonably to apply to the probate court for an order under § 9178.

State v. Telephone Co., 14 C. C. 273; 7 C. D. 536 (1897).

(For former opinion in same case see 11 C. C. 55; 5 C. D. 311).

Delay for four months was held not unreasonable when it occurred during a period when acting bodies of the municipality were unconstitutional, and a new municipal code was about to become effective.

Telephone Co. v. Cincinnati, 48 Bull. 986 (Prob. Ct. 1901).

Proceeding in probate court. The proceeding authorized by this section is practically for an appropriation. It partakes of the character of an exercise of the right of eminent domain.

Telephone Co. v. Cincinnati, 73 O. S. 64, 77 (1905); affirming, 5 C.

C. n. s. 411; 17 C. D. 385; 2 N. P. n. s. 349; 15 L. D. 43.

The power of the probate court under this section is judicial in its character and not legislative, executive or administrative.

Zanesville v. Telephone Co., 64 O. S. 67 (1901).

Telephone Co. v. Cincinnati, 73 O. S. 64, 78 (1905).

An application for a franchise under this section is an adversary proceeding, in which, to obtain jurisdiction, the probate court must find affirmatively that application therefor has been made to the municipality and refused. This rule applies to the transfer of a franchise. The probate court can not transfer a franchise, previously granted, to another company by mere entry on its records.

Fitzsimmons v. Cincinnati, 47 Bull. 171 (Probate Ct. 1901).

Parties. A competing telephone company is not a proper or necessary party defendant. Nor can such competing company intervene in, or prosecute error to, the proceeding where it does not appear that its lines will be affected.

Sidney Telephone Co. v. Farmers Telephone Co., 11 N. P. n. s. 424; 21 L. D. 241 (C. P. 1911).

Pleading. The petition should show a defined plan for occupation of streets. The defendant is entitled to have the issue made as to each street, and as to the question of incommoding the public by the proposed use. Where the petition does not set out in detail the streets to be occupied, exact location of poles, character of poles, wires, etc., a motion to make definite should be sustained.

Telephone Co. v. Cincinnati, 73 O. S. 64, 66, 79 (1905).

Proof. It is incumbent on the company to prove its incorporation according to law, including the due and legal election of directors. Upon a plea of the general issue by the defendant, the burden is upon the company to establish such claim.

Telephone Co. v. Cincinnati, 73 O. S. 64 (1905).

Failure to agree must also appear. *Ib.*

Order. The probate court has no jurisdiction, as a part of its order, to prescribe the rates to be charged by the company for services. So much of the order as undertakes to determine the rates is void for want of jurisdiction.

State v. Telephone Co., 72 O. S. 60 (1905).

The probate court can not make an order granting the right to put wires and apparatus in underground conduits, in the absence of consent by the municipal authorities.

Telephone Co. v. Columbus, 88 O. S. 466 (1913); affirming, 10 N. P. n. s. 433, 437; 21 L. D. 273.

The probate court is not authorized to make any order that may be demanded. Unless issues showing specific questions of difference between the parties are presented, the court has no power other than to dismiss the petition.

Telephone Co. v. Cincinnati, 73 O. S. 64, 78 (1905).

The probate court has no power to make a general order prescribing the mode of use not only for the present, but providing for future necessities, and delegating to the board of public service power to make changes of location, etc.

Telephone Co. v. Cincinnati, 73 O. S. 64, 69 (1905).

See Cincinnati v. Electric Co., 26 W. L. B. 104 (1890).

The length of time during which the company shall use the streets can not be limited in the order.

Telephone Co. v. South Newburgh, 4 N. P. n. s. 624; 52 Bull. 173 (Probate Ct. 1907).

Nor can the moving of buildings across or through streets be provided for.

Telephone Co. v. South Newburgh, 4 N. P. n. s. 624; 52 Bull. 173 (1907).

Order granting right to erect poles subject to rights of other companies to string wires thereon.

See Power Co. v. Electric Co., 23 W. L. B. 137.

Error or appeal. Error, and not appeal, lies to the common pleas court from an order or decree of the probate court under § 9178.

Cincinnati v. Telephone Co., 2 N. P. n. s. 349; 15 L. D. 43 (C. P. 1904); aff'd, 73 O. S. 64.

Section 9179. (Compensation only for damages.) Nothing in the preceding section shall authorize a municipal corporation to demand or receive compensation for the use of a street, alley, or public way, beyond what may be necessary

to restore the pavement to its former state of usefulness. (R. S. Sec. 3461; March 31, 1865, 62 v. 72, § 5; S. & S. 154.)

A municipal corporation has no private proprietary interest in its streets which entitles it to compensation for an authorized additional burden by the construction of a telephone line therein. But being charged with the duty of keeping the streets under its control in repair, it may be allowed compensation to an amount sufficient to make the repairs rendered necessary to such additional use. It is not essential that provision be made for the assessment of such compensation by a jury.

Zanesville v. Telephone Co., 64 O. S. 67 (1901).

An agreement requiring a telephone company to pay a percentage of its gross rentals to the municipality, in addition to restoring the streets to their former state of usefulness, is not invalid under this section where it provides for underground conduits as well as other construction.

Telephone Co. v. Columbus, 88 O. S. 466 (1913); affirming, 10 N. P. n. s. 433; 21 L. D. 273.

A municipality has no power to exact or receive compensation by way of free telephone service for itself or for citizens, or to fix rates for telephone charges.

Farmer v. Telephone Co., 72 O. S. 526 (1905).

Macklin v. Telephone Co., 1 C. C. n. s. 373; 14 C. D. 446 (1902); (aff'd, Findlay v. Telephone Co., 70 O. S. 507).

State v. Telephone Co., 14 C. C. 273; 7 C. D. 536 (1897).

Nor to require the company to permit the municipality to place police and fire alarm wires on the poles of the company.

In re Co-operative Telephone Co., 41 W. L. B. 271; 9 L. D. 831 (Probate Court).

Section 9180. (May construct lines any place that will not incommode the public.) Any person or persons may construct lines of electric telegraphs, from point to point, upon and along any of the public roads and highways, and across any waters within the limits of this state, by the erection of the necessary fixtures, including posts, piers, or abutments for sustaining the cords or wires of such lines. But they shall not be so constructed as to incommode the public in the use of the roads or highways, or endanger or injuriously interrupt the navigation of such waters. This provision shall not authorize the erection of a bridge across any waters of this state. (R. S. Sec. 3461-1; February 8, 1847, 45 v. 34.)

County commissioners can not grant permission to construct lines along public roads, except subject to the limitation of this section and § 9170 that such use of the road shall not "incommode the public in the use" thereof. Nor will a grant of permission by the board of commissioners preclude it, or a subsequent board, from ordering a change in location of the poles and wires if, at any time through changed conditions, their location should incommode the public in its use. Such order will not be interfered with by the courts unless an abuse of discretion is shown.

Ganz v. Telegraph Co., 140 Fed. 692 (C. C. A. 1905); reversing, 137 Fed. 947.

A former statute (R. S. §§ 3461-2, 3461-3) providing for the ap-

pointment of appraisers by county commissioners to assess damages was held unconstitutional.

Telephone Co. v. Cush, 14 L. D. 148 (C. P. 1903).

Section 9181. (Taxation.) The stock or value invested in lines of electric telegraph shall be subject to taxation, like other property in this state. (R. S. Sec. 3461-6; February 8, 1847, 45 v. 34, § 6.)

Taxation of telegraph and telephone companies.

Property tax, §§ 5449 to 5459.

Excise tax, §§ 5470 to 5492.

Section 9182. (Must receive and transmit dispatches of other lines.) Every company, incorporated or unincorporated, operating a telegraph line in this state, shall receive dispatches from and for other telegraph lines; and from or for any individual; and on payment of its usual charges for transmitting dispatches as established by the rules and regulations of the company, transmit them with impartiality and good faith, or forfeit one hundred dollars for each case of neglect or refusal so to do, to be recovered with costs of suit, by civil action in the name and for the benefit of the person or company sending or forwarding or desiring to send or forward the dispatch. (R. S. Sec. 3462; April 15, 1880, 77 v. 264; R. S. 1880; March 31, 1865, 62 v. 72, § 8; S. & S. 155.)

This section, although made applicable to telephone companies by § 9191, does not, when read in connection with § 9171, extend to through verbal communication requiring physical connection of independent telephone lines.

U. S. Telephone Co. v. Middlepoint, etc., Co., 13 C. C. n. s. 337; 22 C. D. (1910); aff'd, no report, 86 O. S. 319; s. c., 7 N. P. n. s. 425; 19 L. D. 202.

Compare Telephone Co. v. Telephone Co., 171 Fed. 130 (C. C. 1909); affirmed, 202 Fed. 66 (C. C. A. 1913).

This section and § 9183 are penal and should be strictly construed. A person on whose behalf a dispatch was sent, but who did not present it to the company and whose name was not signed thereto, is not a "person . . . sending" the dispatch under this section and can not recover the penalty. The sender is the person whose name is signed to the message; the one desiring to send is the one presenting the same for transmission; the one forwarding has reference to the telegraph company who forwards it upon its delivery from another company.

Kester v. Telegraph Co., 8 C. C. 236; 4 C. D. 410 (1894).

A recovery for mere delay is not authorized by this section or § 9185.

Hearn v. Western Union Tel. Co., 73 N. Y. Suppl. 1077; 34 Misc. 557 (1901).

Duty to furnish service without discrimination. This chapter requires telephone companies to receive dispatches from and for telegraph and other companies without discrimination.

State v. Telephone Co., 36 O. S. 296 (1880).

A contract between a telephone company and the owner of telephone instruments providing that in the use of such instruments by the company discrimination shall be made as between telegraph companies is void as against public policy as declared by statute.

State v. Telephone Co., 36 O. S. 296 (1880).

The use of patented property, like other species of property, when devoted to public use, is subject to control by state legislation, where the exigencies of the public welfare require it.

State v. Telephone Co., 36 O. S. 296 (1880).

Where two telephone companies agree to jointly serve the subscribers of both companies, equity will not enforce a contract which provides for any discrimination of service among those similarly situated.

Telephone Co. v. Telephone Co., 12 N. P. n. s. 289 (C. P. 1911).

Discrimination in rates.

See §§ 612-12 to 612-14.

State v. Union, etc., Co., 13 C. C. n. s. 12 (1910).

Liability.

Contracts limiting. While a telegraph company may, by special agreement or by reasonable rules and regulations, limit its liability to damages for errors or mistakes in the transmission and delivery of messages, it can not stipulate or provide for immunity from liability, where the error results from its own negligence; such a stipulation is contrary to public policy and void.

Telegraph Co. v. Griswold, 37 O. S. 301 (1881).

Hord v. Telegraph Co., 3 W. L. B. 147; 6 Am. L. R. 529 (Super. Ct. Cin. 1878).

A stipulation requiring a message to be repeated back, at an additional cost, in order to render the company liable for mistakes, is ineffective to relieve the company from liability for negligence.

Plaut & Isaac v. Telegraph Co., 8 N. P. n. s. 263 (C. P. 1909).

Telegraph Co. v. Griswold, 37 O. S. 301 (1881).

Hord v. Telegraph Co., 3 W. L. B. 147; 6 Am. L. R. 529 (Super. Ct. Cin. 1878).

But the validity of a limitation of liability on interstate messages is governed by federal law, and by that law a stipulation printed on the back of the blank, known to the sender, limiting the amount of recovery for mistake in an unrepeatable night letter to the amount received for sending the same, is reasonable and valid. The company is not liable for a larger amount in the absence of wilful misconduct or gross negligence. Telegraph Co. v. Jones, 7 Ohio App. 90; 28 O. C. A. 150 (1917); Postal Co. v. Warren Co., 251 U. S. 27 (1919).

A stipulation for non-liability for an unrepeatable message is valid in New York, and, where the message was transmitted from New York to Ohio, is a defense in Ohio.

Plaut & Isaac v. Telegraph Co., 8 N. P. n. s. 263 (C. P. 1909).

Where a stipulation provided that the company "assumed no liability for errors in cipher or obscure messages" it was held that the following message was not in cipher or obscure. "Will you give one fifty for twenty-five hundred at London. Answer it once as I have only till to-night."

Telegraph Co. v. Griswold, 37 O. S. 301 (1881).

For errors in transmission. A telegraph company is liable for errors in transmission of messages resulting from its negligence.

Telegraph Co. v. Griswold, 37 O. S. 301 (1881).

Telegraph Co. v. Cereal Co., 3 C. C. n. s. 259; 13 C. D. 516 (1902).

For non-delivery. See note to § 9185.

Parties. The addressee of a message may maintain an action for non-delivery.

Barrack v. Telegraph Co., 12 L. D. 78 (1899).

Damages. In case of failure to deliver a telegraphic message, the company is only liable for such damages as naturally flow from the breach of contract, or such as may fairly be supposed to have been within the contemplation of the parties at the time the contract was made.

Bank v. Telegraph Co., 30 O. S. 555 (1876).

Elden v. Tel. Co., 10 W. L. B. 28 (1883).

Special damages can not be recovered unless for injuries of such a nature as the terms of the message, or some circumstances attending its transmission, would suggest as likely to result from such failure.

Telegraph Co. v. Sullivan, 82 O. S. 14 (1910); reversing 11 C. C. n. s. 129.

See *Hord v. Telegraph Co.*, 3 W. L. B. 147; 6 Am. L. R. 529 (Super. Ct. Cin. 1878).

Damages can not be recovered for mental pain and suffering, because of negligence in failing to transmit a message, unless accompanied with pecuniary loss or physical injury.

Morton v. Telegraph Co., 53 O. S. 431 (1895).

Kester v. Telegraph Co., 8 C. C. 236; 4 C. D. 410 (1894).

Kline v. Telegraph Co., 3 N. P. 143; 4 L. D. 224 (1896).

Kester v. Telegraph Co., 55 Fed. 603; 7 O. F. D. 545 (1893).

Where, because of a misunderstanding of the terms of a proposed contract between the parties, due to an error in the transmission of a telegram, the contract was not made, the measure of damages against the telegraph company is not the amount of loss sustained by the sender through failure to fix prices, as he had intended, but the amount of loss actually sustained in connection with the negotiation.

Telegraph Co. v. Akron Cereal Co., 3 C. C. n. s. 259; 13 C. D. 516 (1902).

See *Barrack v. Telegraph Co.*, 12 L. D. 78 (1899).

Where no actual damages are proved, nominal damages may be recovered.

Bank v. Telegraph Co., 30 O. S. 555 (1876).

Burden of proof. Where, in an action against the company for damages resulting from an inaccurate transmission of a message, such inaccuracy is made to appear, the burden of proof is upon the company to show that the mistake resulted without fault or negligence on its part.

Telegraph Co. v. Griswold, 37 O. S. 301 (1881).

Barrack v. Telegraph Co., 12 L. D. 78 (1899).

But, in an action based on delay in delivery of a message, no presumption of such delay can be indulged where it does not appear that the addressee, or some one representing him, was at the place designated for delivery.

Telegraph Co. v. Sullivan, 82 O. S. 14 (1910); reversing 11 C. C. n. s. 129.

Section 9183. (When company to forward dispatches.)

When a person sending a dispatch desires to have it forwarded over the lines of other telegraph companies, whose termini are respectively within the limits of the usual delivery of such companies, to the place of final destination,

tenders to the first company the usual charges for the dispatch to the place of final delivery, the company shall receive it, and, without delaying the dispatch, pay to the succeeding line the necessary charges for the remaining distance. The succeeding line shall accept it and forward the dispatch as if the sender had applied to it in person, and paid the usual charges. For the omission so to do it shall be liable to a like penalty, as provided in the next preceding section. (R. S. Sec. 3463; March 31, 1865, 62 v. 72, § 8; S. & S. 155.)

This section and § 9182 are penal and should be strictly construed. A person on whose behalf a dispatch was sent, but who did not present it to the telegraph company and whose name was not signed, is not the sender. *Kester v. Telegraph Co.*, 8 C. C. 236; 4 C. D. 410 (1894).

Section 9184. (When agent to indorse dispatch.) When application is made to such company to send a dispatch, the officer, agent, clerk, or servant appointed by the company to receive dispatches at that station shall inform the applicant, and, if required by him, write upon the dispatch, that the line is not in working order, or that the dispatches on hand for transmission will occupy the time so that the dispatch offered can not be transmitted within the time required, if the facts are so. For an omission so to do, or for intentionally giving false information to the applicant as to the time within which the dispatch offered can be sent, the officer, agent, clerk or servant, and the company by which he is employed, shall incur the forfeiture provided in section ninety-one hundred and eighty-two. (R. S. Sec. 3464; March 31, 1865, 62 v. 72, § 8; S. & S. 155.)

Section 9185. (Transmitting and delivery of messages.) Every telegraph company, incorporated or unincorporated, operating a telegraph line in this state, shall transmit and deliver all dispatches in the order in which they are received for transmission or delivery, under the like forfeiture of one hundred dollars, as provided in section ninety-one hundred and eighty-two, except that arrangements may be made with the proprietors or publishers of newspapers for the transmission, for publication, of intelligence of general and public interest, out of its regular order, and dispatches by officers of the state or the United States, on public business, may have preference over all private business, when the public interest so requires. No company is required to deliver dispatches at a greater distance from the station at which they are received than is published in its regulations. If an applicant directs a dispatch to be mailed at

the place of delivery, and offers to pay the necessary postage thereon, the company shall affix the proper postage stamp, and mail the dispatch in time for the first mail that departs after it is received at the office of delivery. For the omission so to do the company shall be liable to a forfeiture as provided in section ninety-one hundred and eighty-two. (R. S. Sec. 3465; March 31, 1865, 62 v. 72, § 9; S. & S. 155.)

Messages must be transmitted in the order of time they are received, and where messages are wilfully delayed, and preference given to another, liberal damages will be allowed.

Davis v. Telegraph Co., 1 C. S. C. R. 100 (1870).

A telegraph company is liable for failure to deliver a message. Where no actual damages are proved, nominal damages may be recovered.

Bank v. Telegraph Co., 30 O. S. 555 (1876).

The addressee of a message may sue for non-delivery.

Barrack v. Telegraph Co., 12 L. D. 78 (1899).

Where a message indicates on its face that prompt delivery is necessary, the company is charged with notice of such necessity and is liable for failure to make prompt delivery.

Telegraph Co. v. Porter, 33 W. L. B. 300 (1895).

See, also, 26 W. L. B. 138.

If the company is in default, but its default is made mischievous to a plaintiff only by the operation of some other intervening cause, such as the dishonesty of a third person, the rule, "*causa proxima non remota spectatur*," applies, and the company can not be made responsible for the loss occasioned by the act of such third party.

Bank v. Telegraph Co., 30 O. S. 555 (1876).

A recovery for mere delay is not authorized by this section.

Hearn v. Western Union Tel. Co., 73 N. Y. Suppl. 1077; 34 Misc. 557 (1901).

Liability generally, measure of damages, etc.

See note to § 9182.

Section 9186. (Transmission of a forged dispatch.) A person who knowingly transmits by a telegraph line any false communication or intelligence, with intent to injure a person, or to speculate in an article of merchandise, commerce, or trade, or with intent that another may do so, or knowingly sends or delivers a dispatch that is forged, or not authorized by the person whose name purports to be signed to it, shall be liable to the forfeiture provided in section ninety-one hundred and eighty-two. (R. S. Sec. 3467; March 31, 1865, 62 v. 72, § 11; S. & S. 156.)

Section 9187. (Removal of telegraph structures.) After the erection of a line of magnetic telegraph upon lands held by a corporation, if it has occasion to use the land upon which a telegraph pole, pier, abutment, or other fixture is erected, for a purpose authorized by its charter, the com-

pany shall remove the pole, pier, abutment, or fixture, to a convenient place designated by the corporation, upon reasonable notice, given in writing, and erect it in such new place, so as not to interfere with the practical uses to which the corporation is authorized to put the land. (R. S. Sec. 3468; March 31, 1865, 62 v. 72, § 12; S. & S. 156.)

Removal or change of lines in general.

See note to § 9170.

Section 9188. (Company may appropriate other land.)

If it is impracticable to erect a line of magnetic telegraph upon the lands of such corporation, in consequence of the uses to which it put the lands, the telegraph company may appropriate adjoining lands, by a separate proceeding for that purpose. (R. S. Sec. 3468; March 31, 1865, 62 v. 72, § 12; S. & S. 156.)

Section 9189. (When another corporation may enforce repairs.) After the erection of such telegraph line on the lands of a corporation, if it apprehends danger, or risk of danger, to its work or practical operations, in consequence of decay or defect in the mode of structure of any works of the telegraph company, upon five days' notice, in writing, it may require the company to repair such decayed or defective works. If the danger is imminent, so as not to admit of delay, the corporation without notice, may repair the defect, and recover the reasonable expense thereof, with costs of suit, before any court of competent jurisdiction. (R. S. Sec. 3469; March 31, 1865, 62 v. 72, § 13; S. & S. 157.)

Section 9190. (When companies may consolidate.) When two or more telegraph companies whose several lines are not parallel or in competition with each other, but which, united, will form a continuous line for receiving and transmitting dispatches, desire to consolidate into a single corporation, they may do so in the manner, and subject to the rules provided for the consolidation of railroad companies. (R. S. Sec. 3470; February 4, 1881, 78 v. 26; R. S. 1880: May 1, 1852, 50 v. 274, § 48; S. & C. 299.)

Telephone companies may consolidate in the manner prescribed by G. C. § 9028.

Rep. Atty. Gen. (1909-1910) 104.

The legislature having recognized, by the enactment of §§ 9190, 9191 and 9171, that combinations of telephone exchanges and lines are necessary in order to afford proper facilities for the public, a contract between a local and a long distance company for the physical connection of lines and exclusive interchange of business is not void as tending to create a monopoly.

Telephone Co. v. Telephone Co., 7 N. P. n. s. 425; 19 L. D. 202 (C. P. 1908); aff'd, 13 C. C. n. s. 337; 22 C. D. 17 (1910); 86 O. S. 319.

See, also, note to § 9171.

Approval of public utilities commission required for consolidation of telephone companies, § 614-61.

Section 9191. (Chapter applies to telephone companies.)

The provisions of this chapter apply also to a company organized to construct a line or lines of telephone; and every such company shall have the powers and be subject to the restrictions herein prescribed for magnetic telegraph companies. (R. S. Sec. 3471; R. S. 1880.)

Without this section the term "telegraph" as a mode of transmitting messages or other communications, is sufficiently comprehensive to embrace the telephone.

Railway Co. v. Telegraph Ass'n, 48 O. S. 390, 423 (1891).

Section 9170 is the foundation of the right of telephone companies to use the public roads of the state. The right is there given to telegraph companies, and, by this section, § 9170 is made to apply to telephone companies also, but subject to all the restrictions imposed by the chapter upon telegraph companies.

Telephone Co. v. Cincinnati, 73 O. S. 64, 79, 80 (1905).

Zanesville v. Telephone Co., 64 O. S. 67 (1901).

State v. Telephone Co., 36 O. S. 309.

Sections 9170 and 9180 apply only to telephone companies which are public utilities. Celina Tel. Co. v. Mutual Tel. Co., 102 O. S. 487, 493 (1921).

Construction of lines, rights of abutting owners, etc., see note to § 9170.

Section 9182, requiring dispatches to be received and transmitted from and for other telegraph lines, although made applicable to telephone companies by this section, does not, when read in connection with § 9171, extend to verbal communication requiring physical connection with independent telephone lines.

U. S. Telephone Co. v. Middlepoint, etc., Co., 13 C. C. n. s. 337; 22 C. D. 17 (1910); aff'd, no rep., 86 O. S. 319; s. c., 7 N. P. n. s. 425; 19 L. D. 202.

Compare, Telephone Co. v. Telephone Co., 171 Fed. 130 (C. C. 1909); affirmed, 202 Fed. 66 (C. C. A. 1913).

Certificate from public utilities commission required in certain competitive territory. See § 614-52.

Power to engage in telegraph or electric light business. One corporation may be formed for the purpose of building and operating both telegraph and telephone lines.

Rep. Atty. Gen. (1904-1905) p. 78.

Citing, Railway v. Telegraph Ass'n, 48 O. S. 390.

But a telephone company can not, by amendment to its articles of incorporation, acquire authority to furnish electric light and power.

Rep. Atty. Gen. (1908-1909) p. 102.

Consolidation. Telephone companies may consolidate in the manner prescribed by G. C. § 9028.

Rep. Atty. Gen. (1909-1910) 104.

Power to adopt regulations. A telephone company has power to adopt a regulation providing that service to a subscriber may be discon-

tinued for the use of improper language. The printing of regulations on the contract for service, and in the telephone directory is a sufficient notice to subscribers.

Pugh v. Telephone Ass'n, 9 W. L. B. 104 (Dist. Ct. 1883).

Service may be discontinued under a rule prohibiting excessive use of a party line. Telephone Co. v. Hussey, 13 O. L. R. 77 (Municipal Court, 1915).

Whether a rule or regulation of a telephone company is reasonable is a question which must be raised before the public utilities commission, before it becomes a judicial question. Telephone Co. v. Hussey, 13 O. L. R. 77, 79 (Municipal Court, 1915).

Duty to furnish service without discrimination. A telephone company is required to receive dispatches without discrimination, and a contract favoring one telegraph company as against another is void on grounds of public policy.

State v. Telephone Co., 36 O. S. 296 (1880).

The use of patented property, when devoted to public use, is subject to state control, whenever the public welfare requires it.

State v. Telephone Co., 36 O. S. 296 (1880).

Mandamus is the proper remedy to compel a company to furnish the proper instruments and service.

State v. Telephone Co., 36 O. S. 296 (1880).

State v. Telephone Co., 13 W. L. B. (Neb.) 185 (1884).

Rates. A municipality has no power to fix the rates for telephone service. A provision in an agreement for the use of streets, fixing the rates, is not binding on the telephone company, although the rates were fixed at the solicitation of the company.

Farmer v. Telephone Co., 72 O. S. 526 (1905).

Macklin v. Telephone Co., 1 C. C. n. s. 373; 14 C. D. 446 (1902); affirmed, Findlay v. Telephone Co., 70 O. S. 507.

See Telephone Co. v. Los Angeles, 211 U. S. 264; 6 O. L. R. 610 (1908).

Except where the franchise includes the right to use the sub-surface of the street for a conduit system. In such a case a stipulation fixing the rates is valid. Columbus v. Telephone Co., 28 O. C. A. 102 (1917); aff'd, no rep. 98 O. S. 454.

Nor has the probate court jurisdiction, in making an order under § 9178, to fix rates. Where the court attempts to fix rates, that part of its order is void for want of jurisdiction.

State v. Telephone Co., 72 O. S. 60 (1905).

Refusal of a telephone company to permit the municipality to fix its rates is not a failure of the company to agree upon the mode of use of streets under § 9178.

State v. Telephone Co., 14 C. C. 273; 7 C. D. 536 (1897).

Schedules of rates are required to be printed and filed with the public utilities commission. §§ 614-16 to 614-20.

Rates must be reasonable. §§ 614-12 to 614-14.

Power of public utilities commission over rates. §§ 614-21 to 614-23.

The public utilities commission, is empowered to fix telephone rates to the exclusion of a municipality having a home rule charter. Telephone Co. v. Cleveland, 98 O. S. 358 (1918).

Section 9192. (Electric light, power and automatic package carrier companies.) Excepting sections ninety-one hundred and seventy-eight and ninety-one hundred and seventy-

nine, so far as applicable, the provisions of this chapter shall apply to companies organized for the purpose of supplying public and private buildings, manufacturing establishments, streets, alleys, lanes, lands, squares and public places with electric light and power, or an automatic package carrier. Save what are given by such excepted sections, every such company shall have the powers and be subject to the restrictions herein prescribed for magnetic telegraph companies. (R. S. Sec. 3471a; April 21, 1896, 92 v. 204; January 26, 1887, 84 v. 7.)

A corporation may be formed to furnish both electricity and gas for lighting purposes.

Pickard v. Hughey, 58 O. S. 577.

Contracts with municipalities for public lighting, see § 3994, 9324 and notes.

Rates for lighting.

Power of municipality to regulate. § 3982.

Appeal to public utilities commission. §§ 614-44 to 614-46.

Contract with municipality as to. §§ 3983, 614-44 to 614-46.

Meter charges. § 3982.

Discrimination, rebates, etc., prohibited. §§ 614-14 to 614-15.

In the absence of an ordinance regulating the price of electric light (see § 3982), an electric light company may be compelled to furnish service at reasonable prices.

Railway v. Bowling Green, 57 O. S. 336 (1897); G. C. § 614-13.

Powers of electric light companies.

To require cash deposit from consumers. § 9334.

To manufacture and furnish artificial gas. § 9321.

To issue bonds, stocks, etc. §§ 614-53, 614-55.

Section 9193. (Municipal control of electricity. Exception.) In order to subject such companies to municipal control alone, no person or company shall place, string, construct or maintain a line, wire, fixture or appliance of any kind to conduct electricity for lighting, heating or power purposes through a street, alley, lane, square, place or land of a city or village without the consent of such municipality. This inhibition also extends to all levels above or below the surface of such public ways, grounds or places, as well as along their surfaces, but not to rights heretofore received through and exercised under, proceedings of a probate court. (February 26, 1910, 101 v. 14; R. S. Sec. 3471a; April 21, 1896, 92 v. 204; January 26, 1887, 84 v. 7.)

Penalty for violation of this section. § 12644.

Franchise not to be granted or transferred to foreign corporation. § 614-73.

Franchises generally, see §§ 3714, 9170. 9180 and notes.

Wires or conduits therefor can not be placed across streets, with the consents of abutting owners, but without the consent of the coun-

cil of the municipality. *Cincinnati v. Light Co.*, 4 Ohio App. 177; 21 C. C. n. s. 260 (1915); motion to certify record overruled, 12 O. L. R. 576.

Where an electric light company removes and dismantles a portion of its lines from streets, without consent of the municipality, and incapacitates itself from furnishing electricity for public lighting, it can not afterward resume occupation of the streets without consent of the municipality. *Lighting Co. v. Upper Sandusky*, 93 O. S. 428 (1916); *aff'd*, 251 U. S. 173.

A franchise to an electric light company which provides that it should not be binding on the grantee unless such grantee is granted the exclusive use of the streets for lighting purposes is invalid. A municipality has no power to grant an exclusive franchise, without clear legislative authority.

Illuminating Co. v. Mt. Gilead, 8 N. P. 669; 10 L. D. 235 (1900).

See *Columbus v. Columbus Gas Co.*, 76 O. S. 309, 339.

Underground conduits can not be constructed without the consent of the municipality.

Telephone Co. v. Columbus, 88 O. S. 466 (1913); *affirming*, 10 N. P. n. s. 433, 441; 21 L. D. 273.

The construction of an electric plant, in connection with an interurban railroad, and on the same side of the traveled roadway, for supplying light, power and heat to consumers for profit is an additional burden, and may be enjoined until compensation is assessed, and paid or secured.

Schaaf v. Railway Co., 66 O. S. 215 (1902).

Section 9194. (Any penalty cumulative.) Any penalty provided by law for enforcing such inhibition shall be cumulative to other means open to the municipality by way of injunction or otherwise, and not exclusive. (R. S. Sec. 3471a; April 21, 1896, 92 v. 204; January 26, 1887, 84 v. 7.)

Penalty for violation of § 9193, see § 12644.

Section 9195. (Powers of electric light and power companies.) A company organized for the purpose of supplying electricity for power purposes, and for lighting the streets and public and private buildings of a city or village, may manufacture, sell and furnish the electric light and power required therein for such or other purposes, and with the consent of the municipality, under such reasonable regulations as it prescribes, also construct lines for conducting electricity for power and light purposes through the streets, alleys, lanes, lands, squares and public places of such city or village, by the erection of the necessary fixtures, including posts, piers and abutments necessary for the wires. All wires so erected and operated shall be covered with a water-proof insulation, and the poles, piers, abutments and wires so located and arranged as not to interfere with the successful operation of existing telegraph and telephone wires. (R. S. Sec. 3471-3; May 12, 1886, 83 v. 143.)

Franchise, see § 9193 and note.

Prior to the enactment of this section (May 12, 1886), there was no statute which expressly, or by fair implication, authorized municipalities to grant an electric light company the right to erect poles in streets. Such an ordinance passed prior to that date is invalid.

Brush, etc., Co. v. Jones, etc., Co., 5 C. C. 340; 3 C. D. 168 (1891); aff'd, no rep., 29 W. L. B. 72; (reversing 23 W. L. B. 329).

See Street Railway v. Light & Power Co., 10 C. C. 531; 4 C. D. 43 (1894); reversed without report, 51 O. S. 633.

Such an invalid grant, although accepted by the company and acted upon, did not prevent the municipality from revoking the privilege, or subsequently imposing other conditions.

Brush, etc., Co. v. Jones, etc., Co., 5 C. C. 340; 3 C. D. 168 (1891); aff'd, no rep., 29 W. L. B. 72.

Where a street franchise is sought for the purpose of selling electric current to a street railway at a point outside the municipality, and not for the purpose of distributing current to other consumers, the council may annex to the franchise a condition that no wires shall be attached to or connected with the wires of the company within the municipality or used under the grant without the consent of the council. Rep. Atty. Gen. 1912, p. 1924.

A requirement that other companies may string wires on the poles of the company to which a franchise is granted is probably a "reasonable regulation" under this section.

Brush, etc. Co. v. Jones, etc., Co., 5 C. C. 340, 346; 3 C. D. 168 (1891); aff'd, no rep., 29 W. L. B. 72.

See Street Ry. v. Light & Power Co., 10 C. C. 531; 4 C. D. 43 (1894); reversed 51 O. S. 633.

Where an electric light company occupies a street with poles under a franchise which does not provide for the joint use of such poles, the municipality can not compel the company to permit it to string wires of the municipal lighting plant thereon. Opins. Atty. Gen. 1915, p. 1750.

Power of municipality to permit private company to string wires on poles owned by municipality.

See Columbus v. Columbus, etc., Co., 4 N. P. n. s. 329; 17 L. D. 291; s. c., 78 O. S. 392.

Defective insulation. Liability. An electric light company is liable for injury to an employe of a telegraph company, caused by contact with wires of the telegraph company to which a powerful current of electricity had escaped from wires of the electric light company, if, in the exercise of ordinary foresight and the light of circumstances, such escape should have been anticipated by the light company as likely to occur.

Light Co. v. Rippon, 8 C. C. n. s. 334; 18 C. D. 561 (1906).

See Marsh v. Railway, 7 C. C. n. s. 405 (1905).

An electric light company is not liable for an injury to a lineman of a telephone company, who climbed a pole of the light company to adjust telephone wires strung above the wires of the light company, although the light company had failed to insulate its wires as required by § 9195, and although the lineman followed an established custom in climbing the pole.

Borck v. Gas & Electric Co., 5 N. P. n. s. 526; 18 L. D. 617 (Super. Ct. Cin. 1906).

Section 9196. (Prior contracts declared valid.) When contracts for electric lighting have been heretofore entered into in which there is an omission or error from want of

conformity to the statutes of this state but which contracts have been made as herein required, and when by reason of the expenditure of money or labor in the performance of such contracts or on any other account, it is just and equitable fully to execute them, in such cases the courts are authorized to uphold such contracts as binding on all parties to them and to carry them into effect as though no such defect, omission or error existed, any law of this state to the contrary notwithstanding. (R. S. Sec. 3471-5; April 22, 1896, 92 v. 290, § 3.)

The legislature may, by subsequent law, validate acts or contracts made *ultra vires* by a municipality, if the act or contract might have been authorized by prior law.

Railway Co. v. Carthage, 18 C. C. 216; 9 C. D. 833; aff'd, no rep., 62 O. S. 636.

See Burgett v. Norris, 25 O. S. 308.

Kumler v. Silsbee, 38 O. S. 445.

State v. Hoffman, 35 O. S. 435.

Section 9197. (Ordinances, validity of.) Any company organized under the laws of this or of any other state, and owning and operating a telephone exchange, or doing a telegraph business, in any city or village in this state, may construct and maintain underground wires and pipes, or conduits and other fixtures for containing, protecting and operating such wires in the streets and public ways of such city or village in the state, when the consent of such city or village has been obtained therefor. Any ordinance of any village purporting to grant the right or privilege to any telephone or telegraph company to construct and maintain underground wires and pipes, or conduits and other underground fixtures for containing, protecting and operating such wires, in the streets and public ways of such village, and which grant has been accepted, or when money has been expended in good faith on account thereof, is hereby declared to be valid and effective, any law, or part of law, to the contrary notwithstanding. (March 23, 1909, 100 v. 85, §§ 1, 1a.)

This section and § 9198 authorize the fixing of telephone rates in a franchise which includes the right to use underground conduits as well as an overhead system. Columbus v. Commission, 103 O. S. 79 (1921); Columbus v. Telephone Co., 13 Ohio App. 232; 28 O. C. A. 102 (1917).

As underground conduits can not be constructed without consent of the municipality, the municipality may exact compensation for a franchise for the same; § 9179 does not apply to underground conduits.

Telephone Co. v. Columbus, 88 O. S. 466 (1913); affirming, 10 N. P. n. s. 433, 441; 21 L. D. 273.

Underground conduits constitute an additional servitude for which abutting owners are entitled to compensation.

Burns v. Telephone Co., 10 C. C. n. s. 308; 20 C. D. 74 (1907); aff'd, no rep., 76 O. S. 589.

Compare, Stone v. Light Co., 9 N. P. n. s. 545; 20 L. D. 130 (C. P. 1909).

Validity of curative acts. The legislature may by a subsequent law validate acts or contracts made *ultra vires* by a municipality, if the act could have been authorized by prior law.

Railway Co. v. Carthage, 18 C. C. 216; 9 C. D. 833; aff'd, no rep., 62 O. S. 636.

See Street Railway v. Horstman, 72 O. S. 93, 666.

Burgett v. Norris, 25 O. S. 308.

Kumler v. Silsbee, 38 O. S. 445.

State v. Hoffman, 35 O. S. 435.

Section 9198. (Consent, by whom to be given.) Consent of a city or village to the construction and maintenance of underground wires and pipes, or conduits and other fixtures therefor, by a company owning and operating a telephone exchange or doing a telegraph business, shall be given by the council in cities or villages. (R. S. Sec. 3471-2; March 23, 1909, 100 v. 85, 2; April 8, 1891, 88 v. 296.)

Underground conduits can not be constructed without the consent of the municipality. The probate court, in a proceeding under § 9178, is not authorized to grant such right to a telephone company.

Telephone Co. v. Cincinnati, 73 O. S. 64 (1905).

Penalty for erecting poles where subways are constructed, see § 12645.

Underground conduits, outside of municipalities, § 9170-1.

An agreement requiring a telephone company to pay a percentage of its gross rentals to the municipality is not invalid under § 9179, where it provides for underground conduits as well as other construction.

Telephone Co. v. Columbus, 88 O. S. 466 (1913); affirming, 10 N. P. n. s. 433; 21 L. D. 273 (C. P. 1910).

Underground conduits constitute an additional servitude, for which abutting owners are entitled to compensation.

Burns v. Telephone Co., 10 C. C. n. s. 307; 20 C. D. 74 (1907); aff'd, no rep., 76 O. S. 589.

Compare, Stone v. Light Co., 9 N. P. n. s. 545; 20 L. D. 130 (C. P. 1909).

CHAPTER 3.

SHIP CANAL COMPANIES.

§ 9199. Powers.	§ 9215. Compensation for land taken.
§ 9200. When a terminus is upon state line.	§ 9216. Issuing of bonds.
§ 9201. Change of line.	§ 9217. Borrowing money and securing loans.
§ 9202. Extensions.	§ 9218. Increase of capital stock.
§ 9203. May acquire lands.	§ 9219. Limit of stock and indebtedness.
§ 9204. May alter places or passages.	§ 9220. Principal office.
§ 9205. Power to make changes and relocate structures.	§ 9221. Where office of officers to be maintained.
§ 9206. May appropriate obstacles to use of canal.	§ 9222. Securities sold to directors under par, void.
§ 9207. Terminals, warehouses, etc.	§ 9223. When directors personally liable to stockholders.
§ 9208. May lease rights.	§ 9224. Consolidation.
§ 9209. May acquire vessels.	§ 9225. Consolidation of domestic and foreign companies.
§ 9210. May build, erect and operate dry-docks and machinery.	§ 9226. Provisions governing consolidations.
§ 9211. May acquire or build telegraph and telephone lines.	§ 9227. Protection of property; duties of officers, agents, etc.
§ 9212. When changes of public or private property made by company.	§ 9228. Company incorporated by another state or the United States.
§ 9213. Occupancy and use of stream.	
§ 9214. Occupancy and use of highway or public ground.	

Section 9199. (Powers.) A ship-canal company may lay out, construct, maintain and operate with any kind of motive power a ship-canal, together with all locks, dams, towpaths, branches, basins, tunnels, aqueducts, feeders to supply water from any lakes or rivers, reservoirs, cuttings, apparatus, appliances, and machinery it deems necessary, between the points named in the articles of incorporation. (R. S. § 3445-1; April 27, 1896, 92 v. 410, § 1.)

Section 9200. (When a terminus is upon state line.) When a terminus named in the articles of incorporation is upon the boundary line of the state, the directors of such company, on the location of the canal in the county where it so ends, shall make and file a certificate thereof, as by law is required of a railroad ending on such boundary line. (R. S. § 3445-1; April 27, 1896, 92 v. 410, § 1.)

Section 9201. (Change of line.) Such company may change the line or grade of its canal and branches thereof, and either of the proposed termini of such canal and branches, in the manner and subject to the provisions, conditions and limitations of law relating to changes of the termini, routes, lines, or grades of steam railroads. (R. S. § 3445-2; April 27, 1896, 92 v. 410, § 2.)

Section 9202. (Extensions.) Such company may extend its canal and branches thereof into and through an adjoining state, under the regulations by such state prescribed. The rights, powers and privileges of the company over such extension, in the construction and use of its canal and branches, in controlling the property and applying the money and assets thereof, shall be the same as if they were wholly in this state. (R. S. § 3445-2; April 27, 1896, 92 v. 410, § 2.)

Section 9203. (May acquire lands.) Such company may enter upon any land for the purpose of examining and surveying the lines of its canal and branches, and also, by purchase, appropriation or otherwise, acquire lands necessary for making, preserving, maintaining, operating or using its canals, other works and appliances. (R. S. § 3445-3; April 27, 1896, 92 v. 411, § 3.)

A company incorporated to construct a line of canal is engaged in making a public work, for which private property may be taken as in the case of other public uses.

Willyard v. Hamilton, 7 Ohio (2d part) 112 (1835).

A special act granting a special charter to a canal company and prescribing a rule of compensation and mode of ascertainment of the same, in appropriating property, was held to be abrogated by the constitution of 1851 and a new rule and mode prescribed.

Perrysburgh, etc., Co. v. Fitzgerald, 10 O. S. 513 (1860).

An appropriation of land by a canal company for the purpose of a canal, in the absence of any contract or statute to the contrary, will be presumed to have included land for a berme bank as well as for a tow path; and the exclusive power of the company over the land necessary for such bank is the same whether it consist of a natural or artificial deposit of earth.

Hatch v. Railroad Co., 18 O. S. 92 (1868).

Sale or abandonment of canal land.

See note to § 9208.

Where land appropriated for canal purposes is subsequently appropriated for railroad purposes the owner is entitled to compensation for the additional burden thereby imposed, and such damages as may result from the new use.

Vought v. Railway, 58 O. S. 123 (1898).

Hatch v. Railroad, 18 O. S. 92 (1868).

State canal lands. Title acquired under conveyances from the state.

See Railway Co. v. Nelson, 9 N. P. n. s. 56 (C. P. 1909).

State v. Fenn, 10 N. P. n. s. 325 (C. P. 1910).

Vought v. Railway, 58 O. S. 123 (1898); affirmed, 176 U. S. 469; 13 O. F. D. 234.

Section 9204. (May alter places or passages.) Such company may make, maintain, and alter places or passages over, under or through the canal, its branches and connections; relocate, alter, move, divert, rebuild or change the grade of a bridge, street, highway, turnpike, road, tramway, railroad, pipe line, conduit or other avenue of trans-

portation, public or private, or of an electric telegraph or telephone line, electric wire, main, conduit, water, gas or steam pipe, sewer, drain, culvert or tunnel, the location of which lies in, on, across, under or contiguous to an intended canal or works, and which obstructs or interferes with their proper construction, maintenance or operation. (R. S. Sec. 3445-3; April 27, 1896, 92 v. 411, § 3.)

Section 9205. (Power to make changes and relocate structures.) By purchase, appropriation, or otherwise, such company may acquire all lands necessary for relocating and moving the aforesaid structures, and in like manner, obtain and use during the construction and operation of such canal and its branches, from rivers, streams, lakes, reservoirs and other sources of water supply adjacent thereto, water sufficient for the construction, maintenance and use of the canal, its branches and works, and also cause and keep up a current of three miles per hour in all the navigable channels of the canal; control the fluctuations of lakes, rivers, and creeks, by regulating and overflow dams and weirs; raise and lower the water surface in the lakes and rivers; control the flood waters of rivers and creeks adjacent to the canal or its branches, by directing or impounding them; divert or alter the course of a river, stream, or other water course, when necessary to their making, maintenance, or operation; and erect, maintain and operate dams, regulating dams, weirs, conduits, channels, diversion channels, cuttings, ditches, trenches, tunnels, reservoirs, basins, aqueducts, and other works necessary to the purposes of the company. (R. S. Sec. 3445-3, April 27, 1896, 92 v. 411, § 2.)

Section 9206. (May appropriate obstacles to use of canal.) Such company may condemn, appropriate, purchase or otherwise acquire and remove any dam, pier, wharf, bridge, causeway, trestle, wall, embankment, or other artificial work or natural obstacle which obstructs, interferes with, or threatens the free navigation or use and operation, and maintenance of its canal or branches, or the safe and easy entrance or exit of vessels to and from them. (R. S. § 3445-3, April 27, 1896, 92 v. 411, § 3.)

Section 9207. (Terminals, warehouses, etc.) Such company may construct, maintain and use, lease or otherwise dispose of terminals, harbors, wharfs, piers, docks, elevators and warehouses upon its canal, or on lakes adjoining or near to it, or connected therewith by waterways, natural or artificial. (R. S. § 3445-3, April 27, 1896, 92 v. 411, § 3.)

Section 9208. (May lease rights.) Such company may lay out and lease, or otherwise dispose of water-lots, and use, lease, sell or otherwise dispose of water brought by or for its canal, and produce, lease and supply, or otherwise dispose of hydraulic, electric, or other kinds of power in connection with its own works, and also erect, maintain and operate such structures, machinery or appliances, as are necessary to produce the power or force required to operate the canal and branches. (R. S. § 3445-3, April 27, 1896, 92 v. 411, § 3.)

Land acquired by a canal company, organized under a special charter, prior to the adoption of the constitution of 1851, authorizing it to acquire lands for its use by donation, grant or appropriation, without expressing the interest or estate to be acquired thereby, revert to the original owner, or his successor in title, upon the abandonment of the canal. The rule is the same where it afterwards disposes of its canal to the state.

Vought v. Railway, 58 O. S. 123 (1898); affirmed, 176 U. S. 469; 13 O. F. D. 234.

Where, however, the land is only abandoned by the state for canal purposes and is at the same time leased or conveyed to a railroad company for railroad purposes, the owner is only entitled to compensation for the additional burden thereby imposed, and such damages as may result from the new use.

Vought v. Railway, 58 O. S. 123 (1898); affirmed, 176 U. S. 469; 13 O. F. D. 234.

Where a canal company and a railroad company resort to the form of an appropriation merely for the purpose of consummating a purchase by the railroad company from the canal company of an easement in the land appropriated, and a railroad is constructed on the line and in place of the canal, this is not such an abandonment as will work a reversion to the original owner.

Hatch v. Railroad Co., 18 O. S. 92 (1868).

See Garlick v. Railway Co., 67 O. S. 223 (1902).

A special act authorizing a canal company to abandon a portion of its canal, is permission to surrender corporate power, not an attempt by special legislation to confer corporate power, and is therefore not in conflict with section 1, article 13, of the constitution.

Penna. Canal Co. v. Commissioners, 27 O. S. 14 (1875).

Vought v. Railway, 58 O. S. 123 (1898); affirmed, 176 U. S. 469; 13 O. F. D. 234.

Owners of lands abutting on a state canal, incidentally benefitted by its water or drainage facilities, can not, on such ground, enjoin the abandonment of the canal, or claim compensation therefor.

Vought v. Railway, 58 O. S. 123 (1898); affirmed, 176 U. S. 469; 13 O. F. D. 234.

Hatch v. Railroad Co., 18 O. S. 92 (1868).

Where a canal company organized under a special charter, which obligated it to repair bridges over the canal, was by a valid act permitted to abandon the canal and surrender its charter, it was thereby released from the obligation to repair bridges.

Penna. Canal Co. v. Commissioners, 27 O. S. 14 (1875).

But where such a company abandoned only part of its canal, it was not relieved from the obligation to keep in repair the parts of the canal not abandoned, nor from the consequences of failure to perform such duty imposed by its charter.

State v. Penna., etc., Co., 23 O. S. 121 (1872).

A canal company incorporated under the act of January 10, 1827 (25 O. L. 3) erected a dam, causing the water to flow back upon the lands of a proprietor above the dam. The company owned in fee simple, by purchase, the land upon which one half of the dam was built; and conveyed, in fee simple, to third persons, the land thus owned and granted to them the privilege of using surplus water of the dam not required for canal purposes.

Held, that the right to flow the lands of such proprietor, which the company acquired by appropriation, did not, by such conveyance, survive and vest in the grantees after dissolution of the canal company.

McCombs v. Stewart, 40 O. S. 647 (1884).

Section 9209. (May acquire vessels.) Such company may acquire, use, or dispose of steamers, tugs, boats, barges and other vessels for its canal purposes, and propel them in and through the canal by any kind of power or force, and also open, cut and make such ponds or basins for the laying up or turning of vessels, boats, or rafts using the canal, at such parts of it as the company deems expedient. (R. S. § 3445-3, April 27, 1896, 92 v. 411, § 3.)

Section 9210. (May build, erect and operate drydocks and machinery.) Such company may build and erect drydocks, slips and machinery therewith, for the hauling out and repairing of vessels, at its discretion; also, provide or make apparatus and appliances for the raising and clearing away of wrecked or sunken vessels, for the floating of sunken or grounded vessels, and lease or hire such instrumentalities on such terms as it sees fit, or operate them by its own servants and agents. (R. S. Sec. 3445-3, April 27, 1896, 92 v. 411, § 3.)

Section 9211. (May acquire or build telegraph and telephone lines.) Such company may construct, or acquire, maintain and operate electric telegraph and telephone lines, electric light poles, wires, machinery, and apparatus for the economic and convenient construction and operation of its canal and branches; also, by license, purchase, or otherwise, acquire the right to use any patented invention, proper for that purpose, and again dispose of them. The company further may do all such things as are necessary for the making, completing, maintaining or operating its canal and branches, and to the carrying out in other respects its objects. (R. S. § 3445-3, April 27, 1896, 92 v. 411, § 3.)

Section 9212. (When changes of public or private property made by company.) When such company finds it necessary to relocate, alter, move, divert, rebuild, or otherwise change a bridge, street, highway, turnpike, or other

public or private avenue of transportation, or of an electric telegraph or telephone line, electric wire, main, conduit, water, gas or steam pipe, sewer, drain, culvert, or tunnel, it forthwith shall properly reconstruct whichever of these is moved or changed, on the most favorable location procurable, with the least possible interruption to its convenient use, and at the company's expense. (R. S. § 3445-3, April 27, 1896, 92 v. 412, § 3.)

Section 9213. (Occupancy and use of stream.) Such company may enter upon, occupy and use, a part or all of a river, creek or stream on and along the route of its canal and branches; enter upon lands on the route adjoining or in the neighborhood thereof, and appropriate so much as is deemed necessary therefor, including buildings and improvements mentioned in sections ninety-two hundred and three and ninety-two hundred and twelve both inclusive, and materials for construction, and rights of way to enable it to construct and repair its canal and branches. (R. S. § 3445-4, April 27, 1896, 92 v. 412, § 4.)

Section 9214. (Occupancy and use of highway or public ground.) If in the location of a canal, or branches thereof, it be necessary to occupy a public road, street, alley, way or public ground, or part thereof, the right to occupy and use it may be acquired in the manner, under the conditions and subject to the restrictions and obligations provided by law for railroads in like cases, which are hereby made applicable to ship-canal companies. (R. S. § 3445-5, April 27, 1896, 92 v. 413, § 5.)

Section 9215. (Compensation for land taken.) No appropriation of property to the use of such company shall be made until full compensation therefor is made in money, or secured by deposit of money, to the owner, to be assessed by a jury without deduction for benefits to any property owner, as prescribed by law. Such appropriation of property shall be made according to the provisions of law relating to the appropriation of private property by corporations. (R. S. Sec. 3445-6; April 27, 1896, 92 v. 413, § 6.)

Section 9216. (Issuing of bonds.) Such company may issue bonds, convertible or otherwise, bearing interest at not more than seven per cent per annum, to an amount not greater than the amount of its capital stock actually subscribed, for one or more of the following purposes: Completing or extending its canal, constructing branch canals,

necessary buildings or improvements, enlarging or deepening its canal or branches, paying its unfunded debts, or redeeming its bonds. It may secure the bonds so issued by mortgage on its property, or otherwise, by complying with the provisions of the law authorizing railroad companies to issue bonds for similar purposes, which are hereby made applicable to ship-canal companies. (R. S. § 3445-7, April 27, 1896, 92 v. 413, § 7.)

Section 9217. (Borrowing money and securing loan.) Such company may borrow money on the terms, for the purposes, and subject to the conditions and restrictions, contained in the law governing the borrowing of money by railroad companies; and its mortgage or pledge to secure the payment of such loans shall be made, recorded, and the lien thereof attached as required and provided with respect to railroad companies. (R. S. §§ 3445-8, 3445-9; April 27, 1896, 92 v. 413, §§ 8, 9.)

Section 9218. (Increase of capital stock.) Such company may increase its capital stock whenever the directors think this necessary to the purposes of the company, by complying with the law which directs the steps to be taken by a railroad company in proceedings for increasing its capital stock; and such increased stock may be "common" or "preferred," on the conditions, and under the restrictions provided therefor, with respect to railroad companies. (R. S. § 3445-10; April 27, 1896, 92 v. 413, § 10.)

Section 9219. (Limit of stock and indebtedness.) But in no case shall the aggregate amount of the capital stock and bonded indebtedness of such company ever exceed the sum of six hundred thousand dollars per mile of its main and branch canals. (R. S. Sec. 3445-10; April 27, 1896, 92 v. 413, § 10.)

Section 9220. (Principal office.) As soon as convenient after its organization, such company shall establish a principal or general office at a point on the line of its canal, which it may change at pleasure, and give public notice of its establishment or change, in some newspaper published on its line, in this state. (R. S. Sec. 3445-11; April 27, 1896, 92 v. 414, § 11.)

Section 9221. (Where office of officers to be maintained.) The office of the president, secretary and treasurer of the company shall be kept at such principal or general office,

or other point on the line of the canal in the state, and a record kept there of all the proceedings of the company, to be open at reasonable hours to the inspection of stockholders. (R. S. § 3445-11, April 27, 1896, 92 v. 414, § 11.)

Section 9222. (Securities sold to directors under par, void.) All capital stock, bonds, notes, or other securities of such company, purchased of it by a director thereof, either directly or indirectly, for less than par value, shall be null and void. (R. S. § 3445-12; April 27, 1896, 92 v. 414, § 12.)

See § 8798 and note.

Section 9223. (When directors personally liable to stockholders.) Such directors shall be liable in their individual capacity to the stockholders for any damage sustained by them by reason of negligence, mismanagement, or unfaithfulness in the discharge of their duties; but a director may exonerate himself by entering his protest upon the record against an act done without his concurrence from which injury is feared, and forthwith publishing it for three weeks in some newspaper printed and of general circulation in the county in which is the principal office of the company. (R. S. § 3445-12; April 27, 1896, 92 v. 414, § 12.)

See G. C. § 8788.

Section 9224. (Consolidation.) When the canals of ship-canal companies are so constructed as to permit the passage of ships, boats or vessels into and through any two or more of such canals continuously, without break or interruption, such companies may consolidate themselves into a single company. (R. S. § 3445-13; April 27, 1896, 92 v. 414, § 13.)

Section 9225. (Consolidation of domestic and foreign companies.) Any company organized in this state for the purpose of constructing, owning, maintaining and operating a ship-canal to the boundary line, or other point in or out of the state may consolidate its capital stock with the capital stock of a company in an adjoining state, organized for a like purpose, whose canal has been projected to the same point, if the several canals when constructed will be continuous. (R. S. Sec. 3445-13; April 27, 1896, 92 v. 414, § 13.)

Section 9226. (Provisions governing consolidations.) Such consolidation shall be made in accordance with the provisions of law authorizing and governing the consolida-

tion of railroad companies and their roads. Such consolidated canal companies shall be entitled to the rights, benefits, and subject to the requirements and restrictions by law granted to or imposed upon railroad companies which have been consolidated, all provisions as to the latter, being hereby made applicable to the former. (R. S. Sec. 3445-14; April 27, 1896, 92 v. 414, § 14.)

Section 9227. (Protection of property, duties of officers, agents, etc.) Laws for the protection of railroads or their property, and relating to or enforcing the duties and obligations of officers, agents and employes of railroad companies, or to the appointment powers and duties of railroad police, shall be applicable to the canals, property, officers, agents and employes of ship-canal companies. (R. S. § 3445-15; April 27, 1896, 92 v. 414, § 15.)

Section 9228. (Company incorporated by another state or the United States.) Any company created under the laws of another state, or of the United States, for the purpose of constructing, maintaining and operating a ship-canal partly in such other state and partly in this state, with any kind of motive power, may exercise and enjoin herein all its powers, privileges, faculties and franchises for the purposes of such canal and its business, not inconsistent with the laws of this state. Such companies shall be entitled to the rights or privileges granted, and subject to the requirements or restrictions imposed by law on ship canal companies organized under the laws of Ohio. (R. S. Sec. 3445-16, March 31, 1906, 98 v. 151, § 15a.)

See Opins. Atty. Gen. 1915, p. 746.

CHAPTER 4.

TURNPIKE, OR PLANK ROAD.

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Section 9229. (Powers.) A turnpike or plank-road company may construct a turnpike or plank-road, as named in its articles of incorporation, between the termini specified therein, and when it is so stated in the articles, may improve and hold more than one road, if such roads diverge from one point, or branch from each other in the course of their routes. (R. S. Sec. 3472; May 1, 1852, 50 v. 274, § 32; March 4, 1853, 51 v. 484, § 2; S. & C. 293; S. & C. 319.)

A turnpike company has no right to acquire and hold land in fee simple, when not necessary for the purposes of the company.

Turnpike Co. v. Railroad Co., 15 C. C. 268; 8 C. D. 269 (1898).

A municipality can not lay water or sewer pipe under the surface of a turnpike, without the consent of the turnpike company, until it acquires the right by appropriation.

Cincinnati Turn. Co. v. Avondale, 17 W. L. B. 294 (1887).

A turnpike company has no power by virtue of its easement to lay

water pipes except to maintain its way or to benefit public travel. Such right rests in abutting owners, or their licensees.

Avenue Co. v. St. Bernard, 1 N. P. 85; 1 L. D. 99 (C. P. 1894).

A turnpike company can not grant a greater easement than it possesses. A street railway, laying tracks in a turnpike under a grant from the turnpike company, may be enjoined from impairing the right of access of an abutting owner.

McMaken v. Street Railroad, 5 N. P. 367; 5 L. D. 358 (C. P. 1897).

Voting rights of stock, formerly owned by the state, in turnpike company organized under a special charter.

See Harper v. Ampt, 32 O. S. 291 (1877).

Plank road companies organized under special charters prior to the constitution of 1851, which charters provided that the companies should be subject to all laws which might "thereafter be enacted, for the purpose of governing and regulating such companies generally in this state;" were held to be subject to general statutes providing for the repair of turnpikes.

Plank Road Co. v. Cotton, 12 O. S. 263 (1861).

See § 9246.

Turnpike or road a public highway. "While a turnpike may be owned and operated by a private corporation, it is still a public highway. A turnpike road can only be constructed and operated under authority of law, and when used by the public it becomes a public highway. The purpose and object of a turnpike is merely to provide a public highway of a better quality than would be furnished by an ordinary county road, and it is maintained by tolls instead of by public taxes. It is not in any sense a private road or way; it could not be closed by the stockholders or corporation against the public use; it is constructed under or by virtue of public authority for the use of every person who desires to pass over it, on the payment of the toll established by law, and its use is common to all who comply with the law. The easement enjoyed by the public in a turnpike road is vested in the public as much as that of a common highway. If for any reason the turnpike should be abandoned as such it would still remain a public highway." Cincinnati v. Leeds, 3 Ohio App. 123, 131; 20 C. C. n. s. 212 (1914).

Section 9230. (Supplementary articles.) Such company may file supplementary articles, for the specification and designation of an additional branch road connected with previous work constructed by it, and may unite with any other turnpike or plank-road company in maintaining and holding any road in common between them and divide the proceeds thereof in proportion to their respective interests. (R. S. Sec. 3473; March 4, 1853, 51 v. 484, § 3; S. & C. 319.)

Section 9231. (Materials used in construction.) In the construction or repair of its road, such company may make or construct a part thereof with stone, gravel, or plank, as one or the other material is most convenient for such part of the road. When plank are used they shall be two and one-half inches thick, cover enough of the road for the accommodation of teams, but may be placed in the center or on either side of the road. A change of material shall

not impair the utility of the road, nor render it less valuable to the traveling public. (R. S. Sec. 3474; May 1, 1852, 50 v. 274, § 33; March 12, 1853, 51 v. 395; § 2; April 3, 1854, 52 v. 24, § 1; S. & C. 295; S. & C. 334; S. & C. 370.)

Section 9232. (May appropriate lands.) Such company, or its agents, may lay out, locate, survey and make its turnpike or plank road through improved or unimproved lands, on the best route between the points or places designated in the articles of incorporation, contracting for and paying the owners of the land over which the road passes the damage done thereto by laying out and making it, and for materials taken therefrom for constructing or repairing it. When the company and the owner can not agree as to the compensation, or if the owner is unknown or incapable of contracting, then such damages shall be assessed and paid in the manner prescribed by law. When any part of the road is rendered unsafe for travel by the current of a river, water-course, or other unavoidable cause, the company may change the location of the road at such place so far as necessary, and appropriate land therefor as above provided. (R. S. Sec. 3475; May 1, 1852, 50 v. 274, § 32; March 8, 1865, 62 v. 36, § 1; S. & C. 293; S. & S. 116.)

Where a company, incorporated for the purpose of constructing a plank road, was authorized by its charter to take possession of public roads for such purpose, and constructed its road, which was accepted by the proper public authority, and the company permitted to erect its gates, any part of a public road so taken was held to be withdrawn from the jurisdiction of the road supervisor, whatever liabilities the company may have incurred to individuals for failure to appropriate their interests in a legal manner.

Chagrin Falls, etc., Co. v. Cane, 2 O. S. 419 (1853).

See G. C. § 7300 (102 v. 117) and §§ 7298 to 7301.

The interest of the public in such roads, consisting in a perpetual easement for purposes of public travel, may, at the discretion of the general assembly, be transferred, without pecuniary equivalent, to a plank road company; such plank road still remaining a public highway. The company in such case becomes the assignee of the public and lawfully possessed of the same interest as the public had.

Chagrin Falls, etc., Co. v. Cane, 2 O. S. 419 (1853).

After a company has appropriated land sixty feet wide for the purposes of its road, and the resulting damages to the owners have been ascertained, it may, within the sixty feet, build a toll-house and dig a well for the accommodation of the toll gatherer.

Ward v. Turnpike Co., 6 O. S. 16 (1856).

Whether the freeholders, in assessing damages, formed erroneous conclusions as to the extent of injury by failing to estimate the detriment which a toll-house might occasion, can not, in the absence of any showing in the record of the basis of their award, be considered by the court. An action of trespass against the company will not lie for errors made in assessing damages.

Ward v. Turnpike Co., 6 O. S. 16 (1856).

Section 9233. (How right to use street or bridge acquired.) When, in laying out or building a turnpike or plank-road, such company deems it proper to enter upon and take possession of a road, street, alley, or bridge outside of a municipality, it shall present to the commissioners of the county in which the road, street, alley, or bridge is situated, a petition, signed by at least twelve citizens who live on or are interested in the road, street, alley, or bridge, and cause a notice to be published in some newspaper of general circulation in the county, for four consecutive weeks, of the object and prayer of such petition, that remonstrances may be made thereto. At their next meeting after the presentation of such petition, such notice having been given, the commissioners shall hear and determine it. If it appears to be for the interest of the community using the road, street, alley, or bridge, to have it used to construct such turnpike or plank-road thereon, the commissioners shall grant a permit, in writing, to the company to take and use it on such terms as they deem for the interest of the community; whereby the company shall acquire an exclusive right of way in such road, street, alley, or bridge. (R. S. Sec. 3476; March 29, 1866, 63 v. 61, § 4; S. & S. 141.)

A franchise for a specified term of years dates from the issuance of the permit by the commissioners and not from the subsequent action of that board granting the right to collect toll, under § 9236.

Commissioners v. State Road, etc., Co., 1 N. P. n. s. 143; 13 L. D. 747 (C. P. 1900); aff'd, no rep., 67 O. S. 554.

Planks placed in a road by a turnpike company under such a franchise can not be removed by the company after the expiration of its franchise.

Commissioners v. State Road, etc., Co., 1 N. P. n. s. 143; 13 L. D. 747 (C. P. 1900); aff'd, no rep., 67 O. S. 554.

See C. E. Ry. Co. v. Cleveland, 204 U. S. 116.

Forfeiture of franchise for failure to keep turnpike in repair.

See Turnpike Co. v. Waechter, 2 C. C. n. s. 21; 15 C. D. 605 (1903).

Section 9234. (Exceptions.) Nothing in the preceding section shall extend to roads, streets, alleys, or bridges within the limits of a city or village, nor to any macadamized road. (R. S. Sec. 3476 March 29, 1866, 63 v. 61, § 4; S. & S. 141.)

Section 9235. (Width and grade.) Turnpikes and plank-roads shall be opened not exceeding sixty feet wide, thirty feet of which must be cleared of brush and logs, and at least sixteen feet be made an artificial road, composed of stone, gravel, wood, or other convenient material, compacted together so as to secure a firm, even and substantial road. In no place shall the ascent in such a road be greater than

five degrees. But when a company, licensed by the county commissioners as directed by law, has collected tolls on its road for ten years or upward, it may demand and receive such tolls thereon as are authorized by law, if the grade does not exceed seven degrees. (R. S. Sec. 3477; April 12, 1869, 66 v. 46, § 1; April 4, 1878, 75 v. 90, § 34; S. & C. 295).

Section 9236. (Authority to collect toll.) When a company has completed its road, or part thereof not less than three miles, and from time to time thereafter it has completed a further or continuous portion, it may apply to the commissioners of the county in which the finished road or part lies, or if it lies in two or more counties, to the commissioners of either of the counties, and they shall appoint three judicious, disinterested freeholders, who, on oath, shall examine it, and report their opinion to the commissioners, in writing. If they report that the road, or part thereof is completed, in accordance with this chapter, the commissioners, by license in writing, shall authorize the company to erect gates, at suitable distances, and demand and receive, of persons traveling the road, the tolls allowed by law. When any commissioner is a stockholder in the company making the application, the duties required of the commissioners shall devolve upon the probate judge of such county or counties. If such judge is a stockholder in the company, such duties shall devolve upon the common pleas judge of the district in which the road lies, or the judge of any of the districts within which it lies, in case it lies in two or more districts. (R. S. Sec. 3478; April 18, 1870, 67 v. 94, § 1; May 1, 1852, 50 v. 275, § 35; March 12, 1853, 51 v. 395, § 3; March 4, 1853, 51 v. 484, § 4; April 29, 1872, 69 v. 196, § 1; S. & C. 295; S. & C. 334; S. & C. 320.)

A franchise, granted by county commissioners under § 9233, for a specified term of years dates from the issuance of the permit by the commissioners and not from the subsequent action of that board granting the right to collect toll, under this section.

Commissioners v. State, etc., Co., 1 N. P. n. s. 143; 13 L. D. 747 (C. P. 1900); aff'd, no rep., 67 O. S. 554.

A demand for the toll is not necessary. The liability arises from passing the gate without payment.

State v. Neil, 7 Ohio (1 pt.) 132 (1823).

The right of taking toll is a franchise.

Seymour v. Turnpike Co., 10 Ohio 477, 480 (1841).

The right to take toll is property which can not be taken away without due process of law.

Turnpike Co. v. Waechter, 2 C. C. n. s. 21; 15 C. D. 605 (1903).

Turnpike Co. v. Parks, 50 O. S. 568 (1893).

The right to take toll can not be sold on execution in the absence of a statute authorizing such sale.

Seymour v. Turnpike Co., 10 Ohio 477 (1841).

See § 9303.

A reservation by the owner of land in granting a right of way for a toll road, that she and her descendants shall have the right to pass without payment of toll, does not create an estate running with the land.

Turpin v. Pike Co., 7 N. P. 12; 9 L. D. 668 (1899).

Toll gates within municipal limits prohibited. § 9254.

Section 9237. (Extension to other improved road.) A turnpike company, whose beginning point is in a turnpike road, and which has completed more than two and one-half miles, but less than three miles, thus connecting its road with an improved graveled road, or with another turnpike road, shall have all the privileges, and in all other respects conform to the requirements of the preceding section. But the county commissioners first shall authorize such privilege by a vote entered upon their journal. (R. S. Sec. 3478a; April 17, 1882, 79 v. 144.)

Section 9238. (Forfeiture for evading gates.) A person using such road, who, with intent to defraud the company, or to evade the payment of toll, passes through a private gate or bars, or along another ground near a turnpike or plank-road gate erected in pursuance of law, or practices any fraudulent or forcible means with intent to evade or lessen the payment of toll, for every such offense shall forfeit and pay five dollars, to be recovered with costs of suit and amount of toll due for passing through such a gate, before any justice of the peace of the county in which the offense was committed, without stay of execution. Such forfeitures when collected must be paid into the common school fund in the township in which the offense was committed. But nothing herein shall prevent persons using such roads between gates for common purpose. (R. S. Sec. 3479; March 22, 1881, 78 v. 77; Rev. Stat. 1880; May 1, 1862, 59 v. 101, § 37; S. & S. 149; S. & C. 296.)

Malicious injury to toll gates; evasion of toll; penalty. See § 12484.

Rights of abutting owners. An abutting owner may erect a bridge over ditch constructed by turnpike company for drainage purposes, in order to enter turnpike from his premises; but can not connect bridge with a private way and allow the public to use it as a "shunpike" to evade payment of toll.

Avenue Co. v. Bates, 2 C. C. 376; 1 C. D. 540 (1887).

An owner of land not abutting on turnpike, but on such private way, over which he has no right, has no right to erect such bridge.

Avenue Co. v. Bates, 2 C. C. 376; 1 C. D. 540 (1887).

An abutting owner has the right to lay water pipes under the surface of the turnpike. The turnpike company is entitled to compensation for injury to the surface, but is not entitled to an injunction to prevent the laying of such pipes, or under ordinary conditions to prevent a temporary disturbance of the surface.

Avenue Co. v. St. Bernard, 1 N. P. 85; 1 L. D. 99 (C. P. 1894).

The transfer of a public road to a turnpike company, duly made by law, can not be presumed to affect injuriously the rights of owners of the land over which it passes, and if such injury is claimed, it must be proved.

Chagrin Falls, etc., Co. v. Cane, 2 O. S. 419 (1853).

Miscellaneous. A municipality can not lay water or sewer pipe under the surface of a turnpike, without the consent of the turnpike company, until it acquires the right by appropriation.

Cincinnati Turnpike Co. v. Avondale, 17 W. L. B. 294 (1887).

Where a bridge company was organized under a special charter which required the rates of toll to be posted at each end of the bridge, it was held that the company could not compel payment of toll where the rates were not posted.

Bonham v. Taylor, 10 Ohio 108 (1840).

See § 9239.

Section 9239. (Mile-stones.) Each company shall put up a post or stone at the end of each mile, with the number of miles from some noted point or place, at one end of the road, fairly cut or painted thereon, and also place near each gate a board, with the rates of toll painted thereon. No toll shall be demanded unless such boards are kept. (R. S. Sec. 3480; May 1, 1852, 50 v. 274, § 38; S. & C. 296.)

Section 9240. (Rates of toll.) A company entitled to charge tolls may receive from persons traveling on or using its road, the following tolls, and no more, for every ten miles travel, and in the same proportion for any less distance, to-wit: For every four-wheeled carriage or other vehicle drawn by one horse or other animal, fifteen cents, and for each additional animal, five cents; for every sled or sleigh drawn by one horse or other animal, five cents, and for each additional animal, five cents; for every horse, or mule and rider, five cents; for every horse, mule or ass, six months old or upwards, three cents; for every head of neat cattle, six months old or upwards, one cent; for every head of sheep or hogs, one-half cent; for every stage-coach or omnibus, drawn by two horses or other animals, thirty cents, and for each additional animal, ten cents; for every two-wheeled carriage drawn by one horse or other animal, ten cents; and for each additional animal, five cents; and for every engine, wagon or other vehicle, drawn or propelled by steam or otherwise than herein provided, may charge and receive such rates of toll as their directors or boards of managers may from time to time direct, but not to exceed five cents per mile. (R. S. Sec. 3481; February 13, 1891, 88 v. 33; March 22, 1889, 86 v. 133; April 17, 1882, 79 v. 147; February 24, 1881, 78 v. 35; Rev. Stat. 1880; March 27, 1875, 72 v. 85, § 1; June 12, 1879, 76 v.

153, § 1; March 16, 1865, 62 v. 142, § 1; S. & S. 148; S. & C. 296.)

The classification of turnpike companies, made by this section and § 9241, is not unreasonable or arbitrary. These sections have a uniform operation upon all the members of each class and are constitutional.

State v. Turnpike Co., 37 O. S. 481 (1882).

Section 9241. (Rates of toll on limestone roads.) On all turnpike roads constructed of and kept in repair with two-thirds broken limestone the companies operating them may charge and receive for each ten miles travel thereon, and in the same proportion for any less distance, to-wit: For every four-wheeled carriage or other vehicle drawn by one horse or other animal, twenty cents, and for each additional animal, ten cents; for every sled or sleigh drawn by one horse or other animal, ten cents, and for each additional animal, five cents; for every horse or mule and rider, ten cents; for every horse, mule or ass, six months old or upwards, five cents; for every head of neat cattle, six months old or upwards, one and one-half cents; for every head of hogs, three-fourths of a cent; for every head of sheep, one-half cent, for every stage coach or omnibus, drawn by two horses or other animals, forty cents, and for each additional animal, ten cents; for every two-wheeled carriage drawn by one horse, fifteen cents; and for every engine, wagon or other vehicle, drawn or propelled by steam or otherwise than herein provided, may charge and receive such rates of toll as their directors or boards of managers from time to time direct, not to exceed five cents per mile. But persons going to and from their regular places of worship on the Sabbath, or to and from funerals, or elections, jurymen going to and returning from their attendance at court, and the troops and armies of the United States, and of this state, may pass on any road free of toll. (R. S. Sec. 3481; February 13, 1891, 88 v. 33; March 22, 1889, 86 v. 133, April 17, 1882, 79 v. 147; February 24, 1881, 78 v. 35; Rev. Stat. 1880; March 27, 1875, 72 v. 85, § 1; June 12, 1879, 76 v. 153, § 1; March 16, 1865, 62 v. 143, § 1; S. & S. 148; S. & C. 296.)

The classification of turnpike companies, made by § 9240 and this section, is not unreasonable or arbitrary. These sections have a uniform operation upon the members of each class and are constitutional.

State v. Turnpike Co., 37 O. S. 481 (1882).

Section 9242. (Toll on certain roads from mines or quarries.) A company incorporated for the purpose of constructing a turnpike or plank-road from a mine or quar-

to a railroad, canal, slack-water navigation or navigable water, macadamized road or place within or upon the borders of this state, when such road is completed, may charge and collect an amount of toll for teams, hauling the products of the mines or quarries on its road as its directors determine, not exceeding four cents per mile for two-horse teams, and an increase of two cents per mile for each additional horse. But such rates shall not be charged for teams hauling the products of mines or quarries for more than eight miles, nor shall other travelers on the roads be charged more than the ordinary rate of toll per mile as allowed by the two preceding sections. (R. S. Sec. 3481; 88 v. 33; 86 v. 133; 79 v. 147; 78 v. 35; Rev. Stat. 1880; 72 v. 85, § 1; 76 v. 153, § 1; 62 v. 143, § 1; [S. & S. 148; S. & C. 296].)

Section 9243. (Repair of roads in municipalities.) If such a company fails to keep any part of its road within the limits of a municipal corporation in repair for five days successively, the proper municipal authority may pass a resolution requiring it to repair the road within ten days after the service of a copy thereof on the gate-keeper nearest the municipality, and the company shall declare its intention to abandon or repair it. On failure or refusal so to do within thirty days, or failure or refusal to repair in ninety days, the municipal corporation may file a complaint in writing, with a copy of the resolution, in the common pleas court of the county, describing the portion of the road required to be repaired. The court, or a judge thereof then shall appoint two disinterested persons as inspectors, who shall view the portion of the road complained of, and return their finding thereon, under oath, to the court, within ten days. If they find the complaint to be true, the court shall declare that such portion of the road is abandoned by the company, and the municipality may improve or repair it and assess and collect the costs of the improvement or repairs in the way provided by law for the improvement of streets. (R. S. Sec. 3482; March 14, 1853, 51 v. 464, § 1; S. & C. 333.)

See *Madisonville v. Turnpike Co.*, 17 W. L. B. 30 (1886).

Section 9244. (Proceeding to enforce repairs.) Notice of the complaint, and of the appointment and time of meeting of the inspectors, shall be served on the president or other officer of the company, or at its principal office, five days before the meeting. If such service be made by a person other than the sheriff, it shall be verified by the

oath of the person making it. No toll shall be received at the gates for the portion of the road so declared abandoned, and if the keeper of any gate demands and receives such toll, he shall pay the sum of five dollars to the party injured, to be recovered by civil action before any justice of the peace having jurisdiction. (R. S. 3483; March 14, 1853, 51 v. 464, § 2; S. & C. 334.)

Section 9245. (Costs.) Costs of the proceeding on the complaint shall be paid by the company, if the action be sustained, but if not sustained by the municipal corporation, and execution shall issue therefor as in other cases. (R. S. Sec. 3483; March 14, 1853, 51 v. 464, § 2; S. & C. 334.)

Section 9246. (Repair of roads outside of municipalities.) If such company fails to keep its road in repair outside of a municipal corporation for five days successively, or fails to build or rebuild any of the bridges or culverts across the streams crossing its road for a period of six months, any person may file a complaint, in writing, before any justice of the peace of the county, setting forth the nature and extent of the defect complained of, and designating the place or places in the road where it exists. Upon at least three days' notice, to be given to the gate-keeper nearest the place complained of, the justice shall appoint two disinterested persons as inspectors, to meet at the place complained of within five days, and of the time and place of which meeting reasonable notice must be given to such gate-keeper. The inspectors shall then examine into the truth of the matter complained of, and if they find the complaint to be true, file with the justice a report of their finding, in writing, and send a certified copy of the complaint, and of their finding thereon, to the keeper of each of the gates between which the defective place or bridge is located. Thereafter no toll shall be received at such gates for the intermediate distance until the parts of the road found defective by the inspectors are fully repaired, or an appeal is taken as hereinafter provided. (R. S. Sec. 3484; April 9, 1878, 75 v. 106, § 1; March 11, 1867, 64 v. 51, § 1; [S. & S. 150, 151; S. & C. 335].)

County commissioners have no such interest as to entitle them to a writ of mandamus to compel a turnpike company to repair a bridge forming a part of such company's road.

State v. Turnpike Co., 16 O. S. 308 (1865).

A supervisor of highways has no power over plank roads, constructed by incorporated companies and placed by law under their control; nor

could he justify interference with such roads, although directed by the township trustees.

Plankroad Co. v. Cane, 2 O. S. 419 (1853).

Revised Statutes, §§ 4914, 4916 and 4918, so far as they authorize probate courts to declare a turnpike road abandoned, without the right to a jury or the right of appeal, are unconstitutional.

Turnpike Co. v. Parks, 50 O. S. 568 (1893).

Turnpike Co. v. Gay, 50 O. S. 583 (1893).

A suspension of the right to take tolls, under §§ 9246 to 9249 is a taking of property.

Turnpike Co. v. Waechter, 2 C. C. n. s. 21; 15 C. D. 605 (1903).

Before the amendment of § 9249 (April 15, 1904, 97 v. 85) §§ 9246 to 9249 were held unconstitutional on the ground that no provision was made for a jury trial.

Turnpike Co. v. Waechter, 2 C. C. n. s. 21; 15 C. D. 605 (1903).

See Plank Road Co. v. Cotton, 12 O. S. 263 (1861).

The franchise of a turnpike company may be forfeited for failure to keep the turnpike in repair.

Turnpike Co. v. Waechter, 2 C. C. n. s. 21; 15 C. D. 604 (1903).

Section 9247. (Damages and forfeiture.) If the keeper of such gate demands and receives toll contrary to the preceding section he shall pay the sum of five dollars to the party injured, to be recovered by action before any justice of the peace having jurisdiction. The company shall be liable to any person injured, for the damages sustained by reason of such road or bridge being suffered to remain out of repair by its neglect. The justice shall record the complaint, and the report of the inspectors. (R. S. Sec. 3484; April 9, 1878, 75 v. 106, § 1; March 11, 1867, 64 v. 51, § 1; [S. & S. 150, 151, S. & C. 335].)

Cited, Turnpike Co. v. Parks, 50 O. S. 575.

Prior to the amendment of § 9249 (97 v. 85) this section was held unconstitutional on the ground that no provision was made for a jury.

Turnpike Co. v. Waechter, 2 C. C. n. s. 21; 15 C. D. 605 (1903).

Where the toll gate is closed at night, without lights or other warning, the company is liable for injury to a horse caused thereby.

Applegate v. Turnpike Co., 13 N. P. n. s. 486 (1912).

Section 9248. (Costs.) The inspectors and justice shall be entitled to one dollar per day for their services, which shall be paid by the company, if the complaint be sustained, but if it fails, then by the complainant. To the amount so taxed shall be added the expense of sending such notice to the gatekeepers, which shall be paid as herein provided, and for which the justice shall render judgment against the party liable for its payment. (R. S. Sec. 3484; 75 v. 106, § 1; 64 v. 51, § 1; [S. & S. 150, 151]; [S. & C. 335].)

Cited, Turnpike Co. v. Parks, 50 O. S. 575.

Prior to the amendment of § 9249 (97 v. 85) this section was held unconstitutional on the ground that no provision was made for a jury.

Turnpike Co. v. Waechter, 2 C. C. n. s. 21; 15 C. D. 605 (1903).

Section 9249. (Appeal by company from decision of justice of the peace.) If the sum necessary to make such repairs exceeds twenty dollars, the person or company owning the turnpike may appeal the proceeding, from the report and judgment as to costs, to the common pleas court of the county, on filing affidavit as to costs of repairs, and giving bond as in other cases of appeal, within ten days after service of a certified copy of the report of the inspectors. The condition of the appeal bond shall be to abide by and perform the order of the court of common pleas. If either party demands a jury to hear and determine the truth of the complaint, the court shall empanel one in the manner provided for empanelling juries in civil causes in such court, to hear and determine the truth of the complaint. If, upon hearing the evidence the jury find the complaint to be true and that the turnpike or portions thereof complained of are out of repair, the court thereupon shall make such order as to repairs as it deems just, or order that the collection of tolls be suspended pending the making and completion of the repairs. (R. S. Sec. 3485; April 15, 1904, 97 v. 85; April 9, 1878, 75 v. 106, § 1; March 11, 1867, 64 v. 51, § 2; S. & S. 151.)

Cited, *Turnpike Co. v. Parks*, 50 O. S. 575.

Prior to the amendment (April 15, 1904, 97 v. 85) this section was held unconstitutional on the ground that no provision was made for a jury trial.

Turnpike Co. v. Waechter, 2 C. C. n. s. 21; 15 C. D. 605 (1903).

Section 9250. (Forfeiture for detaining travelers.) If a toll-gatherer on a turnpike or plank-road unreasonably detains a passenger after the toll is paid or tendered, or demands or receives greater toll than is allowed by law on such road, he shall forfeit and pay a sum not exceeding twenty dollars, to be recovered, with costs of suit before any justice of the peace having jurisdiction thereof, without stay of execution. No suit shall be commenced against a toll-gatherer for a forfeiture incurred under this section, unless it be within twenty days from the time the penalty was incurred. (R. S. Sec. 3486; May 1, 1852, 50 v. 274, § 39; S. & C. 297.)

Section 9251. (Fast riding or driving over bridges.) No person shall carry fire across a wooden bridge, on a turnpike or plank-road, except in a lantern or close vessel, under a penalty of five dollars; nor shall he ride or drive a horse, or drive a stage coach or other vehicle, over such bridge, faster than a walk, under a penalty of two dollars.

But United States express mail shall not be subject to such penalty. (R. S. Sec. 3487; 39 v. 36, § 3; S. & C. 336.)

Section 9252. (Obstructing roads.) Whoever deposits wood, stone or other kind of material, on a turnpike or plank-road inside of the ditches thereof, or outside of the ditches, but so near thereto as to cause the banks to break into them, or causes the accumulation of rubbish, or any kind of obstruction, shall forfeit and pay the sum of five dollars. (R. S. Sec. 3488; 39 v. 36, § 5; S. & C. 336.)

Section 9253. (How forfeitures recovered.) All penalties and forfeitures incurred under the provisions of this chapter, are recoverable, with costs of suit, before a justice of the peace having jurisdiction thereof, and shall be paid into the treasury of the proper county, as in other cases. (R. S. Sec. 3489; 39 v. 36, § 6; S. & C. 336.)

Section 9254. (No toll-gate to be erected in city or village.) No such company shall erect a toll-gate, or collect tolls within a city or village, or within eighty rods thereof. When by the creation of a village, or extension of the limits of a city or village, a toll-gate is brought within the limits or within eighty rods thereof, the company shall remove the toll-gate to a point on its road not nearer to such limits than eighty rods. So much of its road as is included within the limits of such city or village shall thereby become a public street, to be kept in repair as other such streets. No toll shall be taken thereon. (R. S. Sec. 3491; March 23, 1869, 66 v. 36, § 1; April 4, 1878, 75 v. 90, § 34, S. & S. 841; S. & C. 339.)

Where municipal limits are extended beyond a toll gate, the gate can not thereafter be maintained nor tolls collected.

Turnpike Co. v. Kelley, 41 O. S. 144 (1884).

A turnpike company, having a toll gate properly located outside the prescribed boundaries, may charge and collect toll not only for the eighty rods leading to the city limits, but also for such part of the road as is lawfully within the city limits.

Turnpike Co. v. Springfield, 27 O. S. 584 (1875).

A contract between a turnpike company and a municipality, permitting the company to make a portion of its road within municipal limits, and collect tolls thereon, is to be construed with reference to the laws providing for the location of the toll gates. The company having a toll gate properly located, may collect tolls thereat for the portion within the municipality, if the contract is not otherwise objectionable.

Turnpike Co. v. Springfield, 27 O. S. 584 (1875).

The duty to keep in repair that part of a turnpike which becomes included within municipal limits devolves upon the municipality, as it becomes a street under this section. The words "no toll shall be taken thereon" means no toll therefor or for that part.

Madisonville v. Turnpike Co., 17 W. L. B. 30 (C. P. 1886).

See Lower River Road Co. v. Cincinnati, 13 L. D. 214 (1902); reversed, without report, 71 O. S. 486.

Turnpike Co. v. Traction Co., 15 L. D. 118; 1 Hosea 274; reversed, without report, 71 O. S. 530.

Remedies for illegal maintenance of toll gate. Where a turnpike is maintained within eighty rods of the city limits, the remedy is mandamus against city to institute appropriation proceedings.

Gates v. Turnpike Co., 4 N. P. 235; 6 L. D. 337 (1897).

An injunction against a company maintaining a toll gate within eighty rods of the city limits will not be granted at the suit of a private individual not injured differently from the general public.

Kelley v. Turnpike Co., 1 W. L. B. 132 (1876).

Gates v. Turnpike Co., 4 N. P. 235; 6 L. D. 337 (1897).

A corporation organized under a special act, prior to the constitution of 1851, for the sole purpose of managing a road constructed by county commissioners, and collecting tolls thereon to be applied only to its repair and the payment of construction debts incurred by the commissioners, is not prohibited by this section from maintaining a gate and collecting toll within a municipality.

Road Co. v. Riverside, 25 O. S. 658 (1874).

Section 9255. (Compensation for removal of toll-gate and use of road.) Compensation shall be made to the company for the damages it sustains by reason of such removal of its toll-gate, and surrender of such part of its road. If the company and authorities of the city or village do not agree thereon, the damages shall be ascertained in proceedings which the municipal authorities shall commence, to appropriate the property to such use, in the manner provided by law for the appropriation of property by municipal corporations, or, in default of such agreement, or institution of appropriation proceedings, at any time after the removal of the toll-gate, the company may recover its damages from the city or village, by civil action. (R. S. Sec. 3491; March 23, 1869, 66 v. 36, § 1; April 4, 1878, 75 v. 90, § 34; S. & S. 841; S. & C. 339.)

A municipality can not condemn less than the whole of a turnpike within its limits.

Turnpike Co. v. Cincinnati, 2 W. L. B. 126 (1877).

See also, Road Co. v. Riverside, 25 O. S. 658 (1874).

Where, by the extension of the municipality, a turnpike having a toll gate thereon is embraced within the city limits, such toll gate need not be removed until compensation is made to the company.

Cincinnati v. Scarborough, 5 W. L. B. 77 (1880).

Gates v. Turnpike Co., 4 N. P. 235; 6 L. D. 337 (1897).

Measure of damages.

See Turnpike Co. v. Cincinnati, 6 N. P. 233; 9 L. D. 259 (1899).

Cincinnati v. Scarborough, 5 W. L. B. 77; 8 Am. L. R. 562 (1880).

Avondale v. Turnpike Co., 18 W. L. B. 308 (1887).

Nature of proceedings.

See Plankroad Co. v. Toledo, 31 O. S. 588 (1887).

A municipality can not lay water or sewer pipe under the surface

of a turnpike, without the consent of the company, until it acquires the right by appropriation.

Turnpike Co. v. Avondale, 17 W. L. B. 294 (1887).

A corporation organized under a statute providing for the keeping in repair of gravel or macadamized roads, etc., although the road of the company is a plank road, must be regarded as a plank road company, and its only remedy against a municipal corporation, for appropriating a part of its road, is under this section.

Plankroad Co. v. Toledo, 31 O. S. 588 (1887).

Section 9256. (May sell road or bridges to city or village.) Such company, a part of whose road or bridge becomes embraced within the limits of a city or village may contract with the proper authorities thereof, or of the township or county in which it is situated, for the disposal, release, and abandonment of such part of its road or bridge, upon terms agreed upon between the company and the authorities. Such a contract heretofore entered into shall be as valid as if made under this section. (R. S. Sec. 3492; April 11, 1856, 53 v. 180, § 1; S. & C. 338.)

Cited, State v. Road Co., 21 C. C. 662; 12 C. D. 319.

Power of municipality to lease a turnpike and pay rental.

See Road Co. v. Cincinnati, 13 L. D. 214 (1902); reversed, without report, 71 O. S. 486.

Where a county road was used by a turnpike company and subsequently conveyed by it to a municipality, upon extension of municipal limits, the road remains a county road. State v. Eiriek, 14 C. C. n. s. 577, 584, 17 C. C. n. s. 331, 338 (1911); aff'd, no rep. 84 O. S. 503.

Section 9257. (Foreclosure of mortgage on road.) When such company executes a mortgage upon its road, or a part thereof, the mortgagee, or assignee thereof, after the money thereby secured becomes due, may foreclose the mortgage as if it were upon real estate, and the sale so made shall be held to pass to the purchaser the corporate franchises of such company as fully as the mortgagor held them at the time of executing the mortgage. Laws relating to the foreclosure of mortgages upon real estate shall be applicable to the foreclosure of mortgages upon turnpikes or plankroads. (R. S. Sec. 3493; April 16, 1857, 54 v. 179, § 1; S. & C. 339.)

This section and the next show that the franchise of taking tolls is property in the enlarged sense of the term.

Turnpike Co. v. Parks, 50 O. S. 568, 575 (1893).

Section 9258. (Appraisers; purchaser receives franchises.) In such proceeding the court shall appoint the appraisers. When the road runs into or through more than one county it may order it to be appraised and sold entire

or in parcels as to the court seems expedient. The purchaser of such road or part thereof shall be entitled to exercise all the corporate franchises purchased as fully as they belonged to such company before the sale, in any name that the purchaser assumes. (R. S. Sec. 3494; April 16, 1857, 54 v. 179, § 2; S. & C. 339.)

Section 9259. (How road surrendered to county.) A company having its road located or constructed, or the corporate right to construct such a road, through or into any any county or counties of this state, with the consent of three-fourths of its stockholders, and the like consent of all of the commissioners of such county or counties, may relinquish and transfer to the commissioners of the county or counties the whole or any part of its road, together with all rights and privileges appertaining thereto. But the transfer to such commissioners shall be limited to the part of the road within the boundaries of such counties respectively, shall be without consideration, and no tolls shall be collected thereon within such county or counties. (R. S. Sec. 3495; March 11, 1853, 51 v. 405, § 1; January 25, 1861, 58 v. 5, § 1; S. & C. 333; S. & S. 678.)

No valid transfer can be made to the commissioners of the county without the assent of such commissioners.

State v. Turnpike Co., 16 O. S. 308 (1865).

Section 9260. (How transfer evidenced.) Such transfer shall be evidenced by the execution of a written declaration, signed by the president or other principal officer, and the secretary or other recording officer, and under the seal of the company, which shall take effect and have full force when there is deposited with the auditor of the county in which the relinquished road lies, the written declaration, or a copy thereof, and an entry is made upon the journal of the commissioners of the county, signed by all the commissioners of an acceptance of such relinquishment or transfer; which written declaration, so deposited, also shall be entered by the auditor upon his record of roads. Thereafter such road or part of road, shall be under the control of the commissioners of the county in which it lies, who, by a proper order, shall provide that it be a public highway, and that no tolls be collected thereon. (R. S. Sec. 3496; January 25, 1861, 58 v. 5, § 2; S. & S. 678.)

Section 9261. (Private sale of roads.) With the consent of three-fourths of the stockholders, such company, by sale or otherwise, may relinquish and transfer to any

person or persons other than commissioners of counties, the whole or a part of its road, together with all rights and privileges appertaining thereto, which sale or relinquishment shall be evidenced by a written deed of conveyance, under the seal of the company, signed by its president or other principal officer, and the secretary or other recording officer thereof, which, before it shall have validity or effect, shall be recorded in the records of deeds of each county within which the road or part thereof so sold and conveyed lies, or be left for record in the office containing such records. Such sale or transfer also may be made upon the consent of the holders of three-fourths of the entire stock of the company, the holders of the stock so consenting in that case to be liable in their individual capacity to a stockholder not assenting, for such loss or injury as he sustains by reason of the sale or transfer. (R. S. Sec. 3497; April 17, 1857, 54 v. 198, § 3; S. & C. 340.)

Section 9262. (Sale to county commissioners.) The board of directors of such company, when authorized so to do by a vote of the holders of a majority of its stock represented at a meeting of the stockholders called for that purpose by such board or by ten stockholders, of which at least twenty days' notice has been given by advertisement in not more than two newspapers published in the county where the road or part thereof is situated, shall sell and convey the whole or part of its road to the commissioners of the county, with all rights and privileges appertaining thereto, which sale or relinquishment shall be evidenced by a written deed of conveyance, under the company's seal, signed by its president or other principal officer and the secretary or other recording officer thereof, which also, before it shall have any validity or effect, shall be recorded in the official records of deeds of each county within which the road or any part thereof so sold and conveyed lies, or be left for record in the office containing such records. (R. S. Sec. 3498; S. & C. 339.)

Section 9263. (When county commissioners may purchase toll-road.) The county commissioners of any county in the state, when petitioned to do so by at least fifty freeholders, citizens of the counties, shall purchase any or all of the toll roads or parts thereof within such counties, as hereinafter provided. Before such purchase is made the commissioners of the county in which the people vote in favor of purchasing the toll roads, shall make an order to that effect on their journals and submit the purchase to

the voters of the county either before or after an appraisement of the value of the roads has been had, at any regular election, giving at least ten days' notice thereof, in at least two newspapers published in the county. At such election the voters who favor the purchase shall mark on their ballots, "Purchase of toll roads, Yes;" and those opposed thereto, "Purchase of toll roads, No." If, at such an election, a majority of those voting are in favor of such purchase, the commissioners may make it, but not otherwise. The vote shall be returned by the judges of election to the deputy state supervisors of elections, who shall open, count and declare it as in an election for county officers, and certify it to the county commissioners. (R. S. Sec. 3498a; March 25, 1880, 77 v. 83.)

Cited, *Turnpike Co. v. Parks*, 50 O. S. 582 (1893).
Constitutionality.

See *Warder v. Commissioners*, 38 O. S. 639 (1883).

Section 9264. (How roads voted to be purchased appraised.) In a county where a vote at any general election is in favor of purchasing any or all the toll-roads, or parts thereof, lying within the county, at a price to be fixed by three disinterested appraisers, who shall be appointed as follows: One by the common pleas court of the county, or a judge thereof, resident of the subdivision in which the county is situated, one by the probate judge of the county, and one by the county commissioners, after being sworn faithfully and honestly to discharge their duties in that behalf, the appraisers shall personally inspect the road or roads, or parts thereof, so far as they are within such county, and make and return in writing, to the commissioners, a valuation of each of the roads or parts thereof. If from any cause the commissioners fail to purchase any road or part thereof, other appraisers may be so appointed. Nothing herein shall prevent the commissioners from making or receiving propositions therefor, and from purchasing within two years after an appraisement has been had at the appraised value. (R. S. Sec. 3499; April 15, 1881, 78 v. 149; April 12, 1880, 77 v. 187; Rev. Stat. 1880.)

Section 9265. (The purchase and effect.) If the report is satisfactory, and the commissioners, or a majority of them, indorse their approval thereon as to all or any of the roads, or parts thereof, they shall make an entry to that effect on their journal. Thereupon they may purchase them at a price not exceeding such appraisal, and pay the company or companies, in money or in bonds to be issued as

hereinafter specified, whereupon such roads or parts thereof so purchased, shall cease to be toll-roads, and become free roads, to be kept in repair in the manner prescribed in chapter eleven, title four, of part second. (R. S. Sec. 3500; R. S. 1880.)

Section 9266. (The issue of bonds for the purchase and their redemption.) To pay for roads or parts thereof so purchased, the commissioners may issue bonds payable at such times, and in such amounts as shall be as near as practicable equal to the semi-annual collection of taxes levied for that purpose, which bonds shall bear interest not exceeding six per cent, payable semi-annually. Such bonds may be delivered to such companies in payment for the roads, or parts thereof, or sold for money at not less than their par value, but they shall not run more than eight years from date. For the payment thereof the commissioners shall levy, annually, on all the taxable property of such counties, in addition to the taxes they are otherwise authorized to levy, such sum as will fully pay the bonds and the interest thereon. (R. S. Sec. 3501; April 15, 1881, 78 v. 149; R. S. 1880.)

The levying of taxes for the purchase of toll roads, in order to make them free to the public, is a constitutional exercise of the taxing power.
Warder v. Commissioners, 38 O. S. 639 (1883).

Section 9267. (Refunding of taxes and assessments to construct free turnpike.) The commissioners of the counties shall refund to all persons residents of their respective counties, who have paid or may be required to pay, any tax or assessment for the construction of any free turnpike road or roads therein which have not been converted into a toll road. For the purpose of adjusting this refunding of assessments, the auditors of such counties shall prepare a book of the assessments paid in the counties, in which shall be noted all amounts so refunded. But in no instance shall the amount so refunded exceed the amount they paid or may be required to pay towards the purchase of toll-roads, or parts of toll-roads in their respective counties. (R. S. Sec. 3501a; April 26, 1890, 87 v. 335; April 15, 1881, 78 v. 149.)

The levying of a tax to refund assessments is constitutional.
Warder v. Commissioners, 38 O. S. 639 (1883).

Section 9268. (Effect of accepting refunder.) All persons who demand or accept the refunding of the assessments paid by them, or any part thereof, thereby release all right

to have the road or roads, to the construction of which they contributed, converted into a toll-road or roads; and in any attempt to convert such road or roads into toll-roads, the names of such persons and the assessments by them contributed, shall be counted against the conversion of such road or roads, or parts thereof, into toll-roads. (R. S. Sec. 3501a; April 26, 1890, 87 v. 335; April 15, 1881, 78 v. 149.)

Section 9269. (Bonds for purpose of refunding.) For the purpose of refunding such assessments the commissioners are authorized to issue bonds in such amounts as will be necessary, which may run not to exceed eight years, and bear not to exceed six per cent interest, payable semi-annually, and for the payment of these bonds they are required to levy on all the taxable property of the county such sum, annually as will fully pay them, and the interest thereon, in addition to the taxes they otherwise may levy. (R. S. Sec. 3501a; April 26, 1890, 87 v. 335; April 15, 1881, 78 v. 149.)

Section 9270. (Appraiser's fees.) Such appraisers, upon the allowance of the commissioners shall be paid by the county three dollars per day and their necessary expenses, for the time actually employed in the business of their appointment. (June 7, 1911, 102 v. 277; R. S. § 3502; R. S. 1880.)

Section 9271. (Effect of sale in one county on balance.) The sale by a company owning a toll road or part of such road as lies within any county, shall not affect its organization or right as to the part or parts of its road as are outside the county. (R. S. Sec. 3503; R. S. of 1880.)

Section 9272. (Transfer not to affect creditors.) No relinquishment, sale or transfer hereinbefore provided for shall prejudice or affect the claim of any creditor of the company nor shall these provisions extend to or be applicable to a road in which the state is interested as a stockholder. (R. S. Sec. 3504; April 17, 1857, 54 v. 198, § 4; S. & C. 340.)

Section 9273. (Additional stock authorized.) The directors of any company may open books of subscription along the line of its road for the purpose of raising additional stock for the completion, extension, planking, or

otherwise improving or repairing its road. (R. S. Sec. 3505; March 12, 1853, 51 v. 395, § 1; S. & C. 334.)

Section 9274. (Companies may consolidate.) When two or more turnpike or plank-road companies desire to consolidate themselves into a single corporation, they may do so in the manner and subject to the rules provided for the consolidation of railroad companies. (R. S. Sec. 3506; May 1, 1852, 50 v. 274, § 43; S. & C. 298.)

Section 9275. (May assist road which is an extension.) The directors of such a company may subscribe and pay such sums of money as the majority of the stockholders instruct them to subscribe, to build and keep in repair any turnpike or plank-road that is a continuation or an extension of its road. Such subscription shall not exceed the net revenue of its road. (R. S. Sec. 3507; April 12, 1858, 55 v. 160, § 1; S. & C. 340.)

Section 9276. (May assist intersecting free turnpike.) The directors of any company may subscribe and pay such sums of money as they think advisable to build and keep in repair a free turnpike road that intersects their road. Such subscription shall not exceed the dividends of the company, and three-fourths of their stockholders must consent to the subscription. (R. S. Sec. 3508; May 1, 1854, 52 v. 131, § 1; S. & C. 370.)

Section 9277. (Accounts to be kept by county.) Every such company shall keep a fair and accurate account of the whole expense of making its road, with the expense of toll-gatherers and other necessary agents or officers whom it employs, and of the amount of toll received. The books of a company shall always be open for the inspection of the commissioners of a county through or into which the road passes, or of an agent of the general assembly of the state and of any stockholders. If a company refuses or neglects to exhibit its accounts when required by such commissioners or agent, all the rights granted by this chapter, and its right to be a corporation, shall cease and determine. (R. S. Sec. 3509; May 1, 1852, 50 v. 274, § 40; S. & C. 297.)

Section 9278. (Books to be kept by company.) The directors of such company shall keep books in which shall be entered all the transactions of the company, with the dates thereof; also stock books in which shall be entered the names of the stockholders, the number of shares of stock owned by each, and all transfers of stock made during each

year, and by and to whom made. On the first Monday of January of each year the directors shall make a statement in such stock books, showing the names of the owners of the stock and the respective number of shares held by each. All books herein provided for shall, at proper times, be open to the inspection of any stockholder. (R. S. Sec. 3510; April 17, 1868, 65 v. 89, § 1; S. & S. 146.)

Section 9279. (Report of toll-gate keepers.) On the first Monday of January of each year, and at other times as required by the company, a keeper of a toll-gate shall make a report in writing, under oath, showing the amount of toll received at each gate respectively for the preceding year, the amounts paid to the company, the amounts retained on account of salaries to gate-keepers, the amount of tolls outstanding and uncollected, also who and to what amount persons have passed through such gates without paying tolls, and by whose orders such persons have so passed. Such statements shall be submitted to the stockholders at their annual meeting on the second Monday of January of each year. (R. S. Sec. 3511; April 17, 1868, 65 v. 89, § 2; S. & S. 147.)

Section 9280. (Directors' annual report.) The directors of each company shall make, in writing, and submit to the stockholders at the regular meeting thereof on the second Monday of January of each year—notice of which meeting shall be given by the directors, by publication for four consecutive weeks, in a newspaper printed and of general circulation in each county in which any part of the road is situated, a report of the transactions of the company for the year next preceding, showing the amount of revenue received by the company from all sources during the year, and tolls received at each gate respectively. Also a statement in detail of all items of expenditure for all purposes, including the amount expended on each mile of the road respectively, the amount paid to each officer for his services, the amount paid to gate-keepers for salaries or otherwise, and the amount of money on hand after paying expenses of the company; with the outstanding liabilities of the company, to whom owing, and of the amounts due to the company, by whom owing, and how secured. The directors shall order a dividend to be made of the money then on hand, unless otherwise ordered by a majority of persons present at such meeting owning stock in the company. (R. S. Sec. 3512; April 17, 1868, 65 v. 89, §§ 3, 5; S. & S. 147.)

Former statute referred to: Seymour v. Turnpike Co., 10 Ohio 476 (1841).

Section 9281. (Treasurer to hold no other office.) The treasurer of such a company shall hold no other office in the company. When appointed, and before assuming the duties of his office, he shall take an oath of office and give bond, with security to the satisfaction of the board of directors, conditioned for the faithful performance of his duties according to law. (R. S. Sec. 3513; April 17, 1868, 65 v. 89, § 4; S. & S. 147.)

Section 9282. (Toll-gate keeper agent of company.) The keeper of a gate on a turnpike or plank-road is the agent of the company or person owning the road. A judgment against such gate-keeper for a violation of this chapter, shall be held to be a judgment against the company or person owning the road, and execution may issue thereon against the gate-keeper and such company or person. (R. S. Sec. 3514; May 1, 1862, 59 v. 101, § 4; S. & S. 150.)

Section 9283. (How obstructing fences removed.) A person whose fence is on, or who erects a fence on the limits of a turnpike or plank-road, or who places within its limits any wood, stone or other obstruction, other than permanent buildings already constructed, so as to interfere with the public travel upon the road, or prevents or interferes with the free passage of water in the side drains or ditches thereof, and who is notified by the president, a director, or the superintendent of the road to remove such fence or other obstruction, but neglects or refuses to comply with such requirements within ten days from the service of notice, shall forfeit and pay to the company owning the road, not less than one nor more than ten dollars for each day he permits such fence or obstruction to remain after the expiration of ten days from the service of notice; which sum shall be recoverable by action in the name of the company, before any justice of the peace of the township where the fence is situated or the obstruction placed. (R. S. Sec. 3515; March 28, 1861, 58 v. 43, § 1; S. & S. 150.)

Section 9284. (Company may assess stockholders.) When the stockholders of a turnpike or plank-road company are individually liable for the liabilities thereof, the proportion that each stockholder is required to pay to meet existing liabilities may be determined and collected in the manner hereinafter provided. (R. S. Sec. 3516; April 8, 1856, 53 v. 99, § 1; S. & C. 338.)

Section 9285. (Notice of meeting for that purpose.) The directors of such a company, desiring to take such action,

may give notice to the stockholders by publication for at least thirty days in at least two newspapers published in the counties in which the road is located, for a meeting of stockholders, specifying the time, place and object of the meeting. (R. S. Sec. 3517; April 8, 1856, 53 v. 99, §§ 2, 7, S. & C. 338.)

Section 9286. (Proceedings at such meeting.) At such meeting a detailed statement shall be submitted, showing the assets and indebtedness of the company. A majority of the stockholders may there determine upon the basis for assessing stockholders to meet the indebtedness, and fix the time or times, and the mode, for the payment of the amount assessed against each individual or corporation. (R. S. Sec. 3518; April 8, 1856, 53 v. 99, §§ 3, 4; S. & C. 338.)

Section 9287. (Collection of assessments.) No stockholder shall be liable beyond the sum fixed by the charter of such company, and all assessments, when paid, shall be a credit on his liability. A stockholder who fails to pay, as required, the amount so assessed, shall be liable to an action in the name of the company for its recovery, as in other cases of indebtedness. (R. S. Sec. 3519; April 8, 1856, 53 v. 99, §§ 5, 6; S. & C. 338.)

Section 9238. (Parties assessed for improved roads may incorporate.) When a majority of the landholders whose lands may be assessed to construct a road under the act of March 29, 1867, and the acts supplementary thereto and amendatory thereof, desire to incorporate themselves into a turnpike company, they may proceed in the manner hereinbefore provided. In their articles of incorporation they shall state that the road has already been constructed under and by virtue of such acts, and the amount of capital stock of the company as near as it can be arrived at, shall be the amount expended in the construction of the road. Annexed to the articles of incorporation there also shall be a petition, asking for the incorporation of the persons named in the articles for the purposes therein stated, which petition shall be signed by a majority of the landholders whose lands were taxed to make the improvement, accompanied by a certificate of the auditor of the county wherein the road is located, to the effect that the petition contains the signatures of a majority of the landholders whose lands have been so taxed. (R. S. Sec. 3520; May 7, 1869, 66 v. 131, § 16.)

Section 9289. (Who to be stockholders.) No stock book shall be opened, nor subscriptions received to the stock of such company. The auditor of the county in which the road is located, on demand, shall furnish to the incorporators a certified list of the landholders whose lands were taxed for the construction or improvement of the road. At the first election of directors and officers of the company, each person whose lands were so assessed shall be entitled to one vote, and no more. (R. S. Sec. 3521; May 7, 1869, 66 v. 131, § 17.)

Section 9290. (Certificates of stock to be issued.) After the company is organized its president and secretary shall issue certificates of stock to each landholder for the number of shares and fractions thereof, the sum of which as designated by the directors amounts to the sum assessed upon his lands, and which he paid for making the improvement. They also, after the assessment on each landholder each year is paid, must issue like certificates for the amounts so paid. A person whose lands were assessed, and whose assessments have been paid, at any time after the organization of the company, may become a stockholder therein, by producing and exhibiting to the secretary of the company, the certificate of the auditor and treasurer of the county, showing the amount of the assessment on his lands for the improvement, and that it has been paid. Thereupon the president and secretary shall issue certificates of stock to him for the amount so paid. (R. S. Sec. 3522; March 30, 1875, 72 v. 172, § 18.)

Section 9291. (Powers of such companies.) A company so incorporated shall have the same powers and be subject to the same liabilities as other turnpike companies incorporated under the laws of this state. (R. S. Sec. 3523; May 7, 1869, 66 v. 131, § 19.)

Section 9292. (May increase capital stock.) A company organized as provided in section ninety-two hundred and eighty-eight, with the assent of the holders of a majority of its stock, and the consent of the county commissioners, may increase its capital stock to such an amount as is deemed necessary to extend its road or to build a branch road, not exceeding five miles in length, to form a connection with any other similarly improved road in an adjoining county or state. (R. S. Sec. 3524; April 29, 1872, 69 v. 191, § 1.)

Section 9293. (Proceedings for such purpose.) For increasing the capital stock of such company for the objects heretofore stated, books may be opened for subscriptions, under the direction and at the office of the auditor of the county in which the company is located, upon giving thirty days' previous notice in some newspaper published and of general circulation in the county. All persons may become subscribers to such capital stock, but the aggregate of subscriptions shall not exceed the amount necessary to construct or build the road or branch. If a company so organized refuses its assent to such extension, or the construction of such branch road, for the purposes stated, or refuses by a vote of the holders of a majority of its stock, to increase its capital stock for such purposes, a stock company may be organized as hereinbefore provided, and build such extension or branch, and erect toll-gates, as in other cases. (R. S. Sec. 3525; April 29, 1872, 69 v. 191, § 1.)

Section 9294. (Company may divide road.) A company whose road extends into two or more counties may subdivide it into as many divisions as it determines, as hereinafter provided, and so reorganize the company as to have a separate corporation for each of the subdivisions. (R. S. Sec. 3526; May 13, 1878, 75 v. 527, § 1.)

Section 9295. (Proceedings to effect subdivision.) For making such subdivision there shall be a meeting of the stockholders of the company, at the usual place of meeting, on a notice of at least four weeks. If at such meeting the owners of at least two-thirds of the stock assent thereto, in writing, the subdivision shall be made, and the stock of the entire corporation be apportioned among the several new corporations as previously agreed upon. Each subdivision shall be liable for its proportion of the debts of the original corporation, in proportion to its stock. The action of the stockholders' meeting shall be duly recorded, and when attested by the president and secretary of the meeting, a copy thereof, duly certified by them, shall be filed with the secretary of state, become the articles of incorporation for each of the subdivided companies, and be recorded as are other articles of incorporation. (R. S. Sec. 3527; May 13, 1878, 75 v. 527, § 2.)

Section 9296. (Reorganization of separate companies.) After the certificate is filed with the secretary of state each of the subdivisions shall become a separate corporation, and reorganize as such by the election of a board of di-

rectors as other turnpike companies, and thenceforth each of the companies shall have the powers of and be conducted in all respects, as other companies. The rights of stockholders in each subdivision to their stock and property will continue therein as if they had been the sole stockholders in the subdivision prior thereto, subject, however, to the same liabilities of stockholders for debts of the corporation and legislative control as other companies. (R. S. Sec. 3528; May 13, 1878, 75 v. 527, § 3.)

Section 9297. (Names of new companies.) The name of each of the companies of such subdivided corporations shall be such as is assumed and designated in the certificate of incorporation. (R. S. Sec. 3529; May 13, 1878, 75 v. 527, § 4.)

Section 9298. (Roads may be sold on execution.) All turnpikes and plank-roads under the control of individuals or corporations, and held as property or as a franchise, shall be liable to sale upon execution, in the same manner as other property. (R. S. Sec. 3530; May 5, 1868, 65 v. 136, § 1; S. & S. 238.)

Cited, Turnpike Co. v. Parks, 50 O. S. 575 (1893).

Section 9299. (Levy and appraisement.) All such property shall be levied upon, appraised, and sold as real estate is appraised and sold; and the appraisement shall be made with reference to the value thereof for the purposes for which it is or may be used, and shall include the value of the franchise therewith connected. (R. S. Sec. 3531; May 5, 1868, 65 v. 136, § 2; S. & S. 238.)

Section 9300. (When order for appraisement may be made.) When such property is levied upon and not appraised, and portions of it are situated in two or more counties, the court in which the judgment was rendered, upon application of the creditor may order it to be appraised, appoint appraisers, and have it sold entire, or in such parcels as the court deems most advantageous to the debtor. But if no such application be made the sheriff shall proceed as in other cases. (R. S. Sec. 3532; May 5, 1868, 65 v. 136, § 3; S. & S. 238.)

Section 9301. (Purchaser takes franchise.) The purchaser of such a road, upon confirmation of the sale will be entitled to hold and exercise all the corporate franchises purchased at such sale, as fully as they were held and exer-

cised by the debtor before such sale, in any name assumed by the purchaser. (R. S. Sec. 3533; May 5, 1868, 65 v. 136, § 4; S. & S. 238.)

Cited, *Turnpike Co. v. Parks*, 50 O. S. 568, 575 (1893).

The property vests in the purchaser in the same manner as in the original owner and subject to the same visitation on the part of the state.

Turnpike Co. v. Waechter, 2 C. C. n. s. 21, 24; 15 C. D. 605 (1903).

Section 9302. (Transcript to be filed with secretary of state.) Upon filing with the secretary of state a duly attested copy of the sale, confirmation and conveyance of a franchise as herein provided for, such transfer shall be recorded in the same manner as original articles of incorporation. Thereupon the franchise shall vest absolutely in the purchaser, as franchises vest in original corporators upon recording the certificate of incorporation. (R. S. Sec. 3534; May 5, 1868, 65 v. 136, § 5; S. & S. 238.)

Section 9303. (Right to take toll may be sold on execution.) When a judgment rendered against a turnpike, plank-road, or bridge company, remains unsatisfied for ten days after its rendition, execution may issue thereon against the goods and chattels of the company, which shall be levied upon and sold as in other cases. If sufficient goods and chattels can not be found to satisfy the execution, the officer holding it, if the judgment creditor so directs, may levy upon the right of the company to take toll at any of its gates within the jurisdiction of the officer, which right the officer shall advertise and sell as personal property. The person who pays the amount due upon the execution for the right of using such gate or gates, and of taking toll thereat for the shortest time, shall be the purchaser. Nothing herein is to be construed to deprive the company of the right to give bail for stay of execution, within the same time after the rendition of a judgment, that an individual might have. (R. S. Sec. 3535; March 31, 1879, 76 v. 49, § 1; S. & C. 337.)

Cited, *Turnpike Co. v. Parks*, 50 O. S. 568, 576 (1893).

In the absence of a statute, the right to take tolls can not be sold on execution.

Seymour v. Turnpike Co., 10 Ohio 476 (1841).

See also, *State v. Turnpike Co.*, 14 Ohio 405 (1846).

Section 9304. (Certificate of sale and effect.) The officer who makes sale of the right to take toll at a gate as above provided, shall give to the purchaser a certificate thereof, which shall be sufficient to authorize him to take

possession of such gate, and to hold it during the time for which it was sold. The purchaser may demand and receive the same tolls of and from all passengers passing through the gate as were established and posted up by such company according to law. During the possession thereof the purchaser, or his agent, must conform to all rules, regulations, and contracts of the company, in the manner required of the gatherers of toll, except that he shall hold for his own use all tolls collected at such gate during the time for which he purchased it. He shall keep such part of the road in as good repair, so long as he holds it under such contract, as when possession was taken thereof, ordinary wear and travel excepted. (R. S. Sec. 3536; March 31, 1879, 76 v. 49, § 2; S. & C. 337.)

CHAPTER 5.

BRIDGE COMPANIES.

§ 9305. Powers.	§ 9313. May lay tracks on a bridge.
§ 9306. Sale of bridge.	§ 9314. Mortgage of franchises and sale of obligations.
§ 9307. Rates of toll must be posted.	§ 9315. Railroad companies may subscribe stock.
§ 9308. Toll allowed.	§ 9316. Consolidation of companies.
§ 9309. May make and enforce regulations.	§ 9317. May change span or height of bridge.
§ 9310. Powers of Ohio river bridge companies.	§ 9318. Avenues and approaches.
§ 9311. Further powers.	§ 9319. May maintain ferries.
§ 9312. Rates of toll prescribed.	

Section 9305. (Powers.) A company incorporated to construct a bridge over a stream of water in this state shall own the bank of each side of the stream where it is proposed to erect its bridge, or obtain the consent of the owner or owners thereof, in writing, to its occupation. In the manner provided by law, it may appropriate or otherwise acquire and hold, real estate for the site of the bridge, suitable avenues or approaches leading thereto, use so much of a public street, road, or avenue as is necessary for landings and abutments, and may appropriate in the manner provided by law any rights or franchises necessary in the construction of the bridge. (R. S. Sec. 3537; April 29, 1872, 69 v. 185, § 55; April 11, 1856, 53 v. 180, § 1; S. & C. 338.)

Use of railroad bridge as a toll bridge, see § 8774.

The erection of a toll bridge is a public use for which land may be condemned.

Young v. Buckingham, 5 Ohio 485 (1832).

Bridge Co. v. Magruder, 63 O. S. 455 (1900).

See § 9311.

It would seem to be the policy of the state that bridge companies "shall own" the banks of the stream, unless permitted to occupy by a written grant from the owner.

Bridge Co. v. Magruder, 63 O. S. 455, 476 (1900).

Power of congress over navigable waters. Under the power to regulate commerce, congress has power to prevent the obstruction of any navigable water, which is a means of commerce between any two or more states. The exercise of this great public right is not incompatible with the enjoyment of local rights. The public right consists in an unobstructed use of a navigable water connecting two or more states. The local right is to cross such water. The general commercial right is paramount to all state authority.

Railway Co. v. Ohio, 165 U. S. 365 (1897).

Works v. Railroad Co., 5 McLain (U. S.) 425; 3 O. F. D. 101 (1853).

See State v. Commissioners, 7 C. C. n. s. 469; 18 C. D. 212 (1905); dissenting opinion, 8 C. C. n. s. 169.

The paramount power of regulating bridges that affect the navigation of the navigable waters of the United States is in congress.

Bridge Co. v. United States, 105 U. S. (15 Otto) 470; 5 O. F. D. 67 (1882).

Such power of congress is free from state interference. When congress in a proper way declares a bridge across a navigable river of the United States to be an unlawful structure, no legislation of a state can make it lawful.

Bridge Co. v. United States, 105 U. S. 470; 5 O. F. D. 67 (1882).

See §§ 9310, 9317.

When congress, by resolution, gave a license to erect and maintain a bridge across the Ohio River, the bridge company, by accepting its provisions, became subject to the reservation of power in congress contained in the resolution, to withdraw the license and to direct necessary alterations of the bridge. The license could be withdrawn without its being judicially ascertained that the bridge, as authorized, did or would substantially obstruct navigation. The United States was held not liable to make compensation for the loss incurred.

Bridge Co. v. United States, 105 U. S. (15 Otto) 470; 5 O. F. D. 67 (1882).

See §§ 9310, 9317.

Section 9306. (Sale of bridge.) The provisions of law as to the sale of a bridge to a municipality by a turnpike company shall apply to bridge companies. (R. S. Sec. 3537; April 29, 1872, 69 v. 185, § 55; April 11, 1856, 53 v. 180; § 1: S. & C. 338.)

Section 9307. (Rates of toll must be posted.) Such company, previous to receiving tolls upon its bridge, shall set up and keep in a conspicuous place thereon a board, on which shall be written, painted, or printed, in a plain, legible manner, the rates of toll charged thereat. If its charter provides that such rates shall be prescribed by the court of common pleas of the proper county, and the company demands and receives a greater rate of tolls than the rate so prescribed, it shall be fined ten dollars. (R. S. Sec. 3538; May 1, 1852, 50 v. 274, § 61; S. & C. 301.)

To post the rates of toll at each end of the bridge is a condition precedent to the right to exact tolls, and until performed the collection of toll is unlawful.

Bonham v. Taylor, 10 Ohio 108 (1840).

Any casual interruption in keeping of the rates of toll, caused by violence or otherwise and for a short period, would not deprive the company of any right, provided it had once performed its duty and there was not unreasonable delay in complying with the law.

Bonham v. Taylor, 10 Ohio 108 (1840).

Section 9308. (Toll allowed.) A company authorized by its charter to take tolls above the rates hereinafter provided may charge and receive the following rates, and no more: For each foot passenger, one cent; each horse, mule or ass one year old and upward, three cents; each horse and rider, ten cents; every chaise, chariot, gig or other two or four-wheeled pleasure carriage, drawn by one horse, fifteen cents; every such vehicle drawn by two horses, twenty-five cents, and if drawn by four horses, thirty cents; every sled or sleigh drawn by one horse or other animal, ten cents, and for each animal in addition three cents; every wagon drawn by one horse or other animal ten cents, and for each animal in addition, three cents; every wagon drawn by two horses or other animals, fifteen cents, and for each animal in addition, three cents; each head of neat cattle, six months old or upward, one cent; and for each head of sheep, goats or hogs, one-half cent. But this section shall not be construed to affect any company in whose charter special rates are provided, and no power is given to the legislature to alter or amend it. (R. S. Sec. 3539; April 15, 1857, 54 v. 177, § 1; S. & C. 352.)

Section 9309. (May make and enforce regulations.) All bridge companies and owners are invested with full power to make and enforce any rule or regulation deemed necessary to preserve and protect their property and collect their tolls, and may prevent any person from crossing a bridge owned by them on foot, or by riding, or driving a team or vehicle, or stock thereon, who fails to pay the regular fare when demanded. The police or watchman of such bridge shall have all the power of policemen of cities, and may arrest any person who violates the law, or the rules of the company or person owning the bridge, without warrant, at or upon such bridge, and take him before the proper civil authority to be dealt with according to law. (R. S. Sec. 3540; April 12, 1867, 64 v. 128; § 5; S. & S. 57.)

Section 9310. (Powers of Ohio river bridge companies.) A company organized to construct a bridge over the Ohio

river may construct and maintain such bridge, with suitable avenues or approaches leading thereto, and with a single span or a draw, as it determines; but in either case, in order that the bridge may not obstruct the navigation of the river, it shall be built in accordance with an act of congress approved July 14, 1862, entitled "an act to establish certain post-roads," or any act subsequently passed on the subject. (R. S. Sec. 3541; April 3, 1868, 65 v. 55, § 4; S. & S. 203.)

A corporation organized by concurrent legislation of Kentucky and Ohio, receiving from each the same charter, is a domestic corporation in each state, and is liable for the franchise tax on its capital stock in Ohio. A finding by the Ohio taxing officers that the company is a foreign corporation, and the acceptance of reports and franchise tax by the secretary of state, does not conclude the right of the state to its proper tax.

State v. Covington & Cincinnati Bridge Co., 6 N. P. n. s. 55; 18 L. D. 273 (1907).

The franchise of such bridge company, organized under a special act prior to 1851, which contained special provisions as to taxation, can not be surrendered by its president, without authority from the corporation.

Sebastian v. Covington & Cin. Bridge Co., 21 O. S. 451 (1871).

Taxation of such company, under special provisions of its charter.

See Sebastian v. Covington & Cincinnati Bridge Co., 21 O. S. 451 (1871).

Covington & Cincinnati Bridge Co. v. Mayer, 31 O. S. 317 (1877).

Franchise of such company as a contract.

See Sebastian v. Covington & Cincinnati Bridge Co., 21 O. S. 451 (1871).

Power of congress over navigable waters.

See note to § 9305.

Power of state to fix tolls of bridge between two states where congress has not acted. Opins. Atty. Gen. 1917, p. 1166.

Section 9311. (Further powers.) In the manner provided by law, such company may purchase or appropriate and hold such real estate as, in the opinion of its directors, will be required for the site of the bridge, and of suitable avenues or approaches leading thereto, and may locate it on, or construct it over, a public street, road, avenue, or alley. But in constructing it over a public street, road, avenue or alley it must be at such height as not to interfere with travel passing on, over or along the bridge. No pier or other obstruction, shall be built upon such street, road, avenue or alley, without the consent of the municipal or other authorities having charge or control of it. The company shall be responsible for injuries done to private property, adjacent or near to such bridge, by its elevation and construction, which may be recovered in a civil action brought by the owner, at any time within two years from the completion thereof. (R. S. Sec. 3542; February 8, 1889,

86 v. 25; Rev. Stat. 1880; April 3, 1868, 65 v. 55, § 5; S. & S. 203.)

A company organized to construct a bridge over the Ohio River is authorized to purchase, appropriate and hold any interest in real estate, whether an estate in fee simple or a less estate, which, in the opinion of the directors, will be required for the site of the bridge and of suitable avenues or approaches leading thereto.

Covington & Cincinnati Bridge Co. v. Magruder, 63 O. S. 455 (1900).

Section 9312. (Rates of toll prescribed.) Such company may fix and collect reasonable rates of toll for all persons, animals, vehicles, and property passing or transported over the bridge, but which at no time shall exceed those collected at the Covington and Cincinnati bridge. The company shall set up and keep in a conspicuous place, at each end of the bridge, a board on which the rate is written, painted, or printed in a plain, legible manner. (R. S. Sec. 3543; April 3, 1868, 65 v. 55, § 6; S. & S. 203.)

Section 9313. (May lay tracks on a bridge.) Such company may lay down a railway track or tracks upon the bridge and its approaches, and contract at any agreed sum or rate, with any railroad company organized in this state in accordance with law, or organized in any other state of the United States, for the use of the bridge, for the purposes of such railroad company. A railroad company organized in this state may enter into such contract with the bridge company; but the bridge company shall not charge or collect from the railroad company for the use of the bridge in the transportation over it of cars, railroad passengers, and freights, a greater toll than the following: For each ton (two thousand pounds) of freight not exceeding fifteen cents; each passenger not exceeding fifteen cents; for each passenger, baggage, mail, or express car not exceeding one dollar; each eight-wheeled freight car fifty cents; and for each four-wheeled freight car not exceeding twenty-five cents. (R. S. Sec. 3544; April 3, 1868, 65 v. 55, § 7; S. & S. 203.)

Cited, *Mannington v. Railway*, 8 O. L. R. 451, 472; 183 Fed. 133; 16 O. F. D. 552 (1910).

Section 9314. (Mortgage of franchises and sale of obligations.) Such company may include all its rights, income, profits, and franchises in any mortgage it lawfully makes and upon a foreclosure of a mortgage of its bridge, land, and franchises, and sale thereof, such sale shall pass to the purchaser the corporate franchises of the company as fully

as the company had them at the time the mortgage was executed. The company may dispose of any evidence of indebtedness it lawfully issues as is provided for railroads in like case. (R. S. Sec. 3545; April 3, 1868, 65 v. 55, § 8; S. & S. 204.)

Section 9315. (Railroad companies may subscribe stock.)

A railroad company or other private corporation organized under a law of this state, may become a subscriber to the capital stock of such bridge company, to an amount not exceeding one-third of such stock, or purchase, or take by way of pledge, the bonds or other evidences of indebtedness issued by it. (R. S. Sec. 3546; April 3, 1868, 65 v. 55, § 9; S. & S. 204.)

Cited, *State v. Railway*, 12 C. C. n. s. 49, 57; 21 C. D. 175.

Mannington v. Railway, 8 O. L. R. 451, 472; 183 Fed. 133; 16 O. F. D. 552 (1910).

Section 9316. (Consolidation of companies.) A bridge company may consolidate its capital stock with that of a bridge company in an adjoining state, authorized to construct a bridge across the Ohio river, in the manner prescribed for the consolidation of railroad companies, and the two companies thereupon shall be merged into one corporation, possessing within this state all the rights, privileges, and franchises, and subject to all the restrictions, disabilities, and duties of such corporation of this state so consolidated. (R. S. Sec. 3547; April 3, 1868, 65 v. 55, § 10; S. & S. 204.)

Section 9317. (May change span or height of bridge.)

Such company may fix or change the span and altitude of a bridge it constructs, but the span shall not be less than three hundred feet in the clear over the main channel, nor less than two hundred and twenty feet in the clear in one of the next adjoining spans. The height of the bridge in the center of the span over the main channel shall not be less than one hundred feet above the surface of the water at low water-mark, measuring for such elevation to the bottom chord of the bridge, and such height above extreme high water-mark as is provided in any act of congress now in force or hereafter passed. This section shall not apply to any bridge built with a draw in accordance with the provisions of an act of congress approved July 14, 1862, entitled "an act to establish certain post roads," or any act subsequently passed on the subject. (R. S. Sec. 3548; April 3, 1868, 65 v. 55, § 11; S. & S. 204.)

Section 9318. (Avenues and approaches.) A company which has constructed a bridge across the Ohio river, may construct, extend and maintain avenues or approaches there-to beyond the point where they are now, or by law are authorized to be constructed. In the construction and main-tenance of such avenues and approaches, it may exercise all the rights, powers and privileges conferred on bridge com-panies by the laws of this state, and borrow money and se-cure the payment thereof as is provided in section eighty-seven hundred and five. (R. S. Sec. 3548a; May 16, 1894, 91 v. 279.)

Section 9319. (May maintain ferries.) Such companies may purchase, hold, receive grants for, and run ferries within one half mile of such bridges across such river, and do all necessary acts in relation thereto, but the rates of ferriage shall be subject to the control of the authorities as in case of ferries owned and run by individuals. (R. S. Sec. 3549; May 7, 1869, 66 v. 136, § 2.)

CHAPTER 6.

GAS AND WATER COMPANIES.

§ 9320.	Powers.	§ 9328.	Repealed.
§ 9321.	Gas or electric companies may manufacture and supply both electricity and gas.	§ 9329.	Meters, testing of.
§ 9322.	Consent of municipality.	§ 9330.	To what companies appli-cable.
§ 9323.	Contract with municipal-ity.	§ 9331.	Merchantable gas.
§ 9324.	Contracts with municipal-ity for light and water.	§ 9332.	May enter premises to in-spect meter.
§ 9325.	Gas company may extend mains beyond city.	§ 9333.	Company may shut off gas.
§ 9326.	Standard measure for gas.	§ 9334.	Cash deposit; interest.
§ 9327.	Meter must be sealed and stamped.	§ 9335.	Contrary rule unlawful.
		§ 9336.	Forfeiture.
		§ 9337.	Tampering with meter.
		§ 9338.	Meter-prover and photo-meter; penalty.

Section 9320. (Powers.) A company organized for the purpose of supplying gas for lighting the streets and public and private buildings of a city, village, or township, may manufacture, sell, and furnish the gas required therein for such or other purposes, and a company organized for the purpose of supplying the inhabitants of a city, village or township with water may sell and furnish any quantity of water required therein for such or other purposes. Such companies may lay conductors for conducting gas or water through the streets, lands, alleys, and squares in such city or village with the consent of the municipal authorities of the city or village, or with the consent of the trustees of the

township, under such reasonable regulations as they prescribe. (R. S. Sec. 3550; April 17, 1867, 64 v. 255, § 53; S. & S. 157.)

Regulation of price by municipalities. § 3982 and note.

Articles of incorporation. A gas company can not amend its articles of incorporation so as to authorize it to operate a street railway.

State ex rel. v. Taylor, 55 O. S. 61.

See § 9134.

A corporation organized to manufacture gas for lighting purposes may amend its charter so as to employ both gas and electricity.

Picard v. Hughey, 58 O. S. 577.

A corporation formed for the purpose of producing natural gas and piping and transporting the same to certain designated towns, is not under a charter obligation to furnish gas to all of the towns named in its articles of incorporation.

East Ohio Gas Co. v. Akron, 81 O. S. 33.

Powers of gas and water companies.

——. **To borrow money on mortgage security.** A gas company may borrow money to carry out the objects of its creation and secure its payment by note and mortgage of its corporate property.

Hays v. Galion Gas, etc., Co., 29 O. S. 330.

——. **To purchase gas.** A gas company may purchase gas manufactured by another company.

Hamilton v. Gas Light & Coke Co., 8 N. P. 319; 11 L. D. 513.

——. **To substitute natural for artificial gas** A gas company, having a franchise for artificial gas, can not substitute natural gas therefor without the consent of the municipality.

Findlay Gaslight Co. v. Findlay, 2 C. C. 237; 1 C. D. 463.

Water company can not appropriate property. A water company has no power to appropriate land for a right of way for its pipes.

State ex rel. v. Salem Water Company, 5 C. C. 58; 3 C. D. 20.

Franchise in streets.

Franchises generally. See note to § 3714.

The right to use the streets of a municipality, for the laying of gas pipes, is a franchise and must emanate either directly or indirectly from the legislature.

State ex rel. v. Cincinnati Gas, etc., Co., 18 O. S. 262, 291.

The right to operate gas works is a franchise granted directly by the legislature. Consent of the municipality is only necessary for the use of the streets.

Defiance v. Peoples Gas & Electric Co., 12 L. D. 424.

Consent of the municipality is essential to use of the streets.

Brush, etc., Co. v. Jones, etc., Co., 5 C. C. 340; 3 C. D. 168; aff'd, no rep., 29 W. L. B. 72.

Consent to use streets is irrevocable when accepted and acted upon.

Defiance v. Peoples etc., Co., 12 L. D. 424.

But grants of franchises are subject to the tacit condition that they may be lost for non-user or mis-user. The condition thus implied is a condition subsequent. Where no steps to exercise a franchise are taken within a reasonable time, it may be revoked by the municipality. N. Y. Electric Lines v. Empire City Subway, 235 U. S. 179 (1914).

This section does not purport to grant, either directly or by permission of the municipality, an exclusive gas franchise in a municipality. To enable a municipality to make an exclusive grant, the power must be clearly conferred upon it by the legislature.

Columbus v. Columbus Gas Co., 76 O. S. 309, 339.

State ex rel. v. Cincinnati Gas Co., 18 O. S. 262, 289; approved 115 U. S. 659; 118 U. S. 371.

State ex rel. v. Hamilton, 47 O. S. 52, 70, 71; affirmed, 146 U. S. 258. See also G. C. § 3989.

Where a franchise required the grantee to furnish gas for public buildings free so long as the grantee had the exclusive right to use the streets, it was held that so long as the grantee exclusively used the streets, it was bound to furnish free gas. Where another franchise was granted, but was abandoned and forfeited, and not exercised, the obligation to furnish free gas was held to continue.

Newark, etc., Co. v. Newark, 7 N. P. 76; 8 L. D. 418.

A franchise granted to a gas company does not confer vested rights which are violated by the municipality erecting its own gas plant.

State ex rel. v. Hamilton, 47 O. S. 52.

Hamilton, etc., Co. v. Hamilton, 146 U. S. 258.

A franchise can not be abrogated by a vacation of the street. Where a street was vacated after gas pipes were laid under a franchise, and the abutting owner, a railroad company, uncovered the pipes and necessitated the relaying thereof, the railroad company is liable to the gas company for the cost of relaying.

Union, etc., Co. v. Railway Co., 14 N. P. n. s. 171 (1913).

Where a franchise was granted without limitation for pipes, extensions, repairs, etc., a permit for an extension is unnecessary.

Defiance v. Peoples, etc., Co., 12 L. D. 424.

Every grant in derogation of the rights of the public in the streets will be construed strictly against the grantee and liberally in favor of the public, and never extended beyond its express terms when not indispensable to give effect to the grant.

East Ohio Gas Co. v. Akron, 81 O. S. 33, 52.

Cleveland Electric Ry. Co. v. Cleveland, 204 U. S. 116.

Natural gas pipes in street, an additional burden. The laying of natural gas pipes in the street of a municipality is an additional burden and servitude for which abutting owners are entitled to compensation.

Webb v. Ohio Gas Fuel Co., 16 W. L. B. 121.

Federal Gas & Fuel Co. v. Townsend, 1 N. P. n. s. 289; 14 L. D. 5.

See Stone v. Cuyahoga Light Co., 9 N. P. n. s. 545; 20 L. D. 130.

Terms and conditions of franchise.

— Annual payment by company. A municipality may, in an ordinance granting a franchise in its streets, require a gas company to pay a specified sum annually to the municipality, as compensation for inspection. When accepted by the gas company, the ordinance becomes a contract obligating the company to pay.

Columbus v. Columbus Gas Co., 76 O. S. 309, 334; reversing 2 N. P. n. s. 37.

Where a municipality granted a franchise in its streets to a gas company, one of the terms of which required the gas company to make annual payments to cover the expense of inspection, it is no defense to an action by the municipality to recover payments, that the municipality subsequently made grants to other gas companies.

Columbus v. Columbus Gas Co., 76 O. S. 309 ; reversing 2 N. P. n. s. 37.

A sum required to be paid annually by a gas company to compensate the municipality for supervision is presumed to be reasonable, in the absence of evidence to the contrary.

Columbus v. Columbus Gas Co., 76 O. S. 333; reversing 2 N. P. n. s. 37.

— **Percentage of receipts.** In granting a franchise in its streets to a natural gas company a municipality may require the grantee to pay a percentage of its receipts to the municipality; although such payments are expressed to be for the benefit of the general expense fund of the municipality.

Columbus v. Federal Gas & Fuel Co., 10 N. P. n. s. 305; 21 L. D. 179; 22 L. D. 250 (1910); s. c., 13 N. P. n. s. 394 (1910).

Telephone Co. v. Columbus, 88 O. S. 466 (1913).

Under a franchise providing for the payment of "ten percent of all moneys received from the sale of all natural gas sold at a price exceeding fifteen cents per thousand cubic feet", the basis of computation is "all moneys received" when the charge exceeds fifteen cents. Gas Co. v. Columbus, 96 O. S. 530 (1917).

A company which has accepted ordinances granting a franchise to lay pipes in consideration of a percentage of its receipts, and laid and maintained its pipes in the streets, is estopped from questioning the validity of such ordinances.

Columbus v. Federal Gas & Fuel Co., 13 N. P. n. s. 394 (C. P. 1910).

— **That natural gas shall not be furnished for illuminating purposes.** A provision in an ordinance, granting a franchise to a natural gas company, that natural gas shall not be furnished for illuminating purposes, but for heat and power only, is void.

Springfield v. Springfield Gas Co., 12 C. C. n. s. 392; 21 C. D. 446; aff'd, no rep., 81 O. S. 537.

See Comment, 58 Bull. 125.

See Circleville, etc., Co. v. Buckeye Gas Co., 69 O. S. 259.

Gaslight Co. v. Findley, 2 C. C. 237; 1 C. D. 463.

— **Lease of plant to municipality with option to purchase.** A franchise providing for a lease of the plant to the municipality, with an option to purchase, is not invalid as indefinite, uncertain and containing more than one subject.

Moore v. Elmore, 13 N. P. n. s. 651; 23 L. D. 50 (C. P. 1910).

— **Service pipes.** A provision requiring the company to construct service pipes to the inside curb line was held to inure to the benefit of the municipality as well as private consumers. Cincinnati v. Gas Co., 14 N. P. n. s. 513; 24 L. D. 23 (1913).

— **Indemnity against damages from excavations in streets.** Where the franchise of a gas company required it to pay all judgments for damages recovered against the municipality resulting from excavations in the streets, in a suit by the municipality to recover the amount of a judgment paid by it, the charge of the court in the former action as to the issue submitted to the jury therein is conclusive. Gas Co. v. Elyria, 18 C. C. n. s. 156; aff'd, no rep. 85 O. S. 472.

Invalid conditions not going to the life of the franchise do not render the franchise inoperative.

Columbus v. Federal Gas & Fuel Co., 2 N. P. n. s. 277; aff'd, no report, 72 O. S. 632.

Invalid franchise. Suits to enjoin exercise of.

See notes to §§ 9101 and 3714.

Duration of franchise. When a grant is silent as to its duration, the franchise is not perpetual, but exists only so long as the parties mutually agree thereto.

East Ohio Gas Co. v. Akron, 81 O. S. 33.

Expired franchise. Rights of parties. After the expiration of its contract with a municipality, a gas company may wholly withdraw and cease to exercise its franchise. The municipality can not compel it to continue to furnish gas.

East Ohio Gas Co. v. Akron, 81 O. S. 33.

After the expiration of its grant in the streets, a gas company has no right to the further use of the streets without a new grant. In making such new grant the municipality is not limited to regulating the price and mode of use of gas, but may impose other reasonable conditions and regulations.

Columbus v. Columbus Gas Co., 76 O. S. 309, 329, 330; reversing 2 N. P. n. s. 37.

The municipality may require the company to remove its equipment from the streets within a reasonable time.

Detroit United Ry. v. Detroit, 229 U. S. 39 (1913); affirming, 156 Mich. 106.

The adoption of an ordinance granting a renewal of a franchise, but on different terms, does not repeal the original franchise ordinance, and is not binding on the company until acceptance. The company may remove from the municipality at any time and an action does not lie to enjoin discontinuance of impairment of service. Newcomestown v. Gas Co., 30 O. C. A. 283 (1919); aff'd, 100 O. S. 494.

So long as a gas company continues to furnish gas, after expiration of its franchise, it must charge the same rate as during the period while the franchise was in force. Newcomestown v. Gas Co., 30 O. C. A. 283 (1919); affirmed, 100 O. S. 494.

Right of municipality to change grade of street after pipes installed. A gas company laying its pipes in a street does so subject to the right of the municipality to change the grade of the street. In the absence of negligence the municipality is not liable to the gas company for damage occasioned by the necessity of relaying the pipes.

Gas Light & Coke Co. v. Columbus, 50 O. S. 65.

New Orleans, etc., Co. v. Drainage Commission, 197 U. S. 453, 462.

See Union, etc., Co. v. Railway Co., 14 N. P. n. s. 171 (1913).

Where a street in which gas mains have been placed is vacated by order of court at the petition of the abutting owners, upon condition that the gas company be permitted access to lay, repair, change or remove its mains, and thereafter the grade is changed by the owner, he is not liable to the gas company for the cost of changing the location of its mains. Railway Co. v. Gas Co., 6 Ohio App. 213; 28 O. C. A. 333 (1916).

Natural gas company, having franchise for fuel purposes, can not be enjoined from furnishing illuminating gas, by artificial gas company, whose franchise has expired. An artificial gas company, whose contract with the municipality has expired, can not enjoin a natural gas company from furnishing natural gas for illuminating purposes, although the franchise of the natural gas company is for fuel purposes.

Circleville, etc., Co. v. Buckeye Gas Co., 69 O. S. 259; affirming, 1 C. C. n. s. 526.

See *Springfield v. Springfield Gas Co.*, 12 C. C. n. s. 392; 21 C. D. 446; aff'd, no rep., 81 O. S. 537.

Liability for damages for explosion of gas in connecting pipes installed by consumers. Where pipes from the curb line into buildings were installed by consumers, and properly inspected before use, the gas company is not liable for damage caused by subsequent defects in the pipes, in the absence of a contract or other obligation requiring the company to inspect the same. *Cooper v. Gas Co.*, 3 Ohio App. 77; 19 C. C. n. s. 481 (1914).

But the company may be liable to third parties, if it fails to take protective measures after notice that gas is escaping. *Lennon v. Gas Co.*, 4 Ohio App. 153; 22 C. C. n. s. 247 (1915).

Water company failing to furnish water to municipality, not liable to residents for fire losses. Where property in a municipality is destroyed by fire through the failure of a water company to furnish water and fire apparatus to the municipality in accordance with its contract with the municipality, the owner of such property can not recover damages from the water company.

Blunk v. Dennison Water Supply Co., 71 O. S. 250.

Akron, etc., Co. v. Brownlees, 10 C. C. 620; 5 C. D. 1.

Boston, etc., Co. v. Salem Water Co., 94 Fed. 238.

Construction of Sections 9320 and 9324.

See *Brush, etc., Co. v. Jones, etc., Co.*, 23 W. L. B. 329; 5 C. C. 340; 3 C. D. 168; affirmed, 29 W. L. B. 72.

Section 9321. (Gas or electric companies may manufacture and supply both electricity and gas.) Every corporation organized under the laws of this state to manufacture and supply artificial gas for light, heat and power purposes or for any of such purposes, and every corporation organized under the laws of this state to manufacture and supply electricity for light, heat and power purposes, or for any of such purposes, in addition to all powers heretofore conferred, but subject to statutory provisions in force relating to the granting of franchises by municipalities for either of such purposes at the time of granting the franchise, may manufacture and supply electricity and artificial gas, respectively, for light, heat and power purposes, and to make all contracts, and do all things necessary and convenient for furnishing the same for both public and private objects. (R. S. Sec. 3550a; 98 v. 150; 97 v. 258; 90 v. 291.)

A corporation organized to manufacture gas for lighting purposes may amend its charter under G. C. § 8719 so as to employ both gas and electricity.

Picard v. Hughey, 58 O. S. 577.

Section 9322. (Consent of municipality.) Nothing herein confers any right to engage in such business or to erect or maintain structures in a street, alley or public place without the consent of the municipality in which it is to be

constructed. (R. S. Sec. 3550a; 98 v. 150; 97 v. 258; 90 v. 291.)

Section 9323. (Contract with municipality.) Ordinances and resolutions heretofore passed by any municipal corporation, and contracts heretofore made by and between any municipality and company organized to manufacture and supply gas, which were and still are intended to provide for supplying electricity for a municipal purpose and as to which the time of performance has not begun to run, or has not expired, shall be as valid and binding as if this statute had been in force when such ordinance or resolution was passed or contract made. (R. S. Sec. 3550a; 98 v. 150; 97 v. 258; 90 v. 291.)

For constitutionality of this section, see *Kumler v. Silsbee*, 38 O. S. 445.

Section 9324. (Contracts with municipality for light and water.) The municipal authority of any city or village or the trustees of any township, in which a gas or water company is organized, may contract with such company for lighting or supplying with water the streets, lands, lanes, squares and public places in such city, village, or township. (R. S. Sec. 3551; 98 v. 150; 71 v. 93, § 54.)

See §§ 3981, 3994 and notes.

One who has furnished gas to a municipality can not recover therefor in the absence of a contract. There is no implied liability to pay on the part of the municipality.

Wellston v. Morgan, 65 O. S. 219.

Liability of municipality for gas or water furnished under invalid contract,

See *Wellston v. Morgan*, 59 O. S. 147.

Defiance Water Co. v. Defiance, 68 O. S. 520.

Defiance Water Co. v. Defiance, 90 Fed. 753.

Defiance v. McGonigal, 150 Fed. 689; 15 O. F. D. 291; affirming, 140 Fed. 621; 15 O. F. D. 100.

See also note to § 3994.

Where property in a municipality is destroyed by fire through the failure of a water company to furnish water and fire apparatus to the municipality in accordance with its contract with the municipality, the owner of such property can not recover damages from the water company.

Blunk v. Dennison, etc., Co., 71 O. S. 250.

Akron, etc., Co. v. Brownlees, 10 C. C. 620; 5 C. D. 1.

Boston, etc., Co. v. Salem Water Co., 94 Fed. 238.

Construction of contract for "lowest averaged price" of gas furnished to private consumers in certain other cities.

See *Cincinnati v. Gas Light & Coke Co.*, 53 O. S. 278.

Construction of former act.

See *Circleville, etc., Co. v. Buckeye Gas Co.*, 69 O. S. 259.

Gas Co. v. Lima, 4 C. C. 22; 2 C. D. 296.

A municipal contract for electric light or water may be made without competitive bidding.

Rep. Atty. Gen. 1911-1912, p. 1549.

Contra, Rep. Atty. Gen. 1910-1911, p. 298.

Section 9325. (Gas company may extend mains beyond city.) A gas company in a city or village may extend its pipes used for conveying gas to the various localities and inhabitants of the city or village, to any place in the vicinity thereof, outside the corporate limits; but the right of way must be obtained from the corporate or other authorities, or person having control of the places to be affected by such extension. (R. S. Sec. 3552; 56 v. 92, § 1.)

Where a gas company, under the provisions of this section, extends into a village its pipes used for conveying gas, and is vested with the right of way where such pipes are laid, and uses such pipes to convey to the village lamps, gas manufactured outside of such village, and uses such manufactory and pipes as one plant, such company may be regarded as established in such village, within the meaning of section 3982; and such extension of pipes may be regarded as the extension of gas works for supplying the village with gas, within the meaning of section 3989.

Cincinnati Gas Co. v. Avondale, 43 O. S. 257.

Section 9326. (Standard measure for gas.) The standard or unit of measure for the sale of illuminating gas by meter shall be the cubic foot, containing sixty-two and three hundred twenty-one one-thousandth pounds avoirdupois weight of distilled or rain water, weighed in air, of the temperature of sixty-two degrees Fahrenheit's scale, the barometer being at twenty-nine and one-half inches. (R. S. Sec. 3553; 63 v. 164, § 5.)

Section 9327. (Meter must be sealed and stamped.) No meter shall be set unless it is tested by a meter-prover, sealed and stamped as hereinafter provided. A company authorizing the setting of a meter, or allowing it to be used by a consumer of gas, without being so sealed and stamped, shall forfeit and pay not less than twenty-five nor more than one hundred dollars, to be recovered upon the complaint of such consumer, in the name of the state, before any court of competent jurisdiction. (R. S. Sec. 3554; 64 v. 39, § 6.)

This section is constitutional.

Cincinnati, etc., Co. v. State, 18 O. S. 237.

Section 9328. Repealed. (106 v. 554; R. S. Sec. 3555; 88 v. 123; 63 v. 164, § 7.)

Section 9329. (Meters, testing of.) Meters in use shall be tested on the request of the consumer, in his presence,

if desired, with a meter-prover, tested and sealed as provided by law, by an officer or servant of the company. If the meter be found to be correct, and it shall be deemed correct if there be no greater variation than three per cent, the party requesting the inspection shall pay a fee of twenty-five cents, and the expense of removing it for the purpose of being tested. The re-inspection shall be stamped on the meter. If proved incorrect, no fees or expense shall be paid by the consumer, and the company shall furnish a new meter without charge to the consumer. No gas company shall charge rent for meters. (R. S. Sec. 3556; 99 v. 471; 64 v. 39, § 9.)

This section is constitutional.

Cincinnati, etc., Co. v. State, 18 O. S. 237.

This section prohibits a private company from charging rent for meters, although § 3982 provides that the council may fix the rental charge for meters. A municipality, operating its own gas plant, may charge rent therefor. Rep. Atty. Gen. 1912, p. 1805.

Section 9330. (To what companies applicable.) The provisions of the preceding section shall apply to all gas companies, supplying the public with either natural or artificial gas. The failure of any person, firm or corporation so providing either natural or artificial gas to the public to comply with the provisions of such section shall cause the person, firm or corporation to forfeit and pay to the state not less than twenty-five dollars, nor more than one hundred dollars, to be recovered upon the complaint of any consumer of such gas in the name of the state before any court of competent jurisdiction. (R. S. Sec. 3556; 99 v. 471; 64 v. 39, § 9.)

Constitutionality, see Cincinnati, etc., Co. v. State, 18 O. S. 237.

Section 9331. (Merchantable gas.) Illuminating gas which has a minimum value of less than twelve candles—that is, a burner consuming five cubic feet per hour must give a light, as measured by photometric apparatus in ordinary use, of not less than twelve standard sperm candles, each consuming one hundred and twenty grains per hour—shall not be merchantable. (106 v. 554; R. S. Sec. 3557; 64 v. 39, § 10.)

Section 9332. (May enter premises to inspect meter.) If duly authorized in writing by the president, treasurer, agent or secretary of a gas company, at any reasonable time, its officer or servant may enter any premises lighted with gas supplied by such company, for the purpose of exam-

ining or removing the meters, and of ascertaining the quantity of gas consumed or supplied. If a person, directly or indirectly, prevents or hinders such officer or servant from so entering such premises, or from making such examination or removal, on complaint by the officer or servant, under oath, to a justice of the peace of the county wherein such premises are situate, stating the facts in the case, so far as he has knowledge thereof, the justice may issue a warrant, directed to any constable of the city or village where such company is located, commanding him to take sufficient aid, and repair to such premises, accompanied by such officer or servant, who shall examine such meters and ascertain the quantity of gas consumed or supplied therein, and, if required, remove any meters belonging to the company. (R. S. Sec. 3558; 63 v. 164, § 11.)

Constitutionality, see *Cincinnati, etc., Co. v. State*, 18 O. S. 237.

Section 9333. (Company may shut off gas.) If any person so supplied with gas neglects or refuses to pay the amount due therefor, or for rent of articles hired by him of the company, it may stop the gas from entering the premises of such person. In such cases after twenty-four hours' notice, the officers, servants or workmen of the gas company may enter the premises of such parties, between the hours of eight in the forenoon and four in the afternoon, take away such property of the company, and disconnect any meter from the mains or pipes of the company; but it shall not refuse to furnish gas on account of arrearages due the company for gas furnished to former occupants of the premises. (R. S. Sec. 3559; 63 v. 164, § 12.)

A municipal corporation owning and operating its own waterworks may make a rule providing that water shall be shut off, if a consumer is delinquent in payment, and providing a reasonable charge for turning the water off and on. The determination by city officials, of the amount due, is not final, and a consumer may apply to the courts for a determination of the amount, and to restrain the enforcement of such rule pending such determination.

Mansfield v. Humphreys Mfg. Co., 82 O. S. 216.

Section 9334. (Cash deposit; interest.) No person, firm, or corporation engaged in the business of furnishing gas, water or electricity to consumers of such products, shall demand or require a consumer to deposit cash in any sum whatever as security for the payment of any bills for any such commodity to be so furnished, if the proposed consumer be a freeholder who is financially responsible or a person who is able to give a reasonably safe guaranty in an amount

sufficient to secure the payment of bills for fifty days' supply. In case no such security can be furnished, a deposit not exceeding the amount of the monthly average of the annual consumption by such consumer plus thirty per cent may be required, upon which deposit there shall be allowed and paid to the consumer, interest at the rate of six per cent per annum, provided it remains on deposit six consecutive months. (R. S. Sec. 3559a; 99 v. 445.)

Section 9335. (Contrary rule unlawful.) The making of any rule, regulation or requirement in conflict with any of the provisions of the preceding section, is strictly forbidden, and hereby declared to be unlawful. (R. S. Sec. 3559a; 99 v. 445.)

Section 9336. (Forfeiture.) Any person, firm or corporation violating any of the provisions of the second preceding section, upon conviction thereof, shall forfeit all right to collect or receive any sum whatever from such consumer for gas, water or electricity so furnished. (R. S. Sec. 3559b; 99 v. 445.)

Section 9337. (Tampering with meter.) Every person who wilfully or fraudulently injures, or suffers to be injured, a meter belonging to a gas company, or prevents a meter from duly registering the quantity of gas supplied through it, or hinders or interferes with its proper action or just registration, or attaches a pipe to a main or pipe belonging to such company, or otherwise burns or uses or causes to be used, gas supplied by such company, without the written consent of an officer thereof, unless it passes through a meter set by the company; or fraudulently burns the gas of the company, or wastes it, for every such act shall forfeit and pay to the company not more than one hundred dollars, to be recovered in an action brought by it against such offender, and in addition thereto, pay the company the amount of damage by it sustained by reason of such injury, prevention, waste, consumption or hindrance. (R. S. Sec. 3560; 63 v. 164, §§ 13, 14.)

Section 9338. (Meter-prover and photo-meter; penalty.) All gas companies supplying the public with artificial or natural gas, which are not supplied with such apparatus, forthwith shall provide for their use a meter-prover, the holder of which must contain not less than five feet, such prover to be tested in the place where it is to be used and stamped and sealed by the public utilities commission of

Ohio, all such tests to be open to the public. All gas companies supplying artificial or natural gas for illuminating purposes shall on the order of the public utilities commission of Ohio provide for their use a photometer of a type approved by such commission. The failure on the part of any person, firm or corporation supplying the public with artificial or natural gas to comply with the provisions of this section shall cause said person, firm or corporation to forfeit and pay to the state not less than twenty-five dollars nor more than one hundred dollars to be recovered upon the complaint of any such consumer, in the name of the state, before any court of competent jurisdiction. (106 v. 554; R. S. Sec. 3561; 99 v. 471; 88 v. 123; 73 v. 227, § 3.)

See Gas Fuel Co. v. Andrews, 50 O. S. 695.

PART XIX.

INSURANCE COMPANIES.

SUBDIVISION I. INSURANCE UPON PERSONS.

SUBDIVISION II. INSURANCE UPON PROPERTY AND AGAINST CERTAIN CONTINGENCIES.

SUBDIVISION I. INSURANCE UPON PERSONS.

CHAPTER 1. Legal Reserve Life.

CHAPTER 2. Standard Forms, Provisions and Prohibitions.

CHAPTER 3. Mutual Protective.

CHAPTER 4. Fraternal.

CHAPTER 1.

LEGAL RESERVE LIFE.

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DOMESTIC.

Section 9339. (Purpose for which may be formed.) Any number of persons, not less than thirteen, may associate and form a company to make insurance upon the lives of individuals, and every insurance appertaining thereto or connected therewith, on the mutual or stock plan, and grant, purchase, or dispose of annuities. (R. S. Sec. 3587; April 27, 1872, 69 v. 150, § 1.)

Classification of life insurance companies. The Ohio statutes divide life insurance companies, other than fraternal, into two classes, (1) companies that have a capital stock, or at least capital, and (2) companies that have neither capital stock nor capital. The general powers of the first class are granted by § 9339 and those of the second class by § 9427 et seq.

State v. Matthews, 58 O. S. 1, 7 (1898).

Corporations organized under Ohio laws are of two classes: (1) Those organized for profit, which must have a capital stock owned by stockholders. (2) Those organized for purposes other than profit, consisting of members associated together for a lawful purpose. Corporations formed under § 9427 et seq. belong to the second class.

State v. Standard Life Ass'n, 38 O. S. 281 (1882).

Representations made by a stock company that it was doing a mutual insurance business, and the fact that policy holders, who elected to take participating contracts, had written in their contracts a stipulation that they should share in the profits "as apportioned by the company" do not transform such company into a mutual company or even make the participating contracts mutual insurance contracts, or estop the company from treating, as belonging to its stockholders, a surplus fund which clearly arose from profits of the non-participating business.

State v. Insurance Co., 13 C. C. n. s. 49; 22 C. D. 262 (1910); affirmed, 84 O. S. 459.

See *Bell v. Insurance Co.*, 14 C. C. n. s. 385 (1911); s. c., 87 O. S. 475.

Powers of each class. The powers of a company of the first class (§ 9339 et seq.) are unlimited as to the individuals it may insure, but are limited to insuring "on the mutual or stock plan." A company or association of the second class (§ 9427 et seq.) can only insure a member of the corporation, and its business must be transacted "on the assessment plan."

State v. Matthews, 58 O. S. 1, 8 (1898).

The first class has no authority to transact business "on the assessment plan." The lack of such power results solely from the omission of the legislation to grant it.

State v. Matthews, 58 O. S. 1 (1898).

But a foreign corporation, authorized, by the laws of its home state, to transact business on the assessment plan should not be refused admission to do such business in Ohio, under § 9435, because it has a capital stock.

State v. Matthews, 58 O. S. 1 (1898).

A foreign company which carries a line of assessment or stipulated premium policies can not be admitted to Ohio to do business on the mutual or stock plan as a full legal reserve company and to write only full legal reserve business.

5 Opins. Attys. Gen. 679 (1902).

Forfeiture of franchise. Where an insurance company has misused its franchise it may be ousted therefrom by a proceeding in quo warranto.

See § 12304.

State v. Standard Life Ass'n, 38 O. S. 281 (1882).

In such a quo warranto proceeding the court can not concern itself with the rights of policy holders or stockholders, but can only consider whether some public mischief is being done or threatened.

State v. Insurance Co., 13 C. C. n. s. 49; 22 C. D. 262 (1910); affirmed, 84 O. S. 459.

A judgment, in a quo warranto proceeding brought by the attorney general to test the right of a company to declare a dividend out of a surplus fund, dismissing the petition, is no defense to an action by holders of participating policies seeking to conserve their interest in such surplus fund, where the policy holders were not parties to the quo warranto proceeding.

Bell v. Insurance Co., 14 C. C. n. s. 385 (1911); s. c., 87 O. S. 475.

Application of general corporation law to life insurance companies. G. C. § 8623 does not authorize the incorporation of insurance companies, as the organization of such companies is specially provided for in title IX, division III, G. C.

State v. Pioneer Live Stock Co., 38 O. S. 347 (1882).

Corporations formed under § 9427 et seq., though not subject to the provisions of title IX, division III, chapter 1 of the General Code relating to life insurance companies "on the mutual or stock plan" are subject to all the general provisions of title IX, division I, chapter 1, G. C., which apply to corporations not for profit.

State v. Standard Life Ass'n, 38 O. S. 281 (1882).

Powers of life insurance companies.

See § 9385 and note.

Deposit of securities. A company organized under this section must furnish security for the assured, as required by § 9346.

State v. Moore, 38 O. S. 7, 11 (1882).

Section 9340. (Articles of incorporation.) Such persons shall file in the office of the secretary of state articles of incorporation, signed by them, setting forth their intention to form a company for the purposes named in this chapter, which articles shall comprise a copy of the charter they propose to adopt. The charter shall set forth the name of the company, which shall not be the corporate name or title used to designate any fire, life, marine, or other insurance company existing under the laws of this state, the place where it is to be located, the kind of business to be undertaken, the manner in which its corporate powers are to be exercised, the number of directors or trustees, the manner of electing them and other officers, a majority of whom shall be citizens of this state, the time of such election, the manner of filling vacancies, the amount of capital to be employed, and such other particulars as are necessary to explain and make manifest the objects and purposes of the company, and the manner in which it is to be conducted. Such directors and trustees must be stockholders or members, and the number thereof may be increased at the will of the stockholders representing a majority of the stock, or of a majority of the members, to not more than twenty-one. (R. S. Sec. 3588; April 27, 1872, 69 v. 150, § 4; April 11, 1863, 60 v. 75, § 1; May 14, 1878, 75 v. 557, § 1; S. & S. 217; S. & S. 219.)

The words "the amount of capital to be employed" mean authorized capital stock.

Rep. Atty. Gen. 1911-1912, p. 80, 82.

The par value and number of shares may, but need not, be stated. Rep. Atty. Gen. 1912, p. 24.

The articles may be amended under § 8719. Rep. Atty. Gen. 1912, p. 24.

Section 9341. (Approval by attorney-general.) When such articles are filed in the office of the secretary of state, and the name assumed by the company is not so nearly similar to that of any other company organized in this state as to lead to confusion or uncertainty on the part of the public, the secretary of state shall submit them to the attorney-general, for examination. If found by him to be in accordance with the provisions of this chapter, and not inconsistent with the constitution and laws of the United States and of this state, he shall certify to and deliver them to the secretary of state, who shall cause them, with the certificate of the attorney-general, to be recorded in a book to be kept for that purpose. Upon application of the signers thereof the secretary of state shall furnish to them a certified copy of such articles and certificate. (R. S. Sec. 3589;

April 27, 1872, 69 v. 150, § 5; May 14, 1878, 75 v. 557, § 1; S. & S. 219.)

A corporation organized to act as insurance agent is not an insurance company. The articles need not be approved by the attorney general. Opins. Atty. Gen. 1915, p. 2357.

The provisions of this section, as to name, do not apply to mutual protective associations organized under § 9427 et seq.

4 Opins. Attys. Gen. 343 (1890).

Section 9342. (Opening of subscription book.) When the signers of such articles receive from the secretary of state a certified copy thereof, and desire to organize such company, they shall publish their intention in a paper published and having general circulation in the county in which the company is to be organized. After the publication has been made for six weeks, they may open books to receive subscriptions to the capital stock, keep them open until the amount required by this chapter is subscribed, distribute the stock among the subscribers, if more than the necessary amount is subscribed, collect the capital and complete the organization of the company. (R. S. Sec. 3590; April 27, 1872, 69 v. 150, § 6; S. & S. 219.)

Certain provisions required in subscription contract, § 6373-12.

Organization expense limited, § 6373-12.

Duty of superintendent of insurance, § 6373-19.

Directors and officers can not be elected until the entire authorized capital stock is paid in.

Rep. Atty. Gen. 1911-1912, p. 80.

This section and § 9343 are "special provisions" within the meaning of § 8737 and supplant the provisions of the general corporation law, §§ 8630 to 8635.

Rep. Atty. Gen. 1911-1912, p. 80, 84.

Section 9343. (Whole capital must be paid in and invested.) No joint stock company shall be organized under this chapter with less than one hundred thousand dollars capital. Before proceeding to business, the whole capital shall be paid in and invested in treasury notes, in stocks or bonds of the United States, or of the state of Ohio, or of any municipality or county thereof, or in mortgages on unincumbered real estate within this state worth double the amount loaned thereon. (R. S. Sec. 3591; March 5, 1902, 95 v. 38; April 27, 1894, 91 v. 39; April 9, 1873, 70 v. 118, § 7; S. & S. 219.)

Investment of accumulations, § 9357.

Directors and officers can not be elected until the entire authorized capital stock is paid in.

Rep. Atty. Gen. 1911-1912, p. 80.

The capital stock can not be reduced, although in excess of \$100,000.

Rep. Atty. Gen. 1911-1912, pp. 80, 110.

Where a note and mortgage were executed by a stockholder in payment of his stock subscription, the stock, under this section, was regarded as paid up, and the note and mortgage as given for money loaned or invested by the company. The liability of the stockholder on the note and mortgage was held to be not less than that of any other borrower, and his rights as a stockholder not superior to those of non-borrowing stockholders.

Insurance Co. v. Curtis, 35 O. S. 343, 350 (1880).

See also, as to liability of stockholders on notes given in payment for stock.

Insurance Co. v. Jones, 35 O. S. 351 (1880).

Ehrman v. Insurance Co., 35 O. S. 324 (1880).

Kilbreath v. Gaylord, 34 O. S. 305 (1877).

Where its charter authorized an insurance company to invest in "bonds and mortgages," a mortgage securing a *promissory note* was held to be valid and enforceable by the company.

Bank v. Insurance Co., 41 O. S. 1 (1884).

Usurious interest, effect of stipulations for, see note to § 8627.

Unincumbered real estate. The view has been expressed that a building restriction constitutes an incumbrance within the meaning of this section, and that an insurance company can not invest in a first mortgage on restricted property.

Rep. Atty. Gen. (1909-1910) 343.

Compare, Engle v. Morrison, 6 C. C. n. s. 609 (1904); *aff'd*, no rep., 73 O. S. 388.

Section 9344. (Insurance of structures on mortgaged lands.) If the amount loaned exceeds one-half the value of the land mortgaged, exclusive of structures thereon, such structures shall be insured in an authorized fire insurance company in any amount not less than the difference between one-half the value of such land exclusive of structures, and the amount loaned, and the policy assigned to the mortgagee. (R. S. Sec. 3591; March 5, 1902, 95 v. 38; April 27, 1894, 91 v. 39; April 9, 1873, 70 v. 118, § 7; S. & S. 219.)

Section 9345. (Increase of capital stock.) When in the opinion of the board of directors thereof, a company organized under any law of this state, requires a larger amount of capital than that fixed by its articles of incorporation, if authorized by the holders of two-thirds of the stock, they shall file with the secretary of state a certificate setting forth the amount of the desired increase, and thereafter the company shall be entitled to have the increased amount of capital fixed by the certificate, which shall be invested as required by the preceding two sections. (R. S. Sec. 3592; April 27, 1872, 69 v. 150, § 6.)

A surplus fund, arising from the profits of the company, may be applied toward payment of increased stock, and a stock dividend declared therefrom. The fact that the company falsely represented that it was doing a mutual business, and inserted in the contracts of many policy holders a stipulation that they should share in the profits "as appor-

tioned by the company," does not estop the company from treating, as belonging to its stockholders, a surplus fund which clearly arose from profits on the non-participating business.

State v. Life Insurance Co., 13 C. C. n. s. 49; 22 C. D. 262 (1910); affirmed, 84 O. S. 459.

See Bell v. Insurance Co., 14 C. C. n. s. 385 (1911).

A legal reserve life insurance company can not reduce its capital stock under G. C. § 8700.

Rep. Atty. Gen. 1911-1912, pp. 80, 110.

But by amending its articles under § 8719 it may change the par value and number of its shares. Rep. Atty. Gen. 1912, p. 24.

Section 9346. (Deposit of securities with superintendent.)

Any such company may invest its capital in such stocks, bonds, or mortgages, and change and invest it or any part thereof in like manner, at pleasure. But no company shall commence business until it has deposited with the superintendent of insurance at least one hundred thousand dollars, in such stocks, bonds, and mortgages, or one or more of them, duly made or assigned to the superintendent in trust for the purposes mentioned in this chapter. When a mortgage of real estate is assigned to the superintendent, the assignment shall be immediately entered in the records of the county in which the real estate is situated, the fee for the recording of which shall be paid by the company. (R. S. Sec. 3593; April 27, 1872, 69 v. 150, § 8; S. & S. 219.)

Collection of claims from securities, see § 641.

This section relates to domestic companies organized under § 9339. Deposits by foreign companies are regulated by § 9367.

State v. Moore, 38 O. S. 7, 11 (1882).

The deposit is solely for the security of policy holders, and not for the security of general creditors, and before resort can be had to this fund, there must be shown some specific amount due, or that may become due, on account of such policy holders.

Falkenbach v. Patterson, 43 O. S. 359 (1885).

Where accommodation securities are given to the company, for the purpose of being deposited with the superintendent, upon the insolvency of the company, such securities are subject to the claims of the policy holders; but as against general creditors, the same defenses may be invoked as against the company. The makers of such accommodation securities, as against policy holders, are estopped to deny the existence of the corporation and its powers to issue such policies.

Falkenbach v. Patterson, 43 O. S. 359 (1885).

See Cooke v. Warner, 56 Conn. 234 (1888).

Securities deposited in trust for the benefit and protection of policy holders, can not be recovered from the superintendent of insurance by the assignee for creditors of the insurance company, without showing that the company is no longer liable to any of its policy holders. It is the duty of the superintendent, where a company becomes insolvent, to distribute the funds deposited pro rata among the policy holders, and, when their claims are satisfied, to pay the balance to the company, its successors or assigns.

State v. Matthews, 64 O. S. 419 (1901).

See § 641.

Section 9347. (Change of deposits and collection of interest.) The superintendent of insurance shall hold such securities as security for policy holders in the company; but so long as any company so depositing continues solvent he shall permit it to collect the interest or dividends on such securities, and from time to time to withdraw them, or a part thereof, on depositing with him other securities of the kinds heretofore named, and of equal value with those withdrawn. (R. S. Sec. 3594; April 22, 1904, 97 v. 149; April 27, 1872, 69 v. 150, § 9; S. & S. 220.)

Section 9348. (Deposit in excess of required amount.) In case a company making or maintaining such deposit, through inadvertence or by reason of not having securities in such denomination as to make the exact sum of one hundred thousand dollars, deposits securities in excess of the requirement, such excess shall be held in trust for the company and not for the benefit of policy holders, and shall be returned to the company making the deposit on its demand. (R. S. Sec. 3594; April 22, 1904, 97 v. 149; April 27, 1872, 69 v. 150, § 9; S. & S. 220.)

This section authorizes a company to reclaim an excessive deposit made by it.

Rep. Atty. Gen. (1908-1909) 177.

Section 9349. (When company may commence business.) When the company is fully organized and has deposited the requisite amount of securities, it shall file with the superintendent of insurance a duly certified copy of its articles of incorporation and approval of the attorney general, and a copy of its by-laws or constitution. If the superintendent finds that the company is duly organized and that its capital stock has been subscribed, paid in and invested as required by law, unless he finds the name assumed by the company so nearly similar to the name of another company doing business in this state as to lead to confusion or uncertainty on the part of the public, he shall furnish the company with his certificate of such deposit, and with a license duly reciting that the company has complied with the law and is entitled to transact the business defined in section ninety-three hundred and eighty-five, which license shall be its authority to commence business and issue policies. (R. S. Sec. 3595; April 22, 1904, 97 v. 149; April 27, 1872, 69 v. 150, § 10; May 14, 1878, 75 v. 557, § 2; S. & S. 220.)

Section 9350. (Renewal of license.) So long as the

company complies with the law, the superintendent, annually, upon its application, shall renew such license. Certified copies thereof may be used in evidence for and against the company in all actions. (R. S. Sec. 3595; April 22, 1904, 97 v. 149; April 27, 1872, 69 v. 150, § 10; May 14, 1878, 75 v. 557, § 2; S. & S. 220.)

Section 9351. (Consolidation and reinsurance.) No company organized under the laws of this state to do the business of life, accident or health insurance, either on stock, mutual, stipulated premium or assessment plan, shall consolidate with any other company, or reinsure its risks, or any part thereof with any other company, or assume or reinsure the whole of or any portion of the risks of any other company, except as hereinafter provided. Nothing herein contained shall prevent any such company from reinsuring a fractional part of any individual risk, not exceeding four-fifths thereof, in a company duly authorized to transact business in this state, or, with the permission of the superintendent of insurance, the whole of such risk; but no company, except as hereinafter provided, shall reinsure any part of any of its risks when the aggregate amount of its risks reinsured shall equal fifty per cent. of its total insurance in force. (April 22, 1913, 103 v. 174; R. S. Sec. 3597; April 6, 1900, 94 v. 103; April 15, 1880, 77 v. 267; April 27, 1872, 69 v. 150, § 2; S. & S. 218.)

Reinsurance defined.

Insurance Co. v. Insurance Co., 38 O. S. 11, 15 (1882).

See note to § 9555.

Penalty for violation of this section, see § 13416.

Section 9352. (Petition to superintendent of insurance.)

When any such company proposes to consolidate with any other company, or enter into any contract of reinsurance, it shall present its petition to the superintendent of insurance, setting forth the terms and conditions of the proposed consolidation or reinsurance, and praying for the approval or of any modification thereof, which the commission hereinafter provided for may approve. (R. S. Sec. 3597; April 6, 1900, 94 v. 103; April 15, 1880, 77 v. 267; April 27, 1872, 69 v. 150, § 2; S. & S. 218.)

An Ohio company, authorized to do business in Ohio, in entering into a contract to assume the business of a company organized under the laws of another state, must follow the procedure provided in §§ 9352-9356. Rep. Atty. Gen. 1914, p. 1104.

Section 9353. (Notice to policyholders.) The superintendent thereupon shall issue an order of notice, requiring

notice to be given by mail to the policyholders of such company, of the pendency of such petition, and the time and place at which it will be heard, and the publication of the order of notice and petition, in five daily newspapers to be designated by him, at least one of which shall be published in the city of Columbus, for at least two weeks before the time appointed for the hearing on the petition. (R. S. Sec. 3597; April 6, 1900, 94 v. 103; April 15, 1880, 77 v. 267; April 27, 1872, 69 v. 150, § 2; S. & S. 218.)

Section 9354. (Commission to hear and determine petition.) The governor or in the event of his inability to act, some competent person resident of the state to be appointed by him, the attorney-general, and the superintendent of insurance, shall constitute a commission to hear and determine upon such petition. At the time and place fixed in such notice, or at such time and place as is fixed by adjournment, the commission shall proceed with the hearing, and may make such examination into the affairs and condition of the company as it may deem proper. The superintendent of insurance may summon and compel the attendance and testimony of witnesses and the production of books and papers before the commission. Any policy-holder or stockholder of the above named company or companies may appear and be heard in reference to such petition. (R. S. Sec. 3597; April 6, 1900, 94 v. 103; April 15, 1880, 77 v. 267; April 27, 1872, 69 v. 150, § 2; S. & S. 218.)

Section 9355. (Approval and order of commission.) If satisfied that the interests of the policy-holders of such company or companies are properly protected, and that no reasonable objection exists thereto, the commission may approve and authorize the proposed consolidation or reinsurance, or of such modification thereof as seems to it best for the interests of the policy-holders, and make such order with reference to the distribution and disposition of the surplus assets of any such company thereafter remaining, as shall be just and equitable. Such consolidation or reinsurance shall only be approved by the consent of all the members of the commission, whose duty it will be to guard the interests of the policy-holders of any such company or companies proposing to consolidate or reinsure. (R. S. Sec. 3597; April 6, 1900, 94 v. 103; April 15, 1880, 77 v. 267; April 27, 1872, 69 v. 150, § 2; S. & S. 218.)

Consolidation of several companies having an aggregate capital and surplus in excess of \$100,000 into one company with a capital stock of that amount only, under a plan contemplating distribution

of surplus assets of \$2,000,000 to holders of common trust certificates could not lawfully be sanctioned. Opins. Atty. Gen. 1915, p. 171.

Section 9356. (Costs.) All expenses and costs incident to such proceedings shall be paid by the company or companies bringing such petition. (R. S. Sec. 3597; April 6, 1900, 94 v. 103; April 15, 1880, 77 v. 267; April 27, 1872, 69 v. 150, § 2; S. & S. 218.)

Section 9357. (Investment of accumulations by insurance companies.) A company organized under the laws of this state may invest its accumulations as follows:

1. In United States, state, county, school or city bonds, if their market value at the date of purchase is at least eighty per cent. of their par value.

2. In bonds and mortgages upon unincumbered real estate, the market value of which is at least double the amount loaned thereon, at the date of the investment, and in bonds and mortgages upon leasehold estates on real estate for ninety-nine years renewable forever, unincumbered, except rentals accruing therefrom to the owner of the fee, the market value of which leasehold estate is at least double the amount loaned thereon at the date of investment. If the amount loaned exceeds one-half of the value of the land mortgaged, or one-half of the value of the leasehold estate mortgaged, exclusive of structures thereon, such structures must be insured in an authorized fire insurance company or companies, in an amount not less than the difference between one-half the value of such land, or leasehold estate, exclusive of structures, and the amount loaned, and the policy, or policies shall be assigned to the mortgagee. The value of such real or leasehold estate shall be determined by valuation, made under oath, by two real estate owners, residents of the county where the real estate, or leasehold, is located.

3. In loans upon the pledge of such bonds or mortgages, if the current market value of the bonds or mortgages is at least twenty-five per cent. more than the amount loaned thereon.

4. In loans upon its own policies, not exceeding the reserve or present value thereof, computed according to the American experience table of mortality with interest at four per cent. or according to such other higher standard or standards as the company has adopted, the reserve being the amount of debts of life insurance companies by reason of their outstanding policies in gross, and which may be so treated in the returns for taxation made by them. Such

companies may sell, change, or reinvest such investments, or any part thereof, at pleasure. (June 9, 1911, 102 v. 356; R. S. § 3598; April 22, 1908, 99 v. 180; March 5, 1902, 95 v. 39; May 14, 1878, 75 v. 576, § 11; S. & S. 220.)

Investment of capital stock, see § 9343.

Real estate loans. A loan evidenced by a promissory note, instead of by a bond, and secured by mortgage, is substantially in compliance with this section and the note and mortgage are valid.

Bank v. Insurance Co., 41 O. S. 1 (1885).

It is said that a building restriction is an incumbrance within the meaning of this section, and that an Ohio company can not make a loan on property restricted to residence purposes.

Rep. Atty. Gen. (1909-1910) 343.

Compare, Engle v. Morrison, 6 C. C. n. s. 609 (1904); aff'd, no rep., 73 O. S. 388.

Where an insurance company, authorized to acquire notes and mortgages, under certain circumstances, purchases a note and mortgage, in a mode or for a purpose not authorized, its title thereto can not be defeated by the maker of the note and mortgage, who is a stranger to the agreement by which the property was acquired and who is not injured by the transfer.

Ehrman v. Insurance Co., 35 O. S. 324 (1880).

See also note to § 8627. *Ultra vires acts.*

Loans on policies. See also § 9420-(7) (9).

Where a company loaned more than the reserve value of a policy, in violation of this section, and in the note provided that the policy should lapse for non-payment of premiums, the provision for forfeiture of the policy was held to be invalid.

Hoover v. Insurance Co., 7 N. P. 369; 6 L. D. 432 (C. P.); (modified, 61 O. S. 656).

But the insurance company in such case is entitled to the amount of the loan, with interest.

Insurance Co. v. Hoover, 61 O. S. 656 (1899); modifying, 7 N. P. 369; 6 L. D. 432.

Beneficiaries, who have been compelled to pay a loan made by the insured on the policy for his own benefit, may recover from his estate the amount of the debt so paid. Schuerman v. Twachtman, 24 C. C. n. s. 459 (1916).

Requirement that borrower take out insurance. Usury. Where a life insurance company requires an applicant for a loan at the same time to take out an insurance policy on his life on the usual terms and conditions, such insurance and the premium paid thereon will not be considered as compensation in addition to legal interest for the loan or usurious.

Insurance Co. v. Morrow, 16 C. C. 351; 8 C. C. 419 (1898); aff'd, no rep., 61 O. S. 661.

Insurance Co. v. Hilliard, 63 O. S. 478, 493 (1900).

And when the policy issued is on the life of a third person, in whose life the borrower has no insurable interest, the borrower jointly signing premium notes with the insured, the transaction is not usurious.

Insurance Co. v. Hilliard, 63 O. S. 478 (1900).

Taxation. The reserve fund is not a debt owing to the policyholders, and can not be deducted from credits in the tax return of the insurance company.

Hynicka v. Insurance Co., 4 N. P. n. s. 297; 17 L. D. 80 (Super. Ct. Cin. 1906); aff'd, 5 N. P. n. s. 255; 18 L. D. 1.

Accumulated deferred dividends or undivided profits are not a part of the reserve fund, and are not debts of the company, but constitute assets which must be returned for taxation.

Insurance Co. v. Hynicka, 5 N. P. n. s. 255; 18 L. D. 1 (Super. Ct. Cin. 1907); affirming, 4 N. P. n. s. 297; 17 L. D. 80.

Section 9358. (Investments.) The preceding section shall not prohibit a company from accepting any other assets than therein enumerated in payment of debts due it, in order to protect its interests, or from acquiring real estate for its own use, or by foreclosure in accordance with the laws of this state, provided that unincumbered real estate as referred to in the preceding section shall be held to mean real estate not subject to any other lien, except taxes or assessments not yet due. (May 17, 1910, 101 v. 254; R. S. § 3598; April 22, 1908, 99 v. 180; March 5, 1902, 95 v. 39; May 14, 1878, 75 v. 576, § 11; S. & S. 220.)

Section 9359. (What real estate company may acquire.) No company organized under the laws of this state shall purchase, hold, or convey real estate, except for the purposes and in the manner herein set forth:

1. Such as is requisite for its immediate accommodation in the transaction of its business.

2. Such as has been mortgaged to it in good faith, by way of security for loans previously contracted, or for money due.

3. Such as has been conveyed to it in satisfaction of debts previously contracted in the course of its dealings.

4. Such as it has purchased at sales upon judgments, decrees, or mortgages obtained or made for such debts. (R. S. Sec. 3599; April 27, 1872, 69 v. 150, § 12; S. & S. 220.)

Where property which a corporation, under certain circumstances, is authorized to acquire, is purchased in a mode or for a purpose not authorized, the title of the corporation to the property can not be defeated by a party, who is a stranger to the agreement by which the property was acquired, and who is not injured by the transfer.

Ehrman v. Ins. Co., 35 O. S. 324 (1880).

Section 9360. (When real estate to be sold.) All real estate so acquired, and which is not necessary for the accommodation of a company in the convenient transaction of its business, shall be sold and disposed of within two years after the company acquires the title. It shall not hold such real estate for a longer period unless it procures a certificate from the superintendent of insurance that the interests of the company, will suffer materially by a forced sale of it, in which event the time for the sale may be extended

to such time as the superintendent directs in the certificate. (R. S. Sec. 3600; April 27, 1872, 69 v. 150, § 13; S. & S. 221.)

Section 9361. (Certain action authorized.) Actions may be maintained by a company formed under the laws of this state, against any of its members, officers, policyholders, or stockholders, for any cause relating to its business; and actions may be prosecuted and maintained by any member, stockholder, or policyholder, or the heirs or legal representative of either, against the company, for losses which accrue on any risk, if payment be withheld more than two months after the losses become due. (R. S. Sec. 3601; April 27, 1872, 69 v. 150, § 15; S. & S. 221.)

Stipulation in policy limiting time for bringing suit.
See § 9421 and note.

Section 9362. (Dividends.) The directors, managers or officers of any company organized under the laws of this state shall not, directly or indirectly, make or pay a dividend, or pay any interest, bonus, or other allowances in lieu thereof, to its stockholders, except from surplus funds, after setting aside an amount equal to the reserve on all its outstanding risks and policies, calculated by what is known as the American Experience Table, with interest at four per cent, per annum, or by such other higher standard or standards as the company may have adopted, and the unearned premium on all personal accident and sickness insurance. (R. S. Sec. 3602; April 22, 1908, 99 v. 181; April 27, 1872, 69 v. 150, § 15.)

Surplus profits may be applied toward the payment of increased stock and distributed among the stockholders as a stock dividend.

The fact that a company falsely represented that it was doing a mutual insurance business and inserted in the contracts of many policyholders a stipulation that they should share in the profits "as apportioned by the company" does not estop the company from declaring a stock dividend out of a surplus fund that was clearly derived from profits on non-participating business.

State v. Life Insurance Co., 13 C. C. n. s. 49; 22 C. D. 262 (1910); affirmed, 84 O. S. 459.

A judgment in a quo warranto proceeding, brought to test the right of a company to declare a dividend out of a surplus fund, is no defense to an action by holders of participating policies, seeking to preserve their interest in such surplus fund, where the policyholders were not parties to the quo warranto proceeding.

Bell v. Insurance Co., 14 C. C. n. s. 385 (1911); but see s. c., 87 O. S. 475.

Accumulated deferred dividends or undivided profits are not a part of the reserve fund and are not a debt of the company but constitute taxable assets.

Insurance Co. v. Hynicka, 5 N. P. n. s. 255; 18 L. D. 1 (Super. Ct. Cin. 1907); affirming, 4 N. P. n. s. 297; 17 L. D. 80.

Section 9363. (Annual statements.) The president or vice-president, and secretary or actuary, or a majority of the directors of each company organized under the laws of this state, annually on the first day of January, or within sixty days thereafter, shall prepare, under oath, and deposit in the office of the superintendent of insurance, a statement showing the condition of the company on the thirty-first day of December, then next preceding, exhibiting the following facts and items, in the following form:

1. The number of policies issued during the year.
2. The amount of insurance effected thereby.
3. The amount of premiums received during the year.
4. The amount of interest, and all other receipts, specifying the items.
5. The amount paid to policyholders of the company for losses during the year.
6. The amount of all other expenditures and disbursements of the company, specifying such items as the superintendent calls for.
7. Amount of losses unpaid.
8. Whole number of policies in force.
9. Amount insured thereby.
10. Amount of reserve on all policies in force, calculated by what is known as the American Experience Table of Mortality, with interest at four per cent per annum, or by such other higher standard or standards as the company may have adopted, and the unearned premium on all personal accident and sickness insurance in force.
11. Amount of capital stock, specifying amount paid and unpaid.
12. Amount of dividends unpaid; also amount of all other liabilities.
13. A detailed statement of all the assets of the company, and the manner of their investment.
14. A statement that such company has not violated any provision of sections eighty-seven hundred and twenty-nine or eighty-seven hundred and thirty, in the form required by the superintendent of insurance.
15. An exhibit of the policy obligations of the company, which shall include, in the first annual statement, a schedule showing the number, date, age when insured, amount insured, term of policy, term of premium and amount of premium, of all policies issued and schedules of all policies cancelled, revived, changed, reduced or increased and

schedule of reinsurances in other companies; and in every succeeding annual statement a schedule of the foregoing items as to all policies issued during the year, and similar schedules of policies cancelled, revived, changed, reduced or increased during the year, together with schedules of reinsurances in other companies and schedules of additions to policies and a list of all other obligations of the company requiring valuation. Such exhibit of the policy obligations of the company may be required oftener than once a year. (R. S. Sec. 3603; April 22, 1908, 99 v. 182; April 9, 1873, 70 v. 118, § 17; S. & S. 221.)

An indictment for perjury against the secretary of an insurance company for a false statement under this section need not allege that the statement was also sworn to by the president or vice-president.

State v. Mulford, 12 L. D. 655 (C. P. 1902).

Section 9363-1. (Valuation of bonds; method.) All bonds or other evidences of debt having a fixed term and rate held by any insurance company, assessment life association or fraternal benefit society authorized to do business in this state, may, if amply secured and not in default as to principal and interest, be valued as follows: If purchased at par, at the par value; if purchased above or below par, on the basis of the purchase price adjusted so as to bring the value to par at maturity and so as to yield in the meantime the effective rate of interest at which the purchase was made; provided that the purchase price shall in no case be taken at a higher figure than the actual market value at the time of purchase; and, provided further, that the superintendent of insurance shall have full discretion in determining the method of calculating values according to the foregoing rules. (110 v. 260.)

Section 9364. (Companies heretofore organized.) All companies organized under any law of this state shall continue corporations for the purpose for which they were chartered, but subject to all the provisions, requirements, and penalties imposed on companies organized under this chapter, and entitled to all the benefits and privileges of this chapter. (R. S. Sec. 3627; April 27, 1872, 69 v. 150, § 29.)

Cited, *Insurance Co. v. Webster*, 7 C. C. 511, 535; 4 C. D. 704 (1893).

FOREIGN.

Section 9365. (Companies organized by congress or in other state.) No company organized by act of congress, or under the laws of any other state of the United States, shall transact any business of insurance defined in section ninety-three hundred and eighty-five, on the capital stock or mutual plan, in this state, until it procures from the superintendent of insurance a certificate of authority so to do; nor shall any person or corporation, directly or indirectly, act as agent in this state for such a company, either in procuring applications for insurance, taking risks, or in any manner transacting the business of insurance, until such person or corporation procures from the superintendent of insurance a license so to do, in which he shall state that the company has complied with all requirements of the laws of this state applicable to it, and deposits a certified copy of such license in the office of the recorder of the county in which the office or place of business of such agent is established; for which filing the recorder may charge ten cents. (R. S. Sec. 3604; April 22, 1904, 97 v. 153; May 15, 1878, 75 v. 572, § 18; S. & S. 223.)

Cited, *Insurance Co. v. State*, 79 O. S. 310.

State v. Matthews, 58 O. S. 1, 15; *State v. Hahn*, 50 O. S. 714.

State v. Association, 26 O. S. 19.

Foreign companies doing business on the assessment plan, see §§ 9435 to 9441.

License of agent of foreign insurance company, § 644 et seq.

Business of life and accident insurance, what constitutes, see note to § 9385.

Foreign insurance companies and associations, whether incorporated or not, are required to procure a certificate of authority.

State v. Ackerman, 51 O. S. 163, 169 (1894).

Before the amendment of § 9441 and 9427 in 1891 (88 v. 251, 252) it was held that a foreign insurance company organized for "insuring lives on plan of assessment upon surviving members," without limitation, must comply with § 9365 et seq. and not § 9435.

State v. Moore, 38 O. S. 7 (1882).

See *State v. Moore*, 39 O. S. 486 (1883).

State v. Insurance Co., 47 O. S. 167 (1890).

A foreign life insurance company, authorized by its charter to write liability insurance, may be licensed and permitted, under § 9385, to transact such business in Ohio, although domestic life insurance companies are not, in express terms, authorized to transact liability business.

State v. Insurance Co., 69 O. S. 317 (1903).

Sections 646 et seq., 9365 et seq., and 9559 et seq., are statutes in pari materia and should be construed together.

5 Opins. Atty. Gen. 658 (1902).

Citing *State v. Guilbert*, 58 O. S. 637.

A foreign company which carries a line of assessment or stipulated

premium policies can not be admitted to Ohio to do business on the mutual or stock plan as a full legal reserve company and to write only full legal reserve business.

5 Opins. Attys. Gen. 679 (1902).

It is said that a foreign insurance company, the majority of whose stock is held by a holding company, is not entitled to admission to do business in Ohio.

Rep. Atty. Gen. 1910-1911, p. 540.

Discretionary power of superintendent of insurance. The issue of a license is a ministerial and not a judicial act.

State v. Insurance Co., 49 O. S. 440 (1892).

Where a foreign company, tendering compliance with Ohio laws, applies for authority to do business within this state, the superintendent of insurance has no mere arbitrary discretion to refuse such admission.

State v. Moore, 42 O. S. 103 (1884).

But the superintendent may inquire into the financial soundness of the company, and if, upon such inquiry made in good faith, he is not satisfied of its financial soundness, he has discretionary power to refuse admission, and his exercise of such discretion will not be controlled by mandamus.

State v. Moore, 42 O. S. 103 (1884).

The superintendent has discretionary power to refuse a license to an agent who has previously solicited insurance, without a license, and offered rebates of premium.

Vorys v. State, 67 O. S. 15 (1902).

Duration and effect of certificate of authority. The license continues in force until the first day of April of the year after the date of issue, and no longer.

State v. Insurance Co., 47 O. S. 167, 178 (1890).

See § 9379.

Revocation of certificate, see § 9384.

The certificate, so long as it remains in force, confers the right and privilege of carrying on its business in the state. Such privilege is a franchise, which emanates from the state.

State v. Ackerman, 51 O. S. 163 (1894).

A certificate is not a bar to a proceeding in quo warranto where the company is charged with exercising franchises without authority of law.

State v. Insurance Co., 49 O. S. 440 (1892).

Transacting business in the state; what constitutes. The loaning of funds upon property in this state is not the doing of business prohibited by this section.

Hall v. Kummer, 7 N. P. 394; 5 L. D. 176 (Dist. Ct. 1883).

See also note to § 194.

Failure to obtain certificate.

Ouster by quo warranto. A foreign company exercising, in this state, franchises and privileges without authority of law may be ousted therefrom by quo warranto.

State v. Insurance Co., 47 O. S. 167 (1890).

State v. Insurance Co., 49 O. S. 440 (1892).

A foreign company or association which transacts insurance business in the state without a certificate of authority is unlawfully exercising a franchise under G. C. § 12303 and may be ousted from the transaction of such business.

State v. Ackerman, 51 O. S. 163 (1894).

Where the acts of a foreign unincorporated insurance association are such as appertain to corporations, or are done after the manner of cor-

porations, it is acting as a corporation without being legally incorporated within G. C. § 12303.

State v. Ackerman, 51 O. S. 163 (1894).

A license or certificate of authority from the superintendent of insurance is not a bar to a proceeding in quo warranto where the insurance company is charged with exercising franchises without authority of law.

State v. Insurance Co., 49 O. S. 440 (1892).

Effect on policy. A policy issued by a foreign company, which has not complied with this section, is not void.

Insurance Co. v. McMillen, 24 O. S. 67 (1873).

Brand v. Murray, 7 Ohio App. 175; 28 O. C. A. 37 (1916).

In an action against the company on such policy, the failure of the company to comply with this section does not excuse the policyholder from paying premiums according to the terms of the policy.

Insurance Co. v. McMillen, 24 O. S. 67 (1873).

Actions by and against the company. A foreign insurance company, doing business in this state without complying with this section, can not maintain an action in the state courts to recover premiums.

Casualty Co. v. Banking Co., 12 C. C. n. s. 200; 21 C. D. 428 (1908).

Stewart v. Insurance Co., 38 N. J. L. 436 (1876).

Insurance Co. v. Wright, 55 Vt. 526 (1883).

Rose v. Kimberly, 89 Wis. 545 (1895).

Suit in another state.

See Insurance Co. v. Parks, 1 C. S. C. R. 574 (1871).

A foreign insurance company may maintain an action against an agent, who has issued policies without a license, and may recover against the agent and sureties on his bond, for moneys collected by him.

Insurance Co. v. Ellis, 32 O. S. 388 (1877).

A policyholder may maintain an action on a policy issued by a foreign company in violation of this section.

Insurance Co. v. McMillen, 24 O. S. 67 (1873).

Clark v. Middleton, 19 Mo. 53 (1854).

Section 9366. (Other requirements of foreign companies.)

Any such company shall not take risks or transact any business of insurance in this state, unless possessed of the amount of actual capital required of similar companies organized in this state under the provisions of this chapter, nor unless the entire capital stock of the company is fully paid up and invested as required by the laws of the state where organized. But if it is a mutual company, actual cash assets of the same amount and description, invested and deposited as required by the laws of the state where it was organized, shall be accepted in lieu of capital stock. (R. S. Sec. 3604; April 22, 1904, 97 v. 153; May 15, 1878, 75 v. 572; § 18; S. & S. 223.)

Cited, State v. Matthews, 58 O. S. 1, 15.

See note to § 9365.

The purpose of these sections is to protect policyholders and others dealing with the company.

Insurance Co. v. Ellis, 32 O. S. 388, 396 (1877).

This section requires the entire capital stock of a foreign company

to be fully paid up, and not merely paid up to the extent required by the laws of its home estate.

4 Opins. Attys. Gen. 453 (1892).

Where the capital stock of a foreign company has been increased, all of the increased stock must be paid up and invested, although its original paid-up stock equalled or exceeded in amount the requirements of § 9343. Rep. Atty. Gen. 1912, p. 738.

A foreign company which issued a contract providing for assessments at certain specified rates was held not authorized to levy assessments in excess thereof. *Insurance Co. v. Douds*, 103 O. S. 398 (1921); *aff'd*, — U. S. — (1923); 67 L. Ed. 488.

Section 9367. (Deposit with superintendent of insurance or other officer.) No such company shall transact any business of insurance in this state unless at least one hundred thousand dollars of its assets are invested in the interest paying bonds or stocks of the United States, or of this state, or of any municipality or county thereof, or in the interest paying state bonds or stocks of some other state of the United States, of the market value of one hundred thousand dollars in the city of New York, or in bonds and mortgages on unincumbered real estate in this state, or in the state under the laws of which it was organized, of at least double the value of the amount loaned thereon, and such bonds and mortgages are deposited with the superintendent of insurance of this state or the chief financial or other officer of the state in which such company was organized, designated by the laws of such state to receive them. If such bonds and mortgages are deposited with the superintendent of insurance or other officer of another state, the superintendent of insurance of this state shall be furnished with the certificate of such state officer, under his hand and official seal, that he as such officer, holds in trust and on deposit, for the benefit of the policy holders of such company, the securities above mentioned, giving the items thereof, and stating that he is satisfied such securities are worth at least one hundred thousand dollars. (R. S. Sec. 3605; April 22, 1904, 97 v. 153; February 27, 1894, 91 v. 40; May 15, 1878, 75 v. 572, § 18; S. & S. 223.)

Taxation of securities deposited by foreign insurance companies, see § 5437.

Subjection of deposit to claims of policyholders, see § 641.

Withdrawal of deposit, on discontinuance of business, see § 655.

Section cited, *State v. Moore*, 39 O. S. 490 (1883).

State v. Matthews, 58 O. S. 17 (1898).

A company organized under the laws of the District of Columbia may be admitted to do business in Ohio. A rule adopted by the commissioners of the District and approved as authorized by act of congress may be regarded as a law of the state within § 9367.

As § 9367 requires a certificate by the superintendent of insurance or other officer of the home state of the foreign company, that

he holds in trust and on deposit the requisite securities, a certificate that the securities have been deposited in a bank is not a sufficient compliance. Rep. Atty. Gen. 1913, p. 840.

Section 9368. (Filing copy of charter and statement.)

Such company also shall file with the superintendent a certified copy of its charter, or deed of settlement, together with a statement, under the oath of the president, vice-president, or other chief officer or manager, and the secretary of the company, stating the name of the company, the place where it is located, and the amount of its capital, with a detailed statement of all the facts required in the annual statement of companies organized under this chapter, except as to the statement required by item fifteen of section ninety-three hundred and sixty-three, which statement shall be filed by such company only when required by the superintendent of insurance for purposes of actual valuation, as provided by the insurance laws of this state; also, a copy of its last annual report, if any was made. (R. S. Sec. 3606; May 15, 1878, 75 v. 572, § 18.)

Cited, *State v. Hahn*, 50 O. S. 714 (1893).

State v. Tual, 16 C. C. 686; 9 C. D. 42.

Section 9369. (Filing of waiver.) Any such company, desiring to transact such business in this state by an agent, shall file with the superintendent of insurance a written instrument, duly signed and sealed, authorizing any agent of the company in this state to acknowledge service of process for and in behalf of the company in this state, and consenting that the service of process, mesne or final, upon any such agent, shall be taken and held to be as valid as if served upon the company according to the laws of this or any other state or government, and waiving all claims or right of error by reason of such acknowledgment of service, and that if it be sued after it ceases to do business in this state, and it has no agent in the county in which suit is brought upon whom service of process can be had, as provided in section ninety-three hundred and eighty, service upon it shall be had by the sheriff mailing a copy of the summons or other process, postage prepaid, addressed to it at the place of its principal office located in the state where it was organized, or if it is a foreign insurance company, to it at the place of its principal office in the United States, at least thirty days prior to the date of taking judgment in suit. The sheriff's return shall show the time and manner of such service. (R. S. Sec. 3607; May 15, 1878, 75 v. 572, § 18.)

This section is constitutional.

Insurance Co. v. Best, 23 O. S. 105 (1872).

See also § 9384.

A foreign company, doing business under a certificate of authority, may be treated, for the purposes of suit, as a domestic corporation.

Insurance Co. v. Best, 23 O. S. 105 (1872).

Where a foreign insurance company wrongfully collected assessments in excess of rates specified in its policy, the insured was held entitled to an accounting and judgment, where his proof did not necessitate an "exhaustive visitation and examination of the books of the company". Insurance Co. v. Douds, 103 O. S. 398 (1921); aff'd, — U. S. —; 67 L. Ed. 488.

Section 9370. (Annual statement of foreign company.)

Every such company doing business in this state, annually shall file a statement of its condition and affairs in the office of the superintendent of insurance, and in the form and manner required of similar companies organized under the laws of this state. But in such statement no such item as "all other expenditures," or "incidentals," shall be allowed or recognized. Every item of disbursement or expenditure must be clearly and distinctly stated and classified when required by the superintendent of insurance, for the protection of the interests of policy-holders in this state, as provided by law. (R. S. Sec. 3608; April 17, 1891, 88 v. 307; April 27, 1872, 69 v. 150, § 20; S. & S. 223.)

Cited, State v. Hahn, 50 O. S. 714.

State v. Tual, 16 C. C. 686; 9 C. D. 42.

Section 9371. (Statement as to tontine policy.)

Any such company issuing policies on tontine or semi-tontine plan, or which claims to be mutual as to its profits to residents of this state, after the payment of the first premium thereon, and not more than sixty days and not less than ten days prior to the maturity of each and every premium, thereafter in writing shall notify every such policy holder, namely the person whose life is insured or the assignee of such policy, if the company has been notified of its assignment, and the address of the assignee given residing in this state, of the time of payment of such premium. Proof of the depositing of the notice to the policy holder or assignee in the postoffice by the company or its agent, postage prepaid to the last address as given by the policy holder or assignee to the company, shall be conclusive proof of its service. Such notice shall set forth fully the amount of the dividend belonging to the policy, when requested by the policy-holder if it be a participating policy, and at the end of the tontine or semi-tontine period of each policy, the company issuing it shall make a statement to the policy-

holder of all the dividends and profits accruing thereon, and from what sources they have been derived. (R. S. Sec. 3608; April 17, 1891, 88 v. 307; April 27, 1872, 69 v. 150, § 20; S. & S. 223.)

A policyholder who is accustomed to deduct dividends from premiums, is entitled to rely on a custom of the company to mail bills for premiums with notices of dividends; and where no notice of dividends was mailed, and the policyholder in remitting his premium deducted too large a sum for dividends, the company was held not entitled to return the premium and forfeit the policy.

Smith v. Insurance Co., 1 W. L. B. 284 (1876).

See Insurance Co. v. Pottker, 33 O. S. 459 (1878).

Ohio policyholders in a foreign mutual life insurance company can not maintain a bill in equity in a federal court, sitting in Ohio, to compel an accounting of funds alleged to have been diverted from the tontine dividend fund where the accounting relates to the internal affairs of the corporation. Eberhard v. Insurance Co., 210 Fed. 520 (D. C. 1914).

Section 9372. (Renewal certificates of authority.) If such annual statement be satisfactory evidence to the superintendent of insurance of the solvency and ability of the company to meet all its engagements at maturity, and that the deposit is maintained as above required and provided, he shall issue renewal certificates of authority to the agents of the company, certified copies of which must be filed in the recorder's office of the county wherein the agency is located. Such renewal certificates shall be the authority of such agents to issue new policies in this state for the ensuing year. (R. S. Sec. 3609; April 27, 1872, 69 v. 150, § 21; S. & S. 223.)

See note to § 9377.

Section 9373. (Deposit of foreign companies; appointment of agent for service.) No person shall act in this state as agent or otherwise, in receiving or procuring applications for life insurance, nor in any manner aid in transacting the business of any company, partnership, or association incorporated by or organized under the laws of any foreign government, until such company, partnership, or association deposits with the superintendent of insurance, for the benefit of the policy holders of the company, partnership, or association, who are citizens or residents of the United States, securities to the amount of one hundred thousand dollars, of the kind required for similar companies of this state, executes a waiver as provided in section ninety-three hundred and sixty-nine, and appoints an agent or attorney, in each county in this state in which the company establishes an agency, on whom process of law can be served, and

files with the superintendent of insurance a duly certified copy of its charter, or deed of settlement, and a duplicate original copy of the letter or power of attorney of the company, partnership, or association, appointing the attorney thereof, which appointment shall continue until another attorney is substituted. (R. S. Sec. 3610; April 27, 1872, 69 v. 150, § 22; S. & S. 222.)

This section was not repealed by the amendment of § 656 (101 v. 147) providing for the withdrawal of deposits by companies retiring from business in Ohio.

Rep. Atty. Gen. 1911-1912, p. 817.

Section 9374. (Annual and other statement to be filed.) Such company, partnership, or association, also shall file a statement of its condition and affairs in the office of the superintendent of insurance, in the form and manner required for the annual statements of similar companies organized under the laws of this state, and annually, on the first day of January, or within sixty days thereafter, file with the superintendent of insurance a statement of all its affairs, in the manner and form required of similar companies of this state, except as to the requirements of schedule of item fifteen in section ninety-three hundred and sixty-three, which schedule shall be filed only when required by the superintendent for purposes of actual valuation, as provided by the laws of this state. (R. S. Sec. 3611; April 27, 1872, 69 v. 150, § 24; S. & S. 224.)

Section 9375. (Supplementary statements.) Such annual statement shall be accompanied by a supplementary statement, duly verified by the attorney or general agent of the company, partnership, or association in this state, giving a detailed description of the policies issued, and also those which have ceased to be in force, during the year, the amount of premiums received, and claims and taxes paid in this state and the United States, for the year ending on the thirty-first day of December. Such statement shall also contain a description of the investments of the company, partnership, or association in this country, and such other information as may be required by the superintendent of insurance. (R. S. Sec. 3612; April 27, 1872, 69 v. 150, §§ 25, 26; S. & S. 224.)

Section 9376. (Renewal certificates of authority.) If the annual statement be satisfactory evidence to the superintendent of the solvency and ability of the company, partnership, or association to meet all its engagements at ma-

turity, he shall issue renewal certificates of authority to the agents thereof, certified copies of which must be filed by them in the recorder's office of the county where the agency is located. Such renewal certificates shall be the authority of the agents to issue new policies in this state for the ensuing year. (R. S. Sec. 3613; April 27, 1872, 69 v. 150, § 26; S. & S. 224.)

Section 9377. (Certificates of authority to act as agent.)

No person, company, or corporation, directly or indirectly, shall act as agent for any such company, partnership, or association, either in procuring applications for insurance, taking risks, or in any manner aiding in the transaction of the business of life insurance in this state, until it procures from the superintendent a certificate of authority, which shall be renewable annually, stating that the requirements of this chapter as to such company, partnership or association have been complied with, and setting forth the name of the attorney for such company, partnership or association, a certified copy of which certificate must be filed in the recorder's office of the county where the agency is to be established, and which shall be the authority of such company, partnership, or association, and its agent, to do business in this state. (R. S. Sec. 3614; April 27, 1872, 69 v. 150, § 27; S. & S. 223.)

A personal duty is imposed on the agent to procure a certificate and file it with the recorder, and a violation of this duty subjects him to a penalty.

Insurance Co. v. Ellis, 32 O. S. 388 (1877).

These regulations are for the benefit of policyholders and others doing business with the company.

Insurance Co. v. Ellis, 32 O. S. 388 (1877).

The acts of an agent, within the scope of the authority conferred upon him by the company, are valid and binding, not only in favor of third persons, but as between principal and agent, notwithstanding his failure to procure and file a certificate.

Insurance Co. v. Ellis, 32 O. S. 388 (1877).

In an action against such agent and his sureties on a bond given for the faithful performance of his duties, his failure to comply with this section is no defense in favor of such sureties.

Insurance Co. v. Ellis, 32 O. S. 388 (1877).

Section 9378. (Failure to make statement.) If a company, partnership, or association, organized without this state, neglects or refuses to make such annual statements, all persons acting in this state as its agents, or otherwise, in transacting the business of insurance, shall be subject to the penalties provided by law in case of the failure of an insurance company organized under the laws of this state

to make an annual statement. (R. S. Sec. 3615; April 27, 1872, 69 v. 150, § 28; S. & S. 225.)

Section 9379. (Duration of licenses.) All licenses granted by the superintendent of insurance in pursuance of this chapter shall continue in force, unless suspended or revoked, until the first day of April next after the date of their issue. (R. S. Sec. 3616; April 27, 1872, 69 v. 150, § 19.)

Licenses granted at any time during the year expire on the first day of April following.

State v. Insurance Co., 47 O. S. 167, 178 (1890).

Revocation of licenses.

For violation of insurance laws, § 617.

For removal of suit to federal court, see § 9384.

Of unsound foreign company, § 635.

For non-payment of excise tax, § 5434.

For placing risks with unauthorized company or agent, § 5441.

Of agent, solicitor or broker, §§ 648-3, 654-1.

Injunction, not mandamus, is the proper remedy to prevent wrongful revocation of a license.

State v. Hahn, 50 O. S. 714, 718 (1893); overruling, State v. Reinmund, 45 O. S. 214.

It is said that the superintendent of insurance has power to revoke a license which was issued, by mistake, to a foreign insurance company not legally entitled to do business in Ohio.

3 Opins. Attys. Gen. 169 (1883).

Section 9380. (When foreign companies must appoint agents to receive service.) If a company, partnership, or association, organized under the laws of any other state or government, ceases to do business in this state according to law, it shall appoint, in the manner herein provided, in every county wherein an agency existed at the date of such discontinuance, one or more agents for the purpose of receiving service of process in all actions upon policies of insurance issued to the citizens of this state while it was lawfully transacting the business of insurance in this state. Service of process upon such agents, in such actions, shall be as valid as actual service upon the company, partnership, or association. (R. S. Sec. 3617; April 27, 1872, 69 v. 150, § 19.)

Section 9381. (Failure to appoint agent.) In every case where no such agent is appointed, the agent last designated and acting for the company, partnership, or association shall be deemed and taken to be duly authorized by it to receive service of process. The officer who serves such process shall also send a copy of the process served on the agent, by mail, to the address of such company, partner-

ship, or association, at the place of its principal or home office at the time it ceased to do business in this state, and his return must distinctly show that such copy was so mailed at least thirty days before any judgment shall be rendered in such action. (R. S. Sec. 3617; April 27, 1872, 69 v. 150, § 19.)

Section 9382. (Who are agents to receive service.) If any such company, partnership, or association ceases to transact business in this state according to the laws thereof, the agents last designated, or acting as such for it, shall be deemed to continue agents for it, for the purpose of serving process, and for commencing actions upon any policy or liability issued or contracted while it transacted business in this state; and service of process upon any such agent, for such causes, shall be a valid service upon the company, partnership, or association. (R. S. Sec. 3618; April 27, 1872, 69 v. 150, § 23; S. & S. 223.)

Section 9383. (May change securities and collect interest.) Nothing in this chapter shall prevent the company, partnership, or association from collecting the interest on any securities deposited by it, so long as it continues solvent, and complies with all the provisions of this chapter applicable to it, nor from exchanging them for other securities of equal value, and of the kind hereinbefore named, with the officers having them in trust. (R. S. Sec. 3619; May 15, 1878, 75 v. 572, § 18.)

Section 9384. (Authority may be withdrawn in certain cases.) If any company, partnership, or association organized without the limits of this state, and doing business herein, makes an application for a change of venue, or to remove any suit or action to which it is a party, in any court of this state, to the United States district or circuit court, or to any federal court, the superintendent of insurance forthwith shall revoke and recall the license or authority to such company, partnership, or association to do or transact business within this state. No renewal or authority shall be granted to such company, partnership, or association for three years after such revocation, and thereafter it shall be prohibited from transacting business in this state until again duly licensed and authorized. (R. S. Sec. 3620; May 15, 1878, 75 v. 572, § 18.)

The license of a company can not be revoked under this section unless the removal of the suit was authorized by the company. The general counsel of a company, authorized by its by-laws only "to give such legal

advice and assistance as may at any time be solicited by the board, or committees or the officers of the company" can not bind the company by ordering the removal of a suit.

Rep. Atty. Gen. (1909-1910) 337.

Constitutionality. A former statute required foreign insurance companies, as a condition precedent to doing business in this state, to waive the right to remove actions to federal courts.

That statute was held constitutional in *Insurance Co. v. Best*, 23 O. S. 105 (1872), but was declared invalid in *Assurance Co. v. Pierce*, 27 O. S. 155 (1875) on the authority of *Home Ins. Co. v. Morse*, 20 Wall. 445 (1875).

See *Rowland v. Ins. Co.*, 2 W. L. B. 57.

This section is probably unconstitutional. A state may not revoke the license of a foreign corporation because such corporation has removed a suit to federal court. *Terral v. Burke Construction Co.*, — U. S. — (1922); 66 L. Ed. 223; overruling, *Doyle v. Insurance Co.*, 94 U. S. 535.

DOMESTIC AND FOREIGN.

Section 9385. (What kind of business such companies may do.) No company, organized under the laws of this state, shall undertake any business or risk, except as herein provided, and no company, partnership or association, organized or incorporated by act of congress, or under the laws of this or any other state of the United States, or by any foreign government, transacting the business of life insurance in this state, shall be permitted or allowed to take any kind of risks, except those connected with, or appertaining to making insurance on life or against accidents to persons, or sickness, temporary or permanent physical disability, and granting, purchasing and disposing of annuities; nor shall the business of life insurance, or life and accident insurance, in this state, be in any wise conducted or transacted by any company, partnership or association which in this state, or any other state or country, makes insurance on marine, fire, inland, or any other risk, or does a banking or any other kind of business in connection with insurance. (R. S. Sec. 3596; May 2, 1902, 95 v. 355; March 27, 1888, 85 v. 119; R. S. 1880; April 4, 1872, 69 v. 150, § 3; February 20, 1874, 71 v. 12, § 2; S. & S. 218.)

Life and accident insurance. A life insurance policy is not merely a contract of indemnity. It is a contract to pay to the beneficiary a sum certain in the event of death; and if the contract was valid in its inception and so continues until its maturity the beneficiary is entitled to the whole of the stipulated sum.

Keckley v. Coshocton Glass Co., 86 O. S. 213 (1912).

Robert v. Insurance Co., 2 Dis. 106; affirming, 1 Dis. 355.

Life and accident insurance is a contract whereby one party, for a

stipulated consideration, agrees to indemnify another against injuries by accident, or death from any cause not excepted in the contract.

State v. Railway, 68 O. S. 9, 30 (1903).

A railway relief association, composed of employes and the company, to maintain a relief fund created by voluntary contributions, is not engaged in the business of insurance.

State v. Railway, 68 O. S. 9 (1903).

Employers' liability insurance may be classed as accident insurance. It is a risk "connected with or appertaining to accidents to persons."

State v. Insurance Co., 69 O. S. 317, 323, 326 (1903).

Accident insurance companies, see §§ 9542, 9543 and 9445 to 9451.

A policy issued by an accident company, as applicable to injuries resulting in death, is but a contract of life insurance limited to specified risks.

Insurance Co. v. Saylor, 2 N. P. n. s. 305, 309; 15 L. D. 137 (Super. Ct. Cin. 1904); affirming, 1 N. P. n. s. 217.

Policies of accident insurance.

Provisions in, and liability under, see note to § 9542.

Policies of life insurance.

Provisions in, and liability under, see note to § 9410.

Powers of life insurance companies. Powers in general.

See note to § 8627.

An insurance company may be liable for libel.

Insurance Co. v. Insurance Co., 2 W. L. B. 269.

Foreign companies. A foreign life insurance company, authorized by its charter to write employers' liability insurance, may be licensed and permitted, under § 9385, to transact such business in Ohio, although the statute does not in express terms authorize domestic life insurance companies to do an employers' liability business.

State v. Insurance Co., 69 O. S. 317 (1903).

A foreign life insurance company, authorized by its charter to transact business on the assessment plan, should not be refused admission to do such business in Ohio, under § 9435, merely because it has a capital stock.

State v. Matthews, 58 O. S. 1 (1898).

Ohio companies. A company, authorized to do an accident insurance business, may write employers' liability insurance.

State v. Insurance Co., 69 O. S. 317, 323, 326 (1903).

Banking business. The loaning of its money by an insurance company upon property in this state is not banking business although the company restricts its loans to its policyholders.

Bank v. Insurance Co., 41 O. S. 1 (1884).

Hall v. Kummer, 7 N. P. 394; 5 L. D. 176 (Dist. Ct. 1883).

In State v. Insurance Co., 14 Ohio 6 (1846) it was held that a clause in the special charter of an insurance company, prohibiting the exercise of banking powers, prohibited only the issue of currency, and did not prohibit the receiving of money on deposit.

For taxation of insurance company, transacting banking business under a special charter, see

Ohio, etc., Co. v. Debolt, 16 How. (57 U. S.) 416; 3 O. F. D. 170.

The special charter of an insurance company, authorizing it to loan its funds, but prohibiting it from engaging in the business of exchange or of money broker, was held not to prohibit the purchase of a bill of exchange.

Bank v. Insurance Co., 12 O. S. 601 (1861).

Joint fire and life business. It is said that an English company, authorized by laws of that country to do both a fire and life business, with an absolute separation of assets so that the assets of one department are not liable for losses of another department, is not thereby barred from admission to Ohio.

4 Opins. Attys. Gen. 793 (1897).

Section 9386. (Statements as to participating and non-participating policies.) Every life insurance company doing business in this state and issuing policies on both the participating and non-participating plans shall file with the superintendent of insurance separate annual statements of profits and losses with reference to each of such kinds of insurance. (April 22, 1908, 99 v. 176, § 1.)

Where a stock company, before the enactment of this section, falsely represented that it was doing a mutual insurance business and inserted in the contracts of many policyholders a stipulation that they should share in the profits "as appropriated by the company," it was held that the fact that no separate account was kept of the participating and non-participating profits did not prevent the company from declaring a stock dividend out of a surplus fund which was clearly derived from non-participating business.

State v. Life Insurance Co., 13 C. C. n. s. 49; 22 C. D. 262 (1910); affirmed, 84 O. S. 459.

But, in such case, the holders of participating policies may maintain an action to conserve, for their benefit, the surplus fund derived from the Bell v. Insurance Co., 14 C. C. n. s. 385 (1911); reversed, no rep. 87 O. S. 475.

Section 9387. (Policyholders entitled to copies of applications.) Every person holding a policy of insurance issued by a company on the life of any person shall be entitled to be furnished by the company with a copy of any application or document, either written or printed, or both, held by it, upon which such policy was issued, or which may affect its validity. Upon demand made for such copy, by the holder of a policy, or by any person upon whose life it was so issued, the company shall make and forthwith furnish to such person, a certified copy of all such applications or friends' certificates, under the hand of the president, secretary, or other proper officer of the company, and under its seal. (R. S. Sec. 3621; May 5, 1877, 74 v. 181, §§ 1, 3.)

This section does not apply to fraternal benefit societies.

Gilligan v. Royal Arcanum, 5 C. C. n. s. 471; 16 C. D. 42 (1904); aff'd, no rep., 72 O. S. 672.

See § 9465.

This section requires delivery to the insured during his life. Delivery, after his death, to persons interested in the policy is not a compliance.

Dickmeier v. Insurance Co., 4 N. P. 13; 6 L. D. 161 (C. P. 1896).

Section 9388. (Effect of failure to deliver copies.) If such company neglects or fails for thirty days from the time of such demand to furnish to such person a copy of all papers mentioned in the next preceding section, and as provided therein, it thereafter shall be forever barred from setting up, by way of defense to a suit on the policy of insurance, any error or incorrectness, or fraud or misrepresentation of the person making them, or any mistake therein whatever; and such application or other paper or document shall thereafter be taken and held, so far as it may affect any claim under such policy, or fund secured thereby, to be in all respects true and correct. (R. S. Sec. 3622; May 5, 1877, 74 v. 181, § 2.)

This section does not apply to fraternal benefit societies.

Gilligan v. Royal Arcanum, 5 C. C. n. s. 471; 16 C. D. 42 (1904);
aff'd, no rep., 72 O. S. 672.

See § 9465.

Section 9389. (Copies of applications to accompany policies issued.) Every company doing business in this state shall return with, and as part of any policy issued by it, to any person taking such policy, a full and complete copy of each application or other document held by it which is intended in any manner to affect the force or validity of such policy. A company which neglects so to do, so long as it is in default for such copy, shall be estopped from denying the truth of any such application or other document. In case such company neglects for thirty days after demand made therefor, to furnish such copies, it shall be forever barred from setting up as a defense to any suit on the policy, any incorrectness or want of truth of such application or other document. (R. S. Sec. 3623; May 5, 1877, 74 v. 181, § 3.)

This section does not apply to fraternal benefit societies.

Gilligan v. Royal Arcanum, 5 C. C. n. s. 471; 16 C. D. 42 (1904);
aff'd, no rep., 72 O. S. 672.

See § 9465.

Where a complete copy of the application was not returned with the policy, the insurance company is estopped from denying the truth of the application, but to make such estoppel available the facts constituting the estoppel must be pleaded.

Insurance Co. v. Howle, 68 O. S. 614 (1903).

A copy of an application made at the time of a renewal must be returned to the insured. This section contemplates that there may be more than one application in connection with a policy, and the requirement is not limited to the time of the original issue of the policy.

Insurance Co. v. Gilligan, 7 C. C. n. s. 397; 18 C. D. 609 (1905).

Where discrepancies appear between the original application, and the copy which is returned with the policy, and the discrepancies are matters of substance, it is not error to exclude them as evidence, if the

court finds that they were of such a character as to afford a reasonable ground for a defense.

Insurance Co. v. Hoffman, 13 C. C. n. s. 127 (1910); aff'd, no rep., 83 O. S. 477.

An insurance company must show that it has returned copies of the application to the insured, before it can introduce the original application in evidence.

Andrews v. Insurance Co., 7 N. P. 322; 7 L. D. 307 (C. P. 1897).

Where answers in the application are filled up by the agent from his own knowledge, the fact that a copy of the application is attached to the policy will not bind the assured as to statements thus made.

Donnelly v. Insurance Co., 70 Iowa 693 (1886).

Section 9390. (Application to be in ordinary written or printed language.) No company doing business in this state shall take any application, medical certificate, or other document, for insurance upon the life of any person, in cipher, or by character of any sort other than ordinary written or printed language. Such application, medical certificate, or other document taken in violation of this section, shall be held to be void and of no effect as against any person claiming under a policy of insurance issued thereon. (R. S. 3624; May 5, 1877, 74 v. 181, § 4.)

This section does not apply to fraternal benefit societies.

Gilligan v. Royal Arcanum, 5 C. C. n. s. 471; 16 C. D. 42 (1904); aff'd, no rep., 72 O. S. 672.

See § 9465.

Section 9391. (When false answer material.) No answer to any interrogatory made by an applicant, in his or her application for a policy, shall bar the right to recover upon any policy issued thereon, or be used in evidence upon any trial to recover upon such policy, unless it be clearly proved that such answer is wilfully false, was fraudulently made, that it is material, and induced the company to issue the policy, and that but for such answer the policy would not have been issued; and, also that the agent or company had no knowledge of the falsity or fraud of such answer. (R. S. Sec. 3625; May 15, 1878, 75 v. 572, § 18.)

Section compared with § 9583 relating to fire insurance.

Insurance Co. v. Webster, 7 C. C. 511; 4 C. D. 714 (1893); aff'd, 53 O. S. 558.

The insurer may, by suit, compel the surrender and cancellation of a policy obtained by false statements as to health. Insurance Co. v. Wertheimer, 272 Fed. 730 (D. C. Ohio 1920).

Constitutionality. This section is valid and not in conflict with the fourteenth amendment of the federal constitution.

Insurance Co. v. Warren, 59 O. S. 53 (1898); aff'd, 181 U. S. 73; 15 O. F. D. 856.

Insurance Co. v. Block, 12 C. C. 224, 233; 6 C. D. 166 (1893).

Insurance Co. v. Brobst, 56 O. S. 728 (unreported).

To what companies applicable. This section does not apply to fraternal benefit societies.

Gilligan v. Royal Arcanum, 5 C. C. n. s. 471; 16 C. D. 42 (1904); aff'd, no rep., 72 O. S. 672.

Grand Lodge, etc., v. Bunkers, 3 C. C. n. s. 256; 13 C. D. 487 (1902).

Woodmen v. Gallagher, 19 C. C. n. s. 355, 365 (1913).

Goehring v. Maccabees, 13 Ohio App. 195; 31 O. C. A. 264 (1920).

But where, under the issues joined, the burden of proof was on the fraternal society, it can not, after trial and verdict, claim the exemptions provided by § 9465.

Brotherhood v. Daley, 11 C. C. n. s. 464; 21 C. D. 391 (1908).

A foreign insurance company which has complied with the laws of Ohio, and issued a policy to a resident of Ohio, is subject to this section.

Insurance Co. v. Block, 12 C. C. 224; 6 C. D. 166 (1893).

This section applies to a New York contract sued on in Ohio.

Insurance Co. v. Richardson, 11 Ohio App. 305; 30 O. C. A. 556 (1919); motion to certify record overruled, 17 O. L. R. 365.

This section applies to companies doing an "accident" as well as a "life" insurance business.

Insurance Co. v. Richardson, 11 Ohio App. 405; 30 O. C. A. 556 (1919); motion to certify record overruled, 17 O. L. R. 365.

Insurance Co. v. Sayler, 2 N. P. n. s. 305; 15 L. D. 137 (1904); affirming, 1 N. P. n. s. 217.

Common law rule as to false answer. Where a policy, issued before the enactment of this section, was issued and accepted upon the expressed condition that the answers and statements of the application were warranted true in all respects, and that if the policy was obtained by any untrue answer or statement, or, by any fraud, misrepresentation or concealment, it should be null and void; and certain of the answers were untrue, although made without actual fraud, and under an innocent misapprehension of the purport of the questions, it was held that no contract of insurance was thereby made, but it was void *ab initio*; and that the applicant was entitled to recover premiums paid thereon.

Insurance Co. v. Pyle, 44 O. S. 19 (1886).

False answer as a defense under this section. This section was enacted for the purpose of abrogating the common law rule as declared in Insurance Co. v. Pyle, 44 O. S. 19.

Insurance Co. v. Warren, 59 O. S. 45, 53 (1898).

Grand Lodge v. Daly, 11 C. C. n. s. 464, 466; 21 C. D. 391 (1908).

A statement in an application for the renewal of a lapsed policy is within the purview of § 9391. Assurance Co. v. Early, 23 C. C. n. s. 418 (1912).

Under this section to constitute the answer to an interrogatory a defense to a recovery on a policy, it must be clearly proven that such answer was wilfully false and was fraudulently made, that it is material, and induced the company to issue the policy upon it; that but for such answer the policy would not have been issued, and that the agent and company had no knowledge of the falsity or fraud of such answer.

Insurance Co. v. Howle, 62 O. S. 204 (1900).

Insurance Co. v. Warren, 59 O. S. 45 (1898).

Insurance Co. v. Long, 12 Ohio App. 252; 31 O. C. A. 49 (1919);

motion to certify record overruled, 17 O. L. R. 275.

These elements of fraud must be pleaded in the answer.

Insurance Co. v. Sayler, 2 N. P. n. s. 305; 15 L. D. 137 (Super. Ct. Cin. 1904).

Insurance Co. v. Warren, 59 O. S. 45.

A material fact is one which, if communicated to the insurer, would

either induce him to decline the insurance altogether, or not to accept it, unless at a higher premium.

Mieritz v. Insurance Co., 8 N. P. 422; 11 L. D. 759 (C. P.).

Under this section the mere omission of statements or a mere error in statements do not affect the validity of a policy.

Insurance Co. v. Sickles, 2 C. C. n. s. 222, 231; 13 C. D. 594 (1902).
Certificates or statements as to health should be construed favorably to the applicant for insurance. A statement, in a renewal certificate, that the applicant is, to the best of his knowledge, in the same sound condition of health as when last examined by the company's physician when in fact he was suffering from some disease or injury, does not constitute a defense unless it appears that he knew of the disease or injury, and knew that it affected his sound health.

Life Ass'n v. Draddy, 8 N. P. 140; 10 L. D. 591 (Super. Ct. Cin. 1900).

A statement that no life insurance company or association had refused the applicant as a risk is not disproved by evidence that a mutual benefit association had refused to accept him.

White v. Insurance Co., 30 W. L. B. 237 (C. P. 1890).

The defense of fraud was held to be sustained, where the insured, who died within a few months after the policy was issued from the effects of enlargement of his spleen to twenty-six times its normal size, failed to disclose his condition to the examining physician, although three physicians had told him of the condition of his health, one of whom had refused to pass him for life insurance, one had told him he had heart disease, and one had discovered the enlargement. This is true although the examining physician failed to discover his condition and numerous acquaintances testified to his apparent good health.

Insurance Co. v. Whittaker, 7 C. C. n. s. 1; 18 C. D. 688 (1905); s. c., 9 C. C. n. s. 126; 19 C. D. 362.

See also *Insurance Co. v. Wertheimer*, 272 Fed. 730 (D. C. Ohio 1920).

Where an answer, alleging wilfully false, etc., statements by the insured, is controverted by a reply, the burden of proof of falsity rests on the insurer, and is a question for the jury.

Insurance Co. v. Barnes, 15 C. C. n. s. 407 (1910).

Insurance Co. v. Long, 12 Ohio App. 252; 31 O. C. A. 49 (1919); motion to certify record overruled.

For misstatements as to relationship of insured to beneficiary and as to other insurance, see

Mieritz v. Insurance Co., 8 N. P. 422; 11 L. D. 759 (C. P.).

As to use of intoxicants, see

Insurance Co. v. Risley, 22 C. C. 160; 12 C. D. 186 (1901).

Insurance Co. v. Reif, 36 O. S. 598 (1881).

Insurance Co. v. Holterhoff, 2 C. S. C. R. 379 (1872).

Holterhoff v. Insurance Co., 3 Am. L. R. 272 (1874).

Other insurance.

See *Mieritz v. Insurance Co.*, 8 N. P. 422; 11 L. D. 759 (C. P.).

Penniston v. Insurance Co., 4 W. L. B. 935; 8 Am. L. Rec. 361 (Dist. Ct. 1879).

Refusal of risk by other companies.

White v. Insurance Co., 30 W. L. B. 237 (C. P. 1890).

Gessel v. Insurance Co., 1 W. L. B. 189 (C. P. 1876).

Evasion of statute by provisions in policy. This section becomes a part of every policy issued the same, in legal effect, as if copied into the policy.

Insurance Co. v. Warren, 59 O. S. 45, 53 (1898).

Insurance Co. v. Sickles, 2 C. C. n. s. 222; 13 C. D. 594 (1902).

Insurance Co. v. Risley, 22 C. C. 160; 12 C. D. 186 (1901).

This section can not be nullified or evaded by provisions in the policy relating to answers to interrogatories, such as, a provision that the answers are to be regarded as warranties, and that the company shall not be bound by knowledge of statements made to agents unless written upon the application.

Insurance Co. v. Sickles, 2 C. C. n. s. 222; 13 C. D. 594 (1902).

Nor can a foreign insurance company, which has complied with the laws of Ohio and transacted business in this state, evade the provisions of this section by a stipulation that the policy shall be governed by the laws of its home state.

Insurance Co. v. Block, 12 C. C. 224; 6 C. D. 166 (1893).

But this section applies only to false answers to interrogatories in the application and does not apply to conditions in the policy itself.

Insurance Co. v. Howle, 62 O. S. 204 (1900).

Insurance Co. v. Dorney, 68 O. S. 151 (1903).

A schedule of warranties by the insured attached to a policy was held to be within the contemplation of G. C. § 9391, although no independent application containing interrogations and answers was made.

Pacific, etc., Ins. Co. v. Barnes, 15 C. C. n. s. 407 (1910).

Conditions and stipulations in policy not relating to answers in the application. This section applies to false answers to interrogatories in the application, but does not apply to conditions in the policy itself.

Insurance Co. v. Howle, 62 O. S. 204 (1900).

Insurance Co. v. Dorney, 68 O. S. 151 (1903).

Where a life insurance policy contains a condition to the effect that no obligation is assumed by the company, unless at the date of the policy the insured is alive and in sound health there can be no recovery on such policy, if, in fact, the insured was not in sound health at the date of the policy.

Insurance Co. v. Howle, 62 O. S. 204 (1900).

Melvin v. Insurance Co., 9 O. L. R. 361; 56 Bull. 377 (C. P. 1911).

A stipulation, in an accident insurance policy, that the company will not be liable on account of the death of the insured, if it results from infirmity or disease, is available as a defense notwithstanding §§ 9391 and 9392 whose effect is limited to defenses founded on fraud or misstatement in the application.

Insurance Co. v. Dorney, 68 O. S. 151 (1903).

A schedule of warranties by the insured attached to a policy was held to be within the contemplation of G. C. § 9391, although no independent application containing interrogations and answers, was made.

Pacific, etc., Ins. Co. v. Barnes, 15 C. C. n. s. 407 (1910).

Knowledge of agent or company. In filling up an application for a policy, the soliciting agent is the agent of the company and not of the insured; and where the agent makes a mistake in wrongly stating facts, correctly given him by the insured, the company is bound by and responsible for the mistake.

Insurance Co. v. Williams, 39 O. S. 584 (1883).

Insurance Co. v. Pyle, 44 O. S. 19, 28 (1886).

Herbert v. Insurance Co., 3 C. C. n. s. 7; 13 C. D. 235 (1901); aff'd, no rep., 68 O. S. 687.

A stipulation in a policy that the company is not to be bound by any knowledge of, or statements to or by, any solicitor, unless written in the policy, is invalid, under this section.

Insurance Co. v. Sickles, 2 C. C. n. s. 222; 13 C. D. 594 (1902).

It has been held that the company is bound by the knowledge of the

agent, as to the falsity of the answers, although the agent and the insured acted in collusion.

Insurance Co. v. Kilbane, 15 C. C. 62; 8 C. D. 790 (1897).

See Insurance Co. v. Eshelman, 30 O. S. 648 (1876).

Where a subagent, appointed by a duly authorized general agent, filled in an application in the presence of the applicant, after a conversation with the applicant disclosing all the facts to be stated in the application, and the statements written in the application were the suggestion of the subagent, and there is reason to believe that the facts were all made known to the general agent, the knowledge of the subagent as to falsity of the statement is the knowledge of the company.

Insurance Co. v. Sickles, 2 C. C. n. s. 222; 13 C. D. 594 (1902).

See also Insurance Co. v. Eshelman, 30 O. S. 648 (1876).

Where the insured was practically blind in one eye and the sight of the other was impaired, a defect apparent to all who met him, and the agents of the company who originally insured him collected premiums from him for several years, fraudulent intent on the part of the insured is not shown by answers to the effect that he was in sound condition mentally and physically and not suffering from any bodily infirmity or disorder.

Insurance Co. v. Sayler, 2 N. P. n. s. 305; 15 L. D. 137 (Super. Ct. Cin. 1904).

An action on a policy can not be defeated by the company showing that its agent, taking the genuine application, imposed upon the company a spurious application, which the company believed to be genuine.

Insurance Co. v. Eshelman, 30 O. S. 648 (1876).

In such a case the company can not rescind its contract and cancel the policy by tendering the executors of the deceased policyholder the premium received, with interest, as soon as the fraud was discovered.

Insurance Co. v. Eshelman, 30 O. S. 648 (1876).

Burden of proof; questions for jury; evidence, etc. The burden of proof is upon the company to establish the elements of fraud specified in this section.

Insurance Co. v. Sickles, 2 C. C. n. s. 222; 13 C. D. 594 (1902).

Whether answers were wilfully false, fraudulently made, etc., is a question for the jury.

Insurance Co. v. Risley, 22 C. C. 160; 12 C. D. 186 (1901).

Statements of the physician in the proof of death are not competent evidence of the fact that the disease, from which the insured died, existed before the policy was issued or renewed. Assurance Co. v. Early, 23 C. C. n. s. 418 (1912).

The original application is not admissible in evidence on behalf of the company until it is shown that a copy had been furnished to the insured.

Andrews v. Insurance Co., 7 N. P. 322; 7 L. D. 307 (1897).

It is not competent to inquire of the president whether, if the true condition of the health of the insured had been known to the company, the policy would have been issued. The opinion of the witness is not competent testimony.

Insurance Co. v. Eshelman, 30 O. S. 647 (1876).

In an action on a policy, issued upon a spurious application made by the agent and substituted for a genuine one made by the insured, the premium rates of the company, when not put in issue, are not competent testimony to show complicity of the assured in the fraud, or want of knowledge by the company, when the spurious application reached the home office, that another and genuine application had been made.

Insurance Co. v. Eshelman, 30 O. S. 647 (1876).

Recovery of premiums paid. See note to § 9420.

Section 9392. (Estopped from certain defenses.) After having received three annual premiums on a policy issued on the life of any person in this state, all companies are estopped from defending upon any other ground than fraud, against any claim arising upon such policy by reason of errors, omissions, or misstatements of the assured in an application made by him on which the policy was issued, except as to age. (R. S. Sec. 3626; 69 v. 150, § 32.)

See also note to § 9391.

Constitutionality. This section is valid and not in conflict with the fourteenth amendment of the federal constitution.

Insurance Co. v. Block, 12 C. C. 224, 234; 6 C. D. 166 (1893).

To what companies applicable. A foreign insurance company, which has complied with the laws of Ohio and issued a policy to a resident of Ohio, is subject to this section.

Insurance Co. v. Block, 12 C. C. 224; 6 C. D. 166 (1893).

See Lowe v. Insurance Co., 41 O. S. 273 (former statute).

This section applies to companies doing an "accident" as well as a "life" insurance business.

Insurance Co. v. Saylor, 2 N. P. n. s. 305; 15 L. D. 137 (Super. Ct. Cin. 1904; affirming 1 N. P. n. s. 217).

Evasion of statute by provision in policy. This section can not be evaded by a provision in a policy, issued by a foreign insurance company which has transacted business in Ohio after complying with its law, to the effect that the policy shall be governed by the laws of its home state.

Insurance Co. v. Block, 12 C. C. 224; 6 C. D. 166 (1893).

Application and effect of section. A stipulation, in an accident policy, that the company will not be liable on account of the death of the insured, if it results from infirmity or disease, is available as a defense notwithstanding §§ 9391 and 9392, whose effect is limited to defenses founded on fraud or misstatement in the application.

Insurance Co. v. Dorney, 68 O. S. 151 (1903).

A provision in a policy that "this policy shall be incontestable after two years, except for fraud or misstatement or age" is similar to this section and relates entirely to what occurred at the time the policy was issued or the application made, and has no reference to default in payment of premiums.

Insurance Co. v. Walton, 4 C. C. n. s. 133; 15 C. D. 587 (1904); aff'd, no rep., 72 O. S. 650.

This section does not preclude the defense that the insured committed suicide.

Stark v. Insurance Co., 24 W. L. B. 416 (1890).

Insurance Co. v. McGuire, 19 C. C. 502; 10 C. D. 562 (1900).

Renewed policies. Where insurance is renewed year after year without break, the making of the policy in terms annual does not relieve it from the operation of this section. Such renewal policies are, in effect and for the purpose of the statute, merely a renewal of the original agreement.

Insurance Co. v. Saylor, 2 N. P. n. s. 305; 15 L. D. 137 (Super. Ct. Cin. 1904; affirming 1 N. P. n. s. 217).

See also Insurance Co. v. Gilligan, 7 C. C. n. s. 397; 18 C. D. 609 (1905); aff'd, no rep., 72 O. S. 672.

Life Ass'n. v. Draddy, 8 N. P. 140; 10 L. D. 591 (1900).

Misstatement as to age. Provison in policy as to, prescribed.

See § 9420 (5).

Effect of misstatement of age.

See *Insurance Co. v. Goodall*, 3 Am. L. R. 338.

Low v. Insurance Co., 41 O. S. 273; affirming 10 Am. L. R. 313;
6 W. L. B. 666.

Section 9392-1. (Minor's contract for life insurance.)

In respect to insurance heretofore or hereafter issued upon the life of any person between the ages of fifteen and twenty-one years, for the benefit of such minor, or for the benefit of the father, mother, husband, wife, child, brother or sister of such minor, the insured shall not, by reason only of such minority, be incompetent to contract for such insurance, or for the surrender of such insurance, or to give a valid discharge for any benefit accruing, or for money payable under the contract. (May 10, 1910, 101 v. 382.)

Decisions before the enactment of this section. Upon repudiating his contract for life insurance and surrendering the policy to the company, an infant may recover the whole amount of premiums paid by him thereon.

Insurance Co. v. Fuller, 9 C. C. n. s. 441; 19 C. D. 415 (1907); aff'd, no rep., 79 O. S. 451.

A policy on the life of a minor, payable to him if living at maturity, and to his executors, administrators or assigns in case of death before maturity is not absolutely void, nor are notes given by him for premiums void, although he has power to elect to avoid both on arriving at majority. Nor is his written assignment of the policy during minority necessarily void.

Insurance Co. v. Hilliard, 63 O. S. 478 (1900).

Section 9393. (Who may be beneficiary.) Any person may affect an insurance on his life, for any definite period of time, or for the term of his natural life, to inure to the sole benefit of his wife and children, or of either or other relative or relatives dependent upon such person or any creditor or creditors as he may cause to be appointed and provided in the policy. (May 6, 1913, 103 v. 558; in effect August 7, 1913; R. S. Sec. 3628; April 19, 1898, 93 v. 130; February 8, 1847, 45 v. 53, § 1; S. & C. 737.)

See also §§ 9394, 9395 and notes.

This section does not prohibit a person from insuring his own life for the benefit of persons other than his wife and children.

Keckley v. Coshoccon Glass Co., 86 O. S. 213 (1912); affirming 13 C. C. n. s. 229, 240; 21 C. D. 665, 676.

Distinction between §§ 9393-9396 and 9397-9400. Sections 9393-9396 apply where the insurance is effected by the person whose life is insured, for the benefit of his widow and children, or both. The policy is a chose in action belonging to the husband, subject to the limitations of these sections.

Sections 9397-9400 apply where the insurance is effected by the wife on the life of her husband, and although the premiums may have been

paid by him, the policy is yet the wife's separate property, upon which the husband's creditors have no claim, unless the payment of premiums by him has had the effect of withdrawing funds to which the creditors were entitled. As to creditors whose claims existed when such payments were made, fraud might be presumed; as to subsequent creditors it would be necessary to show that there was fraudulent intent.

Weber, Loper & Co. v. Paxton, 48 O. S. 266, 271 (1891).

To what companies applicable. §§ 9393-9396 apply to policies issued by foreign life insurance companies as well as to policies issued by domestic companies.

Cross v. Armstrong, 44 O. S. 613 (1887).

But not to policies issued by foreign companies which do business on the assessment plan.

In re Andress, 5 N. P. 253; 6 L. D. 174 (C. P. 1897).

See § 9441.

Interest of wife in policy. When a husband, acting as agent for his wife, takes out in her name, and for her sole use, a policy on his life, the wife as to such policy must be regarded as a feme sole. The policy becomes her separate property, and is placed beyond the reach of her husband and his creditors.

Jacob v. Insurance Co., 1 C. S. C. R. 519 (1871).

Insurance Co. v. Applegate, 7 O. S. 293 (1857).

Acts of insured after issue of policy; effect. When the husband, in his application for the policy, has made certain representations as to his health, which representations are made a part of the policy, his subsequent declarations, made pending his unauthorized negotiations for the surrender of the policy, and tending to show the false or fraudulent character of the representations in the application, are not competent evidence in an action brought by the wife upon the policy.

Insurance Co. v. Applegate, 7 O. S. 293 (1857).

In an action by the wife, on a policy issued upon the joint application of her husband and herself, and for her sole benefit, the declarations of her husband made prior to the application, and showing that certain statements therein are untrue, are not admissible.

Insurance Co. v. Cheever, 36 O. S. 201 (1880).

Where by the terms of the policy the premium is reduced, by reason of the participation by the beneficiary in the earnings of the company, and it has been the uniform practice of the company to notify the beneficiary of the amount of premium due, and by reason of neglect to give such notice a premium is not paid at the time specified in the policy, such failure to pay will not bar a recovery upon the policy, although by its terms the same is to be forfeited in case of failure to pay premiums upon the specified dates.

Insurance Co. v. Smith, 44 O. S. 156 (1886).

See Insurance Co. v. Pottker, 33 O. S. 459 (1878).

Insurance Co. v. Troy, 20 C. C. 644 (1900).

Where the company has uniformly sent notices of the amount of premium due to the insured (the husband of the beneficiary) and he has regularly paid the same, he will be regarded, in making such payments, as agent for the wife, but where the company has been notified by the husband, shortly after notice sent, that he and the wife have separated, the company is not justified in treating him as her agent, for the purpose either of receiving notice for her or making surrender of the policy.

Insurance Co. v. Smith, 44 O. S. 156 (1886).

In such case the attempt by the husband, without knowledge of the

wife, to surrender the policy to the company is inoperative, and does not impair the rights of the wife.

Insurance Co. v. Smith, 44 O. S. 156 (1886).

See Jander v. Insurance Co., 16 C. C. 536; 9 C. D. 462 (1898).

Kelsey v. Insurance Co., 10 O. L. R. 119 (U. S. C. C. A. 1912).

Insurance Co. v. Penn., 4 N. P. n. s. 97; 16 L. D. 375 (1905).

Where a husband procures a policy payable to his wife, and after paying several premiums gives a premium note containing a more onerous forfeiture clause than the policy, such clause will not avail the company as against the wife.

Insurance Co. v. Buxer, 62 O. S. 385 (1900).

Fuss v. Kroner, 24 W. L. B. 400 (1890).

Kelsey v. Insurance Co., 10 O. L. R. 119 (C. C. A. 1912).

Death or divorce of beneficiary. Where all the beneficiaries named in the policy die during the life of the insured, the policy reverts to the insured and at his death becomes a part of his estate.

Ryan v. Rothweiler, 50 O. S. 595 (1893).

Frank v. Bauman, 35 W. L. B. 59 (1896).

A married woman, named as beneficiary in a policy of insurance on the life of her husband, is entitled to the proceeds of the policy notwithstanding a divorce obtained by her.

Overhiser v. Overhiser, 63 O. S. 77 (1900).

An insured designated "Elizabeth L. Hartlieb, beneficiary, wife of the insured". Subsequently they were divorced, she resuming her maiden name, and the insured remarried. Upon his death without changing the beneficiary, the first wife was held entitled to the insurance, the words "wife of the insured" being words of description. Huff v. Hartlieb, 14 Ohio App. 191 (1920); motion to certify record overruled, 19 O. L. R. 15.

Children. Grandchildren take no interest under a policy payable to their grandmother, or, in case of her death before that of the insured, then to her "children", where the death of the parent through whom they claim preceded that of their grandmother. Lucking v. Insurance Co., 8 Ohio App. 414; 29 O. C. A. 161 (1918); affirming, 21 N. P. n. s. 200; motion to certify record overruled, 16 O. L. R. 108.

Section 9394. (Exemption from claims of creditors.)

All policies of life insurance upon the life of any person, which may hereafter mature, and which have been or shall be taken out for the benefit of, or bona fide assigned to the wife or children, or any relative dependent upon such person, or any creditor, shall be held subject to a change of beneficiary if desired, for the benefit of such wife or children, or other relative or creditor, free and clear from all claims of the creditors of such insured person; and the proceeds or avails of all such life insurance shall be exempt from all liabilities from any debt, or debts, of such insured person. (May 6, 1913, 103 v. 558, in effect August 7, 1913; R. S. Sec. 3623; April 19, 1898, 93 v. 130; February 8, 1847, 45 v. 53, § 1; S. & C. 737.)

See note to § 9393 and article by M. P. Mooney, 19 O. L. R. 590, 603.

The word "representatives" in an earlier form of this section was held to mean personal representatives.

Insurance Co. v. Bank, 173 Fed. 390 (C. C. 1909).

A policy payable to the "legal heirs" of the insured, who has no wife or children, is payable to his next of kin.

In re Andress, 5 N. P. 253; 6 L. D. 174 (C. P. 1897).

This section should be liberally construed.

Richardson v. Michener, 30 W. L. B. 120 (C. P. 1893).

The exemption of § 9394 applies as against the trustee in bankruptcy of the insured, whose remedy is limited to recovery of premiums paid in fraud of creditors under § 9395. In re Fetterman, 243 Fed. 975 (D. C. Ohio 1917).

Where a policy provided for an annuity to the insured, and, at his death, for a certain sum to be paid to his wife, the trustee in bankruptcy of the insured is entitled to the annuity only. The present value of the policy is exempt from the claims of creditors.

In re Schaeffer, 9 O. L. R. 357; 16 O. F. D. 637 (D. C. 1910).

For statute exempting the proceeds of policies from claims of creditors, or beneficiaries, under fraternal benefit policies, held unconstitutional, see

Williams v. Donough, 65 O. S. 499 (1901).

Interpleader. In an action, on a policy, payable to the widow, brought by her in the state where the company is located, the administrator of the deceased, a resident of this state, can not be compelled to interplead, and a judgment of such foreign court can not bar his rights against the widow as to such insurance.

Cross v. Armstrong, 44 O. S. 614 (1887).

An insurance company which in good faith files a bill of interpleader in federal court against adverse claimants to the proceeds of a policy and pays the money into court is entitled to its costs and counsel fees from the fund.

Insurance Co. v. Bank, 173 Fed. 390 (1909).

Section 9395. (Premiums paid in fraud of creditor.)

Subject to the statute of limitations, the amount of any premiums for insurance for the benefit of wife and children, or of either, or other relatives dependent upon such person or any creditor, paid in fraud of creditors, with interest thereon, shall inure to their benefit from the proceeds of the policy. (May 6, 1913, 103 v. 558, in effect August 7, 1913; R. S. Sec. 3628; April 19, 1898, 93 v. 130; February 8, 1847, 45 v. 53, § 1; S. & C. 737.)

See also notes to §§ 9393, 9394 and 9398.

The administrator of the estate of an insolvent decedent, who paid premiums in fraud of creditors, may maintain an action under this section to recover such premiums, to be distributed as a part of the estate.

Insurance Co. v. Bank, 173 Fed. 390 (C. C. 1909).

The assignment, by an insolvent husband to his wife, of a policy of insurance then in force on his life, is not a transfer in fraud of creditors or to hinder or delay creditors within the contemplation of § 11102 et seq. In such case the only remedy of creditors is to recover premiums, wrongfully paid, under § 9395.

Lytle v. Baldinger, 84 O. S. 1 (1911); reversing 5 N. P. n. s. 28; 17 L. D. 305.

See *Child v. Graham*, 7 W. L. B. 43 (1882).

A policy purporting on its face to have been effected by a married woman on the life of her husband wherein the company agrees to pay such insurance to her, and if not living, then to her children, is *prima facie* the sole property of the wife, and as such is not affected by §§ 9393-9396.

Weber, Loper & Co. v. Paxton, 48 O. S. 271 (1891).

The fact that the premiums have been paid by the husband is not sufficient, of itself, to overcome the legal effect of the terms of the contract.

Weber, Loper & Co. v. Paxton, 48 O. S. 266, 271 (1891).

Where creditors of the husband seek to reach the proceeds of such policy, they must establish not only that the husband was insolvent at the time of his decease, but that such payments, or some of them, were made in fraud of existing creditors.

Weber, Loper & Co. v. Paxton, 48 O. S. 266, 271 (1891).

Former law. Prior to the amendment of this section of April 19, 1898 (93 v. 130), the amount of premiums payable for exempt insurance was limited to \$150 per annum. In case of excess, the beneficiaries were entitled to such portion of the insurance as \$150 would bear to the entire annual premium, and the residue was payable to the representatives of the deceased.

See *Cross v. Armstrong*, 44 O. S. 613 (1887).

Under the former statute it was held that the premium on each policy must be taken by itself, and not that of several policies added together.

Hinch v. d'Utassy, 1 L. D. 372.

For other decisions under the former statute

See 38 W. L. B. 239.

In re Andress, 5 N. P. 253; 6 L. D. 174 (1897).

Child v. Graham, 7 W. L. B. 43 (1882).

Wagner v. Karman, 7 Am. L. Rec. 670.

Wagner v. Wiltsie, 3 C. C. n. s. 412; 13 C. D. 302 (1902).

Section 9396. (When company liable to creditor.) The company issuing the policy shall be discharged of all liability thereon by payment of its proceeds in accordance with its terms, unless, before such payments, notice is given to it by a creditor, specifying the amount of his claim and the premiums which he alleges have been so fraudulently paid. (R. S. Sec. 3628; April 19, 1898, 93 v. 130; February 8, 1847, 45 v. 53, § 1; S. & C. 737.)

Section 9397. (Wife may insure life of husband.) A married woman may by herself, and in her own name, or in the name of a third person, with his assent as her trustee, cause the life of her husband to be insured for her sole use, for any definite period, or for the term of his natural life, and if she survives such period or term, the amount of insurance becoming due and payable by the terms of the insurance shall be payable to her, free from the claims of the representatives of the husband, or any of his creditors. (R. S. Sec. 3629; April 27, 1872, 69 v. 150, •

§ 30; February 8, 1847, 45 v. 53, §§ 2, 3; June 12, 1879, 76 v. 160, § 1; S. & C. 737.)

Distinction between §§ 9397-9400 and 9393-9396.

See note to § 9393.

This section does not apply to policies issued before its enactment.

Plaut v. Insurance Co., 4 C. C. n. s. 94; 16 C. D. 499 (1899); aff'd, no rep., 65 O. S. 586.

See Ryan v. Rothweiler, 50 O. S. 595, 602 (1893).

Reakirt v. Besuden, 3 N. P. n. s. 646, 648; 16 L. D. 697 (1903); aff'd, no rep., 73 O. S. 383.

Under this section a policy taken out by a wife on the life of her husband is her separate property and is beyond the reach of her husband and his creditors.

See Insurance Co. v. Applegate, 7 O. S. 292, 296 (1857).

A policy purporting on its face to have been effected by a wife on the life of her husband, for the benefit of herself, or her children, is prima facie her sole property.

Weber, Loper & Co. v. Paxton, 48 O. S. 266, 271 (1891).

This section applies only to policies in which the wife is the sole beneficiary named, and which are issued for her sole use.

Sticken v. Schmidt, 64 O. S. 354, 359 (1901).

Reakirt v. Besuden, 3 N. P. n. s. 646, 652; 16 L. D. 697 (1903); aff'd, no rep., 73 O. S. 383.

A policy, issued by a foreign company doing business on the assessment plan, under § 9427 et seq., is not subject to this section.

In re Andress, 5 N. P. 253; 6 L. D. 174 (C. P. 1897).

Insurance without consent of husband. Where a policy was issued to a wife on the life of her husband, without his knowledge or consent, but without fraud or wrongdoing on her part, and the wife, after paying premiums for several years, discovered that, under the contract, the consent of the husband was necessary to its validity, she is entitled to recover back the premiums paid.

Insurance Co. v. Felix, 73 O. S. 46 (1905).

But where a wife insured the life of her husband, without his knowledge or consent, and, in her dealings with the company, concealed this fact after she knew that it was necessary under the contract, she can not recover back the premiums paid.

Marling v. Insurance Co., 6 O. L. R. 99 (C. P. 1908).

Section 9398. (Policy assigned to married woman.) A policy of insurance on the life of any person, duly assigned, transferred, or made payable to a married woman, or to any person in trust for her or for her benefit, whether such transfer is made by her husband or other person, shall inure to her benefit, and that of her children, independently of her husband or his creditors, or of the person effecting or transferring the policy or his creditors. (R. S. Sec. 3629; April 27, 1872, 69 v. 150, § 30; February 8, 1847, 45 v. 53, §§ 2, 3; June 12, 1879, 76 v. 160, § 1; S. & C. 737.)

This section does not apply to policies issued before its enactment.

Plaut v. Insurance Co., 4 C. C. n. s. 94; 16 C. D. 499 (1899); aff'd, no rep., 65 O. S. 586.

See Ryan v. Rothweiler, 50 O. S. 595, 602 (1893).

Reakirt v. Besuden, 3 N. P. n. s. 646, 648; 16 L. D. 697 (1903); aff'd, no rep., 73 O. S. 383.

The assignment, by an insolvent husband to his wife, of a policy of insurance then in force on his life, is not a transfer in fraud of creditors or to hinder or delay creditors within the meaning of § 11102 et seq. In such case the only remedy of creditors is under § 9395.

Lytle v. Baldinger, 84 O. S. 1 (1911).

See *Child v. Graham*, 7 W. L. B. 43 (1882).

A trustee in bankruptcy acquires no rights in a policy, payable to the bankrupt's wife, by reason of the fact that the insured is entitled to change the beneficiary, or to receive the cash surrender value. *In re Young*, 208 Fed. 373 (D. C. 1912); *In re Fetterman*, 243 Fed. 975 (D. C. 1917).

But an endowment policy, payable to the insured, or to his wife in the event of his death, he having a right to change the beneficiary, passes to the trustee, the wife being merely a contingent beneficiary. *In re Young*, 208 Fed. 373.

A bequest, by a wife to her husband, of all her real and personal property, includes a policy of insurance on his life payable to her, her executors, administrators or assigns. *Schlachter v. Teeppen*, 24 C. C. n. s. 30 (1915); affirming, 18 N. P. n. s. 33.

The pledgee of a policy under a pledge made by a wife, may reimburse himself out of the proceeds of the policy for premiums paid to keep the policy in force, and interest thereon.

Reakirt v. Besuden, 3 N. P. n. s. 646; 16 L. D. 697 (1903); aff'd, no rep., 73 O. S. 383.

Section 9398-1. (Proceeds of policy not subject to transfer, incumbrance or legal process in certain cases.) That any life insurance company incorporated under the laws of this state shall have power to hold the proceeds of any life insurance policy issued by it, payable or assigned to the parents, wife, husband, children or legally adopted children of the policyholder, upon such terms and subject to such limitations as to revocation by the policyholder and control by the beneficiaries thereunder, as shall have been agreed to in writing by such company and the policyholder; and if the said agreement shall so provide, the benefits accruing thereunder shall not be transferable nor subject to commutation or incumbrance, or to legal process. (107 v. 606.)

Section 9398-2. (Rights of creditors.) The provisions of this section shall not impair or affect the rights of creditors under section 9395 of the General Code. (107 v. 606.)

Section 9399. (Beneficiary in case of death of wife.) The amount of the insurance so provided for in the preceding sections, may be made payable, in case of death of the wife before the period at which it becomes due, to his, her, or their children, for their use, as provided in the policy of insurance, or to their guardian, if under age.

If there are no children, upon the death of the wife, such policy shall revert to and become the property of the party whose life is insured, unless it has been transferred as hereinafter provided. When by its terms, or a transfer thereof, a policy is payable to a married woman solely for her own use, she may sell, assign, or surrender it, but the party whose life is insured, shall concur in and become a party to the transfer. (R. S. Sec. 3629; April 27, 1872, 69 v. 150, § 30; February 8, 1847, 45 v. 53, §§ 2, 3; June 12, 1879, 76 v. 160, § 1; S. & C. 737.)

This section does not apply to policies issued before its enactment.

Plaut v. Insurance Co., 4 C. C. n. s. 94; 16 C. D. 499 (1899); aff'd, no rep., 65 O. S. 586.

See Ryan v. Rothweiler, 50 O. S. 595, 602 (1893).

Reakirt v. Besuden, 3 N. P. n. s. 646, 648; 16 L. D. 697 (1903).

Policy payable to wife, or to the children, if she dies before the insured; necessity of consent of guardian of children to exchange of policy.

See Jander v. Insurance Co., 16 C. C. 536; 9 C. D. 462 (1898).

Where a policy was issued to a married woman on the life of her husband, for her benefit, and payable to "her executors, administrators or assigns," or, in case she died before her husband, to "their children," and the wife died, without children, but the husband thereafter paid the premiums for several years, it was held that the company, having treated the husband as beneficiary, was estopped to deny his right to sue for a paid up policy under the terms of the policy.

Insurance Co. v. Hamilton, 41 O. S. 274 (1884).

Where a testator bequeathed to the children of his deceased wife all his interest in a policy, which he had assigned to her during her life, the bequest being made "without abatement on account of premiums heretofore or hereafter paid," such premiums can not be set off against a note executed by the decedent and held by the estate of his wife.

Claypool v. Claypool, 4 C. C. n. s. 577; 15 C. D. 327 (1903); aff'd, no rep., 75 O. S. 578.

Grandchildren. Grandchildren take no interest under a policy payable to their grandmother, or, in case of her death before that of the insured, then to her "children", where the death of their parent preceded that of their grandmother. Lucking v. Insurance Co., 8 Ohio App. 414, 29 O. C. A. 161 (1918); affirming, 21 N. P. n. s. 200; motion to certify record overruled, 16 O. L. R. 108.

Assignment of policy by wife. A policy on the life of a husband, assigned by him to his wife, "and her assigns," and contemplating, by its terms, a reversion back to the insured in the event of the wife's prior death, is assignable by the wife without the consent of her children. The words "and her assigns" indicate an intention to create an estate "solely for her use" within the meaning of this section.

Reakirt v. Besuden, 3 N. P. n. s. 646; 16 L. D. 697 (1903); aff'd, no rep., 73 O. S. 383.

The provision of this section as to assignment applies only to policies in which the wife is the sole beneficiary named, and which are issued for her sole use.

Stricken v. Schmidt, 64 O. S. 354, 359 (1901).

Reakirt v. Besuden, 3 N. P. n. s. 646, 652; 16 L. D. (1903).

Section 9400. (Policy to defraud creditors.) If a policy be procured by a person with intent to defraud his creditors, an amount equal to the premium paid thereon, with interest, shall inure to the benefit of his creditors, subject, however, to the statute of limitations. (R. S. Sec. 3629; June 12, 1879, 76 v. 160, § 1; April 27, 1872, 69 v. 150, § 30; February 8, 1847, 45 v. 53, §§ 2, 3; S. & C. 737.)

Section 9401. (Discrimination against persons of African descent prohibited.) No life insurance company organized or doing business, or that may be organized and do business within this state, shall make any distinction or discrimination between white persons and colored, wholly or partially of African descent, as to premiums or rates charged for policies upon the lives of such persons; nor demand or require greater premiums from such colored persons than are at that time required by the company from white persons of the same age, sex, general condition of health and hope of longevity; nor make or require any rebate, diminution or discount upon the sum to be paid on such policy in case of the death of such colored person insured, nor insert in the policy any condition, nor make any stipulation whereby such person insured binds himself, his heirs, executors, administrators or assigns to accept any sum less than the full value or amount of such policy in case of a claim accruing thereon by reason of the death of the person insured, other than such as are imposed upon white persons in similar cases. Any such stipulation or condition so made or inserted shall be void. (R. S. § 3631-1; March 28, 1889, 86 v. 163.)

Limitation, see § 12955.

Section 9402. (Procedure when application of such persons refused.) Any such company, which refuses the application of a colored person for insurance upon his life, shall furnish him with the certificate of some regular examining physician of the company who has made examination of such person, stating that his application has been refused, not because he is a person of color, but solely upon such grounds of his general health and hope of longevity as would be applicable to white persons of the same age and sex. (R. S. Sec. 3631-1; March 28, 1889, 86 v. 164, § 2.)

Penalty for violation, see § 12954.

Section 9403. (Discriminations prohibited.) No life insurance company doing business in this state shall make or

permit any distinction or discrimination in favor of individuals between the insured of the same class and equal expectation of life in the amount of payment of premiums, or rates charged for policies of life or endowment insurance, or in the dividends or other benefits payable thereon, or in any other of the terms and conditions of the contracts it makes; nor shall any such company, or any agent thereof, make any contract of insurance or agreement as to such contract, other than is plainly expressed in the policy issued thereon. (R. S. § 3631-4; April 22, 1908, 99 v. 183, § 1; April 27, 1893, 90 v. 345; April 10, 1889, 86 v. 220.)

Penalty for violation, see §§ 9405, 13136.

This section constitutes no defense to an action to recover premiums paid on a policy which the plaintiff was induced to take, by fraudulent representations as to future profits, based on past experience and present condition of the company. *Life Soc. v. Statler*, 17 C. C. n. s. 59; 24 C. D. 391 (1911); *aff'd*, no rep. 88 O. S. 549.

Before the amendment of this section (99 v. 183) it was held that an agreement that a note given for a premium should be discounted with a brokerage firm of which the insured was a member, and brokerage allowed such firm, otherwise the insurance should be void and the policy cancelled, was not in violation of this section.

Dailey v. Chappell, 12 C. C. n. s. 561; 21 C. D. 509 (1909).

Insurance companies may classify insureds if the classification does not operate as a distinction or discrimination. A non-mutual company may write supplemental contracts providing for guaranteed income, when supported by sufficient premiums.

Rep. Att. Gen. (1908-1909), 160.

It has been said that a stock option contract, permitting insureds to purchase stock in the company, the insureds paying an increased premium, part of which is credited on the purchase price of the stock, is in violation of this section.

5 Opins. *Att. Gen.* 1019 (1903).

This section does not apply to mutual protective associations organized under § 9427 et seq.

4 Opins. *Attys. Gen.* 241, 659 (1889; 1895).

See *State v. Association*, 26 O. S. 19 (1875).

State v. Association, 38 O. S. 281 (1882).

Section 9404. (Rebates or special favors prohibited. Discrimination no ground for refusal of testimony.) No life insurance company doing business in this state, or any officer, agent, solicitor, employe, or representative thereof, nor any other person, shall pay, allow or give, or offer to pay, accrue thereon, or any paid employment or contract for allow or give, directly or indirectly, as inducement to insurance, nor shall any person, co-partnership or corporation knowingly receive as such inducement to insurance any rebate of premium payable on the policy or any special favor or advantage in the dividends or other benefits to accrue thereon, or any special advantage in the date of a

policy or date of the issue thereof; or any valuable consideration or inducement whatsoever; or give or receive, nothing in this chapter shall be so construed as to forbid a company, transacting industrial insurance on a weekly payment plan, from returning to policy holders, who have made premium payments for a period of at least one year, directly to the company at its home or district offices, a any insurance company or other corporation, association, partnership or individual, or any dividends or profits to services of any kind, or anything of value; provided, that sell or purchase, or offer to give or receive, sell or purchase, as inducements to insurance or in connection therewith any stock, bonds or other obligations or securities of percentage of the premium which the company would have paid for the weekly collection of such premium.

No person shall be excused from attending or testifying or producing any books, papers or other documents before any court or magistrate having jurisdiction, upon any investigation, proceeding or trial for a violation of any of the provisions of this section or of section 9403, upon the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him may tend to incriminate or degrade him, but no person shall be prosecuted or subject to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he may so testify or produce evidence, documentary or otherwise, except for perjury committed in so testifying. (May 31, 1911, 102 v. 509; R. S. § 3631-4; April 22, 1908, 99 v. 183, § 1; April 27, 1893, 90 v. 345; April 10, 1889, 86 v. 220.)

Penalties for violation of this section, see §§ 9405, 13137.

The superintendent of insurance may, in his discretion, refuse a license to an agent who has previously solicited insurance, without a license, and offered rebates of premium.

Vorys v. State, 67 O. S. 15.

The policy itself is not declared void by this section; but a note and post dated check, given in payment of the premium, less the amount of the rebate, are void.

Tillinghast v. Craig, 17 C. C. 531, 535; 9 C. D. 459 (1893).

Where the contract for the policy and amount of the premium were agreed upon before a 60-day note without interest for the first premium was given, such note is not an inducement prohibited by this section. And where the insured made no complaint until after the note fell due and the agent had paid the premium to the company, the insured was held not entitled to defend on the ground that the note was void under this section. McDonald v. Schervish, 6 Ohio App. 88; 26 C. C. n. s. 394 (1916); s. c., 8 Ohio App. 386; 28 O. C. A. 325.

This section constitutes no defense to an action to recover premiums paid on a policy, which the plaintiff was induced to take by fraudulent representations as to future profits, based on past experi-

ence and present condition of the company. *Life Soc. v. Statler*, 17 C. C. n. s. 59; 24 C. D. 391 (1911); *aff'd*, no rep. 88 O. S. 549.

Before the amendment of this section in 1908 (99 v. 183) it was held that an agreement that a note given for a premium should be discounted with a brokerage firm, of which the insured was a member, and brokerage allowed such firm, otherwise the insurance should be void and the policy cancelled, did not thereby make the insured the beneficiary of a rebate, or invalidate the note.

Daily v. Chappell, 12 C. C. n. s. 561; 21 L. D. 509 (1909).

For similar statute applying to other insurance companies, see §§ 9589-1 to 9589-4.

Members of a "life insurance club," who receive compensation for securing new members and additional compensation if such new members become policy holders, do not thereby violate this section.

Rep. Atty. Gen. 1904-1905, p. 112-115.

This section does not apply to mutual protective associations organized under § 9427 et seq.

4 Opins. Attys. Gen. 241, 659 (1889; 1895).

See State v. Association, 26 O. S. 19 (1875).

State v. Association, 38 O. S. 281 (1882).

Section 9405. (Penalty.) Every corporation which shall violate any of the provisions contained in section 9403, or in section 9404, shall forfeit and pay any sum not less than one hundred dollars nor exceeding five hundred dollars, to be recovered by action in the name of the state and the amount so recovered, shall be paid to the county treasurer for the benefit of the common school fund. (May 31, 1911, 102 v. 509; R. S. § 3631-5; April 27, 1893, 90 v. 345; April 10, 1889, 86 v. 220.)

Other penalties, see §§ 12956, 13136, 13137.

Section 9406. (Revocation of license.) It shall be the duty of the superintendent of insurance upon conviction of any such life insurance company, or of any agent thereof for violation of any of the provisions of section 9403, or of section 9404, or upon being satisfied of the violation of either of said sections and after reasonable notice to the accused of the time and place of hearing, to revoke the license of the company or agent so offending, and no license shall be granted to such company, or agent, for a period of three years after such revocation. (May 31, 1911, 102 v. 509; R. S. Sec. 3631-7; April 27, 1893, 90 v. 345.)

See note to § 9404.

Section 9407. (Solicitor is agent of company.) Any person who solicits an application for insurance upon the life of another in any controversy between the assured or his beneficiary and the company issuing a policy upon such application shall be regarded as the agent of the company

and not the agent of the assured. (April 22, 1908, 99 v. 175, § 1.)

See § 9586 and note.

See also note to § 9391. *Knowledge of agent.*

A corporation may act as agent, when such powers are authorized by its charter.

Rep. Atty. Gen. 1908, p. 176.

A bank or trust company has no power to act as agent for an insurance company.

Rep. Atty. Gen. 1908, p. 195.

Duties required by law to be discharged by the company can not, by contract, be imposed upon a general agent.

Rep. Atty. Gen. 1908, p. 173.

When an agent procured from the company a policy on his own life, but was unable to pay the premium, and a member of his family paid the premium to the agent, as agent for the company but the money was never accounted for or paid to the company, and the company had no knowledge of the transaction, it was held that such payment was not a compliance with a provision in the policy making payment of the first premium a condition precedent to the taking effect of the policy.

Insurance Co. v. Harvey, 72 O. S. 174 (1905).

Where an application for life insurance was revoked by the applicant before the policy was issued, the agent who procured the application cannot maintain an action in his own name against the applicant to recover the premium or the amount of his commissions. The right of action, if any, is in the company.

Chapin v. Betts, 14 C. C. 335; 7 C. D. 422 (1897).

A physician, employed to examine an applicant for insurance, and make a report thereof to the company, without further duty or authority, after making an examination and report obtained further knowledge of the applicant's physical condition but did not communicate it to the company. Held, such knowledge was not binding on the company and did not operate as a waiver of a provision in the application that the policy would become effective upon approval at the home office of the company "while the person to be insured is in the same condition of insurability". *Myers v. John Hancock, etc., Co.*, — O. S. — (1923); syl. 21 O. L. R. 140.

The sale of a fire insurance agency business, with good will, does not affect the right of the insurance companies to revoke the authority of the purchaser and to appoint a new agent. Custom of insurance agents does not entitle the purchaser to an injunction against the new agent, to prevent the securing of renewals by the new agent. *Bryson Co. v. Archer*, 18 C. C. n. s. 437 (1912); aff'd, no rep. 89 O. S. 413.

Authority to a broker to collect premiums does not include authority to indorse and collect checks payable to the company. A bank which cashes them is liable to the company as for conversion. *Bank v. Insurance Co.*, 24 C. C. n. s. 485 (1905).

Prior to the enactment of this section, an agent accepting a premium, and issuing a receipt other than the official receipt provided for in the policy, was held to be an agent of the insured. *Insurance Co. v. Trust Co.*, 22 C. C. n. s. 161 (1908).

Agent's contracts for commissions. An agreement by a life insurance agent to pay another person a commission on the "first installment of premium" received from a person recommended to the agent by him, was construed to mean a commission on the first annual premium.

Connelly v. Pickard, 4 N. P. n. s. 294; 17 L. D. 116 (1906).

For a contract between a general agent and subagent, construed to bind the general agent only and not the company, see

Bigger v. Insurance Co., 8 N. P. n. s. 27; 19 L. D. 704 (1908).

Under a general agency contract which required the agent to produce a specified amount of business, he can not recover damages for wrongful discharge where he failed to produce the required business. Boswell v. Insurance Co., 26 C. C. n. s. 385 (1916).

Section 9408. (Misrepresentations prohibited.) No life insurance company doing business in this state, and no officer, director or agent thereof, shall issue or circulate or cause or permit to be issued or circulated any estimate, illustration, circular or statement of any sort misrepresenting the terms of the policies or policy issued by it, or the benefits or advantages promised thereby, or the dividends or shares of surplus to be received thereon, or use any name or title of any policy or class of policies misrepresenting the true nature thereof, nor shall any such corporation, or any officer, agent, solicitor or representative thereof, or any other person or persons, make any misrepresentations to any person insured in any life insurance company for the purpose of inducing or tending to induce such person to lapse, forfeit or surrender his said insurance. (May 31, 1911, 102 v. 509; April 22, 1908, 99 v. 175, § 1.)

Where a stock company, before the enactment of this section, falsely represented that it was doing a mutual insurance business and inserted in the contracts of many policy-holders a stipulation that they should share in the profits "as appropriated by the company," it was held that the fact that no separate account was kept of the participating and non-participating profits did not prevent the company from declaring a stock dividend out of a surplus fund which was clearly derived from non-participating business.

State v. Life Insurance Co., 13 C. C. n. s. 49; 22 C. D. 262 (1910); affirmed, 84 O. S. 459.

But, in such case, the holders of participating policies may maintain an action to conserve, for their benefit, the surplus fund derived from the participating business.

Bell v. Insurance Co., 14 C. C. n. s. 385 (1911); reversed no rep. 87 O. S. 475.

Section 9409. (Penalty.) Every corporation which shall violate any of the provisions of section 9408 shall forfeit and pay not less than one hundred dollars, nor more than five hundred dollars, to be recovered by action in the name of the state and the amount so recovered shall be paid to the county treasurer for the benefit of the common school fund. (May 31, 1911, 102 v. 509; April 22, 1908, 99 v. 175, § 2.)

CHAPTER 2.

STANDARD FORMS, PROVISIONS AND PROHIBITIONS.

§ 9410. Unauthorized policies shall not be issued.	§ 9420. Policies other than standard forms.
§ 9411. Standard forms.	§ 9421. Provisions prohibited.
§ 9412. "Ordinary" or "limited payment."	§ 9422. Preliminary term policies, not standard, subject to certain provisions.
§ 9413. Endowment.	§ 9423. Forms of policies must be submitted to superintendent of insurance.
§ 9414. "Ordinary" or "limited life" fixed survivorship annuity.	§ 9424. Policies may contain provisions prescribed by state where organized.
§ 9415. Endowment fixed survivorship annuity.	§ 9425. To what this chapter shall not apply.
§ 9416. Term.	§ 9426. What the word "company" includes.
§ 9417. Term with right to renew and change.	
§ 9418. Single premium and non-participating policies.	
§ 9419. Preliminary term.	

Section 9410. (Unauthorized policies shall not be issued.)
 No policy of life insurance shall be issued or delivered in this state and no policy of life insurance of a life insurance company organized under the laws of this state shall be issued unless authorized by the provisions of this chapter. (April 22, 1908, 99 v. 139, § 1.)

Parol contract of insurance. A valid contract of insurance may be made by parol, when not forbidden by statute, or by a provision of the company's charter of which the insured has notice; and the assent of the parties to the agreement may be shown by their acts and the surrounding circumstances, as well as by their words.

Machine Co. v. Insurance Co., 50 O. S. 549 (1893).

See Insurance Co. v. Wall, 31 O. S. 628 (1877).

Insurance Co. v. Kelly, 24 O. S. 345 (1873).

Where nothing is said in the negotiations about special rates of insurance, or special conditions of the policy, it will be presumed that those which were usual and customary were intended.

Machine Co. v. Insurance Co., 50 O. S. 549 (1893).

A parol contract of insurance, as distinguished from a parol agreement to issue a policy, must not be executory, but must take effect in praesenti.

Insurance Co. v. Whitman, 75 O. S. 312 (1906).

Full and clear proof is necessary to establish the relation of insurer and insured, before delivery of the policy.

Insurance Co. v. Whitman, 75 O. S. 312 (1906).

In an action to recover on a written policy, and an alleged verbal modification thereof, statements of the agent who solicited the policy, prior to and contemporaneous with its issue, are inadmissible to vary its terms. In the absence of fraud or mistake, such statements are merged into the written contract.

Insurance Co. v. Hook, 62 O. S. 256 (1900).

Agreement to issue policy; specific performance.

See Suydam v. Insurance Co., 18 Ohio 459 (1849).

Neville v. Insurance Co., 19 Ohio 452 (1850).

Insurable interest.

See also *Beneficiary* below.

A person may cause his own life to be insured for the benefit of a stranger and the want of insurable interest in the stranger will not invalidate the policy. But a policy procured by a person for his own benefit on the life of a stranger is void for want of insurable interest.

Ryan v. Rothweiler, 50 O. S. 595, 601 (1893).

One who has obtained a valid insurance upon his life may dispose of it as he sees fit, in the absence of prohibitory legislation or contract stipulations. It is immaterial, in such case, that the assignee has no insurable interest.

Keckley v. Coshocton Glass Co., 86 O. S. 213 (1912); affirming, 13 C. n. s. 229, 240; 21 C. D. 665, 676.

Eckle v. Renner, 41 O. S. 232 (1884).

Contra, Evans v. Moore, 7 C. C. n. s. 123; 18 C. D. 1 (1905).

But where a stipulation in the policy limits the liability of the company to the extent of the insurable interest of the assignee, and requires proof of such interest, an assignee without insurable interest can not recover from the company. Harmeyer v. Insurance Co., 3 Ohio App. 104; 19 C. C. n. s. 308 (1914); affirming, 15 N. P. n. s. 476.

Where a life insurance company makes no defense and pays the amount of its policy into court to abide by the judgment of the court as between conflicting claimants, parties claiming an interest in the fund can not object that the beneficiary named in the policy had no insurable interest.

Keckley v. Coshocton Glass Co., 86 O. S. 213 (1912); affirming, 13 C. n. s. 229, 240; 21 C. D. 665, 676.

Where an assignee without insurable interest, by misstatements in letters to state insurance commissioners and in newspapers, compelled the company to pay money into court and interplead several defendants, the assignee's conduct was held to bar him from equitable relief in the interpleader proceedings. Harmeyer v. Insurance Co., 3 Ohio App. 104; 19 C. C. n. s. 308 (1914); affirming, 15 N. P. n. s. 476.

Where a borrower from an insurance company, on real estate security, also procures the issue, by the company, of an insurance policy to one in whose life he has no insurable interest, and its assignment to the company as collateral security for the loan, and signs premium notes jointly with the insured, the insurance contract is not invalid as a wagering contract.

Insurance Co. v. Hilliard, 63 O. S. 478 (1900).

Brother or sister. A brother has no insurable interest in the life of a younger brother on whom he is not dependent.

Newmore v. Insurance Co., 8 C. C. n. s. 308; 18 C. D. 689 (1906).

Where one makes application for insurance on her life, naming her sister as beneficiary, and a policy is issued in accordance with the application, and premiums paid thereon, the company is estopped from denying that the beneficiary had an insurable interest.

Baker v. Insurance Co., 5 N. P. n. s. 383; 18 L. D. 426 (C. P. 1907).

Corporation in life of officer. Where a person owns a large portion of the stock of a corporation, and his skill and experience are largely relied on to make the corporate business a success, and when, in obtaining credit and in inducing persons to buy stock in the corporation, he represents that he has insured his life for the benefit of the corporation, such facts disclose an insurable interest in the corporation; and the insured and his legal representatives are estopped from claiming that the policies are not based upon an insurable interest, or that the amounts due thereon do not belong to the corporation.

Keckley v. Coshocton Glass Co., 86 O. S. 213 (1912); affirming, 13 C. C. n. s. 229, 240; 21 C. D. 665, 676.

Rep. Atty. Gen. 1911-1912, p. 807.

Where an officer of a corporation made application for insurance, specifying the corporation as beneficiary, and the premiums were paid by the corporation, it is entitled to the proceeds of the policy as against the executor of the insured, although the insured, before his death, had retired as such officer or director.

Insurance Co. v. Coshocton Glass Co., 13 C. C. n. s. 229; 21 C. D. 665 (1910); affirmed, Keckley v. Coshocton Glass Co., 86 O. S. 213 (1912).

And where a policy in which his wife was named as beneficiary, was assigned to the corporation in which the insured was an officer, and all premiums were paid by the corporation, it is entitled to the proceeds of the policy as against the widow.

Coshocton Glass Co. v. Insurance Co., 13 C. C. n. s. 240; 21 C. D. 676; affirmed, Keckley v. Coshocton Glass Co., 86 O. S. 213 (1912).

In Schott, etc., Co. v. Insurance Co., 11 C. C. n. s. 401; 20 C. D. 656 (affirming, 7 N. P. n. s. 548; 19 L. D. 249; and affirmed, no rep., 83 O. S. 507) it was said that a corporation has no insurable interest in the life of an officer or director who is not indebted to it, and that a note given for premiums on a policy on the life of a director or officer was without consideration. The note involved in that case, however, was given by the secretary and general manager without authority from the directors.

Whether a college, church or similar institution may insure the life of an individual depends upon whether, at the time the policy is issued, it has a pecuniary interest or a valid and well founded expectation of benefit from the continuance of the life of the insured.

Rep. Atty. Gen. 1911-1912, p. 807.

POLICIES OF INSURANCE.

Application. See §§ 9387 to 9392 and note to § 9420.

Conditions precedent to taking effect.

Delivery. In the absence of any other evidence to show assent of the company, to a contract of insurance, delivery of the policy must be shown.

Insurance Co. v. Whitman, 75 O. S. 312, 320 (1906).

Requisites of a valid delivery.

See Insurance Co. v. Whitman, 75 O. S. 312, 320.

In the absence of a stipulation in the application or policy, making actual delivery of the policy a condition precedent to the consummation of the contract, the actual delivery or non-delivery of the policy is not of itself conclusive evidence of the completion of the contract; but the unconditional acceptance of the application by the insurer is a consummation of the contract.

Insurance Co. v. Whitman, 75 O. S. 312 (1906).

Machine Co. v. Insurance Co., 50 O. S. 549 (1893).

Insurance Co. v. Plato, 3 C. C. n. s. 207; 13 C. D. 35 (1901); aff'd, no rep., 68 O. S. 701.

Johnson v. Insurance Co., 66 O. S. 6 (1902).

Bennett v. Insurance Co., 27 W. L. B. 15.

Where there is no oral agreement for insurance prior to the policy, if a policy has been executed in form, but has not passed out of the possession of the insurer or his agent, and no premium has been paid, the contract is prima facie incomplete; and the burden is upon the party who

asserts that there is a contract, to show that the policy became operative by the intention of both parties.

Where, there being no oral agreement for insurance to take effect prior to the issue of the policy, upon an application for insurance at less than the regular rate, an agent wrote up and countersigned a policy and, without parting with possession thereof, wrote to the applicant that he had "issued" a policy, but would hold it until he heard from the company, and the company thereafter rejected the risk and the agent forwarded the policy to the company, no contract of insurance was consummated, although the applicant received no notice of refusal of the risk.

Insurance Co. v. Whitman, 75 O. S. 312 (1906).

The mailing of a policy, by the company to its agent, for delivery to the insured, constitutes delivery to the insured. When the first premium is paid to the agent the contract is complete without actual manual delivery to the insured. *Insurance Co. v. Shively*, 1 Ohio App. 238; 17 C. C. n. s. 352; 24 C. D. 357 (1913); *Insurance Co. v. Ford*, 2 Ohio App. 410; 19 C. C. n. s. 689; 24 C. D. 479 (1914).

Payment of premium. See note to § 9420.

Construction.

Policies of insurance should be construed, like other contracts, so as to give effect to the intention and express language of the parties.

Insurance Co. v. Myers, 62 O. S. 529 (1900).

West v. Insurance Co., 27 O. S. 1 (1875).

A policy should be construed strongly against the insurer and liberally in favor of the insured.

Swander v. Insurance Co., 1 C. C. n. s. 233, 237; 15 C. D. 3 (1903).

Holterhoff v. Insurance Co., 3 Am. L. R. 272 (1874).

Snapp v. Insurance Co., 8 O. S. 458, 461 (1858).

See *Insurance Co. v. Schild*, 69 O. S. 136, 139 (1903).

Exceptions in a policy should be strictly construed, and where there are two interpretations which are equally fair, the one which gives the greater indemnity should prevail.

Blackwell v. Insurance Co., 48 O. S. 533, 540 (1891).

Provisions for disabilities and forfeitures should, when the intent is doubtful, be strictly construed against those for whose benefit they are introduced.

Webster v. Insurance Co., 53 O. S. 558 (1895).

Swander v. Insurance Co., 1 C. C. n. s. 233, 235; 15 C. D. 3 (1903).

Provisions, terms and conditions.

Provisions required in life insurance policies; see § 9420.

Provisions prohibited, see § 9421.

Special provisions construed; see notes to §§ 9420 and 9421.

Where a life insurance policy was accepted by the insured, remained in his possession for nine years, and nine annual premiums were paid by him, he is conclusively presumed to have knowledge of all the stipulations and provisions of the policy.

Insurance Co. v. Hook, 62 O. S. 256 (1900).

Beneficiary.

See also *Insurable interest* above.

Wife and children as beneficiaries, see §§ 9393 to 9399.

Where the policy contains no provision permitting the insured to revoke the designation of beneficiary, the beneficiary has a vested right therein, which can not be impaired by acts of the insured. The insured

can not change the beneficiary or surrender the policy without consent of the beneficiary.

Insurance Co. v. Penn, 4 N. P. n. s. 97; 16 L. D. 375 (Super. Ct. Cin. 1905).

Douglas v. Insurance Co., 11 N. P. n. s. 513; 21 L. D. 516 (C. P. 1911).

See Glass v. Insurance Co., 3 N. P. 216; 4 L. D. 234.

The beneficiary is a necessary party to a suit to recover premiums paid, based on the wrongful refusal of the company to receive further premiums or to continue the policy in force.

Insurance Co. v. Penn, 4 N. P. n. s. 97; 16 L. D. 375 (Super. Ct. Cin. 1905).

Where a policy provided that the insured might change the beneficiary "by written notice to the company at its home office accompanied by the policy, such change to take effect on the endorsement of the same on the policy by the company," it was held that consent of the company was requisite to effect the change; and where the insured forwarded to the company notice of change, but died before the company endorsed the change on the policy, the original beneficiary is entitled to the proceeds of the policy.

Douglas v. Insurance Co., 11 N. P. n. s. 513; 21 L. D. 516 (C. P. 1911).

See Modern Woodman v. Daerr, 11 N. P. n. s. 360 (1911; fraternal insurance).

Where the policy reserves to the insured the right to change the beneficiary, the beneficiary named in the policy has no vested right therein. Kerr v. Bowers, 26 C. C. n. s. 289 (1915); motion to certify record overruled, 13 O. L. R. 84.

The beneficiary can not recover on the policy where the death of the insured is caused by the intentional and felonious act of the beneficiary.

Filmore v. Insurance Co., 82 O. S. 208 (1910).

See Mieritz v. Insurance Co., 8 N. P. 422; 11 L. D. 759.

The usual "facility payment" clause, providing that the company "may" pay the insurance to the widow, does not give the widow a vested interest. When no beneficiary is named, the insurance goes to the estate of the insured, subject to the insurer's right to pay under the clause. Rogers v. Metropolitan Co., 24 N. P. n. s. 49 (1921).

Under a policy of industrial insurance which provided that the company "may pay . . . to either the beneficiary named below, or to the executor or administrator, husband or wife . . . or to any other person appearing to said company to be equitably entitled to the same by reason of having incurred expense on behalf of the insured, or for his or her burial", payment to the named beneficiary who was designated as "guardian", the money being used to pay funeral expenses and an unpaid board bill, was held to be a bar to a subsequent action by the insured's administrator. Insurance Co. v. Burbank, 3 Ohio App. 302; 19 C. C. n. s. 550 (1914).

Change of beneficiary, see also note to § 9427.

Assignment. One who has obtained a valid insurance upon his life may dispose of it as he sees fit, in the absence of prohibitory legislation or contract stipulations. It is immaterial, in such case, that the assignee has no insurable interest.

Keckley v. Coshocton Glass Co., 86 O. S. 213 (1912); affirming, 13 C. C. n. s. 229, 240; 21 C. D. 665, 676.

Eckle v. Renner, 41 O. S. 232 (1884).

But where a stipulation in the policy limits liability to the extent of the insurable interest of the assignee, an assignee without

insurable interest can not recover. *Harmeyer v. Insurance Co.*, 3 Ohio App. 104; 19 C. C. n. s. 308 (1914); affirming, 15 N. P. n. s. 476.

Where a policy is pledged as security for a loan, the pledgee may pay premiums to keep the policy in force, without an express contract with the pledgor, and is entitled to reimbursement out of the proceeds of the policy.

Reakirt v. Besuden, 3 N. P. n. s. 646; 16 L. D. 697 (1903); aff'd, no rep., 73 O. S. 383.

But the pledgee is not obliged to pay the premiums, in the absence of an express agreement to do so. It is the duty of the debtor to pay the premiums. The fact that the pledgee paid one premium and charged it on his books to the debtor does not obligate him to continue to do so, or render him liable if the policy lapses for non-payment.

Van Duersen v. Scanlon, 7 W. L. B. 188 (Dist. Ct. 1882).

Delivery of the policy to the assignee is not essential to the validity of the assignment, in the absence of a stipulation to that effect. A prior assignee, without delivery, is entitled to preference over a subsequent assignee to whom the policy is delivered.

Merchants Banking Co. v. Assurance Soc., 10 C. C. n. s. 397 (1907).

See *Hewitt v. Insurance Co.*, 18 W. L. B. 220.

The assignment of a policy by a minor is not necessarily void.

Insurance Co. v. Hilliard, 63 O. S. 478 (1900).

Loans by company on policies, see §§ 9420 (7, 9) 9421 (1).

Assignment of policy by husband to wife, see § 9398.

Assignment by wife of a policy payable to her, see § 9399.

Where a policy was assigned in another state, where the insured, his wife and the assignee all resided, and where the insured died, and suit was brought on the policy in such state by the assignee, a suit brought in Ohio by the wife, who was beneficiary under the policy, and who had removed to Ohio, will be dismissed without prejudice for failure to make a bona fide effort to make the assignee a party.

Swett v. Insurance Co., 14 C. C. n. s. 100; 23 C. D. 369 (1908); affirming, 8 N. P. n. s. 569; aff'd, no rep., 83 O. S. 470.

Section 9411. (Standard forms.) The forms prescribed by the next following six sections are established as standard forms in which policies of life insurance may be issued and delivered in this state, and in which policies of life insurance of life insurance companies organized under the laws of this state may be issued. (April 22, 1908, 99 v. 139, § 2.)

Forms other than the standard forms in §§ 9412-9417 may be used, but non-standard forms must contain the provisions required by § 9420 and exclude four provisions as required by § 9421. *Landis v. Insurance Co.*, 104 O. S. 589 (1922).

Section 9412. (“Ordinary” or “limited payment.”)

OHIO STANDARD LIFE INSURANCE POLICY.

(Insert “Ordinary” or “Limited Payment.”)

.....LIFE.

Age.....

Amount \$.....Premium \$.....

.....

.....

.....

Of (Name of State)

IN CONSIDERATION OF.....Dollars,
receipt of which is hereby acknowledged, and of the pay-
ment of (insert amounts and times of payments of prem-
iums) until (insert “the death of the insured” in ordinary
life, and “.....full years’ premiums shall have
been paid or until the prior death of the insured” in limited
payment life),

PROMISES to pay upon receipt at the Home Office of
the Company in of due proof of the death of
..... of County of, State
of, herein called the Insured, to
beneficiary....., with (insert “out” if so desired)
right of revocation, Dollars, less any in-
debtedness hereon to the Company and any unpaid portion
of the premium for the then current policy year.

CHANGE OF BENEFICIARY.—When the right of revo-
cation has been reserved, or in case of the death of any
beneficiary under either a revocable or irrevocable designa-
tion, the insured, subject to any existing assignment of the
policy, may designate a new beneficiary with or without
reserving right of revocation by filing written notice thereof
at the home office of the company accompanied by the policy
for suitable endorsement thereon. If any beneficiary shall
die before the insured and the insured shall not have desig-
nated a new beneficiary the interest of such beneficiary shall
be payable to the insured (insert “his” or “her”) execu-
tors, administrators or assigns.

PAYMENT OF PREMIUMS.—The company will accept
payment of premiums at other times than as stated above, as
follows:

.....

.....

Except as herein provided the payment of a premium or
installment thereof shall not maintain the policy in force

beyond the date when the next premium or installment thereof is payable.

All premiums are payable in advance at said home office, or to an agent of the company upon delivery of a receipt signed by one or more of the following officers of the company (insert titles of officers who may sign receipts), and countersigned by said agent.

A grace of one month subject to an interest charge at the rate of per centum per annum shall be granted for the payment of every premium after the first, during which month the insurance shall continue in force. If the insured shall die during the month of grace the overdue premium will be deducted from any amount payable hereon in any settlement hereunder.

CONDITIONS.—(The policy may here provide for restrictions of liability by reason of travel, occupation, change of residence and suicide. These restrictions except such as refer to military and naval service in time of war, must be applicable only to cases where the act of the insured provided against occurs within two years after the issuance of the policy.)

INCONTESTABILITY.—This policy and the application therefor, a copy of which is endorsed hereon, constitute the entire contract between the parties and shall be incontestable from its date, except for non-payment of premiums and except as otherwise provided in this policy. All statements made by the insured in said application shall, in the absence of fraud, be deemed representations and not warranties.

If the age of the insured has been misstated, the amount payable hereunder shall be such as the premium paid would have purchased at the correct age.

PARTICIPATION.—This policy shall participate in the surplus of the company and beginning not later than the end of the (insert first, second or third) policy year the company will annually determine and account for the portion of the divisible surplus accruing hereon.

DIVIDENDS.—Dividends at the option of the owner of this policy shall on the day of of each year (here may be inserted "after the first policy year" or "after second policy year") be either—

- (1) Paid in cash, or
- (2) Applied toward the payment of any premium or premiums, or
- (3) Applied to the purchase of paid up additions to the policy, or
- (4) Left to accumulate to the credit of the policy with

interest at (here insert a rate not exceeding that used by the company for calculating its reserves) per centum per annum and payable at the maturity of the policy, but withdrawable on any anniversary of the policy.

Unless the owner of this policy shall elect otherwise within three months after the mailing by the company of a written notice requiring such election, the dividends shall be applied to the purchase of paid up additions.

LOANS.—After three full years' premiums have been paid, the company at any time, while this policy is in force, will advance, on proper assignment of this policy and on the sole security thereof, at a rate of interest not greater than per centum per annum, which interest if not paid annually shall be added to the principal and bear the same rate of interest, a sum equal to, or, at the option of the owner of the policy, less than, the reserve at the end of the current policy year on this policy and on any dividend additions thereto, computed according to the (designate mortality table adopted by the company for computing reserves) mortality table, and interest at the rate of (designate rate of interest adopted by the company for computing reserves) per centum per annum, less (here may be inserted not more than two and one-half) per centum of the amount insured by this policy and of any dividend additions thereto.

The company, however, will deduct from such loan value any existing indebtedness to the company on the policy and any unpaid balance of the premium for the current policy year, and may collect interest in advance on the loan to the end of the current policy year. Such loan may be deferred by the company for not exceeding six months after the application therefor is made. Failure to repay any such advance or to pay interest shall not avoid this policy unless the total indebtedness hereon to the company shall equal or exceed such loan value at the time of such failure and until one month after notice shall have been mailed by the company to the last known address of the insured and of the assignee, if any. No condition other than as herein provided shall be exacted as a prerequisite to any such advance.

ASSIGNMENT.—No assignment of this policy shall be binding upon the company until it be filed with the company at its said home office. The company assumes no responsibility as to the validity of any assignment.

OPTION ON SURRENDER OR LAPSE.—After this policy shall have been in force three full years the owner, within one month after any default, may elect (a) to accept the value of this policy in cash, or (b) to have the insurance

continued in force from date of default, without future participation and without the right to loans, for its face amount, including any outstanding dividend additions, less any indebtedness to the company hereon, or (c) to purchase non-participating paid up insurance, payable at the same time and on the same conditions as this policy. The cash value will be the reserve at the date of default on this policy and on any dividend additions thereto, computed according to the (designate mortality table adopted by the company for computing reserves) mortality table and interest at the rate of (designate rate of interest adopted by the company for computing reserves) per centum per annum, less (here may be inserted not more than two and one-half) per centum of the amount insured by this policy and of any dividend additions thereto, and less any existing indebtedness to the company on this policy. Payment of such cash value may be deferred by the company for not exceeding six months after the application therefor is made. The term for which the insurance will be continued or the amount of the paid up policy will be such as the cash value will purchase as a net single premium at the attained age of the insured according to the (designate the mortality table adopted by the company for computing reserves) mortality table and interest at the rate of (designate rate of interest adopted by the company for computing reserves) per centum per annum. If the owner shall not, within one month from default, surrender this policy to the company at its home office for a cash surrender value or for paid up insurance as provided in options (a) and (c) the insurance will be continued as provided in option (b).

The figures in the following table are computed in accordance with the above provisions and upon the assumption that there is no indebtedness on the policy, and that there are no outstanding dividend additions.

(At the option of the company the following may be here inserted:

“The figures apply to a policy for \$1,000. As this contract is for \$. the loan, cash, or paid up insurance available in any year will be the amount stated in the table for that year.”)

At end of Year.	Cash or Loan Value.	Paid-Up Life Insurance.	Continued Insurance.		
			Years.	Months.	Days.
3	\$.....	\$.....
4	\$.....	\$.....
5	\$.....	\$.....
6	\$.....	\$.....
7	\$.....	\$.....
8	\$.....	\$.....
9	\$.....	\$.....
10	\$.....	\$.....
11	\$.....	\$.....
12	\$.....	\$.....
13	\$.....	\$.....
14	\$.....	\$.....
15	\$.....	\$.....
16	\$.....	\$.....
17	\$.....	\$.....
18	\$.....	\$.....
19	\$.....	\$.....
20	\$.....	\$.....

Figures for later years will be furnished upon request.

REINSTATEMENT.—In case of continued temporary insurance under the above provisions, this policy, upon evidence of insurability satisfactory to the company, may be reinstated within the first three years of the term for which the insurance is continued by payment of arrears of premiums with interest at (here insert not more than six) per centum per annum.

OPTIONS AT MATURITY.—The insured, by written notice to the company at its home office, and with the written consent of the assignee and irrevocable beneficiary, if any, may elect to have the net sum payable under this policy paid either in cash or as follows:

(1) By the payment of interest thereon at per centum per annum payable annually, to the payee under this policy at the end of each year during the life of the payee and by the payment upon the death of the payee of the said net sum and accrued interest to the executors, administrators, or assigns of the payee, unless otherwise directed in said notice.

(2) By the payment of equal annual installments for a specified number of years, the first installment being paya-

(3) By the payment of equal annual installments payable at the beginning of each year for a fixed period of twenty years and for so many years longer as the payee shall survive in accordance with the following table for each \$1,000 of said net sum.

If the insured shall not have directed otherwise the beneficiary may, after the death of the insured, by like written notice, and with the written consent of the assignee, if any, select either of the above options.

Unless otherwise specified by the insured the payee may on any interest date receive the amount yet due under option (1), and may at any time receive the commuted value of payments yet to be made, computed upon the same basis as option (2) in the following table, provided that no such commutation will be made under (3), except after the death of the payee occurring within the aforesaid twenty years.

TABLE OF INSTALLMENTS FOR EACH \$1,000.

[illegible]

.....	\$.....	\$.....
.....	\$.....	\$.....
.....	\$.....	\$.....
.....	\$.....	\$.....
.....	\$.....	\$.....
.....	\$.....	\$.....
.....	\$.....	\$.....

AGENTS ARE NOT AUTHORIZED to modify this policy or to extend the time for paying a premium.

IN WITNESS WHEREOF, The Company has caused this Policy to be executed this day of (April 22, 1908, 99 v. 145, § 2.)

Section 9413. (Endowment.)

OHIO STANDARD LIFE INSURANCE POLICY.

Endowment.

Age
 Amount \$..... Premium \$.....

 Of (Name of State)

IN CONSIDERATION OF Dollars, receipt of which is hereby acknowledged, and of the payment of (here insert amounts and times of payments of premiums) until full years' premiums shall have been paid or until the prior death of the Insured,

PROMISES to pay at the Home Office of the Company in to of County of State of, herein called the Insured, on the day of, if the Insured be then living, or upon receipt at said Home Office of due proof of the prior death of the Insured, to beneficiary with (insert "out" if so desired) right of revocation, Dollars, less any indebtedness hereon to the Company and any unpaid portion of the premium for the then current policy year.

CHANGE OF BENEFICIARY.—When the right of revocation has been reserved, or in case of the death of any beneficiary under either a revocable or irrevocable designation, the insured, subject to any existing assignment of the

policy, may designate a new beneficiary with or without reserving right of revocation by filing written notice thereof at the home office of the company, accompanied by the policy for suitable endorsement thereon. If any beneficiary shall die before the insured and the insured shall not have designated a new beneficiary the interest of such beneficiary shall be payable to the insured, (insert "his" or "her") executors, administrators or assigns.

PAYMENT OF PREMIUMS.—The company will accept payment of premiums at other times than as stated above, as follows:

.....

Except as herein provided the payment of a premium or installment thereof shall not maintain the policy in force beyond the date when the next premium or installment thereof is payable.

All premiums are payable in advance at said home office, or to an agent of the company upon delivery of a receipt signed by one or more of the following officers of the company (insert titles of officers who may sign receipts), and countersigned by said agent.

A grace of one month subject to an interest charge at the rate of per centum per annum, shall be granted for the payment of every premium after the first, during which month the insurance shall continue in force. If the insured shall die during the month of grace the overdue premium will be deducted from any amount payable hereon in any settlement hereunder.

CONDITIONS.—(The policy may here provide for restrictions of liability by reason of travel, occupation, change of residence and suicide. These restrictions except such as refer to military and naval service in time of war, must be applicable only to cases where the act of the insured provided against occurs within two years after the issuance of the policy.)

INCONTESTABILITY.—This policy and the application therefor, a copy of which is endorsed hereon, constitute the entire contract between the parties and shall be incontestable from its date, except for non-payment of premiums and except as otherwise provided in this policy. All statements made by the insured in said application shall, in the absence of fraud, be deemed representations and not warranties.

If the age of the insured has been misstated, the amount payable hereunder shall be such as the premium paid would have purchased at the correct age.

PARTICIPATION.—This policy shall participate in the surplus of the company and beginning not later than the end of the (insert first, second or third) policy year the company will annually determine and account for the portion of the divisible surplus accruing hereon.

DIVIDENDS.—Dividends at the option of the owner of this policy shall on the day of of each year (here may be inserted "after the first policy year" or "after second policy year") be either—

- (1) Paid in cash, or
- (2) Applied toward the payment of any premium or premiums, or
- (3) Applied to the purchase of paid-up additions to the policy, or
- (4) Left to accumulate to the credit of the policy with interest at (here insert a rate not exceeding that used by the company in calculating its reserves) per centum per annum and payable at the maturity of the policy, but withdrawable on any anniversary of the policy.

Unless the owner of this policy shall elect otherwise within three months after the mailing by the company of a written notice requiring such election, the dividends shall be applied to the purchase of paid-up additions.

LOANS.—After three full years' premiums have been paid, the company at any time, while this policy is in force, will advance, on proper assignment of the policy and on the sole security thereof, at a rate of interest not greater than per centum per annum, which interest if not paid annually shall be added to the principal and bear the same rate of interest, a sum equal to, or, at the option of the owner of the policy, less than, the reserve at the end of the current policy year on this policy and on any dividend additions thereto, computed according to the (designate mortality table adopted by the company for computing reserves) mortality table and interest at the rate of (designate rate of interest adopted by the company for computing reserves), per centum per annum, less (here may be inserted not more than two and one-half) per centum of the amount insured by this policy and of any dividend additions thereto. The company, however, will deduct from such loan value any existing indebtedness to the company on this policy and any unpaid balance of the premium for the current policy year, and may collect interest in advance on the loan to the end of the current policy year. Such loan may be deferred by the company for not exceeding six months after the application therefor is made. Failure to repay any such advance

or to pay interest shall not avoid this policy unless the total indebtedness hereon to the company shall equal or exceed such loan value at the time of such failure and until one month after notice shall have been mailed by the company to the last known address of the insured and of the assignee, if any.

No condition other than as herein provided shall be exacted as a prerequisite to any such advance.

ASSIGNMENT.—No assignment of this policy shall be binding upon the company until it be filed with the company at its said home office. The company assumes no responsibility as to the validity of any assignment.

OPTIONS ON SURRENDER OR LAPSE.—After this policy shall have been in force three full years the owner, within one month after any default, may elect (a) to accept the value of this policy in cash, or (b) to have the insurance continued in force from date of default, without future participation and without the right to loans, for its face amount, including any outstanding dividend additions, less any indebtedness to the company hereon, or (c) to purchase non-participating paid-up insurance, payable at the same time and on the same conditions as this policy. The cash value will be the reserve at the date of default on this policy and on any dividend additions thereto, computed according to the (designate mortality table adopted by the company for computing reserves) mortality table and interest at the rate of (designate rate of interest adopted by the company for computing reserves) per centum per annum less (here may be inserted not more than two and one-half) per centum of the amount insured by this policy and of any dividend additions thereto, and less any existing indebtedness to the company on this policy. Payment of such cash value may be deferred by the company for not exceeding six months after the application therefor is made.

The term for which the insurance will be continued or the amount of the paid-up policy will be such as the cash value will purchase as a net single premium at the attained age of the insured according to the (designate the mortality table adopted by the company for computing reserves) mortality table and interest at the rate of (designate rate of interest adopted by the company for computing reserves) per centum per annum. If the sum applicable to the purchase of temporary insurance shall be more than sufficient to continue the insurance to the end of the endowment term named in this policy, the excess shall be used to purchase in the same manner non-participating paid-up pure endow-

ment, payable at the end of the endowment term and on the same conditions. If the owner shall not, within one month from default, surrender this policy to the company at its home office for a cash surrender value or for paid-up insurance as provided in option (a) and (c) the insurance will be continued as provided in option (b).

The figures in the following table are computed in accordance with the above provisions and upon the assumption that there is no indebtedness on the policy, and that there are no outstanding dividend additions.

(At the option of the company the following may be here inserted:

"The figures apply to a policy for \$1,000. As this contract is for \$. the loan, cash, paid-up insurance or pure endowment available in any year will be the amount stated in the table for that year.")

At end of Year.	Cash or Loan Value.	Paid-Up Endow- ment in- surance.	Continued Insurance.			Pure Endow- ment.
			Years.	Months.	Days.	
3	\$.	\$.	\$.
4	\$.	\$.	\$.
5	\$.	\$.	\$.
6	\$.	\$.	\$.
7	\$.	\$.	\$.
8	\$.	\$.	\$.
9	\$.	\$.	\$.
10	\$.	\$.	\$.
11	\$.	\$.	\$.
12	\$.	\$.	\$.
13	\$.	\$.	\$.
14	\$.	\$.	\$.
15	\$.	\$.	\$.
16	\$.	\$.	\$.
17	\$.	\$.	\$.
18	\$.	\$.	\$.
19	\$.	\$.	\$.
20	\$.	\$.	\$.

Figures for later years will be furnished upon request.

REINSTATEMENT.—In case of continued temporary insurance under the above provisions, this policy, upon evi-

dence of insurability satisfactory to the company, may be reinstated within the first three years of the term for which the insurance is continued by payment of arrears of premiums with interest at (here insert not greater than six) per centum per annum.

OPTIONS AT MATURITY.—The insured, by written notice to the company at its home office, and with written consent of the assignee and irrevocable beneficiary, if any, may elect to have the net sum payable under this policy paid either in cash or as follows:

(1) By the payment of interest thereon at per centum per annum payable annually, to the payee under this policy at the end of each year during the life of the payee and by the payment upon the death of the payee of the said net sum and accrued interest to the executors, administrators or assigns of the payee, unless otherwise directed in said notice.

(2) By the payment of equal annual installments for a specified number of years, the first installment being payable immediately, in accordance with the following table for each \$1,000 of said net sum.

(3) By the payment of equal installments payable at the beginning of each year for a fixed period of twenty years and for so many years longer as the payee shall survive in accordance with the following table for each \$1,000 of said net sum.

Installments payable under options (2) or (3) which shall not have been paid prior to the death of the payee shall be paid, unless otherwise directed in said notice, to the executors, administrators or assigns of the payee.

If the insured shall not have directed otherwise the beneficiary may, after the death of the insured, by like written notice, and with the written consent of the assignee, if any, select either of the above options.

Unless otherwise specified by the insured the payee may on any interest date receive the amount yet due under option (1), and may at any time receive the commuted value of payments yet to be made, computed upon the same basis as option (2) in the following table, provided that no such commutation will be made under (3), except after the death of the payee occurring within the aforesaid twenty years.

IN CONSIDERATION OF Dollars, receipt of which is hereby acknowledged, and of the payment of (here insert amounts and times of payments of premiums) until (insert "the death of the insured" in ordinary life, and "..... full years' premiums shall have been paid or until the prior death of the insured" in limited payment life),

PROMISES to pay at its home office in Dollars in Twenty equal annual Installments of \$..... to (herein called the Beneficiary), (insert "his" or "her") executor, administrator or assigns, with (insert "out" if so desired) right of revocation, if (insert "he" or "she") survives the Insured, otherwise to the executors, administrators or assigns of the Insured, the first Installment being payable immediately upon receipt of due proof of the death of the Insured, any indebtedness to the Company on this Policy together with the balance, if any, of the then current year's Premium being deducted from the amounts first payable under this contract.

Should the Beneficiary live to receive the Twenty Installments payable to (insert "him" or "her") as above provided, the Company will pay (insert "him" or "her") annually during the remainder of (insert "his" or "her") life the sum of \$..... beginning one year after the date when the Twentieth Installment payable hereunder shall fall due.

CHANGE OF BENEFICIARY.—When the right of revocation has been reserved, or in case of the death of any beneficiary under either a revocable or irrevocable designation, the insured, subject to any existing assignment of the policy, may designate a new beneficiary with or without reserving right of revocation by filing written notice thereof at the home office of the company, accompanied by the policy for suitable endorsement thereon. If any beneficiary shall die before the insured and the insured shall not have designated a new beneficiary the interest of such beneficiary shall be payable to the insured, (insert "his" or "her") executors, administrators or assigns. If a new beneficiary shall be designated only twenty annual installments will be payable under this policy, and future (if necessary, insert "semi" or "quarter") annual premiums will be reduced to dollars each.

PAYMENT OF PREMIUMS.—The company will accept payment of premiums at other times than as stated above, as follows:

.....

Upon return of this policy to the company accompanied by evidence satisfactory to the company of the death of the beneficiary the company will reduce the future (here insert "annual," "semi-annual" or "quarterly") premiums to \$. each.

Except as herein provided the payment of a premium or installment thereof shall not maintain the policy in force beyond the date when the next premium or installment thereof is payable.

All premiums are payable in advance at said home office, or to an agent of the company upon delivery of a receipt signed by one or more of the following officers of the company (insert titles of officers who may sign receipts), and countersigned by said agent.

A grace of one month subject to an interest charge at the rate of per centum per annum shall be granted for the payment of every premium after the first, during which month the insurance shall continue in force. If the insured shall die during the month of grace the overdue premium will be deducted from any amount payable hereon in any settlement hereunder.

CONDITIONS.—(The policy may here provide for restrictions of liability by reason of travel, occupation, change of residence and suicide. These restrictions except such as refer to military and naval service in time of war, must be applicable only to cases where the act of the insured provided against occurs within two years after the issuance of the policy.)

INCONTESTABILITY.—This policy and the application therefor, a copy of which is endorsed hereon, constitute the entire contract between the parties and shall be incontestable from its date, except for non-payment of premiums and except as otherwise provided in this policy. All statements made by the insured in said application shall, in the absence of fraud, be deemed representations and not warranties.

If the age of the insured has been misstated, or if the age of the beneficiary has been misstated, the amount payable hereunder shall be such as the premium paid would have purchased at the correct age.

PARTICIPATION.—This policy shall participate in the surplus of the company and beginning not later than the end of the (insert first, second or third) policy year the company will annually determine and account for the portion of the divisible surplus accruing hereon.

DIVIDENDS.—Dividends at the option of the owner of this policy will on the day of of each

year (here may be inserted "after the first policy year" or "after second policy year") be either—

(1) Paid in cash, or

(2) Applied toward the payment of any premium or premiums, or

(3) Applied to the purchase of paid up additions to the policy, payable in twenty annual installments at the same times as the original amount insured under this policy is payable. The payment of such twenty installments shall discharge the company from all liability on account of such dividend additions; or

(4) Left to accumulate to the credit of the policy with interest at (here insert a rate not exceeding that used by the company in calculating its reserves) per centum per annum and payable at the maturity of the policy, but withdrawable on any anniversary of the policy.

Unless the owner of this policy shall elect otherwise within three months after the mailing by the company of a written notice requiring such election, the dividends shall be applied to the purchase of paid up additions.

LOANS.—After three full years' premiums have been paid, the company at any time, while this policy is in force, will advance, on the proper assignment of the policy and on the sole security thereof, at a rate of interest not greater than per centum per annum, which interest if not paid annually shall be added to the principal and bear the same rate of interest, a sum equal to, or, at the option of the owner of the policy, less than, the reserve at the end of the current policy year required to provide for the twenty installments payable under this policy and for any dividend additions thereto, and no more, computed according to the (designate mortality table adopted by the company for computing reserves) mortality table and interest at the rate of (designate rate of interest adopted by the company for computing reserves) per centum per annum, less (here may be inserted not more than two and one-half) per centum of the amount insured by this policy and of any dividend additions thereto. The company, however, will deduct from such loan value any existing indebtedness to the company on the policy and any unpaid balance of the premium for the current policy year, and may collect interest in advance on the loan to the end of the current policy year. Such loan may be deferred by the company for not exceeding six months after the application therefor is made. Failure to repay any such advance or to pay interest shall not avoid this policy unless the total indebtedness hereon to the company shall equal or exceed such loan value at the time of such failure and until

one month after notice shall have been mailed by the company to the last known address of the insured and of the assignee, if any. No condition other than as herein provided shall be exacted as a prerequisite to any such advance.

ASSIGNMENT.—No assignment of this policy shall be binding upon the company until it be filed with the company at its said home office. The company assumes no responsibility as to the validity of any assignment.

OPTIONS ON SURRENDER OR LAPSE.—After this policy shall have been in force three full years the owner, within one month after any default may elect

(a) To accept the value of this policy in cash, or

(b) To have the insurance continued in force from date of default without future participation and without the right to loans, for its face amount, including any outstanding dividend additions, less any indebtedness to the company hereon, or

(c) To purchase non-participating paid-up insurance, payable, except as hereinafter provided, at the same times and on the same conditions as this policy. The cash value will be the reserve at the date of default required to provide for the twenty installments payable under this policy and for any dividend additions thereto, computed according to the (designate mortality table adopted by the company for computing reserves) mortality table and interest at the rate of (designate rate of interest adopted by the company for computing reserves) per centum per annum, less (here may be inserted not more than two and one-half) per centum of the amount insured by this policy and of any dividend additions thereto, and less any existing indebtedness to the company on this policy. Payment of such cash value may be deferred by the company for not exceeding six months after the application therefor is made. The term for which the insurance will be continued or the amount of the paid-up policy will be such as the cash value will purchase as a net single premium at the attained age of the insured according to the (designate the mortality table adopted by the company for computing reserves) mortality table and interest at the rate of (designate rate of interest adopted by the company for computing reserves) per centum per annum. If the owner shall not within one month from default surrender this policy to the company at its home office for a cash surrender value or paid-up insurance as provided in option (a) and (c) the insurance will be continued as provided in option (b). The paid-up or continued temporary insurance will be payable in twenty equal installments and

the payment of twenty installments under either option shall discharge the company from all liability under this policy.

The figures in the following table are computed in accordance with the above provisions and upon the assumption that there is no indebtedness on the policy, and that there are no outstanding dividend additions.

(At the option of the company the following may be here inserted.

“The figures apply to a policy for \$1,000. As this contract is for \$. the loan, cash, or paid-up insurance available in any year will be the amount stated in the table for that year.”)

At end of Year.	Cash or Loan Value.	Paid-Up Life Insurance.	Continued Insurance.		
			Years.	Months.	Days.
3	\$	\$
4	\$	\$
5	\$	\$
6	\$	\$
7	\$	\$
8	\$	\$
9	\$	\$
10	\$	\$
11	\$	\$
12	\$	\$
13	\$	\$
14	\$	\$
15	\$	\$
16	\$	\$
17	\$	\$
18	\$	\$
19	\$	\$
20	\$	\$

Figures for later years will be furnished upon request.

REINSTATEMENT.—In case of continued temporary insurance under the above provisions, this policy, upon evidence of insurability satisfactory to the company, may be reinstated within the first three years of the term for which the insurance is continued by payment of arrears of premiums with interest at (here insert not greater than six) per centum per annum.

.
.

AGENTS ARE NOT AUTHORIZED to modify this policy or to extend the time for paying a premium.

IN WITNESS WHEREOF, The Company has caused this policy to be executed this day of (April 22, 1908, 99 v. 155, § 2.)

Section 9415. (Endowment fixed survivorship annuity.)

OHIO STANDARD LIFE INSURANCE POLICY.

Endowment Fixed Survivorship Annuity.

Age
Amount \$..... Premium \$.....
.....
.....
.....
Of (Name of State)

IN CONSIDERATION OF Dollars, receipt of which is hereby acknowledged, and of the payment of (here insert amounts and times of payments of premiums) until full years' premiums shall have been paid or until the prior death of the Insured,

PROMISES to pay at its home office in Dollars in twenty equal annual installments of \$..... to the insured, the first installment to be payable on the day of nineteen hundred and If the insured shall die before receiving all the twenty installments herein provided for, the remainder of such twenty installments shall be payable as they fall due to (herein called the beneficiary), (insert "his" or "her") executors, administrators or assigns, with (insert "out" if so desired) right of revocation, if (insert "he" or "she") survives the insured, otherwise to the executors, administrators or assigns of the insured.

Should the insured die before (insert date of maturity), this policy shall be payable to the beneficiary, (insert "his" or "her") executors, administrators or assigns, if (insert "he" or "she") survives the insured, otherwise to the executors, administrators or assigns of the insured, the first installment being payable immediately upon receipt of due proof of the death of the insured. Any indebtedness to the company on this policy, together with the balance, if any, of the then current year's premium, will be deducted from the amounts first payable under this contract.

Should the insured or beneficiary live to receive the twenty installments payable as above provided, the company, beginning one year after the date when the twentieth

installment payable hereunder shall fall due, will pay the sum of \$..... annually to the insured, or, in the event of the death of the insured, to the beneficiary, the said annual payment to be due and payable so long as either the insured or beneficiary is living.

CHANGE OF BENEFICIARY.—When the right of revocation has been reserved, or in case of the death of any beneficiary under either a revocable or irrevocable designation, the insured, subject to any existing assignment of the policy, may designate a new beneficiary with or without reserving right of revocation by filing written notice thereof at the home office of the company, accompanied by the policy for suitable endorsement thereon. If any beneficiary shall die before the insured and the insured shall not have designated a new beneficiary the interest of such beneficiary shall be payable to the insured, (insert “his” or “her”) executors, administrators or assigns. If a new beneficiary shall be designated only twenty annual installments will be payable under this policy, and future (if necessary, insert “semi” or “quarter”) annual premiums will be reduced to dollars each.

PAYMENT OF PREMIUMS.—The company will accept payment of premiums at other times than as stated above, as follows:

.....
.....

Upon return of this policy to the company accompanied by evidence satisfactory to the company of the death of the beneficiary the company will reduce the future (here insert “annual,” “semi-annual” or “quarterly”) premiums to \$..... each.

Except as herein provided the payment of a premium or installment thereof shall not maintain the policy in force beyond the date when the next premium or installment thereof is payable.

All premiums are payable in advance at said home office, or to an agent of the company upon delivery of a receipt signed by one or more of the following officers of the company (insert titles of officers who may sign receipts), and countersigned by said agent.

A grace of one month subject to an interest charge at the rate of per centum per annum shall be granted for the payment of every premium after the first, during which month the insurance shall continue in force. If the insured shall die during the month of grace the overdue premium will be deducted from any amount payable hereon in any settlement hereunder.

CONDITIONS.—(The policy may here provide for restrictions of liability by reason of travel, occupation, change of residence and suicide. These restrictions except such as refer to military and naval service in time of war, must be applicable only to cases where the act of the insured provided against occurs within two years after the issuance of the policy.)

INCONTESTABILITY.—This policy and the application therefor, a copy of which is endorsed hereon, constitute the entire contract between the parties and shall be incontestable from its date, except for non-payment of premiums and except as otherwise provided in this policy. All statements made by the insured in said application shall, in the absence of fraud, be deemed representations and not warranties.

If the age of the insured has been misstated, or if the age of the beneficiary has been misstated, the amount payable hereunder shall be such as the premium paid would have purchased at the correct age.

PARTICIPATION.—This policy shall participate in the surplus of the company and beginning not later than the end of the (insert first, second or third) policy year the company will annually determine and account for the portion of the divisible surplus accruing hereon.

DIVIDENDS.—Dividends at the option of the owner of this policy shall on the day of of each year (here may be inserted "after the first policy year" or "after second policy year") be either—

- (1) Paid in cash, or
- (2) Applied toward the payment of any premium or premiums, or
- (3) Applied to the purchase of paid up additions to the policy, payable in twenty annual installments at the same times as the original amount insured under this policy is payable. The payment of such twenty installments shall discharge the company from all liability on account of such dividend additions; or
- (4) Left to accumulate to the credit of the policy with interest at (here insert a rate not exceeding that used by the company in calculating its reserves) per centum per annum and payable at the maturity of the policy, but withdrawable on any anniversary of the policy.

Unless the owner of this policy shall elect otherwise within three months after the mailing by the company of a written notice requiring such election, the dividend shall be applied to the purchase of paid up additions.

LOANS.—After three full years' premiums have been paid, the company at any time, while this policy is in force,

will advance, on proper assignment of the policy and on the sole security thereof, at a rate of interest not greater than per centum per annum, which interest if not paid annually shall be added to the principal and bear the same rate of interest, a sum equal to, or, at the option of the owner of the policy, less than, the reserve at the end of the current policy year required to provide for the twenty installments payable under this policy and for any dividend additions thereto, and no more, computed according to the (designate mortality table adopted by the company for computing reserves) mortality table and interest at the rate of (designate rate of interest adopted by the company for computing reserves) per centum per annum, less (here may be inserted not more than two and one-half) per centum of the amount insured by this policy and of any dividend additions thereto. The company, however, will deduct from such loan value any existing indebtedness to the company on the policy and any unpaid balance of the premium for the current policy year, and may collect interest in advance on the loan to the end of the current policy year. Such loan may be deferred by the company for not exceeding six months after the application therefor is made. Failure to repay any such advance or to pay interest shall not avoid this policy unless the total indebtedness hereon to the company shall equal or exceed such loan value at the time of such failure and until one month after notice shall have been mailed by the company to the last known address of the insured and of the assignee, if any. No condition other than as herein provided shall be exacted as a prerequisite to any such advance.

ASSIGNMENT.—No assignment of this policy shall be binding upon the company until it be filed with the company at its said home office. The company assumes no responsibility as to the validity of any assignment.

OPTIONS ON SURRENDER OR LAPSE.—After this policy shall have been in force three full years the owner, within one month after any default, may elect

- (a) To accept the value of this policy in cash, or
- (b) To have the insurance continued in force from date of default, without future participation and without the right to loans, for its face amount, including any outstanding dividend additions, less any indebtedness to the company hereon, or
- (c) To purchase non-participating paid-up insurance, payable, except as hereinafter provided, at the same times and on the same conditions as this policy. The cash value will be the reserve at the date of default required to provide for the twenty installments payable under this policy

and for any dividend additions thereto, computed according to the (designate mortality table adopted by the company for computing reserves) mortality table and interest at the rate of (designate rate of interest adopted by the company for computing reserves) per centum per annum, less (here may be inserted not more than two and one-half) per centum of the amount insured by this policy and of any dividend additions thereto, and less any existing indebtedness to the company on this policy. Payment of such cash value may be deferred by the company for not exceeding six months after the application therefor is made. The term for which the insurance will be continued or the amount of the paid-up policy will be such as the cash value will purchase as a net single premium at the attained age of the insured according to the (designate the mortality table adopted by the company for computing reserves) mortality table and interest at the rate of (designate rate of interest adopted by the company for computing reserves) per centum per annum. If the sum applicable to the purchase of temporary insurance shall be more than sufficient to continue the insurance to the end of the endowment term named in this policy, the excess shall be used to purchase in the same manner non-participating, paid-up pure endowment, payable at the end of the endowment term and on the same conditions. If the owner shall not within one month from default surrender this policy to the company at its home office for a cash surrender value or for paid-up insurance as provided in options (a) and (c) the insurance will be continued as provided in option (b). The paid-up or continued temporary and pure endowment insurance will be payable in twenty equal annual installments and the payment of twenty installments under either option shall discharge the company from all liability under this policy.

The figures in the following table are computed in accordance with the above provisions and upon the assumption that there is no indebtedness on the policy, and that there are not outstanding dividend additions.

(At the option of the company the following may be here inserted:

"The figures apply to a policy for \$1,000. As this contract is for \$. the loan, cash, paid-up insurance or pure endowment available in any year will be the amount stated in the table for that year.'")

At end of Year.	Cash or Loan Value.	Paid-Up Endow- ment in- surance.	Continued Insurance.			Pure Endow- ment.
			Years.	Months.	Days.	
3	\$.....	\$.....	\$.....
4	\$.....	\$.....	\$.....
5	\$.....	\$.....	\$.....
6	\$.....	\$.....	\$.....
7	\$.....	\$.....	\$.....
8	\$.....	\$.....	\$.....
9	\$.....	\$.....	\$.....
10	\$.....	\$.....	\$.....
11	\$.....	\$.....	\$.....
12	\$.....	\$.....	\$.....
13	\$.....	\$.....	\$.....
14	\$.....	\$.....	\$.....
15	\$.....	\$.....	\$.....
16	\$.....	\$.....	\$.....
17	\$.....	\$.....	\$.....
18	\$.....	\$.....	\$.....
19	\$.....	\$.....	\$.....
20	\$.....	\$.....	\$.....

Figures for later years will be furnished upon request.

REINSTATEMENT.—In case of continued temporary insurance under the above provisions, this policy, upon evidence of insurability satisfactory to the company, may be reinstated within the first three years of the term for which the insurance is continued by payment of arrears of premiums with interest at (here insert not greater than six) per centum per annum.

.....
AGENTS ARE NOT AUTHORIZED to modify this policy or to extend the time for paying a premium.

IN WITNESS WHEREOF, The Company has caused this Policy to be executed this day of
(April 22, 1908, 99 v. 160, § 2.)

Section 9416. (Term.)**OHIO STANDARD LIFE INSURANCE POLICY.**

Term.

Age
 Amount \$..... Premium \$.....

 Of (Name of State)

IN CONSIDERATION OF Dollars,
 receipt of which is hereby acknowledged, and of the pay-
 ment of (here insert amounts and times of payments of pre-
 miums) until full years' premiums shall have
 been paid or until the prior death of the Insured,

PROMISES to pay upon receipt at the home office of the
 Company in of due proof of the death of
 of County of
 State of, herein called the Insured, within
 years from the date hereof, Dollars, less any in-
 debtedness hereon to the Company and any unpaid portion
 of the premium for the then current policy year, at said
 home office, to beneficiary with (insert
 "out" if so desired) right of revocation.

CHANGE OF BENEFICIARY.—When the right of revo-
 cation has been reserved, or in case of the death of any bene-
 ficiary under either a revocable or irrevocable designation,
 the insured, subject to any existing assignment of the policy,
 may designate a new beneficiary with or without reserving
 right of revocation by filing written notice thereof at the
 home office of the company, accompanied by the policy for
 suitable endorsement thereon. If any beneficiary shall die
 before the insured and the insured shall not have designated
 a new beneficiary the interest of such beneficiary shall be
 payable to the insured, (insert "his" or "her") executors,
 administrators or assigns.

PAYMENT OF PREMIUMS.—The company will accept
 payment of premiums at other times than as stated above, as
 follows:

.....

 Except as herein provided the payment of a premium or
 installment thereof shall not maintain the policy in force
 beyond the date when the next premium or installment
 thereof is payable.

All premiums are payable in advance at said home office,

or to an agent of the company upon delivery of a receipt signed by one or more of the following officers of the company (insert titles of officers who may sign receipts), and countersigned by said agent.

A grace of one month subject to an interest charge at the rate of per centum per annum shall be granted for the payment of every premium after the first, during which month the insurance shall continue in force. If the insured shall die during the month of grace the overdue premium will be deducted from any amount payable hereon in any settlement hereunder.

CONDITIONS.—(The policy may here provide for restrictions of liability by reason of travel, occupation, change of residence and suicide. These restrictions except such as refer to military and naval service in time of war, must be applicable only to cases where the act of the insured provided against occurs within two years after the issuance of the policy.)

INCONTESTABILITY.—This policy and the application therefor, a copy of which is endorsed hereon, constitute the entire contract between the parties and shall be incontestable from its date, except for non-payment of premiums and except as otherwise provided in this policy. All statements made by the insured in said application shall, in the absence of fraud, be deemed representations and not warranties.

If the age of the insured has been misstated, the amount payable hereunder shall be such as the premium paid would have purchased at the correct age.

PARTICIPATION.—This policy shall participate in the surplus of the company and beginning not later than the end of the (insert first, second or third) policy year the company will annually determine and account for the portion of the divisible surplus accruing hereon.

DIVIDENDS.—Dividends at the option of the owner of this policy shall on the day of of each year (here may be inserted "after the first policy year" or "after second policy year") be either—

- (1) Paid in cash, or
- (2) Applied toward the payment of any premium or premiums, or

(The policy, at the option of the company, may here provide for a further option as follows):

- (3) Left to accumulate to the credit of the policy with interest at (here insert a rate not exceeding that used by the company in calculating its reserves) per centum per annum and payable at the maturity of the policy, or at the expira-

tion of the term, but withdrawable on any anniversary of the policy.

Unless the owner of this policy shall elect otherwise within three months after the mailing by the company of a written notice requiring such election, the dividends shall be applied to the payment of premiums.

ASSIGNMENT.—No assignment of this policy shall be binding upon the company until it be filed with the company at its said home office. The company assumes no responsibility as to the validity of any assignment.

(If the term of the policy is for more than twenty years, the company shall provide for continuance of insurance on surrender or lapse in the following form):

CONTINUANCE OF INSURANCE ON LAPSE.—In event of default in premium payments after this policy shall have been in force three full years, the reserve hereon according to the (designate mortality table adopted by the company for computing reserves) mortality table and interest at the rate of (designate rate of interest adopted by the company for computing reserves) per centum per annum, less (here may be inserted not more than two and one-half) per centum of the amount insured by this policy will be applied to the purchase of non-participating continued temporary insurance for the face amount of this policy at net single premium rates at the attained age of the insured according to the same table of mortality and rate of interest.

TABLE OF CONTINUED INSURANCE.

At end of year.	Years.	Continued Insurance.	
		Months.	Days.
3
4
5
6
7
8
9
10
11
12
13
14

15	.....	.....	.....
16	.....	.....	.....
17	.....	.....	.....
18	.....	.....	.....
19	.....	.....	.....
20	.....	.....	.....

Figures for later years will be furnished upon request.

(If the term policy is for more than twenty years, the company shall provide for reinstatement in the following form):

REINSTATEMENT.—Upon evidence of insurability satisfactory to the company this policy may be reinstated within the first three years of the term for which the insurance is continued by payment of arrears of premiums with interest at (here insert not greater than six) per centum per annum.

OPTIONS AT MATURITY.—The insured, by written notice to the company at its home office, and with written consent of the assignee and irrevocable beneficiary, if any, may elect to have the net sum payable under this policy paid either in cash or as follows:

(1) By the payment of interest thereon at per centum per annum payable annually, to the payee under this policy at the end of each year during the life of the payee and by the payment upon the death of the payee of the said net sum and accrued interest to the executors, administrators or assigns of the payee, unless otherwise directed in said notice.

(2) By the payment of equal annual installments for a specified number of years, the first installment being payable immediately, in accordance with the following table for each \$1,000 of said net sum.

(3) By the payment of equal annual installments payable at the beginning of each year for a fixed period of twenty years and for so many years longer as the payee shall survive in accordance with the following table for each \$1,000 of said net sum.

Installments payable under options (2) or (3) which shall not have been paid prior to the death of the payee shall be paid, unless otherwise directed in said notice, to the executors, administrators or assigns of the payee.

If the insured shall not have directed otherwise the beneficiary may, after the death of the insured, by like written notice, and with the written consent of the assignee, if any, select either of the above options.

Section 9417. (Term with right to renew and change.)

OHIO STANDARD LIFE INSURANCE POLICY.

Term With Right to Renew and Change.

Age

Amount \$..... Premium \$.....

.....

.....

.....

Of (Name of State)

IN CONSIDERATION OF Dollars, receipt of which is hereby acknowledged, and of the payment of (here insert amounts and times of payments of premiums) until full years' premiums shall have been paid or until the prior death of the Insured,

PROMISES to pay upon receipt at the home office of the Company in of due proof of the death of of County of State of, herein called the Insured, within years from the date hereof, Dollars, less any indebtedness hereon to the Company and any unpaid portion of the premium for the then current policy year, at said home office, to beneficiary with (insert "out" if so desired) right of revocation.

CHANGE OF BENEFICIARY.—When the right of revocation has been reserved, or in the case of the death of any beneficiary under either a revocable or irrevocable designation, the insured, subject to any existing assignment of the policy, may designate a new beneficiary with or without reserving right of revocation by filing written notice thereof at the home office of the company, accompanied by the policy for suitable endorsement thereon. If any beneficiary shall die before the insured and the insured shall not have designated a new beneficiary the interest of such beneficiary shall be payable to the insured, (insert "his" or "her") executors, administrators or assigns.

PAYMENT OF PREMIUMS.—The company will accept payment of premiums at other times than as stated above, as follows:

.....

Except as herein provided the payment of a premium or installment thereof shall not maintain the policy in force beyond the date when the next premium or installment thereof is payable.

All premiums are payable in advance at said home office, or to an agent of the company upon delivery of a receipt signed by one or more of the following officers of the company (insert titles of officers who may sign receipts), and countersigned by said agent.

A grace of one month subject to an interest charge at the rate of per centum per annum shall be granted for the payment of every premium after the first, during which month the insurance shall continue in force. If the insured shall die during the month of grace the overdue premium will be deducted from any amount payable hereon in any settlement hereunder.

CONDITIONS.—(The policy may here provide for restrictions of liability by reason of travel, occupation, change of residence and suicide. These restrictions except such as refer to military and naval service in time of war, must be applicable only to cases where the act of the insured provided against occurs within two years after the issuance of the policy.)

INCONTESTABILITY.—This policy and the application therefor, a copy of which is endorsed hereon, constitute the entire contract between the parties and shall be incontestable from its date, except for non-payment of premiums and except as otherwise provided in this policy. All statements made by the insured in said application shall, in the absence of fraud, be deemed representations and not warranties.

If the age of the insured has been misstated, the amount payable hereunder shall be such as the premium paid would have purchased at the correct age.

PARTICIPATION.—This policy shall participate in the surplus of the company and beginning not later than the end of the (insert first, second or third) policy year the company will annually determine and account for the portion of the divisible surplus accruing hereon.

DIVIDENDS.—Dividends at the option of the owner of this policy shall on the day of of each year (here may be inserted "after the first policy year" or "after second policy year") be either—

- (1) Paid in cash, or
- (2) Applied toward the payment of any premium or premiums,

(The policy, at the option of the company, may here provide for a further option as follows:)

- (3) Left to accumulate to the credit of the policy with interest at (here insert a rate not exceeding that used by the

company in calculating its reserves) per centum per annum and payable at the maturity of the policy, or at the expiration of the term, but withdrawable on any anniversary of the policy.

Unless the owner of this policy shall elect otherwise within three months after the mailing by the company of a written notice requiring such election, the dividends shall be applied to the payment of premiums.

(If the renewal term is for ten years or less, the policy may provide, as an alternative to the annual distribution of dividends, for a distribution in periods of ten years or less as follows:)

Dividends accruing hereon shall be accumulated during each renewal period and at the end of each period on renewal of the policy by the insured shall be paid as an annuity for the next succeeding renewal term and applied towards the payment of premiums during such term.

PRIVILEGE OF RENEWAL.—The owner of this policy, if the insured be not over the age of sixty-five years, may renew this policy for further terms of years each by written notice to the company at its said home office accompanied by this policy for suitable endorsement on or before the expiration of the insurance hereunder and by paying the premiums to be fixed by the age on the birthday nearest to the date of such renewal in accordance with the following table for each one thousand dollars of insurance; if the insured shall be over the age of sixty-five years this policy may upon similar notice be surrendered for an ordinary life policy which shall require premiums during life in accordance with the following table for each one thousand dollars of insurance:

the company shall provide for continuance of insurance on surrender or lapse in the following form:)

CONTINUANCE OF INSURANCE ON LAPSE.— In event of default in premium payments after this policy shall have been in force three full years, the reserve hereon according to the (designate mortality table adopted by the company for computing reserves) mortality table and interest at the rate of (designate rate of interest adopted by the company for computing reserves) per centum per annum, less (here may be inserted not more than two and one-half) per centum of the amount insured by this policy will be applied to the purchase of non-participating continued temporary insurance for the face amount of this policy at net single premium rates at the attained age of the insured according to the same table of mortality and rate of interest.

TABLE OF CONTINUED INSURANCE.

At end of year.	Continued Insurance.		
	Years.	Months.	Days.
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20

Figures for later years will be furnished upon request.
(If the term of the policy is for more than twenty years,

the company shall provide for reinstatement in the following form:)

REINSTATEMENT.—Upon evidence of insurability satisfactory to the company this policy may be reinstated within the first three years of the term for which the insurance is continued by payment of arrears of premiums with interest at (here insert not greater than six) per centum per annum.

OPTIONS AT MATURITY.—The insured, by written notice to the company at its home office, and with written consent of the assignee and irrevocable beneficiary, if any, may elect to have the net sum payable under this policy paid either in cash or as follows:

(1) By the payment of interest thereon at per centum per annum, payable annually, to the payee under this policy at the end of each year during the life of the payee and by the payment upon the death of the payee of the said net sum and accrued interest to the executors, administrators or assigns of the payee, unless otherwise directed in said notice.

(2) By the payment of equal annual installments for a specified number of years, the first installment being payable immediately, in accordance with the following table for each \$1,000 of said net sum.

(3) By the payment of equal annual installments payable at the beginning of each year for a fixed period of twenty years and for so many years longer as the payee shall survive in accordance with the following table for each \$1,000 of said net sum.

Installments payable under options (2) or (3) which shall not have been paid prior to the death of the payee shall be paid, unless otherwise directed in said notice, to the executors, administrators or assigns of the payee.

If the insured shall not have directed otherwise the beneficiary may, after the death of the insured, by like written notice, and with the written consent of the assignee, if any, select either of the above options.

Unless otherwise specified by the insured the payee may on any interest date receive the amount yet due under option (1), and may at any time receive the commuted value of payments yet to be made, computed upon the same basis as option (2) in the following table, provided that no such commutation will be made under (3), except after the death of the payee occurring within the aforesaid twenty years.

TABLE OF INSTALLMENTS FOR EACH \$1,000.

Option (2)		Option (3)	
Number of Annual Installments.	Amount of Each Installment.	Age of Payee when Policy becomes payable.	Amount of Each Installment.

AGENTS ARE NOT AUTHORIZED to modify this policy or to extend the time for paying a premium.

IN WITNESS WHEREOF, The Company has caused this Policy to be executed this day of (April 22, 1908, 99 v. 165, § 2.)

Section 9418. (Single premium and non-participating policies.) Single premium policies may be issued in any form prescribed in sections ninety-four hundred and twelve to ninety-four hundred and seventeen, both inclusive, omitting therefrom provisions or portions thereof applicable only to other than single premium policies. Non-participating policies may be issued in any form prescribed in such sections if they shall contain a provision that the policy shall be non-participating, and such policies shall omit therefrom

clauses for participation in the surplus of the company. (April 22, 1908, 99 v. 170, § 3.)

Section 9419. (Preliminary term insurance. Reserve provision.) Policies issued on the standard forms prescribed in such sections may provide for not more than one year preliminary term insurance by incorporation therein of the following clause immediately preceding the "Change of Beneficiary clause":

"The first year's insurance under this policy is Term insurance."

If the premium charged for Term insurance under a Limited-Payment Life or Endowment Preliminary Term policy providing for the payment of all premiums thereon in less than twenty years from the date of the policy exceeds that charged for like insurance under Whole Life Preliminary Term policies of the same company, the reserve thereon at the end of any year, including the first, shall not be less than the reserve on a Whole Life Preliminary Term policy issued in the same year and at the same age together with an amount which shall be equivalent to the accumulation of a net level premium sufficient to provide for a Pure Endowment at the end of the premium-payment period equal to the difference between the value at the end of such period of such a Whole Life Preliminary Term policy and the full reserve at such time of such a Limited-Payment Life or Endowment policy. (May 21, 1910, 101 v. 352; April 22, 1908, 99 v. 171, § 4.)

Section 9420. (Policies, other than standard forms.) No policy of life insurance in form other than as provided in sections ninety-four hundred and twelve to ninety-four hundred and seventeen, both inclusive, shall be issued or delivered in this state or be issued by a life insurance company organized under the laws of this state unless the same shall contain the following provisions:

(1) A provision that all premiums shall be payable in advance either at the home office of the company, or to an agent of the company, upon delivery of a receipt signed by one or more of the officers who shall be named in the policy.

(2) A provision for a grace of one month for the payment of every premium after the first, which may be subject to an interest charge, during which month the insurance shall continue in force, which provision may contain a stipulation that if the insured shall die during the month of grace the over-due premium will be deducted in any settlement under the policy.

(3) A provision that the policy and the application therefor, a copy of which must be endorsed thereon, shall constitute the entire contract between the parties and shall be incontestable after two years from its date, except for non-payment of premiums and except for violations of the conditions of the policy relating to naval and military service in time of war.

(4) A provision that all statements made by the insured in the application shall, in the absence of fraud, be deemed representations and not warranties.

(5) A provision that if the age of the insured has been understated the amount payable under the policy shall be such as the premium would have purchased at the correct age.

(6) A provision that the policy shall participate in the surplus of the company and that, beginning not later than the end of the third policy year, the company will annually determine and account for the portion of the divisible surplus accruing on the policy, and that the owner of the policy shall have the right each year to have the current dividend arising from such participation paid in cash or applied to the purchase of paid-up additions, and if the policy shall provide other dividend options, it shall further provide that if the owner of the policy shall not elect any such other options the dividend shall be applied to the purchase of paid-up additions.

In lieu of the foregoing provision the policy may contain a provision that the policy shall participate in the surplus of the company, and that, beginning not later than the end of the fifth policy year, the company will determine and account for the portion of the divisible surplus accruing on the policy, and that the owner of the policy shall have the right to have the current dividend arising from such participation paid in cash, and that at periods of not more than five years such accounting and payment, at the option of the policy holder, shall be had.

Renewable term policies of ten years or less may provide that the surplus accruing to such policies shall be determined and apportioned each year after the second policy year and accumulated during each renewal period and that at the end of any renewal period on renewal of the policy by the insured, the company shall apply the accumulated surplus as an annuity for the next succeeding renewal term in the reduction of premiums.

These provisions shall not be required in non-participating policies.

(7) A provision that after three full years' premiums

have been paid, the company at any time, while the policy is in force, will advance, on proper assignment of the policy and on the sole security thereof, at a specified rate of interest, a sum equal to, or at the option of the owner of the policy, less than, the reserve at the end of the current policy year on the policy and on any dividend additions thereto, specifying the mortality table and rate of interest adopted for computing such reserve, less a sum not more than two and one-half per centum of the amount insured by the policy and of any dividend additions thereto; and that the company will deduct from such loan value any existing indebtedness on the policy and any unpaid balance of the premium for the current policy year, and may collect interest in advance on the loan to the end of the current policy year; which provision may further provide that such loan may be deferred for not exceeding six months after the application therefor is made. It shall be further stipulated in the policy that failure to repay any such advance or to pay interest shall not avoid the policy unless the total indebtedness thereon to the company shall equal or exceed such loan value at the time of such failure nor until one month after notice shall have been mailed by the company to the last known address of insured and of the assignee, if any.

No condition other than as herein provided shall be exacted as a prerequisite to any such advance.

This provision shall not be required in term insurances.

(8) A provision which, in event of default in premium payments, after premiums shall have been paid for three years, shall secure to the owner of the policy a stipulated form of insurance, the net value of which shall be at least equal to the reserve at the date of default on the policy and on any dividend additions thereto, specifying the mortality table and rate of interest adopted for computing such reserves, less a sum not more than two and one-half per centum of the amount insured by the policy and of any existing dividend additions thereto, and less any existing indebtedness to the company on the policy. Such provision shall stipulate that the policy may be surrendered to the company at its home office within one month from date of default for a specified cash value at least equal to the sum which would otherwise be available for the purchase of insurance as aforesaid and may stipulate that the company may defer payment for not more than six (6) months after the application therefor is made.

This provision shall not be required in term insurances of twenty years or less.

(9) A table showing in figures the loan values, and the

options available under the policies each year upon default in premium payments, during at least the first twenty years of the policy, beginning with the year in which such values and options become available.

(10) A provision that if, in event of default in premium payments, the value of the policy shall be applied to the purchase of other insurance, and if such insurance shall be in force and the original policy shall not have been surrendered to the company and canceled, the policy may be reinstated within three years from such default, upon evidence of insurability satisfactory to the company and payment of arrears of premiums with interest.

(11) A provision that when a policy shall become a claim by the death of the insured settlement shall be made upon receipt of due proof of death, or not later than two months after receipt of such proof.

(12) A table showing the amounts of installments in which the policy may provide its proceeds may be payable.

(13) A title on the face and on the back of the policy correctly describing the same.

Any of the foregoing provisions or portions thereof relating to premiums not applicable to single premium policies, shall to that extent not be incorporated therein. (April 22, 1908, 99 v. 173, § 6.)

A clause stipulating for automatic election, after default in premium payment, on failure of the insured to elect, is valid if it conforms to §§ 9420 and 9421, although the clause differs from the optional rights clause in the statutory forms. *Landis v. Metropolitan Co.*, 104 O. S. 589 (1922).

PREMIUMS.

Payment of first premium; when necessary to put policy in force. The following cases were decided before the enactment of this section, which requires premiums to be paid in advance.

Under a provision in a policy that it "shall not take effect until the first premium shall have been paid to and accepted by the company or an authorized agent" it was held that such payment, unless waived, was necessary to put the policy in force.

Insurance Co. v. Harvey, 72 O. S. 174 (1905).

Such a provision may be waived. Waiver may be proved by showing a known custom of the agent to deliver policies of the company before the premium is paid. Such proof is competent although the policy provides that only certain officers may extend the time of payments. *Insurance Co. v. Kaufman*, 24 C. C. n. s. 113 (1903).

An agent authorized to make contracts of fire insurance and issue policies is authorized to extend credit for premiums, unless there are restrictions on his authority of which the insured has notice.

Machine Co. v. Insurance Co., 50 O. S. 549 (1893).

See *Johnson v. Insurance Co.*, 66 O. S. 6, 13 (1902).

Where a policy with a receipt for the first year's premium was entrusted to a special agent, to be delivered on payment of the premium, the

special agent had no authority to extend credit, or to deliver the policy without payment, and the company is not estopped to set up non-payment and non-delivery of the policy, against an assignee of the policy.

Insurance Co. v. Smith, 3 W. L. B. 607; 7 Am. L. R. 147 (1878).

Where a policy contained a provision making payment of the premium a condition precedent to the taking effect of the policy, and receipt of the premium is acknowledged in the policy, such acknowledgment of receipt is conclusive for the purpose of giving effect to the policy from the time of delivery.

Insurance Co. v. Fellowes, 1 Dis. 217 (1856); affirmed, 2 Dis. 123 (1858).

See *Lee v. Insurance Co.*, 1 Handy 217 (1854).

Where an agent, having received the policy from the company, calls on the insured and collects the first premium, but, finding the insured to be ill, delays delivery of the policy, the contract of insurance is complete. *Insurance Co. v. Shively*, 1 Ohio App. 238; 17 C. C. n. s. 352; 24 C. D. 357 (1913); *Insurance Co. v. Ford*, 2 Ohio App. 410; 19 C. C. n. s. 689; 24 C. D. 479 (1914).

The premium of any premium, after the first, is not a condition precedent to the vesting of all rights, though these rights are liable to forfeiture for non-payment of future premiums.

Insurance Co. v. French, 30 O. S. 240, 252 (1876); (distinguished in *Insurance Co. v. Wilson*, 70 O. S. 354).

Forfeiture of policy for non-payment. Where a policy was issued and accepted on the expressed condition that if the annual premiums were not paid within the time specified the policy "shall be null and void, and wholly forfeited," the failure to pay the premiums avoids the policy.

Insurance Co. v. McMillen, 24 O. S. 67 (1873).

Insurance Co. v. Wilson, 70 O. S. 354 (1904).

For rights of insured to paid insurance, on default, see § 9420 (8) and (10). See also below *Insurance paid by value of policy after default*.

That failure to pay premiums on time was the fault of an employee of the insured is no excuse, see

Graveson v. Life Ass'n., 8 C. C. 171; 6 C. D. 327 (1894); aff'd, no rep., 37 W. L. B. 129.

When a policy contains no provision for forfeiture, failure to pay premiums on or about the day they become due may work a suspension of rights thereunder, until such a time has elapsed as will indicate that the insured does not intend to pay. The company may then give notice of its intention to forfeit the policy.

Swander v. Insurance Co., 1 C. C. n. s. 233; 15 C. D. 3 (1903).

See § 9420 (2).

Insurance Co. v. Fellowes, 1 Dis. 217 (1856); affirmed, 2 Dis. 128.

Failure to pay a premium is excused only when the insurance company, by some wrongful act or omission, prevented the payment. In other cases diligence on the part of the insured would not excuse non-payment.

Insurance Co. v. Troy, 20 C. C. 644; 10 C. D. 761 (1900); aff'd, no rep., 66 O. S. 675.

Premiums must be tendered at reasonable hours, but if so tendered, the policy can not be forfeited because no person authorized to receive payment was in the office of the company.

Insurance Co. v. Troy, 20 C. C. 644; 10 C. D. 761 (1900); aff'd, no rep., 66 O. S. 675.

Where a company repudiates its contract, and clearly indicates that a tender, if made, would not be accepted, actual tender is unnecessary.

Insurance Co. v. Smith, 44 O. S. 156 (1886).

A uniform custom of a company, to give notice of the time and amount

of premium due, may bar the right of the company to forfeit a policy, where non-payment is caused by a failure to give notice.

Insurance Co. v. Smith, 44 O. S. 156 (1886).

Insurance Co. v. Pottker, 33 O. S. 459 (1878).

But in general, where the policy contains no provision for notice, neither demand of payment nor notice of an intention to insist on forfeiture is necessary.

Insurance Co. v. Wilson, 70 O. S. 354 (1904).

Whether a company has waived its right to suspend a policy by a custom of receiving premiums after they had become due, is a question for the jury.

Swander v. Insurance Co., 1 C. C. n. s. 233; 15 C. D. 3 (1903).

Mere delay in declaring a forfeiture is not a waiver.

Graveson v. Life Ass'n., 8 C. C. 171; 6 C. D. 327 (1894); aff'd, no rep., 37 W. L. B. 129.

The receipt and acceptance of a premium after it is due is a waiver of forfeiture.

Insurance Co. v. French, 30 O. S. 240, 253 (1876).

A promissory note given for premiums does not, in general, constitute payment, but merely evidence of the indebtedness.

Koch v. Hotel Co., 13 C. C. n. s. 163 (1910).

See Insurance Co. v. Bonner, 36 O. S. 51 (1880).

Failure to pay a premium note, or interest thereon, avoids the policy, when it so provides.

Insurance Co. v. Wilson, 70 O. S. 354 (1904).

Robert v. Insurance Co., 2 Dis. 106 (1858).

Insurance Co. v. Robinson, 40 O. S. 270 (1883).

Insurance Co. v. Buxer, 62 O. S. 385 (1900).

See Kelsey v. Insurance Co., 10 O. L. R. 119 (U. S. C. C. A. 1912).

A policy provided that, on failure to pay premiums after the third, the policy would be continued in force for such time as one annual premium is contained in its reserve value; and the insured paid a part of the fifth premium in cash, and gave notes for the balance, the notes containing a forfeiture clause. The notes were not paid. The reserve value of the policy was sufficient to keep the policy in force beyond the time when the insured died. Held, the policy was not forfeited by the provisions in the notes.

Kelsey v. Insurance Co., 10 O. L. R. 119 (U. S. C. C. A. 1912); not following Insurance Co. v. Buxer, 62 O. S. 385.

Where a policy provided for a premium note, which was not to be deemed payment, but as an extension of time, and if the note, or a renewal, was not paid at maturity, the company should not be liable for a loss occurring while it remained due and unpaid, it was held that the policy was not forfeited by non-payment, but suspended only.

McEvoy v. Insurance Co., 3 C. C. 569; 2 C. D. 329 (1889).

Non-payment of notes held not to forfeit amount of policy, but to forfeit future dividends under terms of policy.

Insurance Co. v. Bonner, 36 O. S. 51 (1880).

Where both parties joined in a motion for an instructed verdict, the court was authorized to determine from the evidence whether the premium had been paid.

Halstead v. Ins. Co., 14 N. P. n. s. 113; 24 L. D. 296 (1912); affirmed by court of appeals without report; modified and affirmed, 90 O. S. 409.

Revivor after default. Where a policy provided that in case of forfeiture for non-payment of premiums "it may be revived if not more than fifty-two premiums are due, upon the payment of all arrears, and the

presentation of evidence satisfactory to the company of the sound health of the insured," it was held that the company could refuse to accept four weeks' premiums on a policy forty-six days in arrears, an investigation having shown that the insured was far gone with consumption.

Insurance Co. v. Walton, 4 C. C. n. s. 133; 15 C. D. 587 (1904); aff'd, no rep., 72 O. S. 650.

A health certificate furnished for reinstatement, after default, should be construed liberally in favor of the insured.

Life Ass'n. v. Draddy, 8 N. P. 140; 10 L. D. 591 (Super. Ct. Cin. 1900).

Actions to collect. A foreign insurance company which has not procured a license, as required by law, can not maintain an action in a state court to recover premiums.

Casualty Co. v. Banking Co., 12 C. C. n. s. 200 (1908).

Where an application was revoked by the applicant, before the policy was issued, the agent who obtained the application can not maintain an action in his own name against the applicant to recover the premium, or the amount of his commission. The right of action, if one exists, is in the company.

Chapin v. Betts, 14 C. C. 335; 7 C. D. 422 (1897).

Consideration for premiums. The obligation on the part of the company to pay the amount of the policy on the happening of the event contemplated, furnishes a sufficient consideration to support the promise to pay premiums, whether such promise is made by the insured alone, or by another jointly with him.

Insurance Co. v. Hilliard, 63 O. S. 478 (1900).

But it is essential that the insurer incur a liability by a contract which is not affected by any infirmity which it may elect to interpose as a defense to an action on the policy if the life insured should end. Where the insurer incurs no such binding obligation the premiums paid may be recovered.

Insurance Co. v. Felix, 73 O. S. 46 (1905).

Insurance premiums are not necessities under G. C. § 12946-1, and an assignment of future wages therefor is invalid. Rep. Atty. Gen. 1913, p. 848.

Recovery of premiums paid. Where a person has been induced to take a policy by the fraudulent representations of the agent of the company, the assured may have the policy declared void and recover back the premiums paid.

Insurance Co. v. Wright, 33 O. S. 533 (1878).

Martin v. Insurance Co. (Sup. Ct. Tenn.) 3 W. L. B. 646 (1877).

Whether representations as to future profits, based upon the past experience and present condition of the company, were intended as representations of fact or opinion, may be submitted to the jury. Life Soc. v. Statler, 17 C. C. n. s. 59; 24 C. D. 391 (1911); aff'd, no rep. 88 O. S. 549.

Where an insurance company wrongfully declared the policy forfeited, and refused to accept the premium and give a renewal receipt, the insured may demand a rescission of the contract and a return of the premiums paid, with interest.

Insurance Co. v. Pottker, 33 O. S. 459 (1878).

See Insurance Co. v. Hare, 5 C. C. n. s. 348; 16 C. D. 197; reversed without report, 74 O. S. 466.

Where premiums have been paid on a void policy the policyholder, if not guilty of fraud or wrongdoing, may recover the same.

Insurance Co. v. Pyle, 44 O. S. 19 (1886).

Insurance Co. v. Felix, 73 O. S. 46 (1905).

Where premiums were paid by a wife, on a policy on the life of her husband, without his knowledge, and the policy contained a condition that it should be void unless consented to by the insured, the wife, if not guilty of fraud or wrongdoing, may recover back the premiums paid. To constitute a consideration for premiums, it is necessary that the insurer incur a liability that is not affected by any infirmity which it might elect to interpose as a defense in case of death.

Insurance Co. v. Felix, 73 O. S. 46 (1905).

Compare *Brokamp v. Insurance Co.*, 16 C. C. 630; 9 C. D. 412 (1898).

Shaddinger v. Insurance Co., 30 W. L. B. 337; 2 L. D. 402 (1893).

Lowe v. Insurance Co., 41 O. S. 273 (1884).

But where a wife insures the life of her husband, without his consent, and in her dealings with the company conceals this fact, after she must have known that his consent was necessary, she can not recover the premiums paid.

Marling v. Insurance Co., 6 O. L. R. 99 (C. P. 1908).

Where officers of a corporation, without authority, took out insurance on the lives of certain directors, payable to the corporation, which had no insurable interest in the lives of such directors, the premiums paid thereon may be recovered back.

Schott & Sons Co. v. Insurance Co., 7 N. P. n. s. 548 (1908); affirmed, 11 C. C. n. s. 401; 83 O. S. 401.

See *Keckley v. Coshocton Glass Co.*, 86 O. S. 213 (1912).

Where an insured defaulted, after paying two annual premiums, and an assignee of the policy more than six years thereafter sued to recover the premiums paid, alleging fraud in misapplying the funds of the company, knowledge of which had but recently come to him, it was held that the insured was charged with constructive knowledge of the fraud, if any existed, at the time he repudiated the contract by defaulting on his premiums, and that the claim was barred by the statute of limitations.

Baumgarten v. Insurance Co., 7 O. L. R. 294 (C. P. 1909).

Both the insured and the beneficiaries are necessary parties to an action to recover premiums paid on a policy which has been repudiated by the company.

Insurance Co. v. Penn., 4 N. P. n. s. 97; 16 L. D. 375 (Super. Ct. Cin. 1905).

Interpretation of policies. Policies which are prepared by the insurance company and which are reasonably open to different interpretations will be construed most favorably to the insured. Courts will have in mind the relations of the parties to each other. They will give the language of the contract the meaning on which the minds of the parties may be said to have met and which will effectuate their object in entering into it. *Mumaw v. Insurance Co.*, 97 O. S. 1 (1917).

PROVISIONS AND CONDITIONS IN POLICIES.

Policy and application the entire contract. Where the written application is referred to in the policy and expressly made part of the contract, the application thereby becomes a part of the contract.

Byers v. Insurance Co., 35 O. S. 606 (1880).

See § 9420 (3).

See also *Insurance Co. v. Harmer*, 2 O. S. 452 (1853).

Rudershauer v. Insurance Co., 18 C. C. 609; 10 C. D. 258 (1899).

Where a policy is issued and accepted upon the conditions and agreements contained therein, such conditions and agreement form the contract between the parties, and will not be varied or controlled by the

subsequent course of dealing between them, in the absence of fraud or bad faith.

Insurance Co. v. Buxer, 62 O. S. 385 (1900).

Policy incontestable. A provision "that this policy shall be incontestable after two years except for fraud or misstatement of age," is similar to the provision in G. C. § 9392 and relates to what occurred at the time the policy was issued or the application made, and has no reference to default in premiums.

Insurance Co. v. Walton, 4 C. C. n. s. 133; 15 C. D. 587; aff'd, no rep., 72 O. S. 650.

Loans on policies. See also § 9357 (4).

Where a policy provided for loans on such policy, graded as to amount by the number of cash premiums paid, the insured was held not entitled to a loan after he became in default for payment of a premium, or a premium note, where, by the terms of the policy, the default worked a forfeiture, unless the default was waived by the company.

Insurance Co. v. Buxer, 62 O. S. 385 (1900).

Where a loan agreement provided that in the event of non-payment of the loan at maturity the company might cancel the policy and apply \$8,469 the "customary cash surrender consideration" to the payment of the loan, it was held that if the cash surrender value represented the substantial value of the policy, the agreement was valid and cancellation of the policy terminated the rights of the insured. Haas v. Insurance Co., 17 N. P. n. s. 1 (1914); appeal dismissed by court of appeals but judgment of dismissal reversed, 95 O. S. 137; motion to certify record overruled, 15 O. L. R. 192.

Insurance paid by value of policy after default in payment of premiums. Provisions in policies requiring various conditions precedent, construed:

Written application for paid insurance and surrender of original policy within six months after default.

Jones v. Insurance Co., 22 W. L. B. 318 (C. P. 1889).

Payment of premium notes given for premiums subsequent to first three annual premiums.

Insurance Co. v. Buxer, 62 O. S. 385 (1900).

Contra, Kelsey v. Insurance Co., 10 O. L. R. 119 (C. C. A. 1912).

Surrender of original policy, duly receipted.

Jander v. Insurance Co., 16 C. C. 536; 9 C. D. 462 (1898).

Application for new insurance before default occurred.

Bussing v. Insurance Co., 34 O. S. 222 (1877); affirming 7 Am. L. R. 52; 3 W. L. B. 44.

Wife, named as beneficiary, is entitled to paid insurance when:

Insurance Co. v. Hamilton, 41 O. S. 274 (1884).

Jander v. Insurance Co., 16 C. C. 536; 9 C. D. 462 (1898).

Payment of interest on premium notes.

Insurance Co. v. Robinson, 40 O. S. 270 (1883).

Suicide. See also forms in §§ 9412 to 9417 sub-head "Conditions."

A condition declaring the policy void in case of death of the insured within two years from the date of the policy by his own hand or act, sane or insane, is valid. Where the insured commits suicide by shooting himself, while insane, there can be no recovery on the policy.

Insurance Co. v. Maguire, 19 C. C. 502; 10 C. D. 562 (1900).

See Tisch v. Home Circle, 72 O. S. 233 (1905).

Pagenhardt v. Insurance Co., 4 N. P. 169; 6 L. D. 190.

Mieritz v. Insurance Co., 8 N. P. 422.

A provision limiting recovery to the amount of premiums paid, in case of suicide while sane or insane, is not prohibited by § 9421 and is valid. *Insurance Co. v. Horn*, 100 O. S. 478 (1920).

Where a condition avoided the policy if the insured "shall, under any circumstances, die by his own hand," it was held that the words "under any circumstances" were too general and indefinite and that if the insured committed suicide while insane, a recovery could be had.

Schultz v. Insurance Co., 40 O. S. 217 (1883).

The burden is on the insurer to show that the death was within the proviso.

Schultz v. Insurance Co., 40 O. S. 217 (1883).

A policy containing a clause as to incontestability issued in lieu of a policy of the same number issued several years earlier, but without such provision, was held not to read into the original policy a waiver of liability for death by suicide.

Clemens v. Life Ass'n., 8 N. P. 587 (C. P. 1901).

Authority of agent. See also § 9407 and forms in §§ 9412 to 9417.

The standard forms (§§ 9412 to 9417) provide that agents are not authorized to modify the policy or extend the time for paying a premium. Such a provision in a policy accepted by the insured, is both notice to, and an agreement by, the insured that the agent has no authority to waive or modify anything contained in the policy.

Insurance Co. v. Myers, 62 O. S. 529 (1900).

Jander v. Insurance Co., 16 C. C. 536; 9 C. D. 462 (1898).

The insured can not recover on a verbal modification of such a policy, extending the policy one year and waiving the payment of an annual premium, in the absence of estoppel.

Insurance Co. v. Hook, 62 O. S. 256 (1900).

But where a policyholder opened negotiations direct with the company and dealt with the "manager" a provision limiting the authority of agents was held not to apply. *Life Soc. v. Statler*, 17 C. C. n. s. 59; 24 C. D. 391 (1911); aff'd, no rep. 88 O. S. 549.

A physician, employed to examine an applicant for insurance, and make a report thereof to the company, without further duty or authority, after making an examination and report obtained further knowledge of the applicant's physical condition but did not communicate it to the company. Held, such knowledge was not binding on the company and did not operate as a waiver of a provision in the application that the policy would become effective upon approval at the home office of the company "while the person to be insured is in the same condition of insurability". *Myers v. John Hancock, etc.*, Co., — O. S. — (1923); syl. 21 O. L. R. 140.

Military or naval service of insured. A condition avoiding the policy if the insured enters military or naval service is no defense to the company where the cause of death was disease not due to military service. *Frush v. Ohio State Ins. Co.*, 22 N. P. n. s. 428 (1920).

Proof of death. The requirement that a proof of death be made in writing is reasonable, as is also a requirement as to the identification of the deceased.

Menear v. Insurance Co., 12 C. C. n. s. 411; 21 C. D. 483 (1909).

Notice of a defect in a proof of death is not necessary where repeated notices have been given by the company that no proof of death has been filed.

Menear v. Insurance Co., 12 C. C. n. s. 411; 21 C. D. 483 (1909).

An averment in a petition in a suit on a policy that its conditions

as to proof of death had been performed on a certain date is inconsistent with a subsequent averment that such conditions had been waived.

Menear v. Insurance Co., 12 C. C. n. s. 411; 21 C. D. 483 (1909).

Where a policy requires proof of loss to be made "forthwith," proof may be made within a reasonable time.

Kirk v. Insurance Co., 6 W. L. B. 200 (Dist. Ct. 1881); aff'd, no rep., 11 W. L. B. 228.

The requirement that proofs of loss must be made within a specified time may be waived by the company after the expiration of the time limited.

Insurance Co. v. Kukral, 7 C. C. 356; 4 C. D. 633 (1893); aff'd, no rep., 51 O. S. 609.

Where a policy required "immediate" notice of death to be given, and the beneficiaries had no knowledge of the existence of the policy until four months after the death of the insured, when notice was immediately given, it was held that the requirement as to immediate notice was satisfied.

Accident Co. v. Card, 13 C. C. 154; 7 C. D. 504 (1897); aff'd, no rep., 60 O. S. 583.

Acceptance of a proof of loss, and treatment of such proof as final, with an offer to pay less than the amount claimed, constitutes a rejection of the claim, and suit brought thereafter is not premature.

Assurance Co. v. Dickson, 15 C. C. n. s. 228; 24 C. D. 313 (1912); aff'd, 91 O. S. 380.

Sound health. Where a policy provides that no obligation is assumed by the company, unless at the date of the policy the insured is alive and in sound health, there can be no recovery if the insured was not then in sound health.

Insurance Co. v. Howle, 62 O. S. 204 (1900).

Insurance Co. v. Howle, 68 O. S. 614 (1903).

Insurance Co. v. Draddy, 8 N. P. 140.

Sound health means that state of health which is free from any disease or ailment that seriously affects the general healthfulness of the system; not a mere indisposition.

Insurance Co. v. Howle, 62 O. S. 204 (1900).

Insurance Co. v. Howle, 68 O. S. 614 (1903).

Insurance Co. v. Draddy, 8 N. P. 140 (Super. Ct. Cin.).

A breach of the condition as to sound health is a matter of defense. The burden of proof of such breach rests upon the insurance company. *Mumaw v. Insurance Co.*, 97 O. S. 1 (1917); *Insurance Co. v. Zimmer*, 97 O. S. 14 (1917); affirming, 19 N. P. n. s. 188.

Where the first premium was paid to the agent at the time the application was made, under an agreement that a policy would be issued if the medical examination should show the applicant to be in sound health, and such examination was made and a policy sent to the agent, but not delivered because of illness of the insured, it was held that the contract was complete, and the company liable on the policy although the insured was stricken on the day its medical examiner mailed his report to the company and the medical examiner attended the insured in his last illness. *Insurance Co. v. Ford*, 2 Ohio App. 410; 19 C. C. n. s. 689; 24 C. D. 479 (1914).

Where a policy provides that if, at the time of application or of the delivery of the policy, the insured was afflicted with any one of a number of diseases specified therein, and failed to inform the company thereof the policy should be void, there can be no recovery where the insured died from one of such diseases, although the insured was not aware that he was suffering from the same.

Melvin v. Insurance Co., 9 O. L. R. 361; 56 Bull 377 (C. P. 1911).

The insurer may, by suit, compel the surrender and cancellation of a policy obtained by false statements as to health. *Insurance Co. v. Wertheimer*, 272 Fed. 730 (D. C. Ohio 1920).

Intemperate habits. Where a policy provided that if the insured "shall become so far intemperate as to impair his health, or induce delirium tremens" the policy should be void, it was held that, in order to avoid the policy, it was not necessary to show that the impaired health or delirium tremens caused the death of the insured.

Insurance Co. v. Attee, 3 C. C. 650; 2 C. D. 378 (1889); aff'd, no rep., 26 Bull. 263.

See *Insurance Co. v. La Boiteaux*, 4 Am. L. Rec. 1 (1875).

Insurance Co. v. Holterhoff, 2 C. S. C. R. 379 (1872).

Holterhoff v. Insurance Co., 3 Am. L. R. 272 (1874).

Insurance Co. v. Reif, 36 O. S. 598 (1881).

Occupation of insured.

See *Snow v. Modern Woodman*, 4 C. C. n. s. 68; 14 C. D. 142 (1902).

Insurance Co. v. Kilbane, 15 C. C. 62; 8 C. D. 790 (1897).

Section 9421. (Provisions prohibited.) No policy of life insurance in form other than as prescribed in sections ninety-four hundred and twelve to ninety-four hundred and seventeen, both inclusive, shall be issued or delivered in this state or be issued by a life insurance company organized under the laws of this state, if it contain any of the following provisions:

(1) A provision for forfeiture of the policy for failure to repay any loan on the policy or to pay interest on such loan while the total indebtedness on the policy is less than the loan value thereof; or any provision for forfeiture for failure to repay any such loan or to pay interest thereon, unless such provision contain a stipulation that no such forfeiture shall occur until at least one month after notice shall have been mailed by the company to the last known address of the insured and of the assignee, if any.

(2) A provision limiting the time within which any action at law or in equity may be commenced to less than five years after the cause of action shall accrue.

(3) A provision by which the policy shall purport to be issued or to take effect before the original application for the insurance was made, if thereby the assured would rate at an age younger than his age at date when the application was made, according to his age at nearest birthday.

(4) A provision for any mode of settlement at maturity of less value than the amount insured on the face of the policy plus dividend additions, if any, less any indebtedness to the company on the policy and less any premium that

may by the terms of the policy be deducted. (April 22, 1908, 99 v. 174, § 6.)

This section does not prohibit a provision that, in the event of suicide of the insured within two years from the date on which the insurance begins, the limit of recovery shall be the amount of the premiums paid. *Insurance Co. v. Horn*, 100 O. S. 478 (1920).

Clause 4 of § 9421 does not apply to optional settlements upon a surrender of the policy after premium default, until the option has been exercised and the face value fixed anew. *Landis v. Metropolitan Co.*, 104 O. S. 589 (1922).

Stipulation in policy limiting time for bringing suit. Before the enactment of this section, stipulations in policies limiting the time for bringing suits on the policy were upheld where the time was reasonable.

(Twelve months); *Insurance Co. v. Schwan*, 1 C. C. 192; 1 C. D. 105 (1885).

Insurance Co. v. Howle, 19 C. C. 621; 10 C. D. 290 (1899).

(Six months); *Appel v. Insurance Co.*, 76 O. S. 52 (1907).

See *Insurance Co. v. Gierl*, 16 C. C. 294; 9 C. D. 162; aff'd, no rep., 57 O. S. 671.

Where a petition shows on its face that suit is brought after the time limited, a sufficient excuse for the delay must be alleged.

Minerick v. Insurance Co., 1 Cleve. L. R. 217.

See *Meyer v. Insurance Co.*, 6 N. P. 34; 7 L. D. 573; aff'd, 9 L. D. 596.

Acceptance of a proof of loss, and treatment of such proof as final, with an offer to pay less than the amount claimed, constitutes a rejection of the claim, and suit brought thereafter is not premature.

Assurance Co. v. Dickson, 15 C. C. n. s. 228 (1912); aff'd, 91 O. S. 380.

Section 9422. (Preliminary term policies, not standard, subject to certain provisions.) Preliminary term policies not issued on the standard forms shall also be subject to the provisions of section ninety-four hundred and nineteen. (April 22, 1908, 99 v. 174, § 7.)

Section 9423. (Forms of policies must be submitted to superintendent of insurance.) No policy of life insurance shall be issued or delivered in this state, or be issued by a life insurance company organized under the laws of this state, until the form of the same has been filed with the superintendent of insurance; and after the superintendent of insurance shall have notified any company of his disapproval of any form it shall be unlawful for such company to issue any policy in the form so disapproved. The superintendent's action shall be subject to review by any court of competent jurisdiction. (April 22, 1908, 99 v. 174, § 8.)

Section 9424. (Policies may contain provisions prescribed by state where organized.) The policies of a life insurance company, not organized under the laws of this state, may

contain any provision which the law of the state, territory, district or country under which the company is organized, prescribes shall be in such policies when issued in this state, and the policies of a life insurance company organized under the laws of this state may, when issued or delivered in any other state, territory, district or country, contain any provision required by the laws of the state, territory, district or country in which the same are issued, anything in this chapter to the contrary notwithstanding. (April 22, 1908, 99 v. 174, § 9.)

Section 9425. (To what this chapter shall not apply.)
This chapter shall not apply to annuities, industrial policies or to corporations or associations operating on the assessment or fraternal plan. (April 22, 1908, 99 v. 174, § 10.)

Section 9426. (What the word company includes.)
Wherever the word company is used in this chapter it shall be held to include corporations and associations. (April 22, 1908, 99 v. 174, § 11.)

CHAPTER 3.

MUTUAL PROTECTIVE.

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| § 9427. Mutual protective associations. | § 9442. Where an action may be brought. |
| § 9428. By-laws. | § 9443. Restrictions on the issue of policies. |
| § 9429. Amendment to constitution or by-laws. | § 9444. Expenses. |
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| § 9430. Annual statement. | § 9449. Investment of reserve fund. |
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| § 9433. Examination of companies. | § 9452. Foreign companies insuring against accidental injury or death. |
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| § 9436. Certificate of authority. | § 9455. Annual statement. |
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| § 9440. Fees; exceptions. | § 9459. Mutual benefit societies excepted. |
| § 9441. May do life and accident business on assessment plan. | § 9460. When association may become subject to insurance laws. |
| | § 9461. Bond of treasurer. |

Section 9427. (Mutual protective associations.) A company or association may be organized to transact the business of life or accident or life and accident insurance on the assessment plan, for the purpose of mutual protection and relief of its members, and for the payment of stipulated sums of money to the families, heirs, executors, administrators, or assigns of the deceased members of such company or association, as the member may direct, in the manner provided in the by-laws. The company also may receive money either by voluntary donation or contribution, or collect it by assessments on its members, and may accumulate, invest, distribute and appropriate such money in such manner as it deems proper. All accumulations and accretions thereon shall be held and used as the property of the members and in the interest of the members, and not be loaned to, used, appropriated, or invested for the benefit of any officer or manager of such company or association. No company or association shall issue a certificate for a greater amount than it is able to pay from the proceeds of one assessment. Such company or association shall be subject to the provisions of this chapter. (R. S. Sec. 3630; March 31, 1891, 88 v. 251; May 14, 1886, 83 v. 161; Rev. Stat. 1880; February 3, 1875, 72 v. 23, § 3.)

Fraternal benefit societies, § 9462 et seq.

Construction of section before amendment of 1891 (88 v. 251).

See *State v. Insurance Co.*, 47 O. S. 167 (1890) and § 9441.

An association organized under this section is not a society organized for benevolent purposes within the meaning of § 176. The fee for filing articles of incorporation is, under § 176 (4), twenty-five dollars.

3 Opins. Attys. Gen. 504.

Rep. Atty. Gen. 1911-1912, pp. 57, 88, 90.

Classification of life insurance companies. The Ohio statutes divide life insurance companies, other than fraternal, into two classes, (1) companies that have a capital stock, or at least capital, and (2) companies that have neither capital stock nor capital. The general powers of the first class are granted by § 9339 and those of the second class by § 9427 et seq.

State v. Matthews, 58 O. S. 1, 7 (1898).

Corporations organized under Ohio laws are of two classes: 1st, those organized for profit, which must have a capital stock owned by stockholders. 2nd. Those organized for purposes other than profit, consisting of members associated together for a lawful purpose. Corporations formed under § 9427 et seq. belong to the second class.

State v. Standard Life Ass'n., 38 O. S. 281 (1882).

Representations made by a stock company that it was doing a mutual insurance business, and the fact that policyholders, who elected to take participating contracts, had written in their contracts a stipulation that they should share in the profits "as apportioned by the company" do not transform such company into a mutual company or even make the participating contracts mutual insurance contracts, or estop the company

from treating, as belonging to its stockholders, a surplus fund which clearly arose from profits of the non-participating business.

State v. Insurance Co., 13 C. C. n. s. 49; 22 C. D. 262 (1910); affirmed, 84 O. S. 459.

See Bell v. Insurance Co., 14 C. C. n. s. 385 (1911); s. c., 87 O. S. 475.

A mutual protective association was held to be a mutual insurance company under the federal corporation tax law of 1909. Commercial Travellers Assn. v. Rodway, 13 O. L. R. 405 (U. S. D. C. 1913).

Powers of each class. The powers of a company of the first class (§ 9339 et seq.), are unlimited as to the individuals it may insure, but are limited to insuring "on the mutual or stock plan." A company or association of the second class (§ 9427 et seq.), can only insure a member of the corporation, and its business must be transacted "on the assessment plan."

State v. Matthews, 58 O. S. 1, 8 (1898).

The first class has no authority to transact business "on the assessment plan." The lack of such power results solely from the omission of the legislation to grant it.

State v. Matthews, 58 O. S. 1 (1898).

But a foreign corporation, authorized, by the laws of its home state, to transact business on the assessment plan, should not be refused admission to do such business in Ohio, under § 9435, because it has a capital stock.

State v. Matthews, 58 O. S. 1 (1898).

Mutual protective associations have no power to issue policies guaranteeing any fixed amount, except such fixed amount shall be conditioned upon the same being realized from the assessments made on members to meet it.

State v. Insurance Co., 47 O. S. 167 (1882).

§ 9432.

Under this section it is probable that a mutual protective association may accumulate a fund to be managed and invested, dividends paid to members thereon, and portions of the fund, exceeding a certain amount, distributed to the members.

4 Opins. Attys. Gen. 339 (1890).

See 3 Opins. Attys. Gen. 422, 693 (1884, 1885).

But associations are not authorized to write endowment or investment certificates.

4 Opins. Attys. Gen. 741 (1897).

By what laws mutual protective associations governed. An association organized for the purposes specified in this section, whether incorporated before or after the amendment of February 3, 1875 (72 v. 23, § 3), is not subject to the laws of this state relating to life insurance companies (§§ 9339, 9426).

State v. Mutual Protection Ass'n., 26 O. S. 19 (1875).

State v. Standard Life Ass'n., 38 O. S. 281 (1882).

In re Andress, 5 N. P. 253; 6 L. D. 174 (1897).

4 Opins. Attys. Gen. 343, 241 (1890, 1899).

Corporations organized under this section, though not subject to the provisions relating to life insurance companies on the mutual or stock plan, are subject to the general provisions of title IX, division I, chapter 1 (§ 8623 et seq.), which apply to corporations not for profit.

State v. Standard Life Ass'n., 38 O. S. 281 (1882).

A mutual protective association may receive contributions, but can not rely thereon for the payment of benefits. In its articles of

incorporation the right to assess members should be provided for. Opins. Atty. Gen. 1917, p. 924; Rep. Atty. Gen. 1913, pp. 71, 102, 122.

Articles of incorporation. The articles of incorporation of an association organized under § 9427 should provide for the right to make assessments on members for the purpose of paying the benefits provided for. Opins. Atty. Gen. 1917, p. 924; Rep. Atty. Gen. 1913, pp. 102, 113.

The secretary of state has refused to accept and file articles because of the following defects:

Articles providing for the payment of "such sum of money as is derived from assessing its members in a manner provided in the by-laws of said society" instead of the payment of stipulated sums. Opins. Atty. Gen. 1915, p. 1394; Rep. Atty. Gen. 1913, pp. 102, 114, 71.

Articles providing for definite assessments and indefinite benefits. Rep. Atty. Gen. 1913, p. 79; Rep. Atty. Gen. 1912, p. 77.

Members. The members are those mutually engaged in promoting the purposes of the organization, and who, by virtue of their relation to the corporation, are entitled to the mutual protection and relief provided, or whose family, heirs, etc., are, in case of death entitled to the specific relief provided for them.

State v. Standard Life Ass'n., 38 O. S. 281 (1882).

The members are the elective and controlling body, authorized to elect trustees and prescribe regulations.

State v. Standard Life Ass'n., 38 O. S. 281 (1882).

After the first election the trustees must be elected annually in accordance with § 8647.

3 Opins. Attys. Gen. 390 (1884).

See § 8655.

Ratification, by a member of an association, of a transfer of its assets and obligations to another company; effect on membership.

See Insurance Co. v. Hare, 5 C. C. n. s. 348; 16 C. D. 197 (1904); reversed without report, 74 O. S. 466.

Expulsion or suspension. Power of association to expel, grounds, procedure, remedies of members, etc., see note to § 8653.

Beneficiaries. Where the class of beneficiaries is limited by statute, such class can not be enlarged by a provision in the constitution or by-laws. But the payment of benefits may be limited to a part only of the classes authorized by statute. Wegener v. Wegener, 101 O. S. 22 (1920).

Associations organized under this section are not authorized to provide for the payment of stipulated sums of money to persons other than the families, heirs, executors, administrators or assigns of deceased members.

Wegener v. Wegener, 101 O. S. 22 (1920).

Association v. Bleher, 3 N. P. n. s. 673; 16 L. D. 671 (C. P. 1906).

State v. Mutual Benefit Ass'n., 42 O. S. 579 (1885).

Association v. Gonser, 43 O. S. 1 (1885).

State v. Association, 29 O. S. 399 (1876).

State v. Association, 38 O. S. 281, 296 (1882).

The beneficiary may be designated in the will of a member. Dhonau v. Striebinger, 24 C. C. n. s. 598 (1904).

Before the amendment of this section in 1891 (88 v. 251), the beneficiaries were limited to the family and heirs of members.

Association v. Bleher, 3 N. P. n. s. 673; 16 L. D. 671 (C. P. 1906).

Wegener v. Wegener, 101 O. S. 22 (1920).

A step-child, taken at a tender age into the home of its step-father and reared as his child, is a member of the family. *Dhonau v. Striebinger*, 24 C. C. n. s. 598 (1904).

The words "legal representatives," used to designate the beneficiary in a certificate issued prior to the amendment, mean the family and heirs of the member and not his executor or administrator.

Association v. Bleher, 3 N. P. n. s. 673; 16 L. D. 671 (C. P. 1906).
See *Hague v. Hague*, 11 C. C. n. s. 406; 20 C. D. 628 (1908); *aff'd*, no rep., 81 O. S. 488.

The mother of the insured may be a beneficiary although she is not living with his family.

Life Ass'n v. Harrison, 23 W. L. B. 360 (1890).

The divorce and remarriage of the wife of the insured does not bar her right to recover on a certificate.

Supreme Commandery v. Everding, 20 C. C. 689; 11 C. D. 419 (1893).

See *Brotherhood v. Taylor*, 9 C. C. n. s. 17; 19 C. D. 171 (1906).

Under a statute limiting beneficiaries to families or "dependents" there is no presumption that a brother is a dependent.

Benevolent Legion v. McGinness, 59 O. S. 531 (1898).

An association, incorporated at a time when the statute authorized payment of benefits to "families or heirs", limited, in its articles of incorporation, the beneficiaries to "families" of the members. Held, a valid limitation which rendered ineligible as a beneficiary a brother of a member not living with such member. *Wegener v. Wegener*, 101 O. S. 22 (1920).

Nor is one engaged to be married to the insured a dependent.

American Legion v. Perry, 15 W. L. B. 357 (Mass. 1886.)

Beneficiary funds form no part of a decedent's estate and are not subject to the claims of creditors.

In re *Andress*, 5 N. P. 253; 16 L. D. 174 (1896).

Odd Fellows Benef. Ass'n v. Diebert, 2 C. C. 462; 1 C. D. 589 (1887).

Arthur v. Odd Fellows Benef. Ass'n, 29 O. S. 557 (1876).

Where a wife, the original beneficiary, died and her widower subsequently remarried and thereafter surrendered the policy and a new policy was issued naming "Mrs. Patrick Sherry, wife", as beneficiary, the insurance is payable to the second wife to the exclusion of the children of the first wife. *Sherry v. Assn.*, 6 Ohio App. 228; 26 C. C. n. s. 426; 28 C. D. 383 (1916).

"Heirs" or "legal heirs" as beneficiaries mean next of kin under the statute of descent and distribution.

Association v. Pollard, 3 C. C. 577; 2 C. D. 333 (1888).

In re *Andress*, 5 N. P. 253; 6 L. D. 174 (1897).

Association v. Gonser, 43 O. S. 1 (1885).

Jameson v. Association, 12 W. L. B. 272 (1884).

Where a policy is contracted for with reference to the laws of Ohio, and is executed and made payable in Ohio, being payable to the "heirs" of the insured, who was a resident of New York, it was held that it should be determined according to the laws of Ohio, who are his heirs.

Association v. Hey, 4 O. L. R. 744; 17 L. D. 661 (1907).

Compare *Association v. Greene*, 79 Fed. 461 (1897).

Rules of association. The laws and regulations of the association determine the rights of the members, if the rules comply with the statute; and a fund raised by the association in pursuance of such laws and regulations, to be paid to the family or heirs of a deceased member, in the manner therein specified, unless otherwise directed by such member during his lifetime, will, on failure to give such direction, be controlled by such laws and regulations.

Arthur v. Odd Fellows Benef. Ass'n, et al., 29 O. S. 557 (1876).

Charch v. Charch, 57 O. S. 561 (1898).

Halle v. Grand Lodge, 1 C. C. n. s. 83; 14 C. D. 717 (1903).

The rights of members of foreign associations are also governed by the lawful rules and regulations.

Charch v. Charch, 57 O. S. 561 (1898).

Designation of a person not included within the class to be benefited under rules of the association does not relieve it from payment to the proper person.

Parke v. Welsh, 33 Ill. App. 188 (1889).

Supreme Council v. McGinness, 59 O. S. 531 (1899).

Where the charter of an association limits it to the payment of its protective funds to certain designated persons, a member of such association can, by no act of his own, name any other beneficiary than those designated in the charter.

Odd Fellows Benef. Ass'n v. Diebert, 2 C. C. 462; 1 C. D. 589 (1887).

Mutual Aid Ass'n v. Gonser, 43 O. S. 1 (1885).

Supreme Council v. McGinness, 59 O. S. 531 (1899).

The rules of the association control the manner of change of beneficiary.

Charch v. Charch, 57 O. S. 561 (1898).

"D," a member of an association, in consideration of a loan, assigned his certificate of membership to a person in no way related to him, with the agreement that the assignee should pay all future assessments, and upon "D's" death to receive the sum due on the certificate. The assignee, in good faith and in reliance of the assignment, paid such assessments until "D's" death. "D" left a widow. The rules of the association provided that the certificate should be payable to the widow, children, mother, sister, father or brother of the deceased member, and in the order named, unless otherwise directed by the member previous to his death. Held:

1. That the assignment was void.
2. That a member can not direct the payment of the beneficiary fund to any other persons than those named in the rules of the association, and that the words "unless otherwise directed" simply empower the member to designate who, of such persons named, shall receive the fund in disregard of the order in such rules.
3. That the fund being in court for distribution, it will be ordered paid, (a) the costs; (b) to the assignee, the assessments paid subsequent to the assignment, with interest thereon; (c) the balance to the widow.
4. That the fund became no part of the estate, and that as to such loan the assignee had no claim upon the fund.

Odd Fellows Benef. Ass'n v. Diebert et al., 2 C. C. 462; 1 C. D. 589 (1887).

Change of beneficiary. The beneficiary named in a certificate of benefit insurance has no vested rights therein. The insured may revoke the designation of beneficiary and substitute a new beneficiary, if such change is made according to the rules of the association.

Lentz v. Fritter, 92 O. S. 186 (1913).

Earley v. Earley, 3 C. C. n. s. 71; 13 C. D. 618 (1902); aff'd, no rep., 69 O. S. 562.

Thesing v. Knights, 24 W. L. B. 401 (1890).

A policy issued in favor of the wife of the assured, which reserves to the latter the right to change the beneficiary confers upon the wife no right which can pass to her estate in case of her death prior to that of her husband.

Tafel v. Knights, 12 W. L. B. 35 (1884).

But the change of beneficiary can only be made in the manner provided by the rules of the association. Where a certificate is payable to

the wife, and by the rules a change of beneficiary can only be made by its surrender and issue of a new certificate, such change can not be made by will, the wife being in life.

Charch v. Charch, 57 O. S. 561 (1898).

See *Vance v. Park*, 15 C. C. 713; 8 C. D. 425 (1898).

Murphy v. Association, 13 L. D. 183.

The rules in force at the time of the change of beneficiary control, and not the rules in force when the certificate was issued.

Thesing v. Supreme Lodge, 24 W. L. B. 401 (1890).

See *Earley v. Earley*, 3 C. C. n. s. 71; 13 C. D. 618 (1902); aff'd, no rep., 69 O. S. 562.

The rule that the beneficiary must be changed in the manner prescribed by the rules, is subject to three exceptions.

1. Where the association has waived a strict compliance with its rules, and has issued a new certificate, the original beneficiary can not avoid the change because of failure to observe the rules.

2. If it be beyond the power of the insured to comply literally with the regulations, a court of equity will treat the change as having been legally made.

3. If the insured has pursued the course pointed out by the laws of the association, and has done all in his power to change the beneficiary, but, before the new certificate is actually issued, he dies, a court of equity will treat such certificate as having been issued.

Modern Woodman v. Daerr, 11 N. P. n. s. 360 (C. P. 1911).

Citing, *Supreme Conclave v. Cappella*, 41 Fed. 1 (1890).

See *Earley v. Earley*, 3 C. C. n. s. 71; 13 C. D. 618 (1902); aff'd, no rep., 69 O. S. 562.

Thesing v. Knights, 24 W. L. B. 401 (1890).

By interpleading and paying into court the benefit money, the association may be deemed to have waived defects or irregularities in effecting a change of beneficiary. *Abernathy v. Assn.*, 19 C. C. n. s. 184 (1909); *Kerr v. Bowers*, 26 C. C. n. s. 289 (1915); motion to certify record overruled, 13 O. L. R. 84.

Where the insured sent the policy to the company, requesting its endorsement approving a change of the beneficiary, but died before the endorsement was made, the change was held to have been effected. *Harold v. Insurance Co.*, 17 C. C. n. s. 21 (1908); *Kerr v. Bowers*, 26 C. C. n. s. 289 (1915); motion to certify record overruled, 13 O. L. R. 84.

An injunction, in an action between the insured and the original beneficiary, restraining any change of beneficiary, renders ineffective an attempted change in violation of the injunction. *Harold v. Insurance Co.*, 17 C. C. n. s. 21 (1908).

The reorganization of a mutual protective association into a fraternal benefit society does not affect policies then outstanding, or invalidate policies whose beneficiaries are not within the limited class permitted by the fraternal beneficiary society statute. But the policy holder and the association may agree to treat the policy as controlled by the fraternal benefit society laws. *Lentz v. Fritter*, 92 O. S. 186 (1915).

A change of beneficiary is not rendered invalid by irregularities, where the change is made substantially according to the laws of the association, and the officers of the association have knowledge of the irregularities. Failure to pay a fee of fifty cents, required on the second certificate, is not a defense, where it was in fact issued.

Earley v. Earley, 3 C. C. n. s. 71; 13 C. D. 618 (1902); aff'd, no rep., 69 O. S. 562.

Marriage of the insured does not revoke the designation of his brothers as beneficiaries.

Johnson v. Benevolent Assn., 13 N. P. n. s. 568 (C. P. 1912); affirmed, no report, 92 O. S. 511; reversing, 2 Ohio App. 148; 20 C. C. n. s. 487; 24 C. D. 245.

But where the rules of the association provided that the benefit was payable to dependents of the insured, his marriage was held to revoke the designation of his father as beneficiary and to substitute his wife.

Lett v. Brotherhood, 44 W. L. B. 160 (C. P. 1898).

The will of an insured which bequeathes "all policies of insurance" does not include certificates in a mutual protective association, where he had other insurance policies, and it did not clearly appear that he intended to thereby change the beneficiary.

Association v. Harrison, 23 W. L. B. 360 (1890).

Where by the rules of an association the fund is to be paid "to the widow, children, mother, sister, father or brother" of a deceased member, in the order named, "if not otherwise directed by the member," the relatives will take the fund in the order named, unless the member otherwise directed during his lifetime; and the will of a member, who dies seized of both real and personal property, devising to his children "my estate and property, real, personal and mixed," is not such an execution of the power of direction as will control the fund.

Arthur v. Ass'n, 29 O. S. 557 (1876).

See Vance v. Park, 15 C. C. 713; 8 C. D. 425 (1898).

A former beneficiary, claiming to have paid assessments and to have a property interest in the certificate, can not maintain an action, during the life of the member, for the cancellation of a new certificate in which another beneficiary is designated. Strauch v. Strauch, 16 C. C. n. s. 556, 26 C. D. 140 (1907).

Assessments. A policy of a mutual assessment association agreeing, upon loss, to pay the member a fund collected by assessment on all the members, implies a promise to levy such assessment, and the insured need not seek specific performance, but may sue at law for the breach of such promise.

Hall v. Association, 25 W. L. B. 79 (C. P. 1891).

Members failing to pay assessments after the association has ceased to do business do not thereby forfeit their rights in its funds.

In re Mutual Aid Association, 3 N. P. 145; 4 L. D. 272.

Assessments after insolvency, see note to § 9538.

A certificate can not be forfeited for non-payment of an assessment unless notice of the assessment is given in accordance with the rules of the association.

Judge v. Association, 10 C. C. n. s. 473; 20 C. D. 133 (1907).

Where notice of an assessment is mailed to the former address of a member, after he had notified the association of his change of address, and such notice of assessment is not received by the member, the association can not forfeit his certificate and membership.

Judge v. Association, 10 C. C. n. s. 473; 20 C. D. 133 (1907).

Where overdue premiums are several times accepted by the association, it is estopped from defending on the ground of forfeiture for non-payment within the time specified in the policy. Commercial Assn. v. Bagnell, 9 Ohio App. 458; 29 O. C. A. 321 (1918); motion to certify record overruled, 16 O. L. R. 364.

Where the defendant in a suit on a contract of insurance pleaded non-compliance with a by-law requiring payment of assessments within a certain time, a reply is not a departure which pleads another by-law, providing for reinstatement.

Beckel v. Ins. Co., 14 N. P. n. s. 207 (1913).

The president of a mutual life insurance company has no authority to levy a call or assessment, where the laws of the company provided two different methods of restoring a deficiency in its mortuary fund. The power of levying the call or assessment is vested in the directors. *Beckel v. Insurance Co.*, 15 N. P. n. s. 266 (1913).

Where a member failed to pay assessments and the directors, by resolution, ordered that his policy remain cancelled "unless he pass a successful medical examination" it was held that, upon passing a successful medical examination, he was restored to membership without further action of the board. *Beckel v. Insurance Co.*, 15 N. P. n. s. 266 (1913); s. c., 14 N. P. n. s. 207.

Upon proof that a person was in good standing as a member at one time, a presumption arises that he continued in good standing until his death. The burden of proof of suspension for non-payment rests on the society. *Heptasophs v. Fife*, 16 C. C. n. s. 205 (1905); *Hall v. Association*, 6 C. C. 137, 141, (1891).

But such presumption being rebutted, the plaintiff must prove payment of all assessments up to the death of the member. *Heptasophs v. Fife*, 16 C. C. n. s. 205 (1905).

Members are represented by the association in a suit against it, by one beneficiary and all others similarly situated, in an action to enforce payment of benefits. All members are bound by the judgment in such suit. *Munn v. Barfield*, 26 C. C. n. s. 555; 28 C. D. 75 (1914).

Certificate or policy. A certificate of membership, in which the holder agrees to pay a membership fee, annual dues and pro rata assessments in consideration of the company's stipulation to pay to his family or heirs a sum of money, is a contract of life insurance.

State v. Standard Life Ass'n, 38 O. S. 281 (1882).

The rules and regulations of the association are a part of the insurance contract.

Judge v. Association, 10 C. C. n. s. 473; 20 C. D. 133 (1907).

Language in a policy designating the beneficiary must, subject to the statutory or charter limitations as to who may be beneficiaries, be regarded as the language of the insured alone; and should receive as nearly as possible the same construction as if used in a will.

Association v. Greene, 79 Fed. 461 (C. C. 1897).

After a lapse of seven years a presumption of death arises where the insured has not been heard from; and a beneficiary who has kept the certificate alive by the payment of assessments is entitled to recover.

Supreme Commandery v. Everding, 20 C. C. 689; 11 C. D. 419 (1893).

Section 9428. (By-laws.) Such associations may provide in their by-laws that there be not less than five nor more than fifteen trustees, whose term of office shall not be more than three years. If the term be made more than one year, the by-laws may provide for electing at the first election a part of them for one year, a part for two years and a part for three years, and thereafter elections shall be for a term of three years. Such associations by their regulations or by-laws may provide for:

1. The time, place and manner of calling and conducting their meetings.

2. The number of members constituting a quorum.

3. The time of the annual election for trustees and the mode and manner of giving notice thereof.

4. The duties and compensation of officers.

5. The manner of election, or appointment, and tenure of office of all officers. The tenure of the trustees shall not be for more than three years, one-third of whom may be elected annually. The provisions of sections eighty-seven hundred and three, and eighty-seven hundred and four, shall not apply to such associations.

6. But nothing herein shall affect or impair the powers or franchises of corporations, companies or associations heretofore organized under this and the original section, or under it as heretofore amended. Such companies or associations may avail themselves of the provisions of the first three sections of this chapter, by amendment of their articles of incorporation as provided in sections eighty-seven hundred and nineteen to eighty-seven hundred and twenty-three, both inclusive. (R. S. Sec. 3630; March 31, 1891, 88 v. 251; May 14, 1886, 83 v. 161; Rev. Stat. 1880; February 3, 1875, 72 v. 23, § 3.)

Trustees. Neither the incorporators nor the trustees first elected are authorized to adopt a by-law providing that they shall hold office during life, and in case of vacancy to fill same by appointment. *State v. Standard Life Ass'n*, 38 O. S. 281 (1882).

Trustees have no authority to act for or bind the association except in their aggregate capacity as a board; and where they assume, by virtue of their trusteeship, to act in the individual capacity as officers or agents of the corporation, they can not thereby create against it a legal liability to compensate them as trustees for such services. *State v. Association*, 42 O. S. 579 (1885).

Trustees having accepted designated sums, as compensation for their services for particular years, have no power in subsequent years to vote themselves further compensation for services of previous years.

Such trustees, unless especially invested with the additional authority of officers or agents, are limited to such compensation as will reasonably pay for their time and expenses in going to, attending and returning from their official meetings, and for services while in session. *State v. Association*, 42 O. S. 579 (1885).

Trustees are charged with the duty of faithfully executing the trust which the law and regulations impose on them. They are entitled to reasonable compensation; but any plan by which money is collected from members by assessment or otherwise, with a view to their individual profit, and beyond what is necessary to defray the reasonable expenses of the trust, is a breach of such trust. *State v. Standard Life Ass'n*, 38 O. S. 281 (1882).

Trustees are not personally liable for a death loss on a policy issued during their term of office. *Kelley v. Bender*, 22 C. C. 144; 12 C. D. 181 (1901). See § 8666. *Mfgs. Fire Ass'n v. Drug Mills*, 8 C. C. 112; 4 C. D. 352 (1893).

Where the secretary of a mutual insurance company obtains proxies from policyholders, he is not obliged to vote the same for the old directors, nor can the board control him in voting the proxies, unless the proxies were obtained under representations to that effect. *Burch v. Coan*, 17 L. D. 717 (Super. Ct. Cin. 1907).

Section 9429. (Amendment to constitution or by-laws.)

Associations so organized may change or amend their constitution or by-laws by the assent thereto in writing of a majority of the members, or by a majority of those present, in person or by proxy, at a meeting held for that purpose, thirty days' notice of such meeting having been given with the proposed changes in full by the acting president personally or by letter mailed to each member. But such change shall not take effect or be in force until it has been submitted to and approved by the superintendent of insurance; Provided, that any association so organized which while issuing policies or certificates advertises or gives out that it is maintaining a reserve greater than that required for yearly renewable term policies shall continue to maintain such reserve against said policies or certificates while they are in force, and no amendment to its constitution and by-laws decreasing said reserve on said policies or certificates shall be approved by the superintendent of insurance. (110 v. 256; R. S. Sec. 3630; March 3, 1891, 88 v. 251; May 14, 1886, 83 v. 161; Rev. Stats. 1880; February 3, 1875, 72 v. 23, § 3.)

An amendment to by-laws of a mutual benevolent society, reducing the amount of benefits, does not affect a right to benefits which had become vested before the adoption of the amendment. *Pellazzino v. Society*, 16 W. L. B. 27 (Super. Ct. Cin. 1886); *Forresters v. Rennie*, 2 C. C. n. s. 510; 15 C. D. 790 (1903); aff'd, no rep., 71 O. S. 525.

Reorganization as a fraternal benefit society, see *Lentz v. Fritter*, 92 O. S. 186 (1915).

Section 9429-1. (Authorizing certain insurance companies to amend articles of incorporation so as to change plan of insurance. Deposit with superintendent of insurance for protection of policy holders.) That, any company or association organized under authority of section 9427 General Code for the purpose of transacting the business of life or accident or life and accident insurance on the assessment plan, as provided therein, may, with the consent in writing of a majority of its members, and upon the vote of the majority of its directors or trustees therefor, and also with the written approval of the superintendent of insurance, amend its articles of incorporation and its constitution and by-laws in such a manner as to permit it to transact the business of life insurance on the legal reserve or level premium plan as a mutual company without capital stock, and, upon procuring from the superintendent of insurance a certificate of authority to transact business on the legal reserve or level premium plan, shall incur the obligations and enjoy the benefits thereof as provided by the laws of this state, as

though it had thus been originally incorporated, and thereafter shall cease to receive members and issue certificates on the assessment plan; such corporation, under its articles of incorporation, as amended, shall be a continuation of the original corporation, and the officers at the time of such amendment shall serve through the terms for which they have been elected, but their successors shall be elected and serve for such terms and perform such duties as shall be provided in the constitution and by-laws of such association after such amendment. The amendment of the articles of incorporation, as herein provided, together with the amendment of the constitution and by-laws of such association, shall not affect existing suits, rights or contracts. Any such company or association may amend its articles of incorporation and its constitution and by-laws, as herein provided, so as to enable it to transact the business of legal reserve or level premium life insurance on the mutual plan, without capital stock, and in such case the provisions of sections 9339 to 9409 General Code, insofar as the same relate to capital stock of legal reserve companies, shall not apply to such company or association, and thereupon such company or association shall deposit with the superintendent of insurance funds to the amount of one hundred thousand dollars held by it for the protection of its members and policy holders, of the character specified in section 9357 General Code; said deposit to be held by the superintendent of insurance in trust for the benefit and security of all of the members and policy holders of such company or association. All contracts and certificates issued prior to the amendment of the articles of incorporation and constitution and by-laws, as herein provided, shall be valued as one year term insurance at the ages attained, according to the standard of valuation specified for life insurance policies by the laws of this state. At the time of the amendment of its articles of incorporation, such company shall compute, in a manner satisfactory to the superintendent of insurance, the value of each member's interest in the funds of such company, and shall at the time of such amendment, notify each member of the amount standing to his credit, and shall give to each of its members the right to exchange his certificate for a policy upon the legal reserve basis; within six months after the receipt of said notice, each member shall declare, in writing, whether (1) he elects to take a legal reserve policy, which shall not exceed in amount the maximum amount payable to beneficiary on such member's certificates, unless such limitation is expressly waived by such company or association, the premiums on which shall be reduced each year by

the annuity purchasable by his credit in the funds of the company or association; or whether (2) he elects to retain his original certificate; in the latter case, or if he fails to make an election within the time specified, the assessments shall be levied and collected as provided in the constitution and by-laws of such company or association in force at the time of the amendment of the articles of incorporation. (May 7, 1913, 103 v. 714, § 1; in effect August 8, 1913.)

Section 9429-2. (Separate annual statements to superintendent of insurance.) Such company or association so amending its articles of incorporation and its constitution and by-laws, shall be subject to sections 9428 and 9429 General Code as to its organization and government and shall make separate annual statements to the superintendent of insurance of the business transacted by it under the assessment plan, as required by section 9430 General Code, and of the business transacted by it under the level premium or legal reserve plan, as required by section 9363 General Code. (May 7, 1913, 103 v. 716, § 2; in effect August 8, 1913.)

Section 9429-3. (Sections not applicable.) Sections 8720 to 8723, inclusive, of the General Code shall not apply to companies or associations amending their articles of incorporation as herein provided. (May 7, 1913, 103 v. 716, § 3; in effect August 8, 1913.)

Section 9429-4. (Assessment plan companies not permitted to do business in this state; exceptions.) No company or association transacting the business of life insurance on the assessment plan, other than fraternal beneficiary associations, shall do business within this state, except such companies as are now authorized to do business within this state and which shall value their assessment policies or certificates of membership as yearly renewable term policies, according to the standard of valuation of life insurance policies prescribed by the laws of this state. (May 7, 1913, 103 v. 716, § 4; in effect August 8, 1913.)

Section 9430. (Annual statement.) Each corporation, company, or association organized under any law of this state, for the purpose of doing business under preceding sections of this chapter, or for the purpose of doing such business as is contemplated by them, on the first day of January, each year, or within sixty days thereafter, shall deposit in the office of the superintendent of insurance, a statement under oath, of all its transactions for the year next preced-

ing the first day of January, and the condition of its business at the close of such year, according to printed blanks, which shall be prepared and furnished by the superintendent, showing, in detail, the transactions of each company or association, exhibiting the following facts and items, in the following form:

1. Number of certificates or policies issued during the year.
2. The amount of the indemnity effected thereby.
3. Number of death losses during the year.
4. Number of death losses paid during the year.
5. Total amount received from death assessments during the year.
6. Total amount paid to certificate-holders or policy-holders for losses during the year.
7. Number of death claims not due, but for which assessments have been made.
8. Number of losses for which assessments have not yet been issued.
9. Number of death claims compromised or resisted during the year, and reasons for such compromise or resistance.
10. Does the association or company charge annual dues?
11. How much are the dues for one thousand dollars of indemnity?
12. Does the association or company use the death assessments to meet its expenses, in whole or in part?
13. Amount of death assessments used to meet expenses during the year.
14. Do the certificates or policies issued by the association or company guarantee a fixed amount to be paid, regardless of amount realized from assessments made to meet them?
15. If so, state how the amount is guaranteed?
16. What security for such guarantee?
17. Does the association or company issue endowment certificates or policies, or undertake and promise to pay to members during life any sum of money or thing of value?
18. If so, how are these payments or promises provided for?
19. If by reserve, state the amount of reserve.
20. From what source is the reserve fund obtained?
21. How invested?
22. What guarantee or security have the certificate-holders for this reserve?
23. How many classes or divisions of endowment certificates or policies have the association or company?

24. How many years required for maturity of first class or division? How many years required for maturity of second class or division? How many years required for maturity of third class or division? How many years required for maturity of fourth class or division?

25. Number of certificates or policies in force in first class or division. Number of certificates or policies in force in second class or division. Number of certificates or policies in force in third class or division. Number of certificates or policies in force in fourth class or division.

26. Date of organization of association of company.

27. Number of certificates or policies lapsed during the year.

28. Whole number of certificates or policies in force at the beginning and end of the year.

29. The aggregate amount of certificates in force at the beginning of the year.

30. The aggregate amount of certificates lapsed during the year.

31. The aggregate amount of certificates in force at the end of the year.

32. Maximum, minimum, and average age of members received during the year.

33. Has the association or company any agents who have not given bonds?

34. In what state is the association doing business? (R. S. Sec. 3630a; April 12, 1880, 77 v. 178.)

This section does not apply to certain mutual benefit societies.

§ 9459.

State v. Railway, 68 O. S. 9, 40 (1903).

This section does not enlarge the class of companies provided for in § 9427.

State v. Moore, 38 O. S. 7 (1882).

Section 9431. (Failure to file a statement.) Any such corporation, company, or association which fails or refuses to file a statement or report, or whose treasurer fails to file a bond as required by law, shall forfeit its right to do business, which forfeiture the superintendent of insurance shall enforce by proceedings in quo warranto, and the attorney-general of the state shall institute such proceedings, upon his request, in writing. (R. S. Sec. 3630c; April 12, 1880, 77 v. 178, 180.)

Section 9432. (When must comply with requirements of mutual life companies.) No such corporation, company, or association issuing endowments, certificates or policies, or

undertaking, or promising to pay to members during life any sum of money, or thing of value, or certificate, or policy guaranteeing any fixed amount to be paid at death, except such fixed amounts or endowments be conditioned upon their being realized from the assessments made on members to meet them, shall be permitted to do business in this state, until they comply with the laws regulating regular mutual life insurance companies. (R. S. Sec. 3630c; April 12, 1880, 77 v. 178, 180.)

A provision in a policy that "the proceeds from the next mortuary call are hereby made liable for the payment of all benefits payable under the policy and the insurance thereunder is conditioned thereupon" is a substantial compliance with this section.

4 Opins. Atty. Gen. 408 (1891).

This section does not apply to policies issued by a foreign association outside of Ohio. This section is complied with if all policies issued in Ohio contain the provisions prescribed.

4 Opins. Attys. Gen. 446 (1892).

Section 9433. (Examination of companies.) When he has good reason to believe that the business of any such corporation, company or association is not being legally and honestly conducted, or that such corporation, company or association is exercising powers or franchises not conferred by law, the superintendent of insurance may cause an examination of its affairs to be made. If upon such examination, it appears that such corporation, company or association is exercising powers or franchises contrary to law, he shall institute in quo warranto against it, as hereinbefore provided. (R. S. Sec. 3630d; May 12, 1902, 95 v. 549; April 12, 1880, 77 v. 178, 180.)

Section 9434. (Expenses of examinations.) The expenses of all examinations of companies, made under authority of this chapter, shall be paid by the state treasurer on the warrant of the state auditor upon the certificate of the superintendent of insurance; except that the expenses of any examination, made upon the demand of the company, must be paid by the company making such demand; and when, by the laws of any other state, district, territory or nation, examinations of companies or associations of this state are required or permitted to be made by the insurance department or other authority of such state, district, territory or nation at the expense of such companies, then the expenses of all examinations, made by the insurance department of this state of companies of such state, district, territory or nation, shall be charged to and collected from the companies so examined respectively. (R. S. Sec. 3630d; May 12, 1902, 95 v. 549; April 12, 1880, 77 v. 178, 180.)

Section 9435. (How foreign corporations admitted.) Any corporation, company, or association organized under the laws of any other state of the United States to transact the business of life or accident or life and accident insurance on the assessment plan, as a condition precedent to transacting business in this state, shall deposit with the superintendent of insurance the following:

1. A certified copy of its charter or articles of incorporation;

2. A certificate from the insurance commissioner, or superintendent of its own state, showing its authority to do such business;

3. A certificate from such commissioner or superintendent or other like authority of its own state, that corporations, companies or associations of this state engaged in life or accident insurance on the assessment plan as the case may be, upon complying with the laws of such state, legally are entitled to do business therein;

4. A statement under the oath of its president and secretary or like officers, in the form by the superintendent of insurance required, of its business for the preceding year;

5. A certificate under the oath of its president and secretary, or like officers, that such corporation, company or association is paying, and for the twelve months next preceding has paid the maximum amount named in its policies or certificates;

6. A copy of its policy or certificate, application and by-laws, which must show that the liabilities of the assured or members are not limited to fixed or artificial premiums;

7. Evidence satisfactory to such superintendent that such corporation, company or association has accumulated and maintained a fund securely invested in securities permitted by the law of its incorporation, not less in amount than the proceeds of one periodical payment by, or an assessment on all certificates or policyholders thereof, and that such fund is held solely for the benefit of certificate or policyholders and can only be used for the purposes provided in the laws of the state where incorporated; except that such fund in the case of accident companies or accident associations shall not be less than five thousand dollars, and need not be more than ten thousand dollars;

8. Evidence that such corporation, company or association, except it be an accident insurance corporation, company or association, does not issue certificates or policies upon the life of any person more than sixty-five years of age, or upon any life in which the beneficiary named has not a legal insurable interest. But license to do business

in this state shall not be delivered to any such corporation, company or association until it has filed with the superintendent of insurance an appointment of an attorney within this state upon whom service of process may be had. (R. S. Sec. 3630e; April 22, 1904, 97 v. 144; March 31, 1891, 88 v. 252; April 18, 1883, 80 v. 179, 180; April 12, 1880, 77 v. 178, 181.)

Foreign stock or mutual insurance companies, see § 9365 et seq.

Foreign fire, etc., insurance companies, see §§ 9559, 9560.

Penalty for failure to comply with provisions, see § 13417.

Under § 9435 et seq. the insurance commissioner can not be compelled to issue a license to a foreign company, doing business on the assessment plan, where by the laws of its home state, Ohio companies of like character are not entitled as a matter of right to do business therein.

State v. Moore, 39 O. S. 486 (1883).

The law of comity is fully satisfied, when foreign companies are permitted to do business in this state upon the terms prescribed for domestic companies.

State v. Moore, 38 O. S. 7, 11 (1882).

This section does not enlarge the class of companies provided for in § 9427, but merely prescribes the regulations under which foreign companies may do business in Ohio.

State v. Moore, 38 O. S. 7 (1882).

While life insurance companies organized in this state to do business on the mutual plan have no authority to do business on the assessment plan, yet such a foreign corporation having such power may be allowed to do business in this state.

State v. Matthews, 58 O. S. 1 (1898).

What constitutes the business of life insurance "on the assessment plan," within the meaning of that term, as used in this section, should be determined by the laws of this state; and that phrase should be held to contemplate a scheme of insurance conducted for the sole benefit of the policyholders, the principal source of revenue to arise from post-mortem assessments intended to liquidate specific losses.

State v. Matthews, 58 O. S. 1 (1898).

In their dealings with residents of Ohio, foreign associations, doing business in this state, are governed by the laws of Ohio.

Earley v. Earley, 3 C. C. n. s. 71; 13 C. D. 618 (1902); aff'd, no rep., 69 O. S. 562.

Before the amendment of Rev. Stats. §§ 3630 and 3630e in 1891 (88 v. 251, 252) it was held that a company of another state organized for "insuring lives on the plan of assessment upon surviving members," without limitation, does not come within the class of companies provided in this section. The section did not embrace companies insuring the lives of members for the benefit of other than their families and heirs.

State v. Moore, 38 O. S. 7 (1882).

Ohio v. Moore, 39 O. S. 486 (1883).

State v. Insurance Co., 47 O. S. 167 (1890).

See also § 9441.

Rights of Ohio associations in Michigan.

See State v. Insurance Co., 47 O. S. 167 (1890).

Section 9436. (Certificate of authority.) Thereupon the superintendent shall issue to such corporation, company or

association a certificate of authority to transact its business in this state, which certificate shall be renewed annually; but he shall refuse such certificate to any such corporation, company or association, when in his judgment a refusal will best promote the public interest, but all decisions by him made shall be subject to review by courts of competent jurisdiction. (R. S. Sec. 3630e; April 22, 1904, 97 v. 144; March 31, 1891, 88 v. 252; April 18, 1883, 80 v. 179, 180; April 12, 1880, 77 v. 178, 181.)

Section 9437. (Revocation of authority.) Such authority shall be revoked whenever the superintendent of insurance on investigation or examination finds that such corporation, company or association is not paying the maximum amount named in its policies or certificates in full, that such corporation, company or association is transacting business fraudulently or illegally, or that the statement of its condition and affairs required herein are false and fraudulent, or for failure to file the annual statement, or when, upon investigation it appears that the expense of management of such company or association, for the year preceding the year in which such investigation is made, was more than thirty per cent. of its income from premiums, assessments and membership fees. Upon such revocation, the superintendent shall cause notice thereof to be published for four weeks in some newspaper published in the county of Franklin, and no new insurance shall thereafter be written by such corporation, company or association or any of its agents in this state. (R. S. Sec. 3630e; April 22, 1904, 97 v. 144; March 31, 1891, 88 v. 252; April 18, 1883, 80 v. 179, 180; April 12, 1880, 77 v. 178, 180.)

Section 9438. (When agent shall not transact business.) No agent of such corporation, company or association shall transact business in this state without being first regularly appointed thereby and being licensed by a certificate of authority issued by the superintendent of insurance. (R. S. Sec. 3630e; April 22, 1904, 97 v. 144; March 31, 1891, 88 v. 252; April 18, 1883, 80 v. 179, 180; April 12, 1880, 77 v. 178, 180.)

The acts of an unlicensed agent, within the scope of his authority, are valid, not only in favor of third persons, but as between principal and agent. Insurance Co. v. Ellis, 32 O. S. 388 (1877).

Section 9439. (Annual statement.) Each such corporation, company or association annually thereafter, and on or before the first day of March, shall make and file in the

office of the superintendent of insurance a statement in the form by such superintendent required of its business for the twelve months next preceding the thirty-first day of December. (R. S. Sec. 3630e; April 22, 1904, 97 v. 144; March 31, 1891, 88 v. 252; April 18, 1883, 80 v. 179, 180; April 12, 1880, 77 v. 178, 180.)

Section 9440. (Fees; exceptions.) The fees to be paid by each such corporation, company or association to the superintendent for the authority to it and its agents under the license granted by him to transact business in this state, shall be as follows:

Filing copy of charter or articles of incorporation, twenty five dollars;

Filing each annual statement, twenty dollars;

Issuing certificate of authority or license to company or association, one dollar;

Issuing license to each agent, one dollar;

Affixing seal and certifying any paper, one dollar.

But any company or association may pay to the superintendent the sum of twenty-five dollars for licenses to its agents for the year, and by so doing shall be entitled without further charge to licenses for as many agents as it may choose to appoint; except that when any other state or country imposes any obligations in excess of those imposed by this chapter upon any such corporation of this state, a like obligation shall be imposed on similar corporations, and their agents, of such state or country doing business herein. (R. S. Sec. 3630e; April 22, 1904, 97 v. 144; March 31, 1891, 88 v. 252; April 18, 1883, 80 v. 179, 180; April 12, 1880, 77 v. 178, 180.)

Section 9441. (May do life and accident business on assessment plan.) Such corporation, company or association which is transacting business in this state shall be subject only to the sections of this chapter which provide for the organization of mutual protective associations, and shall be authorized to transact in this state the business of life or accident or life and accident insurance on the assessment plan, for the purpose of mutual protection and relief of its members, and for the payment of stipulated sums of money to the families, heirs, executors, administrators or assigns of the deceased members of such corporation, company or association as the members may direct, notwithstanding such corporation, company or association may have been organized on the assessment plan and authorized by the laws governing it to issue policies insuring lives on the plan of as-

assessment upon surviving members without limitation. (R. S. Sec. 3630e; April 22, 1904, 97 v. 144; March 31, 1891, 88 v. 252; April 18, 1883, 80 v. 179, 180; April 12, 1880, 77 v. 178, 180.)

Before the amendment of this section and § 9427 in 1891 (88 v. 251, 252) it was held that a foreign company organized for "insuring lives on the plan of assessment upon surviving members" without limitation, did not come within the class provided for in § 9427. That section did not embrace companies insuring the lives of members for the benefit of others than their families, heirs, etc.

State v. Moore, 38 O. S. 7 (1882).

State v. Insurance Co., 47 O. S. 167 (1890).

4 Opins. Attys. Gen. 332 (1890).

But under this section as amended a foreign association may enlarge the classes of beneficiaries outside of Ohio, so long as it complies with § 9427 et seq. in the business transacted by it within the state.

4 Opins. Atty. Gen. 446 (1892).

Where the only business which a foreign company seeks to do in Ohio is authorized, it should not be refused admission because it is authorized to do other and additional classes of business in other states.

5 Opins. Attys. Gen. 787 (1902).

A foreign company which carries a line of assessment or stipulated premium policies can not be admitted to Ohio to do business on the mutual or stock plan as a full legal reserve company and to write only full legal reserve business.

5 Opins. Attys. Gen. 679 (1902).

Section 9442. (Where an action may be brought.) An action may be brought against such a corporation, company or association, organized under the laws of this state, or against any such foreign corporation, company or association doing business in this state, in any county where such cause of action arises, and summons may be issued and service had as provided by law for the issuance and service of such writs in the court of common pleas, and justices' courts. (R. S. Sec. 3630f; April 21, 1904, 97 v. 138; April 12, 1880, 77 v. 187, 181.)

Section 9443. (Restrictions on the issue of policies.) No such corporation, company or association shall issue a certificate or policy to any person, until he first has been subjected to a thorough medical examination by a regularly educated physician and found to be a good risk, nor to any person above the age of sixty-five years, or under the age of fifteen years. But this section in respect to the age and medical examination of persons to whom certificates or policies issue, shall not apply to such corporations, companies or associations doing purely accident business. (R. S. Sec. 3630g; April 17, 1885, 82 v. 138; 80 v. 179.)

Penalty for violation of this section, see G. C. §§ 13134, 13135, 13417.

Section 9444. (Expenses.) The expenses of such corporation, company or association must be met by fixed annual payments, or by assessments made and designated to be for such expenses; but such assessments in no case shall be made or become a part of, assessments to pay a loss by death. No part of the mortuary fund in any case shall be used to pay expenses. (R. S. Sec. 3630h; April 18, 1883, 80 v. 179.)

Section 9445. (Against personal injury or loss of life or sickness.) Companies consisting of five or more citizens of this state may be organized under this chapter and sections ninety-four hundred and forty-five to ninety-four hundred and fifty-one, both inclusive, for the special purpose of insuring against accidental personal injury and loss of life, sustained while traveling by railroad, steamboat or other mode of conveyance, and against accidental loss of life and personal injury, sustained by accident of any description whatever, and against expenses and loss of time occasioned by injury or sickness, and on such terms and conditions, and for such periods of time, and confined to such countries and localities, and to such persons as may at any time be provided in the by-laws of the company. (R. S. Sec. 3630i; April 26, 1904, 97 v. 435; May 19, 1894, 91 v. 332; March 19, 1887, 84 v. 130.)

Penalty for violation of act, see § 13418.

Construction of provisions in accident insurance policies. See note to § 9542.

It is doubtful whether the approval of the attorney general is required to articles of a company organized under this section. Opins. Atty. Gen. 1916, p. 65; Opins. Atty. Gen. 1919, p. 36.

At least five incorporators must be citizens of Ohio. Opins. Atty. Gen. 1922, p. 621.

Section 9446. (Expenses; separation of funds.) The expenses of such corporations, companies or associations shall be met by fixed annual payments, payable quarterly or otherwise or by assessments on the members, payable as provided in the by-laws. On either plan there may be included in such payments or assessments, a certain per cent thereof, to be fixed by the by-laws, which when collected, must be credited on the books of the company to the expense fund, and the residue thereof be so credited to the fund to pay losses and create a reserve or guarantee fund for the payment of losses and liabilities. Such funds must be kept separate and never shall be interchanged or used for purposes other than those for which they were respectively collected; except that funds collected for, but not

required for expenses, may be transferred to the fund for payment of losses or the reserve or guarantee fund. The assessed shall be notified at the time of the collection of each payment the per cent thereof that is collected to pay expenses, and the per cent thereof that is collected to pay losses and create a guarantee fund; but nothing herein shall prevent the company from distributing to certificate holders the surplus in the accident fund and the surplus arising from the reserve on lapsed and cancelled certificates as provided by the by-laws of the company. (R. S. Sec. 3036i; April 26, 1904, 97 v. 435; May 19, 1894, 91 v. 332; March 19, 1887, 84 v. 130.)

Section 9447. (Bond.) Companies so organized, before engaging in business, must execute a bond in the sum of one hundred thousand dollars to the state of Ohio, with security to the acceptance and approval of the superintendent of insurance, for the use and benefit of all persons holding policies or certificates in such company, conditioned that it shall credit upon its books, all moneys received by it under this and the preceding section, keep the funds separate and not use or interchange them for purposes other than those for which they were respectively collected, and that they will apply and pay out such funds to and for the purposes provided for in the preceding section. When so executed and approved the bond shall be deposited with and held by the superintendent of insurance. (R. S. Sec. 3630i; April 26, 1904, 97 v. 435; May 19, 1894, 91 v. 332; March 19, 1887, 84 v. 130.)

The superintendent of insurance may require the renewal of bonds given under this section.

Rep. Atty. Gen. 1908-1909, p. 182.

Section 9448. (Bond only of purely accident companies.)

A corporation, company or association, organized for the purpose of doing a purely accident insurance business, and which creates a reserve or guarantee fund from the premiums collected by assessments or otherwise, as provided in its by-laws, shall not be required to deposit a bond of one hundred thousand dollars; but the treasurer thereof, before commencing business, shall deposit with the superintendent of insurance a bond with approved securities, to his acceptance in the sum of ten thousand dollars, for the use and purposes provided in the preceding section. (R. S. Sec. 3630i; April 26, 1904, 97 v. 435; May 19, 1894, 91 v. 332; March 19, 1887, 84 v. 130.)

Section 9449. (Investment of reserve fund.) Every such corporation, company, or association shall invest, as provided by law for domestic life insurance companies, so much of the reserve or guarantee fund, in excess of ten thousand dollars, as will equal at least two and one-half per cent of all premiums or assessments collected from policies or certificates in force, on the last days of June and December of each year, until such reserve or guarantee fund is equal to two dollars for every five thousand dollars of insurance in force. Securities for such reserve, as herein provided, shall be deposited with the superintendent of insurance on the last days of June and December of each year, or within thirty days thereafter, to be held by him for the benefit and protection of policy or certificate holders. (R. S. Sec. 3630i; April 26, 1904, 97 v. 435; May 19, 1894, 91 v. 332; March 19, 1887, 84 v. 130.)

Section 9450. (Release of security.) If such corporation, company or association at any time causes all of its unexpired policies or certificates to be paid, cancelled or reinsured, and all its liabilities under such policies or certificates thereby to be extinguished, or to be assumed by some other responsible company authorized to do business in this state, on application of such company, verified by the oath of its president or secretary, and on being satisfied by an examination of its books and officers, under oath, that all of its policies or certificates are so paid, cancelled, extinguished or reinsured, the superintendent of insurance shall deliver up to it such security. (R. S. Sec. 3630i; April 26, 1904, 97 v. 435; May 19, 1894, 91 v. 332; March 19, 1887, 84 v. 130.)

Section 9451. (Annual statement.) Annually, before March first, every such corporation, company or association shall file with the superintendent of insurance a statement under the oath of its officers showing its transactions for the year ending on the thirty-first day of December preceding, and its condition on that day, in the form prescribed by the superintendent. (R. S. Sec. 3630i; April 26, 1904, 97 v. 435; May 19, 1894, 91 v. 332; March 19, 1887, 84 v. 130.)

Section 9452. (Foreign companies insuring against accidental injury or death.) Companies and associations organized under the laws of the United States and of other states, territories and nations, and doing the business of insuring against accidental personal injury and loss of life, sustained while traveling by railroad, steamboat or other mode of con-

veyance, and making all and every insurance connected with accidental loss of life and personal injury, sustained by accident of any description whatever, and against expenses and loss of time occasioned by injury or sickness, and on such terms and conditions and for such periods of time, and confined to such countries and localities, and to such persons as from time to time may be provided in the by-laws of the company, and when payment and the expenses of such corporations, companies or associations, are met by fixed annual payments, payable quarterly or otherwise, or by assessments on the members, payable as may be provided in the by-laws, or as hereinafter provided, shall be admitted to do and transact such business in this state. (R. S. Sec. 3630j; April 22, 1904, 97 v. 147; May 10, 1902, 95 v. 520.)

An Ohio corporation may become a member of a foreign mutual insurance association, for its own protection, and on the insolvency of such association, it is liable for an assessment duly made on the members.

Stone v. Traction Co., 4 N. P. n. s. 104; 16 L. D. 645 (1906).

A foreign association doing a life, health and accident business may under this section be admitted to do a health and accident business only, in Ohio. The fact that it is authorized to do a life insurance business in other states is not a ground for refusing it admission to do health and accident business only.

5 Opins. Attys. Gen. 787 (1902).

Section 9453. (Conditions precedent to transact business.) As a condition precedent to transacting business in this state, such corporation, company or association shall deposit with the superintendent of insurance the following:

1. A certified copy of its charter or articles of incorporation;

2. A certificate from the insurance commissioner or superintendent of its own state, showing its authority to do such business;

3. A certificate from such commissioner or superintendent or other like authority of its own state that corporations, companies or associations of this state engaged in the same or similar business, or engaged in the business of paying benefits in the case of sickness and disability to be derived from assessments collected from the members, upon complying with the laws of such state, legally are entitled to do business therein;

4. A statement under the oath of its president and secretary or like officers, in the form by the superintendent of insurance required, of its business for the preceding year;

5. A certificate under the oath of its president and secretary or like officers, that such corporation, company or association is paying and for the twelve months next pre-

ceding has paid the maximum amount named in its policies or certificates;

6. A copy of its policy or certificate, application and by-laws, which must show that the liabilities of the assured or members are not limited to fixed or artificial premiums;

7. Evidence satisfactory to such superintendent that the corporation, company or association has accumulated and maintained a fund, securely invested in securities permitted by the laws of its incorporation, not less in amount than the proceeds of one periodical payment by, or an assessment on all certificate or policy holders thereof, and that such fund is held solely for the benefit of certificate or policy holders and can only be used for the purposes provided in the laws of the state where incorporated; which fund shall not be less than five thousand dollars and need not be more than ten thousand dollars.

8. The appointment in writing of an attorney in this state upon whom service of process may be had. (R. S. Sec. 3630j; April 22, 1904, 97 v. 147; May 10, 1902, 95 v. 520.)

Section 9454. (Certificate of authority and its revocation.) Thereupon the superintendent of insurance shall issue to such corporation, company or association a certificate of authority to transact its business in this state, which certificate shall be renewed annually. But the superintendent shall refuse or revoke such certificate to any such corporation, company or association, when in his judgment such refusal or revocation will best promote the public interest, also, when upon investigation it appears that the expense of management of such company or association, for the year preceding the year in which the investigation is made, was more than thirty per cent of its income from premiums, assessments and membership fees. But all decisions by him made shall be subject to review by courts of competent jurisdiction. (R. S. Sec. 3630j; April 22, 1904, 97 v. 147; May 10, 1902, 95 v. 520.)

Section 9455. (Annual statement.) Every such corporation, company or association, annually before March first, shall file with the superintendent of insurance a statement under the oath of its officers showing its transactions for the year ending on the preceding thirty-first day of December, and its condition on that day, in the form prescribed by the superintendent. (R. S. Sec. 3630j; April 22, 1904, 97 v. 147; May 10, 1902, 95 v. 520.)

Section 9456. (Where actions brought.) The provisions of section ninety-four hundred and forty-two as to where actions may be brought, shall apply to such corporation, company or association. (R. S. Sec. 3630j; April 22, 1904, 97 v. 147; May 10, 1902, 95 v. 520.)

Section 9457. (No agent to collect dues without giving bond.) No agent or officer of such a corporation, company or association shall be permitted to collect or receive dues, assessments, or donations for or on account of it until he executes jointly, with two responsible sureties, a bond to the corporation, company or association, to the approval of the trustees thereof, in such sum as they prescribe, conditioned for the payment of all such dues, assessments, and donations over to the proper officer of the company. (R. S. Sec. 3631; April 12, 1880, 77 v. 178, 181; February 3, 1875, 72 v. 23, § 4.)

The conditions of the bond must conform to this section.

Rep. Atty. Gen. 1904-1905, p. 117.

Section 9458. (Bond of treasurer.) All receipts of such company or association shall be paid into the hands of the treasurer thereof, who before assuming the duties of his office, shall give a bond of not less than ten thousand nor more than fifty thousand dollars, as the superintendent of insurance determines, with not less than three sureties to be approved by him, and conditioned for the faithful accounting for, and proper payment and disbursement to the legitimate purposes of the company or association of all the money thereof, which comes into his hands. Such bond shall be examined, as to its sufficiency, annually, be renewed whenever the superintendent of insurance requires and with his approval indorsed thereon, be filed with the secretary of state. (R. S. Sec. 3631; April 12, 1880, 77 v. 178, 181; February 3, 1875, 72 v. 23, § 4.)

The bond required to be filed by the treasurer under this section is additional to the bond required from the company under § 9447.

Rep. Atty. Gen. 1908-1909, p. 182.

The conditions of the bond must conform to this section.

Rep. Atty. Gen. 1904-1905, p. 117.

Section 9459. (Mutual benefit societies excepted.) The provisions of sections ninety-four hundred and thirty to ninety-four hundred and fifty-eight, both inclusive, shall not apply to any association of religious or secret societies, or to any class of mechanics, express, telegraph or railroad employes, or ex-union soldiers, formed for the mutual bene-

fit of the members thereof and their families or blood relatives exclusively or for purely charitable purposes. (R. S. Sec. 3631a; May 4, 1908, 99 v. 268; March 31, 1904, 97 v. 61; April 16, 1900, 94 v. 354; April 11, 1890, 87 v. 170; March 14, 1889, 86 v. 89; April 12, 1880, 77 v. 178, § 8.)

This section is constitutional.

State v. Burial Ass'n, 8 C. C. n. s. 233; 18 C. D. 397.

An association of a class of mechanics must be organized in conformity to § 9427 although, by § 9459, it is exempt from certain regulatory statutes. Such an association may possess no powers inconsistent with § 9427 and its articles of incorporation must disclose that the proposed business is consistent with that section. Rep. Atty. Gen. 1913, p. 102.

Railway relief association.

Sections 9430 to 9458 do not apply to railway relief associations.

State v. Railway, 68 O. S. 9, 40 (1903).

See Gearen v. Railway, 19 W. L. B. 293 (1888).

A railway relief association, composed of employes and the railway company, to maintain a relief fund created by voluntary contributions, is not engaged in the business of insurance.

State v. Railway Co., 68 O. S. 9 (1903).

Rights under certificates.

See note to § 9013.

Statutory prohibitions as to, see

§§ 9010 to 9014.

Burial association. Provision for, added to this section 97 v. 61, repealed 99 v. 268.

Designation of undertaker, prohibited § 666.

Where a burial association is not subsidiary to or controlled by an undertaking company, the fact that some of its officers, directors and members are also officers and directors of an undertaking company, does not constitute an offense, or warrant the revocation of its charter.

State v. Burial Ass'n, 8 C. C. n. s. 233; 18 C. D. 397 (1906).

Section 9460. (When association may become subject to insurance laws.) Any such association or class which desires to become subject to the provisions of sections ninety-four hundred and thirty to ninety-four hundred and thirty-four, both inclusive, may file with the superintendent of insurance notice thereof in writing, signed by its president, and attested by its secretary. Thereupon, such association or class shall become subject to such provisions. The superintendent of insurance immediately must provide such an association or class with proper blanks for furnishing the statement of its condition, and it shall make such report within sixty days thereafter, and thenceforward, annually, as in case of other insurance companies, which report shall be included by the superintendent of insurance in his annual report, the same as the reports of other companies, and subject to the fees prescribed by law in like cases payable by life insurance companies. (R. S. Sec. 3631a; May 4,

1908, 99 v. 268; March 31, 1904, 97 v. 61; April 16, 1900, 94 v. 354; April 11, 1890, 87 v. 170; March 14, 1889, 86 v. 89; April 12, 1880, 77 v. 178, § 8.)

Section 9461. (Bond of treasurers.) The treasurer of any association or class which avails itself of the benefits of such provisions shall be required to give bond in the manner provided for treasurers of mutual benefit companies, such bond to be conditioned, approved and renewed as by such treasurers. (R. S. Sec. 3631a; May 4, 1908, 99 v. 268; March 31, 1904, 97 v. 61; April 16, 1900, 94 v. 354; April 11, 1890, 87 v. 170; March 14, 1889, 86 v. 89; April 12, 1880, 77 v. 178, § 8.)

CHAPTER 4.

FRATERNAL.

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| § 9462-2. When benefit certificate shall be issued; basis of contributions. | § 9476. License and renewal; fee. |
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Section 9462. (Fraternal benefit society defined.) Any corporation, society, order or voluntary association, without capital stock, organized and carried on solely for the mutual benefit of its members and their beneficiaries, and not for profit, and having a lodge system with ritualistic form of work and representative form of government, and which shall make provision for the payment of benefits in accordance with section 5 [G. C. Sec. 9466] hereof, is hereby declared to be a fraternal benefit society. (May 31, 1911, 102 v. 533, § 1; April 26, 1904, 97 v. 421, § 1; R. S. Sec. 3631-11; April 27, 1896, 92 v. 360, § 1.)

The act of May 31, 1911 (102 v. 533-548, § 32) repealed "all acts and parts of acts inconsistent with this act." As it is doubtful whether certain of the original General Code sections of this chapter were repealed, all are given in the notes.

See Rep. Att'y. Gen. 1911-1912, p. 113.

A benefit society is not an insurance company.

Benevolent Legion v. McGinness, 59 O. S. 531, 537 (1898).

A fraternal benefit society can not be organized as a mutual protective association by filing articles with the secretary of state. The articles should be filed with the superintendent of insurance. § 9473; Rep. Att'y. Gen. 1913, p. 100.

Section 9462. (Fraternal beneficiary associations defined.) Any corporation, society, order or voluntary association without capital stock, organized and carried on solely for the mutual benefit of its members and their beneficiaries, and not for profit, and having a lodge system with ritualistic form of work and representative form of government and which makes provision for the payment of death benefits, is a fraternal beneficiary association. (April 26, 1904, 97 v. 421, § 1.)

Section 9462-1. (Schedule of benefits for protection and maintenance of members.) Any fraternal benefit society authorized to do business in this state and operating on the lodge plan, may provide in its constitution and by-laws, in addition to other benefits provided for therein, for the payment of death or annuity benefits upon the lives of children between the ages of two and eighteen years at next birthday, for whose support and maintenance a member of such society

is responsible. Any such society may at its option, organize and operate branches for such children, and membership in local lodges and initiation therein shall not be required of such children, nor shall they have any voice in the management of the society. The total benefits payable as above provided shall in no case exceed the following amounts at ages at next birthday at time of death, respectively, as follows: two, thirty-four dollars; three, forty dollars; four, forty-eight dollars; five, fifty-eight dollars; six, one hundred and forty dollars; seven, one hundred and sixty-eight dollars; eight, two hundred dollars; nine, two hundred and forty dollars; ten, three hundred dollars; eleven, three hundred and eighty dollars; twelve, four hundred and sixty dollars; thirteen to fifteen, five hundred and twenty dollars; and sixteen to eighteen years, where not otherwise authorized by law, six hundred dollars. (107 v. 529, § 1.)

Section 9462-2. (When benefit certificate shall be issued; basis of benefit contributions.) No benefit certificate as to any child shall take effect until after medical examination or inspection by a licensed medical practitioner, in accordance with the laws of the society, nor shall any such benefit certificate be issued unless the society shall simultaneously put in force at least five hundred certificates, on each of which at least one assessment has been paid, nor where the numbers of lives represented by such certificate falls below five hundred. The death benefit contributions to be made upon such certificate shall be based upon the "Standard Industrial Mortality Table" or the "English Life Table Number Six" and a rate of interest not greater than four per cent. per annum, or upon a higher standard; provided that contributions may be waived or returns may be made from any surplus held in excess of reserve and other liabilities, as provided in the by-laws, and, provided further that extra contributions shall be made if the reserves hereafter provided for become impaired. (107 v. 530, § 2.)

Section 9462-3. (Reserve required; separate and distinct funds; new certificates.) Any society entering into such insurance agreements shall maintain on all such contracts the reserve required by the standard of mortality and interest adopted by the society for computing contributions as provided in section 2, and the funds representing the benefit contributions and all accretions thereon shall be kept as separate and distinct funds, independent of the other funds of the society, and shall not be liable for nor used for the

payment of the debts and obligations of the society other than the benefits herein authorized; provided, that a society may provide that when a child reaches the minimum age for initiation into membership in such society, any benefit certificate issued hereunder may be surrendered for cancellation and exchanged for any other form of certificate issued by the society, provided that such surrender will not reduce the number of lives insured in the branch below five hundred, and upon the issuance of such new certificate any reserve upon the original certificate herein provided for shall be transferred to the credit of the new certificate. Neither the person who originally made application for benefits on account of such child, nor the beneficiary named in such original certificate, nor the person who paid the contributions, shall have any vested right in such new certificate, the free nomination of a beneficiary under the new certificate being left to the child so admitted to benefit membership. (107 v. 530, § 3.)

Section 9462-4. (Separate financial statement required in annual report.) An entirely separate financial statement of the business transactions and of assets and liabilities arising therefrom shall be made in its annual report to the insurance commissioner by any society availing itself of the provisions hereof. The separation of assets, funds and liabilities required hereby shall not be terminated, rescinded or modified, nor shall the funds be diverted for any use other than as specified in section 3, as long as any certificates issued hereunder remain in force, and this requirement shall be recognized and enforced in any liquidation, reinsurance, merger or other change in the condition of the status of the society. (107 v. 531, § 4.)

Section 9462-5. (Mingling of funds.) Any society shall have the right to provide in its laws and the certificate issued hereunder for specified payments on account of the expense or general fund, which payments shall or shall not be mingled with the general fund of the society as its constitution and by-laws may provide. (107 v. 531, § 5.)

Section 9462-6. (Certificate may be continued for benefit of estate of the child.) In the event of the termination of membership in the society by the person responsible for the support of any child, on whose account a certificate may have been issued, as provided herein, the certificate may be continued for the benefit of the estate of the child, provided

the contributions are continued, or for the benefit of any other person responsible for the support and maintenance of such child, who shall assume the payment of the required contributions. (107 v. 531, § 6.)

Section 9463. (Lodge system.) Any society having a supreme governing or legislative body and subordinate lodges or branches by whatever name known, into which members shall be elected, initiated and admitted in accordance with its constitution, laws, rules, regulations and prescribed ritualistic ceremonies, which subordinate lodges or branches shall be required by the laws of such society to hold regular or stated meetings at least once in each month, shall be deemed to be operating on the lodge system. (May 31, 1911, 102 v. 533, § 2; April 26, 1904, 97 v. 422, § 2; R. S. Sec. 3631-12; April 27, 1896, 92 v. 360, § 1.)

The beneficiary named in a certificate issued by a grand lodge, under the authority of the supreme lodge, was held entitled to a judgment against both the supreme lodge and the receiver of the grand lodge, payable out of the beneficiary fund.

Grear v. Supreme Lodge, 8 O. L. R. 324; 21 L. D. 66 (C. P. 1910).

Where a subordinate lodge surrendered its charter and records to the grand lodge, and divided its funds among its remaining members, to their satisfaction, but in violation of the rules of both the subordinate and grand lodge, the grand lodge having no proprietary interest in the fund, was held not entitled to recover the same.

Grand Grove, etc., v. Mullen, 1 C. C. n. s. 63; 14 C. D. 239 (1903).

Property held by subordinate lodges may, under some circumstances, be deemed to be owned by the parent body and may be reached by creditors. *Parks v. Order*, 26 C. C. n. s. 89 (1916). See *Schroeder v. Iron Hall*, 7 N. P. 243; 1 L. D. 408 (1895).

Powers of subordinate lodges, see § 10061-1.

Section 9463. (Lodge system defined.) Any association having a supreme governing or legislative body and subordinate lodges or branches by whatever name known into which members are elected and initiated or admitted in accordance with its constitution, laws, rules, regulations, and prescribed ritualistic ceremonies, which lodges or branches are required to hold regular or stated meetings at least once in each month, shall be deemed to be operating under the lodge system. (97 v. 422, § 2.)

Section 9464. (Representative form of government.) Any such society shall be deemed to have a representative form of government when it shall provide in its constitution and laws for a supreme legislative or governing body, composed of representatives elected either by the members or by delegates elected directly or indirectly by the members, together with such other members as may be prescribed by its constitution and laws; provided, that the elective members shall constitute a majority in number and have not less than two-thirds of the votes, nor less than the votes required

to amend its constitution and laws; and provided further, that the meetings of the supreme or governing body, and the election of officers, representatives or delegates shall be held as often as once in four years. The members, officers, representatives or delegates of a fraternal benefit society shall not vote by proxy. (May 31, 1911, 102 v. 533, § 3; April 26, 1904, 97 v. 422, § 3; R. S. Sec. 3631-13; April 27, 1896, 92 v. 360.)

The management of a society will not be interfered with by courts, on complaint of a member, in the absence of fraud or collusion, or action in excess of corporate power.

Coss v. Mansfield Lodge, 4 C. C. n. s. 11; 14 C. D. 36 (1902).

Ingram v. National Union, 4 O. L. R. 316; 17 L. D. 227 (1906).

Steuve v. Grand Lodge, 5 C. C. 471; 3 C. D. 231 (1891).

The National Union was held to have a representative form of government.

Ingram v. National Union, 4 O. L. R. 316; 17 L. D. 227 (1906).

The Endowment Rank of the Knights of Pythias was held not to have a representative form of government.

Hildreth v. Knights of Pythias, 8 N. P. 540; 11 L. D. 622 (1901).

See § 9491.

A provision in the constitution or laws of a society requiring officers of subordinate lodges to furnish bonds having as surety a surety company selected by certain officers of the supreme body is valid. Rep. Atty. Gen. 1913, p. 837.

Section 9464. (Representative form of government defined.) Any association shall be deemed to have a representative form of government when it provides in its constitution and laws for a supreme legislative or governing body, composed of representatives elected either by the members or by delegates elected directly or indirectly by the members, together with such other members as may be prescribed by its constitution and laws. But the elective representatives shall constitute a majority in number and have not less than a majority of the votes, nor less than the votes required to amend its constitution and laws. The meetings of the supreme or governing body and the election of officers must be held as often as once in four years. (97 v. 422, § 3.)

Section 9465. (Exempt from insurance laws.) Except as herein provided, such societies shall be governed by this act, and shall be exempt from all provisions of the insurance laws of this state, not only in governmental relations with the state, but for every other purpose, and no law hereafter enacted shall apply to them, unless they be expressly designated therein. (May 31, 1911, 102 v. 533, § 4; April 26, 1904, 97 v. 422, § 4; R. S. Sec. 3631-14; April 27, 1896, 92 v. 360, § 1.)

A fraternal benefit society is not an insurance company.

Benevolent Legion v. McGinness, 59 O. S. 531, 537 (1898).

Certificates of fraternal benefit societies are not governed by the rules of law applicable to policies of life insurance companies.

Brotherhood v. Taylor, 9 C. C. n. s. 17; 19 C. D. 171 (1906).

G. C. § 9391 (providing that a false answer in an application for insurance shall not bar a recovery on the policy unless such answer is wilfully false, fraudulently made, etc.,) does not apply to fraternal benefit societies.

Gilligan v. Royal Arcanum, 5 C. C. n. s. 471; 16 C. D. 42 (1904); aff'd, no rep., 72 O. S. 672.

Grand Lodge v. Bunkers, 3 C. C. n. s. 256; 13 C. D. 487 (1902).

Woodmen v. Gallagher, 1 Ohio App. 368; 19 C. C. n. s. 355, 365 (1913); Ladies of Honor v. Kopittke, 21 C. C. n. s. 374 (1906).

But where, under the issues joined, the burden of proof was on the fraternal benefit society, it can not, after trial and verdict, claim the exemptions provided by this section.

Brotherhood v. Dailey, 11 C. C. n. s. 464; 21 C. D. 391 (1908); reversing, 7 N. P. n. s. 238; 19 L. D. 60.

Section 9465. (Exemptions.) Except as herein provided, such association shall be governed by this chapter and be exempt from all provisions of the insurance laws not only in governmental relations with the state, but for every other purpose. No law hereafter passed shall apply to them, unless they are expressly designated therein. (97 v. 422, § 4.)

Section 9466. (Society shall pay benefits. When extended and paid up protection may be granted.) Subsection 1. Every society transacting business under this act shall provide for the payment of death benefits, and may provide for the payment of benefits in case of temporary or permanent physical disability, either as the result of disease, accident or old age; provided, the period of life at which the payment of benefits for disability on account of old age shall commence, shall not be under seventy years, and may provide for monuments or tombstones to the memory of its deceased members, and for the payment of funeral benefits. Such society shall have the power to give a member, when permanently disabled or on attaining the age of seventy, all, or such portion of the face value of his certificate as the laws of the society may provide; provided, that nothing in this act contained shall be so construed as to prevent the issuing of benefit certificates for a term of years less than the whole of life which are payable upon the death or disability of the member occurring within the term for which the benefit certificate may be issued. Such society shall, upon written application of the member, have the power to accept a part of the periodical contributions in cash, and charge the remainder, not exceeding one-half of the periodical contribution, against the certificate with interest payable or compounded annually at a rate not lower than four per cent. per annum; provided, that this privilege shall not be granted except to societies which have readjusted or may hereafter readjust their rates of contributions, and to contracts affected by such readjustment.

Subsection 2. Any society which shall show by the an-

nual valuation hereinafter provided for that it is accumulating and maintaining the reserve necessary to enable it to do so, under a table of mortality not lower than the American Experience Table and four per cent. interest may grant to its members, extended and paid up protection, or such withdrawal equities as its constitution and laws may provide; provided, that such grants shall in no case exceed in value the portion of the reserve to the credit of such members to whom they are made. (May 31, 1911, 102 v. 533, § 5; April 26, 1904, 97 v. 422, § 5; R. S. Sec. 3631-15; April 27, 1896, 92 v. 360, § 1.)

Under original G. C. §§ 9466, 9469 and 9470 it was held that a foreign association did not violate the laws of Ohio by issuing certificates containing provisions for cash surrender values, loan values, paid-up insurance and dividends arising from death losses and expenses.

State v. Lemert, 11 N. P. n. s. 535; 21 L. D. 118 (C. P. 1910).

Total disability. Under a clause providing for certain benefits if the insured is "totally unable to labor" or "to earn a livelihood in any employment", evidence that an insured had lost his right hand and was unemployed, during the period for which benefits were claimed, was held sufficient for submission to the jury of the question whether he was able to earn a livelihood in any employment. Hughes v. Railway, 15 N. P. n. s. 604; 27 L. D. 215 (1914).

Section 9466. (Benefits.) Every association transacting business under this chapter shall provide for the payment of death benefits and may provide for the payment of benefits in case of temporary or permanent physical disability, either as the result of disease, accident or old age. But the period of life at which the payment of benefits for disability on account of old age may begin, shall not be under seventy years. (97 v. 422, § 5.)

Section 9467. (To whom benefits shall be paid.) The payment of death benefits shall be confined to wife, husband, relative by blood to the fourth degree, father-in-law, mother-in-law, son-in-law, daughter-in-law, stepfather, stepmother, stepchildren, children by legal adoption, or to a person or persons dependent upon the member; provided, that if after the issuance of the original certificate the member shall become dependent upon an incorporated charitable institution, he shall have the privilege with the consent of the society, to make such institution his beneficiary. Within the above restrictions each member shall have the right to designate his beneficiary, and, from time to time, have the same changed in accordance with the laws, rules or regulations of the society, and no beneficiary shall have or obtain any vested interest in such benefit until the same has become due and payable upon the death of such member; provided, that any society may, by its laws, limit the scope of bene-

beneficiaries within the above classes. (May 31, 1911, 102 v. 533, § 6; April 26, 1904, 97 v. 422, § 6; R. S. Sec. 3631-16; April 27, 1896, 92 v. 360, § 1.)

A benefit certificate must be made payable to one of the classes specified in this section. Any other designation of beneficiary is invalid.

Brotherhood v. Taylor, 9 C. C. n. s. 17; 19 C. D. 171 (1906).

Starr v. Maccabees, 6 C. C. n. s. 473; 17 C. D. 475 (1905).

Wegener v. Wegener, 101 O. S. 22 (1920).

A society may, in its by-laws, limit the payment of benefits to a part, only, of the classes specified in the statute.

Halle v. District Grand Lodge, 1 C. C. n. s. 83; 14 C. D. 717 (1903);
aff'd, no rep., 72 O. S. 607.

Wegener v. Wegener, 101 O. S. 22 (1920).

Where the class of beneficiaries is limited by statute, such class can not be enlarged by a provision in the constitution or by-laws. But the payment of benefits may be limited to a part only of the classes authorized by statute. Wegener v. Wegener, 101 O. S. 22 (1920).

The status of the beneficiary as it exists at the time of payment controls.

Brotherhood v. Taylor, 9 C. C. n. s. 17; 19 C. D. 171 (1906).

Where by-laws require the member to designate a beneficiary, and, upon his failure so to do, provide that the benefits shall be paid to certain heirs in the order named, the society has the right to designate what shall be done with the benefits upon failure of the member to designate a beneficiary, and upon failure of such heirs as are specified in the by-laws.

Halle v. District Grand Lodge, 1 C. C. n. s. 83; 14 C. D. 717 (1903);
aff'd, no rep., 72 O. S. 607.

See Caughlin v. Assn., 89 O. S. 452.

Although the society in such case may elect to treat the benefits as having lapsed, contrary to the spirit of the statute, heirs at law who are not specified in the by-laws are not entitled to recover the benefits.

Halle v. District Grand Lodge, 1 C. C. n. s. 83; 14 C. D. 717 (1903);
aff'd, no rep., 72 O. S. 607.

Where a certificate is rendered invalid by the false designation of the beneficiary as a dependent, there can be no recovery on the certificate by the mother of the member. Woodmen v. Gallagher, 1 Ohio App. 368; 19 C. C. n. s. 355 (1913).

Where a certificate was made payable to Alice B. Taylor, his wife, if living, if not, to his executors or administrators in trust for his heirs at law, and the wife obtained a divorce from the insured, the words "Alice B. Taylor" were rejected and the certificate construed to mean that if there were no wife living, the benefits were to be paid to the administrator in trust for his heirs.

Brotherhood v. Taylor, 9 C. C. n. s. 17; 19 C. D. 171 (1906).

In such case the certificate neither lapsed nor reverted to the society, but was payable to the administrator.

Brotherhood v. Taylor, 9 C. C. n. s. 17; 19 C. D. 171 (1906).

After the death of the insured, the beneficiary may assign her claim as security for her debt.

Brewing Co. v. Cassman, 21 C. C. 465; 12 C. D. 141 (1900).

The beneficiary may be designated in the will of the member, within the limited class permitted by statute, if not prohibited by the rules of the society. Dhonau v. Striebinger, 24 C. C. n. s. 598 (1904).

The reorganization of a mutual protective association (formed under § 9427 et seq.) into a fraternal benefit society does not affect

policies then outstanding, but the policyholder and society may agree to change the beneficiary to one within the class specified by § 9467. The form of such change is not important. *Lentz v. Fritter*, 92 O. S. 186 (1915).

Wife. Where a wife obtained a divorce subsequent to the issuance of a benefit certificate, in which she is named as beneficiary, she is precluded from recovering benefits as wife or beneficiary. *Johnson v. Benevolent Assn.*, 13 N. P. n. s. 568 (1912); *aff'd*, no rep. 92 O. S. 511; reversing, 2 Ohio App. 148; 20 C. C. n. s. 487; 24 C. D. 245; *Mahar v. Mahar*, 19 C. C. n. s. 586 (1912); *Brotherhood v. Taylor*, 9 C. C. n. s. 17; 19 C. D. 171 (1906).

While a wife has no vested interest which will prevent the substitution of another beneficiary for her, yet where premiums were paid by such wife out of her personal earnings, she is entitled to reimbursement out of the proceeds of the policy.

National Union v. Shaw, 9 N. P. n. s. 474; 20 L. D. 225 (C. P. 1910).

Father or mother. The mother of the insured may be made beneficiary although she is not dependent on the insured and is not a member of his family.

National Union v. Shaw, 9 N. P. n. s. 474; 20 L. D. 225 (C. P. 1910).

See *Earley v. Earley*, 3 C. C. n. s. 71; 13 C. D. 618 (1902); *aff'd*, no rep., 69 O. S. 562.

Dependent. A woman who for twelve years occupied the relation of wife to the insured, she and the society being in ignorance of the fact that the relation was illegal in that he had a wife living, is a "dependent" under this section and is entitled to the proceeds of the benefit certificate, in which she is named as beneficiary, as against the lawful wife and heirs of the insured, although the certificate was issued after she discovered the unlawful relation.

Starr v. Maccabees, 6 C. C. n. s. 473; 17 C. D. 475 (1905); *aff'd*, no rep., 74 O. S. 501.

A foreign society, authorized by its charter to pay benefits to the family or dependents of a member, in not authorized to issue a certificate payable to a brother who is not a dependent.

Benevolent Legion v. McGinness, 59 O. S. 531 (1898).

Where the laws of the society provide that a false statement in the application shall render the certificate void, a false designation of the named beneficiary as a dependent renders the certificate void, and there can be no recovery by the mother of the member. *Woodmen v. Gallagher*, 1 Ohio App. 368; 19 C. C. n. s. 355 (1913).

Change of beneficiary. A member may substitute a new beneficiary, in accordance with the rules of the society, without the consent of the original beneficiary. *Brotherhood v. Taylor*, 9 C. C. n. s. 17, 20; 19 C. D. 171 (1906); *Dauber v. Dauber*, 24 C. C. n. s. 129 (1902); *Railway Conductors v. Bland*, 24 C. C. n. s. 169; 27 C. D. 220 (1915); *Arnold v. Newcomb*, 104 O. S. 578 (1922).

But where the original beneficiary has paid the premiums, she is entitled to reimbursement out of the proceeds of the policy.

Railway Conductors v. Bland, 24 C. C. n. s. 169; 27 C. D. 220 (1915).

National Union v. Shaw, 9 N. P. n. s. 474; 20 L. D. 225 (1910).

Where the new beneficiary is not within the class specified in the statute or laws of the society, the change is invalid and the original beneficiary is entitled to the benefit.

Benevolent Legion v. McGinness, 59 O. S. 531 (1898).

Where a member surrendered a certificate in which his wife was named as beneficiary, and procured a new certificate in which his mother was so designated, a change of beneficiary was held to have been accomplished. By issuing the new certificate the society was held to have waived a provision of its constitution to the effect that the object of its endowment fund was for the support of widows and orphans of members. *Dauber v. Dauber*, 24 C. C. n. s. 129 (1902).

A change of beneficiary is not rendered invalid by reason of irregularities, such as a failure to pay a fee of fifty cents, where the new certificate was issued, and the officers had knowledge of the irregularities, and such irregularities can not be taken advantage of by the original beneficiary.

Earley v. Earley, 3 C. C. n. s. 71; 13 C. D. 618 (1902); *aff'd*, no rep., 69 O. S. 562.

Where the member executed the transfer on the back of the certificate, in accordance with the rules, and delivered it to the new beneficiary, who did not forward it to the society until after the death of the member, the change was held valid as against the former beneficiary. *Arnold v. Newcomb*, 104 O. S. 578 (1922).

Exceptions to rule that change of beneficiary must be made in accordance with rules of the order.

See *Modern Woodmen v. Daerr*, 11 N. P. n. s. 360 (1911).

Where the insured forwarded the certificate with a request for a change of beneficiary, with the required fee, to the society, but the new certificate was not issued until after the death of the insured, it was held that the change of beneficiary was accomplished.

Modern Woodmen v. Daerr, 11 N. P. n. s. 360 (C. P. 1911).

See also, as to change of beneficiary, note to § 9427.

Change of beneficiary under certificate issued by a foreign society in its home state. See *Modern Woodmen v. Myers*, 99 O. S. 87 (1918).

Section 9467. (Beneficiaries.) The payment of death benefits shall be confined to the family, heirs, relatives by blood, marriage or legal adoption, affianced husband or affianced wife, or to a person or persons dependent on the member. (97 v. 422, § 6.)

The grand-niece of the husband of a member was held to be a "relative by marriage". *Hessenmueller v. Sirilo*, 23 C. C. n. s. 313 (1912).

Section 9468. (Age limit for admission to membership in fraternal benefit societies.) Any society may admit to beneficial membership any person not less than sixteen and not more than sixty years of age, who has been examined by a legally qualified physician, and whose examination has been supervised and approved in accordance with the laws of the society; provided, that any beneficiary member of such society who shall apply for a certificate providing for disability benefits, need not be required to pass an additional medical examination therefor; and any society limiting its membership to any one hazardous occupation may issue certificates providing for accident disability benefits to beneficiary members not more than seventy years of age. Nothing herein contained shall prevent any society from accept-

ing general or social members. (February 26, 1913, 103 v. 28, in effect May 28, 1913; May 31, 1911, 102 v. 533, § 7; April 26, 1904, 97 v. 422, § 7; R. S. Sec. 3631-17; April 27, 1896, 92 v. 360, § 1.)

Where the constitution of the society provides that no person shall be admitted to beneficial membership who is engaged in the sale of intoxicating liquors, the officers of the society have no power to waive such provision.

Grand Lodge v. Bunkers, 3 C. C. n. s. 256; 13 C. D. 487 (1902).

Expulsion or suspension of members; power of society to expel or suspend, grounds, remedies of members, etc., see also note to § 8653.

The valid expulsion of a member terminates all rights under his benefit certificate. And a member, although wrongfully expelled, will be held to have acquiesced in the action taken, where he did not appeal therefrom, apply for reinstatement, and did not thereafter pay or tender dues or otherwise act as a member. After his death there can be no recovery on his certificate.

Foxhever v. Red Cross, 2 C. C. n. s. 394; 14 C. D. 56 (1901); aff'd, no rep., 68 O. S. 717.

Dimmer v. Catholic Knights, 22 C. C. 366; 12 C. D. 413 (1901).

Herron v. Catholic Union, 2 O. L. R. 352; 15 L. D. 703 (1904); s. c., 4 O. L. R. 686; 17 L. D. 789 (1907).

Where the laws of a society provided for expulsion only for non-payment of dues, or misrepresentation as to age, it was held that the society had inherent power to expel for offenses against the duty of a member as a corporator. Where one of the essential qualifications of membership was that members should comply with their duties as Catholics, a member may be expelled for idleness and drunkenness, and sentence to imprisonment for abuse of family.

State v. Aurora Relief Society, 2 W. L. B. 125 (Dist. Ct. 1877).

A member may be expelled for wrongfully reporting himself sick, when in fact he was drunk, when such cause of expulsion is specified in the laws of the society.

State v. Verein, 3 W. L. B. 295 (Dist. Ct. 1878).

Where the constitution of a society provides that none but practical Roman Catholic women may become members, a member who marries a divorced man, in violation of the rules of the church, may be expelled. Koukolicek v. Association, 20 C. C. n. s. 291 (1912).

Where a member failed to pay assessments, and the board of directors by resolution ordered that his policy remain canceled "unless he pass a successful medical examination"; held, that upon passing a successful medical examination, he was restored to membership without further action of the board. Beckel v. Insurance Co., 15 N. P. n. s. 266 (C. P. 1913); s. c., 14 N. P. n. s. 207.

Remedies of members. A member must exhaust the remedies provided by the constitution and laws of the society before he is entitled to maintain an action.

(Injunction against misapplication of funds.)

Coss v. Mansfield Lodge, 4 C. C. n. s. 11; 14 C. D. 36 (1902).

Ingram v. National Union, 4 O. L. R. 316; 17 L. D. 227 (1906).

(Wrongful expulsion.)

Hersheiser v. Williams, 6 C. C. 147; 3 C. D. 389 (1892); aff'd, no rep., 53 O. S. 663.

Klein v. Amazon Lodge, 16 C. C. n. s. 606 (1907).

Catholic Union v. Herron, 4 O. L. R. 686; 17 L. D. 789 (1907).

State v. Knights of Golden Rule, 10 W. L. B. 2.

See also note to § 8653.

Remedies on benefit certificate.

See note to § 9469.

The management of a society, by its officers, will not be interfered with by the courts, on complaint of a member, in the absence of fraud or collusion or action in excess of corporate power.

Coss v. Lodge, 4 C. C. n. s. 11; 14 C. D. 36 (1902).

Ingram v. National Union, 4 O. L. R. 316; 17 L. D. 227.

Steuve v. Grand Lodge, 5 C. C. 471; 3 C. D. 231 (1891).

Power of society to regulate admission of members.

See § 9473.

Section 9468. (What person admitted.) No association shall admit to beneficial membership any person less than sixteen or more than sixty years of age, nor any person who has not been examined by a competent physician and whose examination has not been supervised and approved as provided by the laws of the association. (97 v. 422, § 7.)

Section 9469. (Certificate shall constitute agreement.) Every certificate issued by any such society shall specify the amount of benefit provided thereby, and shall provide that the certificate, the charter or articles of incorporation, of, if a voluntary association, the articles of association, the constitution and laws of the society and the application for membership and medical examination, signed by the applicant, and all amendments to each thereof, shall constitute the agreement between the society and the member, and copies of the same certified by the secretary of the society, or corresponding officer, shall be received in evidence of the terms and conditions thereof, and any changes, additions or amendments to such charter or articles of incorporation, or articles of association, if a voluntary association, constitution or laws duly made or enacted subsequent to the issuance of the benefit certificate shall bind the members and his beneficiaries, and shall govern and control the agreement in all respects the same as though such changes, additions or amendments had been made prior to and were in force at the time of the application for membership. (May 31, 1911, 102 v. 533, § 8; April 26, 1904, 97 v. 422, § 8; April 27, 1896, 92 v. 360, § 1.)

Contract of membership. Before the enactment of this section, it was held that the certificate, constitution, rules, regulations and by-laws of a beneficial association constitute the contract between the member and the association.

Chevaliers v. Shearer, 6 C. C. n. s. 587; 17 C. D. 509 (1905).

The charter, constitution and laws of a society need not be set out in a petition in an action on a certificate. Americus v. McDowell, 16 C. C. n. s. 573 (1907).

Application. Where the application for insurance is made a part

of the contract by its own terms and by the constitution of the order, it is reversible error to charge the jury that the contract of insurance is embodied in the constitution and the certificate.

Brotherhood v. Daly, 11 C. C. n. s. 464; 21 C. D. 391 (1908).

Where an application, signed by the insured, contained an agreement to conform to all laws, rules and usages of the society then in force or thereafter adopted, and that such compliance was the express condition upon which the insured was entitled to benefits, and the application was made a part of the contract, the society may thereafter amend its laws and restrict its liability without impairing vested rights under the contract.

Tisch v. Home Circle, 72 O. S. 233 (1905).

G. C. § 9391 providing that a false answer in an application shall not bar recovery on the policy unless the answer is wilfully false, fraudulently made, etc., does not apply to fraternal benefit societies.

Gilligan v. Royal Arcanum, 5 C. C. n. s. 471; 16 C. D. 42 (1904),
aff'd, no rep., 72 O. S. 672.

Grand Lodge v. Bunkers, 3 C. C. n. s. 256; 13 C. D. 487 (1902).

§ 9465.

And a provision in an application for a benefit certificate that the answers shall be deemed warranties, is valid.

Hess v. Maccabees, 4 O. L. R. 30.

Where the laws of the society provide that a false statement in the application shall render the certificate void, a false designation of the named beneficiary as a dependent renders the certificate void, and there can be no recovery by the mother of the membr. *Woodmen v. Gallagher*, 1 Ohio App. 368; 19 C. C. n. s. 355; 25 C. D. 271 (1913).

The answers must be taken as a whole in determining their truth or falsity. *Woodmen v. Clelland*, 10 Ohio App. 210; 28 O. C. A. 506 (1917).

Whether the answers were false is a question for the jury. *Woodmen v. Clelland*, 10 Ohio App. 210; 28 O. C. A. 506 (1917).

Answers in an application relating to health, various diseases, other insurance, etc., construed.

Hess v. Maccabees, 4 O. L. R. 30.

See also note to § 9391.

The burden of proof of the falsity of answers rests on the society.

Hess v. Maccabees, 4 O. L. R. 30.

Certificate. The certificate need not contain all the provisions of the constitution and by-laws. Where the certificate provides that it is issued subject to the constitution, laws, rules and regulations of the society, the member is conclusively presumed to have knowledge of the provisions of the constitution and laws and is bound thereby.

Chevaliers v. Shearer, 6 C. C. n. s. 587; 17 C. D. 509 (1905).

Pete v. Woodmen, 5 C. C. n. s. 446; 16 C. D. 653 (1904); aff'd, no rep., 74 O. S. 445.

State v. Lemert, 11 N. P. n. s. 535; 21 L. D. 118 (1910).

Constitution and laws. Where the application or certificate provides that it is made or issued subject to the constitution and laws of the society, or that the constitution and laws are made part thereof, the member making the application, or receiving the certificate, is conclusively presumed to have knowledge of the constitution and laws and is bound thereby.

Tisch v. Home Circle, 72 O. S. 233 (1905).

State v. Lemert, 11 N. P. n. s. 535; 21 L. D. 118 (1910).

Chevaliers v. Shearer, 6 C. C. n. s. 587; 17 C. D. 509 (1905).

Pete v. Woodmen, 5 C. C. n. s. 446; 16 C. D. 653 (1904); aff'd, no rep., 74 O. S. 445.

Amendment of laws. Before the enactment of § 9469 it was held that where the right to amend its laws was reserved by a society in its contracts, subsequent amendments violated no vested rights under such contracts.

(Amendment providing for non-liability in case of suicide.)

Tisch v. Home Circle, 72 O. S. 233 (1905).

(Amendment providing that no death losses shall be paid where the only evidence of death is the presumption arising from disappearance for seven years.)

McGovern v. Brotherhood, 12 C. C. n. s. 137 (1909); aff'd, no rep., 85 O. S. 460.

(Amendment changing the mode of levying assessments.)

Steuve v. Grand Lodge, 5 C. C. 471; 3 C. D. 231 (1891).

But the rights of a member to sick benefits are to be determined by the laws in force when his sickness begins, and a by-law, adopted subsequent to the beginning of his sickness, reducing the amount of sick benefits, is without effect to such member.

Forresters v. Rennie, 2 C. C. n. s. 510; 15 C. D. 790 (1903); aff'd, no rep., 71 O. S. 525.

Special provisions in constitution and laws.

Suicide. A by-law providing that a benefit certificate shall be void and all benefits forfeited, in case the insured shall die by suicide, felonious or otherwise, sane or insane, is valid.

Tisch v. Home Circle, 72 O. S. 233 (1905); affirming, 1 C. C. n. s. 185; 14 C. D. 489.

Occupation of members. Where the constitution provides that no person shall be admitted to beneficial membership who is engaged in the sale at retail of intoxicating liquors, the officers of the society have no authority to waive such provision.

Grand Lodge v. Bunkers, 3 C. C. n. s. 256; 13 C. D. 487 (1902).

See § 9473 as to power of society to regulate admission of members.

Defining extent of injury. Where a certificate provided for a benefit to be paid if the member should "by accident, lose one hand;" and the constitution provided for a benefit for loss of a hand "by amputation at or above the wrist," the member was held not entitled to recover where his hand had not been amputated, although his arm and hand were permanently disabled.

Chevaliers v. Shearer, 6 C. C. n. s. 587; 17 C. D. 509 (1905).

Where the constitution of a society provided for a benefit to be paid to any member "who shall suffer the amputation or severance of an entire hand at or above the wrist joint . . . but not otherwise", a member is not entitled to the benefit where a part of his hand only was amputated, although the part remaining is permanently disabled for use. *Trainmen v. Walsh*, 89 O. S. 15 (1913).

Submission of disputed benefit claims to tribunals of society.

See below *Remedies on Certificate*.

Forfeiture or suspension of benefits for default in periodical payments. (See also § 9472.) Where the laws of a society provide for suspension and loss of benefits, in case a member shall be delinquent in periodical payments, there can be no recovery on the certificate of a member who has been suspended from membership and not reinstated. Such a provision is binding on both member and beneficiary.

Tisch v. Home Circle, 72 O. S. 233, 261 (1905).

Catholic Knights v. Connema, 3 C. C. 130; 2 C. D. 74 (1888).

Pete v. Woodmen, 5 C. C. n. s. 446; 16 C. D. 653 (1904); aff'd, no rep., 74 O. S. 445.

A provision in the constitution of a society to the effect that delinquency in the payment of assessments shall immediately forfeit all benefits is valid. Geis v. Commercial Travellers, 9 Ohio App. 391; 29 O. C. A. 475 (1918); Catholic Union v. Hriez, 10 Ohio App. 57 (1917).

The society is not estopped from defending, on such ground, by the fact that a local secretary without authority had previously accepted other delinquent payments and reported the reinstatement of the member, without a signed statement as to health, as required, the general officers of the society having no knowledge of the irregular acts of the secretary.

Pete v. Woodmen, 5 C. C. n. s. 446; 16 C. D. 653 (1904); aff'd, no rep., 74 O. S. 445.

Fahey v. Forresters, 3 O. L. R. 642; 51 Bull. 102.

Where the laws of the society require notice of payments to be given, the rights of the member are not forfeited unless notice is given in accordance with the laws, notwithstanding that another law provides for suspension *ipso facto* from all benefits on non-payment.

Crocket v. Red Cross, 4 C. C. n. s. 519; 14 C. D. 421 (1903); aff'd, no rep., 71 O. S. 532.

See also Judge v. Association, 10 C. C. n. s. 473; 20 C. D. 133 (1907).

The burden of proof is on the society to show that notice has been given in accordance with its laws.

Crocket v. Red Cross, 4 C. C. 519; 14 C. D. 421 (1903); aff'd, no rep., 71 O. S. 532.

A call instructing local secretaries to collect an assessment and to mail or deliver to members a notice thereof, without specially naming any member, is not a waiver of a provision of the constitution for the *ipso facto* suspension of delinquent members. Such call can only be construed to be a call to collect from members or such delinquents as are entitled to reinstatement.

Pete v. Woodmen, 5 C. C. n. s. 446; 16 C. D. 653 (1904); aff'd, no rep., 74 O. S. 445.

A local secretary has no authority to suspend a provision of the constitution and laws to the effect that non-payment of assessments, when due, shall *ipso facto* suspend the delinquent from membership, when such authority is expressly denied in such laws.

Pete v. Woodmen, 5 C. C. n. s. 446; 16 C. D. 653 (1904); aff'd, no rep., 74 O. S. 445.

Payment of overdue assessments by a son of a suspended member after the death of such member, or while he is dying, will not reinstate such member, where the laws of the association require such payment to be made by the member in person, or to be accompanied by a written statement as to his health.

Pete v. Woodmen, 5 C. C. n. s. 446; 16 C. D. 653 (1904); aff'd, no rep., 74 O. S. 445.

A by-law which provides that a member in arrears shall not be entitled to sick benefits, merely by reason of payment of arrears after his sickness began is probably reasonable and valid. But a by-law which provides that acceptance of assessments by the society, during the illness of a member, shall not entitle the member to benefits, is unreasonable and invalid.

Phoenix Council v. Bennett, 9 C. C. n. s. 195; 16 C. D. 110 (1904); affirming, 1 N. P. n. s. 445; 14 L. D. 493.

Upon proof that a person was in good standing as a member at one time, a presumption arises that he continued in good standing until his death. The burden of proof of suspension for non-payment

on the society. *Heptasophs v. Fife*, 16 C. C. n. s. 205 (1905); *Hall v. Association*, 6 C. C. 137, 141 (1891).

But such presumption being rebutted, the plaintiff must prove payment of all assessments up to the death of the member. *Heptasophs v. Fife*, 16 C. C. n. s. 205 (1905).

Where a member failed to pay assessments, and the board of directors by resolution ordered that his policy remain canceled "unless he pass a successful medical examination", held that upon passing a successful medical examination, he was restored to membership without further action of the board. *Beckel v. Insurance Co.*, 15 N. P. n. s. 266 (C. P. 1913); s. c., 14 N. P. n. s. 207.

A provision forfeiting benefits for non-payment of assessments may be waived by the acceptance of overdue payments by authorized officers. *Commercial Travellers v. Bagnell*, 9 Ohio App. 458; 29 O. C. A. 321; motion to certify record overruled, 16 O. L. R. 364 (1918).

Members who cease to pay assessments after the society discontinued business do not forfeit their rights in its funds.

In re *Mutual Aid Ass'n*, 3 N. P. 145; 4 L. D. 272 (C. P. 1895).

While a member may be ipso facto suspended, for delinquency in payment of assessments, under the laws of a society, a member can not be expelled from the society without a trial.

See *Schwartz v. Catholic Union*, 9 C. C. n. s. 337; 19 C. D. 471 (1907); 21 C. C. n. s. 165.

A remittance blank and report sent by a subordinate lodge to the supreme lodge, reporting suspension for non-payment, and a card, which is a part of the bookkeeping system of the society, are admissible in evidence to prove suspension. *Heptasophs v. Fife*, 16 C. C. n. s. 205 (1905).

Medical examination. See § 9468.

Remedies on benefit certificate. Where the laws of the order provide that disputed claims must be submitted to tribunals within the society, and both nisi prius and appellate tribunals are provided, the member or beneficiary must exhaust the remedies so provided, before resorting to the courts. The determination of the matter by such tribunals in substantial accordance with the laws of the society will be final and conclusive of the right to receive benefits.

Myers v. Jenkins, 63 O. S. 101 (1900); reversing, 16 C. C. 545.

Railroad Co. v. Stankard, 56 O. S. 224, 231 (1897).

Forresters v. Herlinger, 6 C. C. n. s. 28; 17 C. D. 151 (1905).

Lodge v. Littlebury, 6 W. L. B. 237 (Dist. Ct. 1880).

Schryver v. Lodge, 3 C. C. 422 (1888).

See G. C. § 9484, original numbering (101 v. 119).

Where a society refuses or neglects, on demand, to have the right determined in accordance with the laws of the order, or refuses to pay benefits after the same have been awarded by its tribunals, then the member or beneficiary may sue in the civil courts to recover such benefits.

Myers v. Jenkins, 63 O. S. 101 (1900).

Railroad Co. v. Stankard, 56 O. S. 224 (1897).

Where the tribunal of a subordinate lodge determines that a member is not entitled to benefits, and the member appeals to the next higher tribunal of the order, and the lodge furnishes him a proper transcript of the proceedings, and he fails to secure a hearing of his appeal by reason of his own negligence, or that of the higher tribunal or some officer thereof, the failure to secure a hearing of his appeal will not entitle the member to sue the subordinate lodge for such benefits.

Myers v. Jenkins, 63 O. S. 101 (1900).

An agreement by a member, in advance, to waive and renounce his right to appeal to the courts is void.

Myers v. Jenkins, 63 O. S. 101 (1900).

Railroad Co. v. Stankard, 56 O. S. 224 (1897).

A provision in the constitution of a society that the decisions of its tribunals shall be final and conclusive and that no resort shall be had to the courts is invalid. Zanesville Lodge v. Fluherty, 8 Ohio App. 1; 27 O. C. A. 391 (1917).

Where no method of obtaining a review and no appellate tribunal has been provided, suit may be brought upon rejection of the claim by the nisi prius tribunal. Nepomicine Soc. v. Zoulek, 20 C. C. n. s. 146 (1912).

Where the certificate is attached as an exhibit and made part of the petition, failure to set forth the charter, constitution, laws, etc., of the society does not render the petition demurrable. Americus v. McDowell, 16 C. C. n. s. 573 (1907).

An allegation in the petition that the decedent was a member in good standing is equivalent to an allegation that he had conformed to all the rules of the society. Americus v. McDowell, 16 C. C. n. s. 573 (1907).

Members are represented by the association in a suit against it, by one beneficiary and all others similarly situated, in an action to enforce payment of benefits. All members are bound by the judgment in such suit. Munn v. Barfield, 26 C. C. n. s. 555; 28 C. D. 75 (1914).

Demand of payment, when not a condition precedent to suit.

See Herron v. Catholic Knights, 3 O. L. R. 598; 17 L. D. 190 (1906); (reversed, on other grounds, 4 O. L. R. 686; 17 L. D. 789).

That an assessment, if levied, would not produce the maximum amount of the benefit specified in the certificate is a matter of proof for the society and not for the member or beneficiary.

Herron v. Catholic Knights, 3 O. L. R. 598; 17 L. D. 190; (reversed, on other grounds, 4 O. L. R. 686; 17 L. D. 789).

Section 9469. (Certificate.) Every certificate issued by any association shall specify the maximum amount of benefit provided thereby, and the conditions governing the payment thereof, and provide that the certificate, the charter or articles of association, the constitution and laws of the association, and the application for membership and medical examination, signed by the applicant shall constitute the contract between the association and the member; and that copies of these certified by the secretary of the association or corresponding officer shall be received in evidence of the terms and conditions of the contract. Changes, additions or amendments to the charter or articles of association, constitution or laws duly made or enacted subsequent to the issuance of the benefit certificate shall bind the member and his beneficiaries and govern and control the contract in all respects the same as though such changes, additions or amendments had been made prior to and were in force at the time of the application for membership. (97 v. 422, § 8.)

Section 9469-1. (Exception as to commercial travelers.) The provisions of section ninety-four hundred and sixty-nine of the General Code, requiring the certificate to specify the maximum amount of benefit provided thereby and the conditions governing the payment thereof, shall not apply to the certificates of a fraternal beneficiary association organ-

ized under the laws of Ohio, whose membership consists of commercial travelers and which does not obligate itself to pay stipulated amounts of benefits in case of natural death. (May 18, 1910, 101 v. 289.)

Section 9470. (Investment, disbursement and application of funds. Liabilities.) Subsection 1. Any society may create, maintain, invest, disburse and apply an emergency, surplus or other similar fund in accordance with its laws. Unless otherwise provided in the contract, such funds shall be held, invested and disbursed for the use and benefit of the society, and no member or beneficiary shall have or acquire individual rights therein or become entitled to any apportionment or the surrender of any part thereof, except as provided in subsection 2 of section 5 [G. C. Sec. 9466] of this act. The funds from which benefits shall be paid and the funds from which the expenses of the society shall be defrayed, shall be derived from periodical or other payments by the members of the society and accretions of such funds; provided, that no society, domestic or foreign, shall hereafter be incorporated or admitted to transact business in this state, which does not provide for stated periodical contributions sufficient to provide for meeting the mortuary obligations contracted, when valued upon the basis of the National Fraternal Congress Table of Mortality as adopted by the National Fraternal Congress, August 23, 1899, or any higher standard, with interest assumption not more than four per cent. per annum, nor write or accept members for temporary or permanent disability benefits except upon tables based upon reliable experience, with an interest assumption not higher than four per cent. per annum.

Subsection 2. Deferred payments or installments of claims shall be considered as fixed liabilities on the happening of the contingency upon which such payments or installments are thereafter to be paid. Such liabilities shall be the present value of such future payments or installments upon the rate of interest and mortality assumed by the society for valuation, and every society shall maintain a fund sufficient to meet such liability regardless of proposed future collections to meet any such liabilities. (May 31, 1911, 102 v. 533, § 9; April 26, 1904, 97 v. 422, § 9; original G. C. Secs. 9470, 9471; R. S. Sec. 3631-19; April 27, 1896, 92 v. 360, § 1.)

A foreign society may provide for and issue certificates, containing provisions for cash surrender value, loan values, paid-up insurance and dividends, when authorized by its charter and the laws of its home state so to do.

State v. Lemert, 11 N. P. n. s. 535; 21 L. D. 118 (C. P. 1910).

Under original G. C. § 9476 it was held that the legislature was without power to delegate to a voluntary association, such as the "national fraternal congress," the right to fix rates of assessment which shall be binding on all fraternal societies seeking incorporation in Ohio.

State v. Lemert, 10 N. P. n. s. 133; 21 L. D. 113 (C. P. 1910).

The superintendent of insurance was held to be without discretion to refuse a certificate to a benefit society merely because it had not filed a statement of rates, under original G. C. § 9476.

State v. Lemert, 10 N. P. n. s. 133; 21 L. D. 113 (C. P. 1910).

Misapplication of funds. Remedy. An injunction against a proposed expenditure will not be issued, at the suit of a member, unless the petition alleges affirmatively that the plaintiff has exhausted all the remedies provided by the constitution and by-laws of the society.

Coss v. Mansfield Lodge, 4 C. C. n. s. 11; 14 C. D. 36 (1902).

Ingram v. National Union, 4 O. L. R. 316; 17 L. D. 227 (1906).

Distribution of funds on dissolution or insolvency, see note to § 9463.

Section 9470. (Funds.) Any association may create, maintain, disburse and apply a reserve, emergency or surplus fund in accordance with its constitution and laws not inconsistent with the provisions of this chapter. Unless otherwise provided in the contract, such funds must be held, invested and disbursed for the use and benefit of the association, and no member or beneficiary shall have or acquire any individual rights therein, or be entitled to an apportionment or the surrender of any part thereof. (97 v. 423, § 9.)

Section 9471. (How funds invested.) Every society shall invest its funds only in securities permitted by the laws of this state for the investment of the assets of life insurance companies; provided, that any foreign society permitted or seeking to do business in this state, which invests its funds in accordance with the laws of the state in which it is incorporated, shall be held to meet the requirements of this act for the investment of funds. (May 31, 1911, 102 v. 533, § 10; original G. C. Sec. 9472; R. S. Sec. 3631-20; April 26, 1904, 97 v. 423, § 10; April 27, 1896, 92 v. 360.)

A society is not authorized to advance money to a person to be used in the erection of a building, a part of which is to be occupied by the society, where no mortgage is taken, and control over the rents is vested in the borrower.

Rep. Atty. Gen. 1906-1907, p. 147.

Section 9471. (How funds derived.) The funds from which benefits shall be paid and the funds from which the expenses of the association defrayed, shall be derived from periodical or other payments by the members of the association and accretions of such funds. Every contract hereafter made between such association and its members shall provide that if such regular payments are insufficient to pay all matured death and disability claims in full and to provide for the creation and maintenance of the funds required by its constitution and laws, extra assessments may be levied upon the members to meet such deficiency. (97 v. 423, § 9.)

Section 9472. (Laws of society providing for payment must state purpose.) Every provision of the laws of the

society for payment by members of such society, in whatever form made, shall distinctly state the purpose of the same and the proportion thereof which may be used for expenses, and no part of the money collected for mortuary or disability purposes or the net accretions of either or any of such funds shall be used for expenses. (May 31, 1911, 102 v. 533, § 11; original G. C. Secs. 9473, 9471; R. S. Sec. 3631-21; April 26, 1904, 97 v. 423, § 11; April 27, 1896, 92 v. 360.)

Where the certificate provides that the constitution and laws are made a part thereof, the certificate need not set forth the provisions of the constitution and by-laws relating to payments.

State v. Lemert, 11 N. P. n. s. 535; 31 L. D. 118 (1910).

A by-law providing that a member in arrears shall not be entitled to benefits merely by reason of the fact that after becoming sick he pays up all dues owing when his sickness began is probably reasonable and valid. But a by-law which provides that acceptance of arrears by the society, during illness of the member, with knowledge of his illness, shall not entitle a member to benefits, is unreasonable and invalid.

Phoenix Council v. Bennett, 9 C. C. n. s. 195; 16 C. D. 110 (1904); affirming 1 N. P. n. s. 445; 14 L. D. 493.

Forfeiture of contract for default in payments, see note to § 9469.

Section 9472. (Investment of funds.) In investing its funds, a domestic association transacting business under this chapter shall be governed by paragraphs one, two and three of section ninety-three hundred and fifty-seven, and by sections ninety-three hundred and fifty-nine and ninety-three hundred and sixty. (97 v. 423, § 10.)

Section 9473. (Articles of incorporation. Record. Preliminary certificate. Society may solicit members, when. Restrictions on liabilities. Examination by superintendent of insurance. Certificate. Expiration of preliminary certificate. Powers of society.) Seven or more persons, citizens of the United States, and a majority of whom are citizens of this state, who desire to form a fraternal benefit society, as defined by this act, may make and sign (giving their addresses) and acknowledge before some officer competent to take acknowledgment of deeds, articles of incorporation, in which shall be stated:

1st. The proposed corporate name of the society, which shall not so closely resemble the name of any society or insurance company already transacting business in this state as to mislead the public or lead to confusion;

2d. The purpose for which it is formed—which shall not include more liberal powers than are granted by this act, provided that any lawful social, intellectual, educational, charitable, benevolent, moral or religious advantages may be set forth among the purposes of the society—and the mode in which its corporate powers are to be exercised;

3d. The names, residences and official titles of all the officers, trustees, directors or other persons who are to have and exercise the general control and management of the affairs and funds of the society for the first year or until the ensuing election at which all such officers shall be elected by the supreme legislative or governing body, which election shall be held not later than one year from the date of the issuance of the permanent certificate.

Such articles of incorporation and duly certified copies of the constitution and laws, rules and regulations, and copies of all proposed forms of benefit certificates, applications therefor and circulars to be issued by such society, and a bond in the sum of five thousand dollars, with sureties approved by the superintendent of insurance, conditioned upon the return of the advanced payments, as provided in this section, to applicants, if the organization is not completed within one year, shall be filed with the superintendent of insurance, who may require such further information as he deems necessary, and if the purposes of the society conform to the requirements of this act, and all provisions of law have been complied with, the superintendent of insurance shall so certify and retain and record the articles of incorporation, and furnish the incorporators a preliminary certificate authorizing such society to solicit members as hereinafter provided.

Upon receipt of such certificate from the superintendent of insurance, said society may solicit members for the purpose of completing its organization and shall collect from each applicant the amount of not less than one regular monthly payment, in accordance with its table of rates as provided by its constitution and laws, and shall issue to each such applicant a receipt for the amount so collected. But no such society shall incur any liability other than for such advanced payments, nor issue any benefit certificate nor pay or allow, or offer or promise to pay or allow, to any person any death or disability benefit until actual bona fide applications for death benefit certificates have been secured upon at least five hundred lives for at least one thousand dollars each, and all such applicants for death benefits shall have been regularly examined by legally qualified practicing physicians, and certificates of such examinations have been duly filed and approved by the chief medical examiner of such society; nor until there shall be established ten subordinate lodges or branches into which such five hundred applicants have been initiated; nor until there has been submitted to the superintendent of insurance, under oath of the president and secretary, or corresponding officers of such society, a

list of such applicants, giving their names, addresses, date examined, date approved, date initiated, name and number of the subordinate branch of which each applicant is a member, amount of benefits to be granted, rate of stated periodical contributions, which shall be sufficient to provide for meeting the mortuary obligation, contracted, when valued for death benefits upon the basis of the National Fraternal Congress Table of Mortality, as adopted by the National Fraternal Congress August 23, 1899, or any higher standard at the option of the society, and for disability benefits by tables based upon reliable experience and for combined death and permanent total disability benefits by tables based upon reliable experience, with an interest assumption not higher than four per cent. per annum; nor until it shall be shown to the superintendent of insurance by the sworn statement of the treasurer, or corresponding officer of such society, that at least five hundred applicants have each paid in cash at least one regular monthly payment as herein provided per one thousand dollars of indemnity to be effected, which payments in the aggregate shall amount to at least twenty-five hundred dollars; all of which shall be credited to the mortuary or disability fund on account of such applicants, and no part of which may be used for expenses.

Such advanced payments shall, during the period of organization, be held in trust, and, if the organization is not completed within one year as hereinafter provided, returned to such applicants.

The superintendent of insurance may make such examination and require such further information as he deems advisable, and, upon presentation of satisfactory evidence that the society has complied with all the provisions of law, he shall issue to such society a certificate to that effect. Such certificate shall be prima facie evidence of the existence of such society at the date of such certificate. The superintendent of insurance shall cause a record of such certificate to be made and a certified copy of such record may be given in evidence with like effect as the original certificate.

No preliminary certificate granted under the provisions of this section shall be valid after one year from its date, or after such further period, not exceeding one year, as may be authorized by the superintendent of insurance, upon cause shown; unless the five hundred applicants herein required have been secured and the organization has been completed as herein provided; and the articles of incorporation and all proceedings thereunder shall become null and void in one year from the date of such preliminary certificate, or at

the expiration of such extended period, unless such society shall have completed its organization and commenced business as herein provided. When any domestic society shall have discontinued business for the period of one year, or has less than 400 members, its charter shall become null and void.

Every such society shall have the power to make a constitution and by-laws for the government of the society, the admission of its members, the management of its affairs and the fixing and readjusting of the rates of contribution of its members from time to time; and it shall have the power to change, alter, add to or amend such constitution and by-laws and shall have such other powers as are necessary and incidental to carrying into effect the objects and purposes of the society. (May 31, 1911, 102 v. 533, § 12; original G. C. Secs. 9471, 9474, 9475, 9476, 9477, 9478, 9479 and 9480; R. S. Sec. 3631-22; April 26, 1904, 97 v. 423, § 12; April 27, 1896, 92 v. 360, § 7.)

The first trustees have power to adopt by-laws relating to the conduct of the business of the society.

Chevaliers v. Shearer, 6 C. C. n. s. 587; 17 C. D. 509 (1905).

Where the requirements of this section have been complied with, the superintendent of insurance may be compelled by mandamus to issue a preliminary certificate authorizing the association to solicit members.

State v. Lemert, 10 N. P. n. s. 133; 21 L. D. 113 (C. P. 1910).

Ruling organization, location and removal, see §§ 8651, 8652.

A fraternal order which is not a fraternal benefit society in that it lacks power to issue certificates, may incorporate under the general corporation law by filing articles with the secretary of state.

Rep. Atty. Gen. 1911-1912, pp. 112, 125.

G. C. § 9491.

The trustees or directors are not liable for debts of the society under G. C. § 8666 although such debts are incurred by the trustees for its expenses. *Paper Co. v. Chevaliers*, 18 C. C. n. s. 257 (1909).

A foreign society, authorized to pay death benefits only in the event of death from accident, and therefore unable to annually report a valuation of death certificates as required by the Ohio law, is not entitled to a license to do business in Ohio. *Opins. Atty. Gen.* 1916, p. 57.

Section 9473. (Distribution of funds.) Every provision for payment by members of such an association, in whatever form made, shall distinctly state its purpose, and the proportion thereof which may be used for expenses. No part of the money collected for mortuary or disability purposes and no part of the reserve, emergency or surplus funds or the net accretions of either of any of such funds shall be used for expenses. (97 v. 423, § 11.)

Section 9474. (What societies may incorporate but not compelled to do so.) Any society now engaged in transacting business in this state may exercise, after the passage of this act, all of the rights conferred thereby, and all of the

rights, powers and privileges now exercised or possessed by it under its charter or articles of incorporation not inconsistent with this act, if incorporated; or, if it be a voluntary association, it may incorporate hereunder. But no society already organized shall be required to incorporate hereunder, and any such society may amend its articles of incorporation from time to time in the manner provided therein or in its constitution and laws, and all such amendments shall be filed with the superintendent of insurance and shall become operative upon such filing, unless a later time be provided in such amendments or in its articles of incorporation, constitution or laws. (May 31, 1911, 102 v. 533, § 13; original G. C. Secs. 9481, 9482, 9473; R. S. Sec. 3631-23; April 26, 1904, 97 v. 426, § 13; April 27, 1896, 92 v. 360, § 7.)

Where a mutual protective association, organized under § 9427, is reorganized as a fraternal benefit society, the change does not affect policies then outstanding. *Lentz v. Fritter*, 92 O. S. 186 (1915).

A fraternal benefit society, incorporated prior to the enactment of the present act, is authorized by this section to amend its articles of incorporation in the manner provided in its constitution in so far as its internal operations are concerned. The certificate of amendment should be filed with the superintendent of insurance. *Rep. Atty. Gen.* 1913, p. 96.

Section 9474. (Organization; articles of incorporation.) Seven or more persons, citizens of the United States, and a majority of whom are citizens of this state, who desire to form a fraternal beneficiary association, as defined by this chapter, may make and sign, giving their addresses, and acknowledge before some officer competent to take acknowledgment of deeds, articles of association in which shall be stated:

1. The proposed corporate name of the association, which shall not so closely resemble the name of any association or insurance company already transacting business in this state as to mislead the public or lead to confusion.

2. The purpose for which it is formed,—which shall not include more liberal powers than are granted by this chapter, though any lawful social, intellectual, educational, moral or religious advantages may be set forth among the purposes of the association,—and the mode in which its corporate powers are to be exercised.

3. The names, residences and official titles of all the officers, trustees, directors, or other persons who are to have and exercise the general control and management of the affairs and funds of the association for the first year or until the ensuing election at which all such officers shall be elected by the supreme legislative or governing body. (97 v. 423, § 12.)

Section 9475. (Merger by contract in writing. Approval of merger.) No domestic society shall merge with or accept the transfer of the membership or funds of any other society unless such merger or transfer is evidenced by a contract in writing, setting out in full the terms and conditions of such merger or transfer, and filed with the superintendent of in-

surance of this state, together with a sworn statement of the financial condition of each of said societies, by its president and secretary, or corresponding officers, and a certificate of such officers, duly verified under oath of such officers of each of the contracting societies, that such merger or transfer has been approved by a vote of two-thirds of the members of the supreme legislative or governing body of each of said societies.

Upon the submission of such contract, financial statements and certificates, the superintendent of insurance shall examine the same, and, if he shall find such financial statements to be correct and the such contract to be in conformity with the provisions of this section, and that such merger or transfer is just and equitable to the members of each of said societies, he shall approve such merger or transfer, issue his certificate to that effect and thereupon the such contract of merger or transfer shall be of full force and effect.

In case such contract is not approved, the fact of its submission and its contents shall not be disclosed by the superintendent of insurance. (May 31, 1911, 102 v. 533, § 14; original G. C. Secs. 9483, 9473; R. S. Sec. 3631-23a; April 26, 1904, 97 v. 426, § 14.)

Section 9475. (Articles, etc., to be filed with the superintendent of insurance.) Such articles of association and duly certified copies of the constitution and laws, rules and regulations, copies of all proposed forms of benefit certificates, applications therefor, and literature to be issued by such association, and a bond in the sum of five thousand dollars, with sureties approved by the superintendent of insurance, conditioned upon the return of the advance payments, as herein provided, to applicants, if the organization is not completed within one year, shall be filed with such superintendent, who may require further information as he deems necessary. If the purposes of the association conform to the requirements of this chapter and all the provisions of the law have been complied with, the superintendent shall so certify and retain and record the articles of association in a book kept for that purpose and furnish the incorporators a preliminary certificate authorizing the association to solicit members as hereinafter provided. (97 v. 423, § 12.)

Section 9476. (License and renewal. Fee.) Societies which are now authorized to transact business in this state may continue such business until the first day of April next succeeding the passage of this act, and the authority of such societies may thereafter be renewed annually, but in all cases to terminate on the first day of the succeeding April; provided, however, the license shall continue in full force and effect until the new license be issued or specifically refused. For each such license of renewal the society shall pay the superintendent of insurance twenty-five dollars. A

duly certified copy or duplicate of such license shall be prima facie evidence that the licensee is a fraternal benefit society within the meaning of this act. (May 31, 1911, 102 v. 533, § 15; original G. C. Sec. 9485; R. S. Sec. 3631-23c; April 26, 1904, 97 v. 426, § 16; April 27, 1896, 92 v. 360, § 6.)

Section 9476. (Commencing business.) Upon receipt of such certificate from the superintendent of insurance the association may solicit members for the purpose of completing its organization and shall collect from each applicant the amount of not less than one death benefit assessment or payment, in accordance with its table of rates as provided by its constitution and laws, and issue to each such applicant a receipt for the amount so collected. But no such association shall incur any liability other than for such advanced payments, nor issue any benefit certificate nor pay or allow, or offer or promise to pay or allow to any person any death or disability benefit until actual bona fide applications for death benefit certificates have been secured upon at least five hundred lives for at least one thousand dollars each and all such applicants for death benefits have been regularly examined by legally qualified practicing physicians and certificates of such examinations duly filed and approved by the chief medical examiner of such association; nor until ten subordinate lodges or branches into which the five hundred applicants have been initiated are established; nor until there has been submitted to the superintendent of insurance, under oath of the president and secretary or corresponding officers of such association, a list of such applicants, giving their names, addresses, date examined, date approved, date initiated, name and number of the subordinate branch of which each applicant is a member, amount of benefits to be granted, rate of regular payments or assessments, which shall not be lower for death benefits than those required by the national fraternal congress table of mortality, with interest at four per cent per annum; nor until it is shown to the superintendent by the sworn statement of the treasurer or corresponding officer of such association that at least five hundred applicants have each paid in cash at least one regular monthly payment or assessment as herein provided per one thousand dollars of indemnity to be effected, which payments in the aggregate amount to at least twenty-five hundred dollars, all of which shall be credited to the mortuary or disability fund on account of such applicants and no part of which may be used for expenses. (97 v. 423, § 12).

Section 9477. (License to foreign society and how obtained. Renewal. Qualifications. Fee. Refusal—revocation.) No foreign society now transacting business, organized prior to the passage of this act, which is not now authorized to transact business in this state, shall transact any business herein without a license from the superintendent of insurance. Any such society shall be entitled to a license to transact business within this state upon filing with the superintendent a duly certified copy of its charter or articles of association; a copy of its constitution and laws, certified by its secretary or corresponding officer; a power of attorney to the superintendent as hereinafter provided; a statement of its business under oath of its president and secre-

tary, or corresponding officers, in the form required by the superintendent, duly verified by an examination made by the supervising insurance official of its home state or other state satisfactory to the superintendent of insurance of this state; a certificate from the proper official in its home state, province or country, that the society is legally organized; a copy of its contract, which must show that benefits are provided for by periodical, or other payments by persons holding similar contracts; and upon furnishing the superintendent such other information as he may deem necessary to a proper exhibit of its business and plan of working, and upon showing that its assets are invested in accordance with the laws of the state, territory, district, province or country where it is organized, he shall issue a license to such society to do business in this state until the first day of the succeeding April, and such license shall, upon compliance with the provisions of this act, be renewed annually, but in all cases to terminate on the first day of the succeeding April; provided, however, that license shall continue in full force and effect until the new license be issued or specifically refused. Any foreign society desiring admission to this state shall have the qualifications required of domestic societies organized under this act and have its assets invested as required by the laws of the state, territory, district, country, or province where it is organized. For each such license or renewal the society shall pay the superintendent twenty-five dollars. When the superintendent refuses to license any society, or revokes its authority to do business in this state, he shall reduce his ruling, order or decision to writing and file the same in his office, and shall furnish a copy thereof, together with a statement of his reasons, to the officers of the society, upon request, and the action of the superintendent shall be reviewable by proper proceedings in any court of competent jurisdiction within the state; provided, however, that nothing contained in this or the preceding section shall be taken or construed as preventing any such society from continuing in good faith all contracts made in this state during the time such society was legally authorized to transact business herein. (May 31, 1911, 102 v. 533, § 16; original G. C. Secs. 9486, 9487, 9488; R. S. Sec. 3631-23d; April 26, 1904, 97 v. 427, § 17; May 12, 1902, 95 v. 606; April 27, 1896, 92 v. 360, § 3.)

Where the superintendent refuses to renew a license, for causes existing prior to the expiration of the license, the superintendent must give notice to the foreign society as required by § 9490.

State v. Lemert. 11 N. P. n. s. 535; 18 L. D. 118 (C. P. 1910).

A foreign society, authorized to pay death benefits only in the

event of death from accident, and therefore unable to annually report a valuation of death certificates as required by the Ohio law, is not entitled to a license to do business in Ohio. Opins. Atty. Gen. 1916, p. 57.

Action against foreign society on contract issued in its home state. See *Modern Woodmen v. Myers*, 99 O. S. 87 (1918).

Under the former statute (Rev. Stats. § 3631-11), it was held mandatory upon the superintendent of insurance to issue a license, when the application for admission showed compliance with the statute, and that the superintendent was not authorized to make inquiry except as to whether the laws of the home state of the society provided for formal authorization of any association to do business.

State v. Vorys, 69 O. S. 56, 66 (1903).

State v. Lemert, 10 N. P. n. s. 133; 21 L. D. 113 (1910).

Failure of a foreign society to comply with this section does not invalidate a certificate issued by it.

Brewing Co. v. Cassman, 21 C. C. 465; 12 C. D. 141 (1900).

Section 9477. (How advanced payments held.) Such advanced payments, during the period of organization shall be held in trust for and, if the organization is not completed within one year as hereinafter provided, returned to the applicants. (97 v. 423, § 12.)

Section 9478. (Supt. attorney for societies, on whom legal process shall be served. Copies, sufficient evidence. Time of pleading.) Every society, whether domestic or foreign, now transacting business in this state shall, within thirty days after the passage of this act, and every such society, hereafter applying for admission, shall, before being licensed, appoint in writing the superintendent of insurance and his successors in office to be its true and lawful attorney, upon whom all legal process in any action or proceeding against it shall be served, and in such writing shall agree that any lawful process against it which is served upon such attorney shall be of the same legal force and validity as if served upon the society and that the authority shall continue in force so long as any liability remains outstanding in this state.

Copies of such appointment, certified by such superintendent of insurance, shall be deemed sufficient evidence thereof and shall be admitted in evidence with the same force and effect as the original thereof might be admitted. Service shall only be made upon such attorney, must be made in duplicate upon the superintendent of insurance or in his absence upon the person in charge of his office and shall be deemed sufficient service upon such society; provided, however, that no such service shall be valid or binding against any such society when it is required thereunder to file its answer, pleading or defense in less than thirty days from the date of mailing the copy of such service to such society. When legal process against any such society

is served upon such superintendent of insurance he shall forthwith forward by registered mail one of the duplicate copies prepaid and directed to its secretary or corresponding officer. Legal process shall not be served upon any such society except in the manner provided herein. (May 31, 1911, 102 v. 541, § 17; original G. C. Secs. 9489, 9490, 9491; R. S. Sec. 3631-23e; April 26, 1904, 97 v. 428, § 18; April 27, 1896, 92 v. 360, § 5.)

Section 9478. (Certificate of compliance.) The superintendent of insurance may make such examination and require further information as he deems advisable, and upon presentation of satisfactory evidence that the association has complied with all the provisions of the law he shall issue to it a certificate to that effect. Such certificate shall be prima facie evidence of the existence of the association at the date thereof. (97 v. 423, § 12.)

Section 9479. (Place of meetings.) Any domestic society may provide that the meetings of its legislative or governing body may be held in any state, district, province or territory wherein such society has subordinate branches, and all business transacted at such meetings shall be as valid in all respects as if such meetings were held in this state; but its principal office shall be located in this state. (May 31, 1911, 102 v. 541, § 18; original G. C. Sec. 9492; R. S. Sec. 3631-23f; April 26, 1894, 97 v. 428, § 19; April 27, 1896, 92 v. 360, § 9.)

Section 9479. (Certified copies of certificate.) The superintendent of insurance shall cause a record of such certificate to be made and a certified copy of the record may be given in evidence with like effect as the original certificate. (97 v. 423, § 12.)

Section 9480. (Non-individual liability.) Officers and members of the supreme, grand or any subordinate body of any such incorporated society shall not be individually liable for the payment of any disability or death benefit provided for in the laws and agreements of such society; but the same shall be payable only out of the funds of such society and in the manner provided by its laws. (May 31, 1911, 102 v. 541, § 19; original G. C. Sec. 9493; R. S. Sec. 3631-23g; April 26, 1904, 97 v. 428, § 20.)

The trustees or directors are not liable for debts of the society under G. C. § 8666 although such debts are incurred by the trustees for its expenses. *Paper Co. v. Chevaliers*, 18 C. C. n. s. 257, 195 (1909).

The members of a society are not liable to another member of such society for benefits unless there is some law of the society expressly making them so liable.

Myers v. Jenkins, 63 O. S. 101 (1900); reversing 16 C. C. 545.

Section 9480. (Validity of preliminary certificate.) No preliminary certificate so granted shall be valid after one year from its date, or after such further period, not exceeding one year, as may be authorized by the superintendent of insurance, upon cause shown, unless the five hundred applicants herein required have been secured and the organization completed as above provided. The articles of association and all proceedings thereunder shall become null and void in one year from the date of such preliminary certificate or at the expiration of the extended period, unless the association has completed its organization and commenced business as hereinbefore provided. When any domestic association has discontinued business for one year, its charter shall become null and void. (97 v. 423, § 12.)

Section 9481. (Laws of society to be binding on members and beneficiaries.) The constitution and laws of the society may provide that no subordinate body, nor any of its subordinate officers or members shall have the power or authority to waive any of the provisions of the laws and constitution of the society, and the same shall be binding on the society and each and every member thereof and on all beneficiaries of members. (May 31, 1911, 102 v. 542, § 20; original G. C. Sec. 9494; R. S. Sec. 3631-23h; April 26, 1904, 97 v. 429, § 21.)

Provisions denying the power of subordinate officers to waive the provisions of the laws of the order were upheld, prior to the enactment of this section.

(Conditions as to reinstatement of suspended members.)

Pete v. Woodmen, 5 C. C. n. s. 446; 16 C. D. 653 (1904); aff'd, no rep., 74 O. S. 445.

(Persons engaged in certain occupations ineligible for membership.)

Grand Lodge v. Bunkers, 3 C. C. n. s. 256; 13 C. D. 487 (1902).

For respective rights and liabilities of supreme and subordinate lodges, see note to § 9463.

Section 9481. (Powers retained.) Any association now engaged in transacting business in this state, may exercise all of the rights conferred herein, and all of the rights, powers and privileges now exercised or possessed by it under its charter or articles of association not inconsistent with this chapter, or it may be reincorporated hereunder. (97 v. 426, § 13.)

Section 9482. (Benefits not liable to process of law.) No money or other benefit, charity or relief or aid to be paid, provided or rendered by any such society shall be liable to attachment, garnishment or other process, or be seized, taken, appropriated or applied by any legal or equitable process or operation of law to pay any debt or liability of a member or beneficiary, or any other person who may have a right thereunder, either before or after payment. (May 31, 1911, 101 v. 542, § 21; April 27, 1896, 92 v. 360, § 8; R. S. Sec. 3631-18, 97 v. 433.)

A former statute (Rev. Stats. § 3631-18; 92 v. 360, § 8) exempting

benefits from the claims of creditors of members and beneficiaries was held unconstitutional.

Williams v. Donough, 65 O. S. 499 (1901).

Benefits of a society which is not a fraternal society as defined in § 9462 are not exempt.

Hildreth v. K. P., 8 N. P. 540; 11 L. D. 622 (1901).

Former statute construed.

Brewing Co. v. Cassman, 21 C. C. 465; 12 C. D. 141 (1900); reversing, 9 L. D. 599 (dismissed in supreme court, 44 W. L. B. 186).

The beneficiary may, after the death of the insured, assign her claim under the benefit certificate to secure her debt.

Brewing Co. v. Cassman, 21 C. C. 465; 12 C. D. 141 (1900).

Section 9482. (Amendments.) No association already organized shall be required to reincorporate hereunder, nor to adopt the rates prescribed herein for new associations, in order to avail itself of the privileges of this chapter. Such an association may amend its articles of association from time to time in the manner provided herein, or in its constitution or laws. All such amendments shall be filed with the superintendent of insurance and become operative upon the filing, unless a later time be provided in the amendments, or in its articles of association, constitution or laws. (97 v. 426, § 13.)

Section 9483. (Changes of constitution must be filed with superintendent.) Every society transacting business under this act shall file with the superintendent of insurance a duly certified copy of all amendments of or additions to its constitution and laws within ninety days after the enactment of the same. Printed copies of the constitution and laws as amended, changed or added to, certified by the secretary or corresponding officer of the society, shall be prima facie evidence of the legal adoption thereof. (May 31, 1911, 102 v. 542, § 22; original G. C. Sec. 9496; R. S. Sec. 3631-23j; April 26, 1904, 97 v. 429, § 23.)

Section 9483. (Transfer of membership.) No domestic association shall transfer its membership or funds to any association not authorized by the superintendent of insurance to transact business in this state; nor transfer its membership or funds to any licensed association, unless the contract of transfer has been approved by a two-thirds vote of the members of the supreme body of the association whose membership is proposed to be transferred; and by a two-thirds vote of the trustees or board having charge of the association proposing to take such membership. (97 v. 426, § 14.)

Section 9484. (Verified statement of standing. Additional report of valuation. Verified valuation. Separate funds. Printed report to each beneficiary [member]. Increased assessments.) Every society transacting business in this state shall annually, on or before the first day of March, file with the superintendent of insurance, in such form as he may require, a statement under oath of its president and

secretary or corresponding officers, of its conditions and standing on the thirty-first day of December next preceding, and of its transactions for the year ending on that date and also shall furnish such other information as the superintendent may deem necessary to a proper exhibit of its business and plan of working. The superintendent may at other times require any further statement he may deem necessary to be made relating to such society.

In addition to the annual report herein required, each society shall annually report to the superintendent a valuation of its certificates in force on December 31, last preceding; excluding those issued within the year for which the report is filed, in cases where the contributions for the first year, in whole or in part, are used for current mortality and expenses; provided the first report of valuation shall be made as of December 31, 1912. Such report of valuation shall show, as contingent liabilities, the present mid-year value of the promised benefits provided in the constitution and laws of such society under certificates then subject to valuation; and, as contingent assets, the present mid-year value of the future net contributions provided in the constitution and laws as the same are in practice actually collected. At the option of any society, in lieu of the above, the valuation may show the net value of the certificates subject to valuation hereinbefore provided, and such net value, when computed in case of monthly contributions, may be the mean of the terminal values for the end of the preceding and of the current insurance years.

Such valuation shall be certified by a competent accountant or actuary, or, at the request and expense of the society, verified by the actuary of the department of insurance of the home state of the society, and shall be filed with the superintendent within ninety days after the submission of the last preceding annual report. The legal minimum standard of valuation for all certificates, except for disability benefits, shall be the National Fraternal Congress Table of Mortality as adopted by the National Fraternal Congress April 23, 1899, or, at the option of the society, any higher table; or, at its option it may use a table based upon the society's own experience of at least twenty years and covering not less than one hundred thousand lives with interest assumption not more than 4 per centum per annum. Each such valuation report shall set forth clearly and fully the mortality and interest basis and the method of valuation. Any society providing for disability benefits shall keep the net contributions for such benefits in a fund separate and apart from all other benefit and expense funds and the

valuation of all other business of the society; provided, that where a combined contribution table is used by a society for both death and permanent total disability benefits, the valuation shall be according to tables of reliable experience and in such case a separation of funds shall not be required.

The valuation herein provided for shall not be considered or regarded as a test of the financial solvency of the society, but each society shall be held to be legally solvent so long as the funds in its possession are equal to or in excess of its matured liabilities.

Beginning with the year 1914, a report of such valuation and an explanation of the facts concerning the condition of the society thereby disclosed shall be printed and mailed to each beneficiary member of the society not later than June 1 of each year; or, in lieu thereof, such report of valuation and showing of the society's condition as thereby disclosed, may be published in the society's official paper and the issue containing the same mailed to each beneficiary member of the society. The laws of such society shall provide that if the stated periodical contributions of the members are insufficient to pay all matured death and disability claims in full, and to provide for the creation and maintenance of the funds required by its laws, additional, increased or extra rates of contribution shall be collected from the members to meet such deficiency; and such laws may provide that, upon the written application or consent of the member, his certificate may be charged with its proportion of any deficiency disclosed by valuation, with interest not exceeding five per centum per annum. (May 31, 1911, 102 v. 542, § 23; original G. C. Sec. 9497; R. S. Sec. 3631-23k; April 26, 1904, 97 v. 429, § 24; April 27, 1896, 92 v. 360, § 4.)

Section 9484. (Time for commencing action against fraternal associations. Duty of association, as to furnishing information.) No member of any association organized or operating under the provisions of this act, or his beneficiary, or his legal representatives, or any other person in any way interested in any of his benefits, or any person deriving legal rights from him, shall commence any action or other legal proceedings in any of the courts of this state, on account of his contract insurance, against the supreme or governing body of such association, until after he shall have exhausted all the reasonable remedies provided in the constitution and laws of such association by appeals and otherwise that can be determined within one year after the filing of proof of death or disability.

Such association after notice of the death of the insured must give to such beneficiary or his legal representatives or any other person in any way interested in any of the benefits or any person deriving legal rights in the same, such information and help as should enable him to know how to exhaust all of the remedies provided in the constitution and laws

of such association by appeals and otherwise. (April 23, 1910, 101 v. 119; 97 v. 426, § 15.)

Section 9485. (Maintenance of financial condition at each triennial valuation; proceedings to dissolve on failure.) If the valuation of the certificates, as hereinbefore provided, on December 31, 1920, shall show that the present value of future net contributions, together with the admitted assets, is less than the present value of the promised benefit and accrued liabilities, such society shall thereafter maintain said financial condition at each succeeding triennial valuation in respect of the degree of deficiency as shown in the valuation as of December 31, 1920. If at any succeeding triennial valuation such society does not show at least the same condition, the superintendent shall direct that it thereafter comply with the requirements herein specified. If the next succeeding triennial valuation after the receipt of such notice shall show that the society has failed to maintain the conditions required herein, the superintendent may, in the absence of good cause shown for such failure, institute proceedings for the dissolution of such society, in accordance with the provision of section 9486 of this act, or in the case of a foreign society, its license may be cancelled in the manner provided in this act.

Any such society, shown by any triennial valuation, subsequent to December 31st, 1920, not to have maintained the condition herein required, shall within two years thereafter, make such improvement as to show a percentage of deficiency not greater than as of December 31st, 1920, or thereafter, as to all new members admitted, be subject, so far as stated rates of contribution are concerned, to the provisions of section 9473 of this act, applicable in the organization of new societies; provided that the net mortuary or beneficiary contributions and funds of such new members shall be kept separate and apart from the other funds of the society. If such required improvement is not shown by the succeeding triennial valuation, then the said new members may be placed in a separate class and their certificates valued as an independent society in respect to contributions and funds. (108 (Pt. 1) v. 688; 102 v. 544, § 23a.)

Section 9485-1. (Charge for cost of insurance. Provision for transfer. Valuation of certificates on tabular basis. How deficiencies met. When assets carried separately for a class. Table of rates and credits filed with annual report. Surplus may be maintained over credits and reserve.) In lieu of the requirements of sections 9484 and 9485, any so-

ciety accepting in its laws the provisions of this section may value its certificates on a basis, herein designated "accumulation basis," by crediting each member with the net amount contributed for each year and with interest at approximately the net rate earned and by charging him with his share of the losses for each year, herein designated "cost of insurance" and carrying the balance, if any, to his credit. The charge for the cost of insurance may be according to the actual experience of the society applied to a table of mortality recognized by the law of this state, and shall take into consideration the amount at risk during each year, which shall be the amount payable at death less the credit to the member. Except as specifically provided in its articles or laws or contracts, no charge shall be carried forward from the first valuation hereunder against any member for any past share of losses exceeding the contributions and credit. If, after the first valuation, any member's share of losses for any year exceeds his credit, including the contribution for the year, the contribution shall be increased to cover his share of the losses, and, if the credit at the time any benefit becomes payable during the lifetime of the member, including any available funds does not equal such benefit, the contributions to be made by him or on his behalf shall be increased by the difference. Any such excess share of losses chargeable to any member may be paid out of a fund or contributions especially created or required for such purpose.

Any member may transfer to any plan adopted by the society with net rates on which tabular reserves are maintained, and on such transfer shall be entitled to make such application of his credit as provided in the laws of the society.

Certificates issued, rerated or readjusted on a basis providing for adequate reserves to mature such certificates upon assumptions for mortality and interest recognized by law of this state shall be valued on such basis, herein designated the "tabular basis," provided that if on the first valuation under this section a deficiency in reserve shall be shown for any such certificate, the same shall be valued on the accumulation basis.

Whenever in any society having members upon the tabular basis and upon the accumulation basis, the total of all costs of insurance provided for any year shall be insufficient to meet the actual death and disability losses for the year, the deficiency shall be met for the year from the available funds after setting aside all credits in the reserve; or from increased contributions or by an increase in the

number of assessments applied to the society as a whole or to classes of members as may be specified in its laws. Savings from a lower amount of death losses may be returned in like manner as may be specified in its laws.

If the laws of the society so provide, the assets representing the reserves of any separate class of members may be carried separately for such class as if in an independent society, and the required reserve accumulation of such class so set apart shall not thereafter be mingled with the assets of other classes of the society.

A table showing the rates being paid by and the credits to individual members at each age and year of entry, and showing opposite each credit the tabular rates and the tabular reserve required, or at the option of the society the required reserve on a level rate equivalent to that being paid, according to assumption of mortality and interest recognized by the laws of this state and adopted by the society, and, in either case, including any benefit payable at a specified age or on account of old age disability shall be filed by the society with each annual report and also be furnished to each member before July first of each year.

In lieu of the aforesaid statement there may be furnished to each member within the same time a statement giving the data aforesaid for such member. No table or statement need be made or furnished when the reserves are maintained on the tabular basis.

For this purpose, individual bookkeeping accounts for each member shall not be required and all calculations may be made by actuarial methods.

Nothing herein contained shall prevent the maintenance of such surplus over and above the credits on the accumulation basis and the reserves on the tabular basis as the society may provide by or pursuant to its laws; nor be construed as giving to the individual member any right or claim to any such reserve or credit other than in manner as expressed in the contract and its laws; nor as making any such reserve or credits a liability in determining the legal solvency of the society. (108 (Pt. 1) v. 688.)

Section 9486. (Visitation and examination. Action in quo warranto, on failure to comply with act. Notice.) The superintendent of insurance, or any person he may appoint, shall have the power of visitation and examination into the affairs of any domestic society. He may employ assistants for the purpose of such examination, and he, or any person he may appoint, shall have free access to all the books,

papers and documents that relate to the business of the society and may summon and qualify as witness under oath and examine its officers, agents and employes, or other persons in relation to the affairs, transactions and condition of the society.

The expense of such examination shall be paid by the state upon statement furnished by the superintendent of insurance, and the examination shall be made at least once in three years.

Whenever after examination the superintendent of insurance is satisfied that any domestic society has failed to comply with any provisions of this act, or is exceeding its powers, or is not carrying out its contracts in good faith, or is transacting business fraudulently; or whenever any domestic society, after the existence of one year or more, shall have a membership of less than 400 (or shall determine to discontinue business), the superintendent of insurance may present the facts relating thereto to the attorney-general, who shall, if he deem the circumstances warrant, commence an action in quo warranto in a court of competent jurisdiction, and such court shall thereupon notify the officers of such society of a hearing, and if it shall then appear that such society should be closed, such society shall be enjoined from carrying on any further business and some person shall be appointed receiver of such society, and shall proceed at once to take possession of the books, papers, moneys and other assets of the society and shall forthwith, under the direction of the court, proceed to close the affairs of the society and to distribute its funds to those entitled thereto.

No such proceedings shall be commenced by the attorney-general against any such society until after notice has been duly served on the chief executive officers of the society and a reasonable opportunity given to it, on a date to be named in such notice, to show cause why such proceedings should not be commenced. (May 31, 1911, 102 v. 545, § 24; original G. C. Secs. 9498, 9499, 9500; R. S. Sec. 3631-231; April 26, 1904, 97 v. 429, § 25.)

The superintendent of insurance and attorney-general have discretion as to instituting proceedings in quo warranto in case examination by the superintendent discloses insolvency.

Rep. Atty. Gen. 1908-1909, p. 179.

Proceedings can not be instituted against an unincorporated society licensed under the laws of Ohio, but which subsequently moved its assets and office to another state.

Rep. Atty. Gen. 1908-1909, p. 184.

Administration and distribution of funds upon dissolution or insolvency. Priorities. The adjudication of a claim in favor of a beneficiary,

and the issuing of a warrant therefor on the treasury of the society, is a disposition of the fund which is entitled to priority over claims of general creditors.

Hunt v. Supreme Lodge, 5 O. L. R. 374 (1907).

State v. Grand Lodge, 11 C. C. n. s. 488; 20 C. D. 818 (1907).

Priorities as between different classes of certificate holders.

In re Mutual Aid Ass'n, 3 N. P. 145; 4 L. D. 272 (C. P. 1895).

The expectancy of life of beneficiaries at the time of dissolution determines their interest in the fund.

Collier v. Ass'n, 1 W. L. B. 18* (Super. Ct. Cin. 1876).

Where the constitution of a society provided that the funds of subordinate lodges should belong to and be subject to the supreme lodge, and, upon insolvency of the society, a receiver was appointed in the state where the supreme body was located, the funds of subordinate lodges were held to be subject to the order of such receiver, and local receivers appointed in other states were treated as ancillary receivers.

Schroeder v. Iron Hall, 7 N. P. 243; 1 L. D. 408 (C. P. 1895).

Section 9486. (Admission of foreign associations.) No foreign association shall do any business in this state without a license from the superintendent of insurance. Such an association shall be entitled to a license to transact business within the state, upon filing with the superintendent a duly certified copy of its charter or articles of association; a copy of its constitution or laws, certified by its secretary or corresponding officer, a power of attorney to the superintendent as hereinafter provided; a statement, under oath, of its president and secretary or corresponding officer, in the form required by the superintendent, duly verified by an examination made by the supervising insurance official of its home state of its business for the preceding year; a certificate from the proper official, in its home state, province or country, that the association is legally organized; a copy of its contract, which must show that benefits are provided for by assessments upon, or other payments by, persons holding similar contracts, and upon furnishing the superintendent such other information as he may deem necessary to a proper exhibit of its business and plan of working. Upon showing also that its assets are invested in accordance with the laws of the state, territory, district, province or country where it is organized, he shall issue a license to such association to do business in this state until the first day of the succeeding April. Upon compliance with the provisions of this chapter, such license must be renewed annually, but in all cases to terminate on the first day of the succeeding April. (97 v. 427, § 17.)

Section 9487. (Application for receiver, etc.) No application for injunction against or proceedings for the dissolution of or the appointment of a receiver for any such domestic society or branch thereof shall be entertained by any court in this state unless the same is made by the attorney-general. (May 31, 1911, 102 v. 545, § 25; original G. C. Sec. 9501; R. S. Sec. 3631-23m; April 26, 1904, 97 v. 430, § 26; April 27, 1896, 92 v. 360, § 11.)

Section 9487. (Foreign association not doing business herein, not required to change rates.) Nothing contained in this chapter shall require any such foreign association, not now authorized to transact business in this state to conform its rates of assessment to those prescribed by the national fraternal congress mortality table as a condition precedent

to the securing of such license or any renewal thereof. Any foreign association hereafter organized, desiring admission to this state, in addition to the requirements of this and the preceding section, must show that it collects from all of its members for death benefits, assessments not lower than those required by the national fraternal congress mortality table, with interest at four per cent, have the further qualifications required of domestic associations organized under this chapter, and have its assets invested as required by the laws of the state, territory, district, country or province where it is organized. (97 v. 427, § 17.)

Section 9488. (Examination of foreign societies. Effect of refusal.) The superintendent of insurance, or any person whom he may appoint, may examine any foreign society transacting or applying for admission to transact business in this state. Such superintendent may employ assistants, and he, or any person he may appoint, shall have free access to all the books, papers and documents that relate to the business of the society, and may summon and [qualify], as witness under oath and examine its officers, agents and employes and other persons in relation to the affairs, transactions and conditions of the society. He may, in his discretion, accept in lieu of such examination the examination of the insurance department of the state, territory, district, province or country where such society is organized. The actual expenses of examiners making any such examination shall be paid by the society upon statement furnished by the superintendent of insurance.

If any such society or its officers refuse to submit to such examination, or to comply with the provisions of the section relative thereto, the authority of such society to write new business in this state shall be suspended or license refused until satisfactory evidence is furnished the superintendent relating to the condition and affairs of the society, and during such suspension the society shall not write new business in this state. (May 31, 1911, 102 v. 546, § 26; original G. C. Secs. 9502, 9503; R. S. Sec. 3631-23n; April 26, 1904, 97 v. 430, § 27.)

Section 9488. (Fees; refusal or revocation of license.) For each such license or renewal, the association shall pay the superintendent twenty-five dollars. When the superintendent refuses to license any association or revokes its authority to do business in this state, he shall reduce his ruling, order or decision to writing and file it in his office, and upon request furnish a copy thereof, together with a statement of his reasons, to the officers of the association. The action of the superintendent shall be reviewable by proper proceedings in any court of competent jurisdiction within this state. Nothing herein shall prevent any such association from continuing in good faith all contracts made in this state during the time its was legally authorized to transact business therein. (97 v. 427, § 17.)

Section 9489. (No publicity pending investigation.)

Pending, during or after an examination or investigation of any such society, either domestic or foreign, the superintendent of insurance shall make public no financial statement, report or finding, nor shall he permit to become public any financial statement, report or finding affecting the status, standing or rights of any society, until a copy thereof shall have been served upon such society, at its home office, nor until such society shall have been afforded a reasonable opportunity to answer any such financial statement, report or finding, and to make such showing in connection therewith as it may desire. (May 31, 1911, 102 v. 546, § 27.)

Section 9489. (Power of attorney.)

Every foreign association transacting business in this state, and every such association applying for admission, before being licensed, must appoint in writing the superintendent of insurance and his successors in office to be its true and lawful attorney upon whom all legal process in any action or proceeding against it may be served, and in such writing agree that any lawful process against it, which is so served shall be of the same legal force and validity as if served upon the association; also that the authority shall continue in force so long as any liability remains outstanding in this state. (97 v. 428, § 18.)

Section 9490. (Causes for revocation. Notice. Review.)

When the superintendent of insurance on investigation is satisfied that any foreign society transacting business under this act has exceeded its powers, or has failed to comply with any provisions of this act, or is conducting business fraudulently, or is not carrying out its contracts in good faith, he shall notify the society of his findings, and state in writing the grounds of his dissatisfaction, and after reasonable notice require such society, on a date named, to show cause why its license should not be revoked. If on the date named in such notice such objections have not been removed to the satisfaction of such superintendent, or the society does not present good and sufficient reasons why its authority to transact business in this state should not at that time be revoked, he may revoke the authority of the society to continue business in this state. All decisions and findings of the superintendent made under the provisions of this section may be reviewed by proper proceedings in any court of competent jurisdiction, as provided in section 16 [G. C. Sec. 9477] of this act. (May 31, 1911, 102 v. 546, § 28; original G. C. Secs. 9504, 9505; R. S. Sec. 3631-230; April 26, 1904, 97 v. 431, § 28; April 27, 1896, 92 v. 360, § 11.)

The notice of revocation or discontinuance of the license, required by this section, is mandatory and jurisdictional.

State v. Lemert, 11 N. P. n. s. 535; 21 L. D. 118 (C. P. 1911).

Section 9490. (How service of process made.) Copies of such appointment, certified by the superintendent of insurance, shall be deemed sufficient evidence thereof and be admitted in evidence with the same force and effect as the original. Service may be made only upon such attorney, must be made in duplicate, and shall be deemed sufficient service upon such association; except that no such service shall be valid or binding against an association if it is required thereunder to file its answer, pleading or defense in less than thirty days after the date of service. (97 v. 428, § 18.)

Section 9491. (Lodges, societies, orders and associations excepted. Superintendent of insurance may require information. No compensation for securing new members. What societies may be licensed hereunder.) Nothing contained in this act shall be construed to affect or apply to grand or subordinate lodges of Masons, Odd Fellows or Knights of Pythias (exclusive of the insurance department of the Supreme Lodge Knights of Pythias), and the Junior Order of United American Mechanics (exclusive of the beneficiary degree or insurance branch of the National Council Junior Order United American Mechanics), or the National Council Daughters of America Benefit Department, or societies which limit their membership to any one hazardous occupation, nor to similar societies which do not issue insurance certificates, nor to an association of local lodges of a society now doing business in this state which provides death benefits not exceeding three hundred dollars to any person, or disability benefits not exceeding three hundred dollars in any one year, to any one person, or both, nor to any contracts of reinsurance business on such plan in this state, nor to domestic societies which limit their membership to the employees of a particular city or town, designated firm, business house or corporation, nor to domestic lodges, orders or associations of a purely religious, charitable and benevolent description, which do not provide for a death benefit of more than one hundred dollars, or for disability benefits of more than one hundred and fifty dollars to any one person in any one year; provided, always, that any such domestic order or society which has more than five hundred members, and provides for death or disability benefits, and any such domestic lodge, order or society which issues to any person a certificate providing for the payment of benefits, shall not be exempt by the provisions of this section, but shall comply with all the requirements of this act; nor to any endowment fund created by a conference or other general ecclesiastical body of a religious denomination held in the United States and incorporated under sections ten thousand eleven and ten thousand twelve of the General Code of Ohio for the

payment of pensions or benefits to superannuated ministers and missionaries of such religious denomination, their widows and children, where not to exceed forty per cent. of the cost and expense of such fund is assessed against the members thereof, and the balance is contributed by such conference or religious denomination or from other sources, and where the benefits to be paid to any one person in any one year shall not exceed the sum of six hundred dollars; and provided further, that nothing in sub-section 2, of section 5, and paragraph 3rd, of section 12, and section 23 and section 23a of this chapter, shall affect or apply to any corporation, society, order or voluntary association, which was prior to the first day of January, 1911, organized and doing business in this state on the lodge system, as provided in section 2 of this chapter, which issues death certificates in a sum not exceeding \$500.00 to any one member, and whose membership is confined and limited exclusively to persons of one particular religious faith.

The superintendent of insurance may require from any society such information as will enable him to determine whether such society is exempt from the provisions of this act.

No society, which is exempt by the provisions of this section from the requirement of this act, shall give or allow, or promise to give or allow, to any person any compensation for procuring new members.

Any fraternal benefit society, heretofore organized and incorporated and operating within the definition set forth in sections 1, 2 and 3 of this act, providing for benefits in case of death or disability resulting solely from accidents, but which does not obligate itself to pay death or sick benefits, may be licensed under the provisions of this act, and shall have all the privileges and shall be subject to all the provisions and regulations of this act, except that the provisions of this act requiring medical examinations, valuations of benefit certificates, and that the certificates shall specify the amount of benefits, shall not apply to such society. (108 (Pt. 2) v. 1118; 102 v. 546, § 29; original G. C. Sec. 9506; R. S. Sec. 3631-23p; 97 v. 431, § 29; 94 v. 356; 92 v. 360, § 13.)

An association which desires exemption under this section should, in its articles of incorporation, set out its plan of business. Rep. Atty. Gen. 1913, p. 100.

A fraternal order authorized to render aid to its members, but lacking the power to issue certificates, is within the exception provided in this section, and may incorporate by filing articles with the secretary of state instead of the superintendent of insurance.

Rep. Atty. Gen. 1911-1912, pp. 112, 125.

Section 9491. (Duty of superintendent when service made on him.) When legal process against any such association is served upon the superintendent of insurance, forthwith he shall forward by registered mail one of the duplicate copies, prepaid and directed to its secretary or corresponding officer. The plaintiff in process so served must pay to the superintendent of insurance for the use of the state at the time of service a fee of two dollars, which shall be recovered by him as part of the taxable costs, if he prevails in the suit. (April 26, 1904, 97 v. 428, § 18.)

Section 9492. (Place of meeting; office.) Any domestic association may provide for holding the meetings of its legislative or governing body in any state, district, province or territory wherein such association has subordinate branches. All business transacted at such meetings shall be as valid in all respects as if they were held in this state. But its principal office must be located in this state. (97 v. 428, § 19.)

Section 9493. (No personal liability.) Officers and members of the supreme, grand or any subordinate body of any such incorporated association shall not be individually liable for the payment of any disability or death benefit, provided for in the laws and contracts of the association. They shall be payable only out of the funds of the association and in the manner provided by its laws. (97 v. 428, § 20.)

Section 9494. (Waiver of the provisions of the laws.) The constitution and laws of the association may provide that no subordinate body, nor any of its officers or members shall have the power or authority to waive any of the provisions of its laws and constitution, and this shall be binding on the association and every member thereof. (97 v. 429, § 21.)

Section 9495. (Separate jurisdiction provisions.) All grand lodges by whatever name known, whether incorporated or not, holding charters from the supreme governing body, which are conducting business in this state as fraternal beneficiary associations upon what is known as the separate jurisdiction plan, shall be treated as a federation of grand lodges and not as single state organizations; and all reports required by the provisions of this chapter shall be made and furnished by the officers of such supreme governing bodies and must contain the transactions, liabilities and assets of the entire order. (97 v. 429, § 22.)

Section 9496. (Constitution and laws; amendments.) Every association transacting business under this chapter, must file with the superintendent of insurance a duly certified copy of all amendments of, or additions to, its constitution and laws within ninety days after their enactment. Printed copies of the constitution and laws and of additions or amendments thereto, certified by the secretary or corresponding officer of the association shall be prima facie evidence of the legal adoption thereof. (97 v. 429, § 23.)

Section 9497. (Annual reports.) Every association transacting business in this state, annually on or before the first day of March, must file with the superintendent of insurance in such form as he requires, a statement under oath of its president and secretary, or corresponding officers, of its condition and standing on the thirty-first day of December next preceding and of its transactions for the year ending on that date, and also, furnish such other information as the superintendent deems

necessary to a proper exhibit of its business and plan of working. The superintendent at other times may require any further statement he deems necessary to be made relating to such associations. (97 v. 429, § 24.)

Section 9498. (Examination of domestic associations.) The superintendent of insurance, or any person he appoints, shall have the power of visitation and examination into the affairs of any domestic association. He may employ assistants for the purposes of such examination and he, or any person he appoints shall have free access to all books, papers and documents relating to the business of the association, and may summon and qualify as witnesses under oath and examine its officers, agents, employes and other persons in relation to its affairs, transactions and condition. The expenses of such examination shall be paid by the state treasurer on the warrant of the state auditor on the certificate of the superintendent of insurance from the proper appropriations. (97 v. 429, § 25.)

Section 9499. (Quo warranto.) When after such examination, the superintendent is satisfied that a domestic association has failed to comply with any provision of this chapter, or is exceeding its powers, or is not carrying out its contracts in good faith; or is transacting business fraudulently; or when such an association, after the existence of one year or more has a membership of less than three hundred, or votes to discontinue business, he may present the facts relating thereto to the attorney-general, who, if he thinks the circumstances warrant it shall commence an action in quo warranto in a court of competent jurisdiction, and the court thereupon shall notify the officers of such association of a hearing. Unless it then appears that some special and good reason exists why the association should not be closed, it shall be enjoined from doing any further business, and some person be appointed a receiver thereof, who shall at once take possession the books, papers, moneys, and other assets of the association and under the direction of the court forthwith proceed to close up its affairs, and to distribute its funds to those entitled thereto. (97 v. 429, § 25.)

Section 9500. (Hearing must be had before instituting suit). No such proceeding shall be commenced by the attorney-general against such an association until after notice has been duly served on its chief executive officers, and a reasonable opportunity given to it on a date to be named in the notice to show cause why such proceedings should not be commenced. (97 v. 429, § 25.)

Section 9501. (Attorney-general to institute suit.) No application for injunction or other proceedings for the dissolution of, or the appointment of a receiver for, such a domestic association or branch thereof shall be entertained by any court in this state unless it is made by the attorney-general. (97 v. 430, § 26.)

Section 9502. (Examination of foreign associations.) The superintendent of insurance, or any person whom he appoints, may examine any foreign association transacting or applying for admission to transact business in this state. He may employ assistants for the purpose of such examination and he, or any person appointed by him, shall have free access to all the books, papers and documents that relate to the business of the association and may summon and qualify as witnesses under oath and examine its officers, agents, employes and other persons in relation to its affairs and condition. In his discretion, in lieu of such

examination, he may accept the examination of the insurance department of the state, territory, district, province or country where the association is organized. Examinations under the provisions of this section shall be made without expense to the association examined. (97 v. 430, § 27.)

Section 9503. (When examination refused.) If such an association or its officers refuse to submit to such examination or to comply with the provisions of the preceding section relating thereto, its authority to transact business in this state shall be revoked until satisfactory evidence is furnished such superintendent relating to the condition and affairs of the association. During such revocation it shall not transact any business in this state. (97 v. 430, § 27.)

Section 9504. (Revocation of license.) When the superintendent on investigation is satisfied that a foreign association transacting business under this chapter has exceeded its powers, or failed to comply with any provision thereof, or is conducting business fraudulently, or not carrying out its contract in good faith, he shall notify the president and secretary, or other officers corresponding thereto, of his findings, state in writing the grounds of his dissatisfaction, and after reasonable notice require the association on a date named therein, to show cause why its license should not be revoked. If on that date such objections have not been removed to the satisfaction of the superintendent, or the association fails to present good and sufficient reasons why its authority to transact business in this state should not then be revoked he may revoke its authority to continue business in this state. (97 v. 431, § 28.)

Section 9505. (Decisions of superintendent may be reviewed.) All decisions and findings of the superintendent made under the provisions of the preceding section may be reviewed by proper proceedings in any court of competent jurisdiction as hereinbefore provided in this chapter, in similar cases. (97 v. 431, § 28.)

Section 9506. (Exemption of certain associations.) Nothing contained in this chapter shall affect or apply to grand or subordinate lodges of Masons, Odd Fellows or Knights of Pythias (exclusive of the insurance branch of the supreme lodge Knights of Pythias), or to similar orders which do not issue insurance certificates, nor to local lodges of an association doing business in this state, that provide death benefits not exceeding three hundred dollars to any one person, or disability benefits not exceeding three hundred dollars in any one year to any one person, or both; nor to any contracts of reinsurance of or between such local lodges of such association doing business on such plan in this state, nor to domestic associations which limit their membership to the employees of a particular city or town, designated firm, business house or corporation; nor to domestic lodges, orders, associations of a purely religious, charitable and benevolent description, which do not operate with a view to profit and which do not provide for a death benefit of more than one hundred dollars or for disability benefits of more than one hundred and fifty dollars to any one person in any one year. But any such domestic order or association, which has more than five hundred members, and provides for death or disability benefits and any such domestic lodge, order or association which issues to any person a certificate providing for the payment of benefits, shall not be exempt by the provisions of this section, and must comply with all the requirements of this chapter. (97 v. 431, § 29.)

Section 9507. (Superintendent may require certain information.)

The superintendent of insurance may require from any association such information as will enable him to determine whether or not it is exempt from the provisions of this chapter. No association which is so exempt shall give or allow or promise to give or allow to any person any compensation for procuring new members. (97 v. 431, § 29.)

Section 9508. (Construction.) The word "association" as used in

this chapter shall be taken as meaning a fraternal beneficiary corporation, society, order or voluntary association as defined in the first sections of this chapter. The words "domestic association" shall be taken as meaning an association organized or incorporated under the laws of this state. The words "foreign associations," shall be taken as meaning an association organized or incorporated under the laws of another territory, district, state, province or country. All provisions of each section of this chapter, except as otherwise provided shall be taken as applying to both domestic and foreign associations. (97 v. 432, § 31.)

Section 9509. (Vacancy in office of superintendent.) In event of a

vacancy in the office of the superintendent of insurance or in the absence or disability of that officer the deputy superintendent shall perform all the duties required of the superintendent by this chapter. (97 v. 432, § 31.)

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CHAPTER 2-1. Mutual Fire Insurance.

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CHAPTER 1.

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INSURANCE AUTHORIZED.

Section 9510. (Powers of companies.) A company may be organized or admitted under this chapter to—

1. Insure houses, buildings and all other kinds of property in and out of the state against loss or damage by fire, lightning and tornadoes, and make all kinds of insurance on goods, merchandise and other property in the course of transportation, on land, water, or on a vessel, boat or wher-ever it may be.

2. Make insurance on the health of individuals and against personal injury, disablement or death, resulting from traveling or general accidents by land and water; make insurance against loss or damage resulting from accident to property, from cause other than fire or lightning; guarantee the fidelity of persons holding places of public or private trust, who are required to, or, in their trust capacity do receive, hold, control, disburse public or private moneys or property; guarantee the performance of contracts other than insurance policies, and execute and guarantee bonds and undertakings required or permitted in all actions or proceedings, or by law allowed; make insurance to indemnify employers against loss or damage for personal injury or death resulting from accidents to employes or persons other than employes and to indemnify persons and corporations other than employers against loss or damage for personal injury or death resulting from accidents to other persons or corporations. But a company of another state, territory, district or country admitted to transact the business of indemnifying employers and others, in addition to any other deposit required by other laws of this state, shall deposit with the superintendent of insurance for the benefit and security of all its policy holders, fifty thousand dollars in bonds of the United States or of the state of Ohio, or of a county, township, city or other municipality in this state, which shall not be received by the superintendent at a rate above their par value. The securities so deposited may be

exchanged from time to time for other securities. So long as such company continues solvent and complies with the laws of this state it shall be permitted by the superintendent to collect the interest on such deposits.

3. Make insurance on the lives of horses, cattle or other live stock against loss by death caused by accident, disease, fire or lightning, and against loss by theft and damage by accident. But such companies shall have a capital of one hundred thousand dollars, with at least twenty-five per cent of the capital stock paid up.

4. Receive on deposit and insure the safekeeping of books, papers, moneys, stocks, bonds and all kinds of personal property; lend money on bottomry or respondentia, and cause itself to be insured against any loss or risk it has incurred in the course of its business, and upon the interest which it has in any property by means of any loan which it has made on mortgage, bottomry, or respondentia, and generally to do all other things proper to promote these objects. (R. S. Sec. 3641; April 25, 1904, 97 v. 407; April 1, 1902, 95 v. 81; April 21, 1898, 93 v. 170; April 13, 1894, 91 v. 138; April 11, 1893, 90 v. 157; March 16, 1891, 88 v. 102; April 30, 1885, 82 v. 185; R. S. 1880; April 14, 1874, 71 v. 65, § 8; S. & S. 299.)

Contracts or policies of fire insurance, and liability thereunder.

See §§ 9587, 9583 and notes.

Accident insurance companies, see § 9542 et seq.

Mutual companies, see § 9607-2 et seq.

Deposit in home state, in lieu of deposit under this section, § 9510-7 et seq.

Insurance companies can not incorporate under the general corporation law (§§ 8623 to 8743). The organization of insurance companies other than life, is provided for in this chapter.

State v. Pioneer Live Stock Co., 38 O. S. 347 (1882):

The enlargement of the scope of original section 3641 of the Revised Statutes, so as to include classes of insurance other than fire insurance, and authorizing fire insurance companies to insure against tornadoes and the like does not constitute a special grant of corporate power, and is not a violation of Art. XIII, § 1 of the constitution.

Casualty Co. v. Hahn, 33 W. L. B. 286 (1895).

An insurance company does not forfeit its charter, by nonuser, by refusing to insure against extra hazardous risks.

Corwin v. Insurance Co., 14 Ohio 6 (1846).

Effect of § 9607-2 on §§ 9510, 9511 and 9556. The attorney general has ruled that §§ 9510, 9511 and 9556 have been supplanted by § 9607-2, basing his opinion upon the following language in § 9607-2: "A mutual or a stock insurance company may transact only the first kind of insurance, or may transact such as it may elect of the other kinds of insurance, following:"

The conclusion reached by the attorney general was that fire insurance companies, whether stock or mutual, have only the powers conferred by § 9607-2; that the powers conferred by § 9607-2 are

available to either stock or mutual companies but powers mentioned in §§ 9510 and 9556, but not mentioned in § 9607-2 may not be exercised by either stock or mutual companies; that in some respects the powers conferred by § 9607-2 are broader than those enumerated in § 9510; and that a company originally organized under § 9510 may obtain the additional powers by amending its articles of incorporation. Opins. Atty. Gen. 1919, p. 925; 17 O. L. R. 308; compare Opins. Atty. Gen. 1918, p. 1348.

In *State, ex rel., v. Gearheart*, 103 O. S. 263 (1921), a foreign stock company claimed certain powers by virtue of § 9607-2. But the court said (p. 265): "This section is a part of the chapter dealing with 'mutual fire insurance companies'. It is difficult to comprehend how it can be stretched to include the relator."

Casualty insurance. The general terms of paragraph two of § 9510, authorizing insurance against loss from "accidents to property other than fire or lightning," cover plate glass and steam boiler insurance and also burglary insurance.

4 Opins. Attys. Gen. 526, 653 (1893).

Credit insurance.

See also §§ 9621 to 9633.

The language of paragraph two of § 9510 authorizing a company to "guarantee the performance of contracts other than insurance policies" covers credit insurance.

4 Opins. Attys. Gen. 535 (1893).

Employers' liability insurance. Employers' liability insurance has been superseded by the Workmen's Compensation Law as to employers who employ three or more workmen. G. C. § 1465-69; *Thornton v. Duffy*, 99 O. S. 120 (1918); aff'd, 254 U. S. 361.

Prior to the amendment of § 1465-69 (107 v. 159) employers liability insurance contracts were much restricted. See *State v. Liab. Corp.*, 95 O. S. 289 (1917); *State v. Fidelity Co.*, 96 O. S. 250 (1917); *State v. Ocean Co.*, 95 O. S. 590 (1917).

Decisions under policies of employers' liability insurance. See *State v. Insurance Co.*, 69 O. S. 317; *Verducci v. Casualty Co.*, 96 O. S. 260 (1917); *Insurance Co. v. Bright*, 1 C. C. n. s. 295; 14 C. D. 441 (1903); aff'd, no rep. 70 O. S. 497.

Liability to indemnify employers for damages paid to minors illegally employed. *Collings-Taylor Co. v. Fidelity Co.*, 96 O. S. 123 (1917); *Lockwood v. Ins. Co.*, 8 Ohio App. 444 (1917).

Insurance company not obligated to make compromise settlement. *Wire Spring Co. v. Gen. Accident Co.*, 6 Ohio App. 344; 27 O. C. A. 536 (1917); motion to certify record overruled, 15 O. L. R. 247.

Recovery, by insurer from insured, of amount payable by insured before recourse to insurer, where insurer settled claim. *Coal Co. v. Assurance Co.*, 27 O. C. A. 43 (1916).

The fact that the insurance company defended an action against the insured, brought by an employe, was held not an estoppel or a waiver of a condition of the policy that it did not cover liability for injuries caused by failure of the insured to comply with certain requirements of law. *Ohio Moulding Co. v. Standard Life Ins. Co.*, 24 C. C. n. s. 603 (1903).

A default judgment rendered against the insured, after notice to the insurance company which made no defense, is binding on the insurance company, in the absence of fraud or collusion. *McGhee v. Insurance Co.*, 15 Ohio App. 457 (1921).

Deposit. The requirement of this section, that foreign liability companies deposit securities, is constitutional. *Casualty Co. v. Hahn*, 33 W. L. B. 286 (1895).

An alien company, which did not deposit \$50,000 and which had no license to transact liability insurance in Ohio, made a contract in another state reinsuring the liability risks of other foreign companies which arose from Ohio policies of the latter. Held, to be a violation of the insurance laws for which the superintendent of insurance was authorized to cancel its license to transact other insurance business in Ohio. *State v. Tomlinson*, 101 O. S. 459 (1920).

The deposit may be made out of the capital of a company, although its capital is the minimum amount permitted by § 9524.

Rep. Atty. Gen. 1910-1911, p. 552.

This section requires a deposit from companies which write no employers' liability policies, but confine their business to indemnity against loss to persons other than employers. Rep. Atty. Gen. 1913, p. 857.

The amount of deposit of a foreign company, desiring to do only an employer's liability business in Ohio, is \$50,000, and not \$150,000. Section 9565 does not apply to such companies.

5 Opins. Attys. Gen. 30 (1900).

Farm loan bonds may be deposited. § 9518-2.

Upon insolvency of a company, its deposit should be administered by the superintendent of insurance under direction of the Ohio court, for the benefit of Ohio policyholders. The deposit should not be turned over to the legal representatives of the company in the state of its domicile. *Turner v. Insurance Co.*, 8 Ohio App. 285; 28 O. C. A. 113 (1917); *Hogan v. Surety Co.*, 8 Ohio App. 172; 28 O. C. A. 139 (1916); s. c., 18 N. P. n. s. 380.

A non-resident creditor, whose claim arises out of a contract of insurance arising outside of Ohio, is not entitled to participate in the fund arising from the deposit, although the creditor transacted business in Ohio and incurred liabilities covered by his policy. *McGhee v. Casualty Co.*, 15 Ohio App. 457 (1921).

Attorneys employed by the insurance company are not, as against policyholders, entitled to participate in the fund. *McGhee v. Casualty Co.*, 15 Ohio App. 457 (1921).

Taxes due under § 5433 are subordinate to the claims of policyholders, but may be set off against any amount due the insurance company. *McGhee v. Casualty Co.*, 15 Ohio App. 457 (1921).

Policyholders who paid attorneys' fees in defending suits after default of the insurance company may include such fees in their claims. *McGhee v. Casualty Co.*, 15 Ohio App. 457 (1921).

A construction contract and bond, for work to be performed outside of Ohio, and executed by the sureties outside of Ohio, is not an Ohio contract although the contractor was a resident of Ohio and signed the contract and bond in Ohio. *McGhee v. Casualty Co.*, 15 Ohio App. 457 (1921).

Fidelity or guaranty insurance.

See note to § 9570.

A company attempting to incorporate under par. 2 of § 9510 can not combine fidelity insurance with insurance against damage by fire as such nor against loss or damage by theft. Opins. Atty. Gen. 1915, p. 828.

Plate glass insurance. Insurance companies operating under par. 2 of this section may insure against loss or damage to plate glass resulting from inundation. Rep. Atty. Gen. 1915, p. 91.

Marine insurance.

A company organized under a special charter prior to the constitution of 1851 for the purpose of insuring farm buildings against fire, can not by adopting § 9510, acquire the right to write marine insurance. But it may acquire such right by amending its articles under § 8719.

Rep. Atty. Gen. 1911-1912, p. 798.

A vessel is a chattel and a mortgage thereof a "chattel mortgage" under a policy which provides that it shall be void "if the subject of insurance be personal property and be or become incumbered by a chattel mortgage."

Transportation Co. v. Insurance Co., 170 Fed. 279 (C. C. A. Ohio 1909).

A mortgage invalidates such a policy although the debt secured thereby is not in default.

Transportation Co. v. Insurance Co., 170 Fed. 279 (1909).

Where, by what is denominated a "contract proposition" an application is made for insurance "covering all shipments of the following description of articles, viz: sundry coal cargoes belonging to the applicant and as agents, at risk" a policy issued on such application stating that it is made as per said contract covers only those cargoes shipped by the insured as agent, in which it has some pecuniary interest at risk.

Insurance Co. v. Coal Co., 68 O. S. 469 (1903).

An open marine policy authorizing the insured to issue certificates covering specified property, to be countersigned by the insurer's agent, was held to make the insured agent of the insurer.

Where, after the issuance of such a certificate not containing the name of the vessel because unknown at the time, the insured failed to inform the insurer of the name of the vessel after learning the same, until after the vessel was overdue, when it was too late for the insurer to obtain re-insurance, as was customary as to risks above certain amounts, after payment of the loss the insurer was held entitled to recover damages from the insured. Aetna Ins. Co. v. Willis Overland Co., 288 Fed. 912 (D. C. Ohio 1922).

The captain and crew are bound to use diligent efforts to preserve and recover property. This duty exists independently of policy stipulations.

Insurance Co. v. May, 20 Ohio 211 (1851).

Risks held covered. Goods carried on deck by established usage, under policy made with reference to particular trade or line of steamers.

Insurance Co. v. Shillito, 15 O. S. 559 (1864).

Loss due to negligence of insured, or his officers or seamen.

Insurance Co. v. Parisot, 35 O. S. 35 (1875).

Insurance Co. v. May, 20 Ohio 211 (1851).

Perrin v. Insurance Co., 11 Ohio 147 (1842).

See Insurance Co. v. Sherlock, 25 O. S. 33 (1874).

Injury to a flatboat by ordinary waves raised by steamboats.

Insurance Co. v. Reed, 20 Ohio 199 (1851).

Explosion of boiler.

Perrin v. Insurance Co., 11 Ohio 147 (1842).

Loss by fire caused by collision, under policy covering fire loss only, where collision is not excepted by terms of policy.

Insurance Co. v. Sherlock, 25 O. S. 33 (1874).

Where the printed terms of an open marine policy covered only perils of seas, rivers, fire and overpowering thieves, and the insurance company endorsed "\$2000 on cargo canal boat Ben Franklin, at and from this port per Miami and Wabash canals to Covington, Ind., and landed" the policy was held to cover the ordinary risks of canal navigation.

Insurance Co. v. Wilson, 6 O. S. 553 (1856).

Risks held partially covered. Total loss after policy expired, caused by injury while policy in force; actual injury covered, but not total loss. *Howell v. Insurance Co.*, 7 Ohio (pt. 1) 284 (1835).

Risks held not covered. Sinking as the result of an attempt to repair. *Insurance Co. v. Purcell*, 19 C. C. 135; 10 C. D. 538 (1899); *aff'd*, no rep., 66 O. S. 678.

Loss certain to happen, such as wear and tear.

Insurance Co. v. Reed, 20 Ohio 199 (1851).

Loss where vessel overloaded or unseaworthy.

Insurance Co. v. May, 20 Ohio 211 (1851).

Insurance Co. v. Tobin, 32 O. S. 77 (1877).

Actions. Insurance brokers, holding an open policy for themselves and whom it may concern, may maintain an action in their names for the use of the owners, not named in the policy, where the insurance was for their benefit.

Insurance Co. v. Wilson, 6 O. S. 553 (1856).

Evidence and presumptions. Seaworthiness at time of insurance is presumed to continue; but when a dangerous leak occurs, without apparent cause, a rebuttable presumption of unseaworthiness arises. The owner may recover on showing a probable cause of loss.

Insurance Co. v. Tobin, 32 O. S. 77 (1877).

Expert testimony as to causes of loss.

See *Insurance Co. v. Tobin*, 32 O. S. 77 (1877).

Insurance Co. v. May, 20 Ohio 211 (1851).

Transportation risks.

See also *Marine insurance*.

A foreign company, authorized by its charter to insure risks of inland transportation, and already licensed in Ohio to write fire and marine insurance, may, under § 9510, be authorized to insure risks of inland transportation.

4 Opins. Attys. Gen. 714 (1896).

Insurance against damage in transportation of goods from a place without the state to a place within the state need not be written or placed by a resident agent. § 5438 does not apply to such a case.

5 Opins. Attys. Gen. 432 (1901).

Section 9510-1. (Employee subrogated to rights of employer, when.) An employee, who has heretofore recovered or shall hereafter recover against his employer for injuries sustained while in the employ of his employer, and because of negligence of the employer, or negligence for which he or it is liable, shall be subrogated to all the rights of the employer under any contract or policy of insurance against loss or damage resulting to said employer from injury or death of an employee while in the service of such employer whether said person, co-partnership or corporation contracting or issuing such policy of insurance has been made a party to the action for damages sustained or not. (May 12, 1910, 101 v. 192.)

The requirements of § 9510-1 can not be defeated by provisions inserted in policies. A provision to the effect that no action can be

brought on the policy except by the employer and not until a judgment by employe against employer has been fully paid is in conflict with this section and void. *Verducci v. Casualty Co.*, 96 O. S. 260 (1917).

An employee, after obtaining judgment against an insured employer, is not barred from the benefit of this section (1), by a compromise made by the insured employer with the insurance company after the cause of action arose, or (2) by a provision in the policy applying to the insured and limiting his right of action to 90 days after judgment. *McGhee v. Casualty Co.*, 15 Ohio App. 457 (1921).

This section is unconstitutional so far as it relates to judgments recovered against an employer prior to its enactment.

Garrett v. Insurance Co., 11 N. P. n. s. 221; 22 L. D. 259 (C. P. 1911).

Before the enactment of this section it was held that, where by the terms of the policy the employer had no right of action against the insurance company until he had paid the amount of the judgment in money, the employe could not recover a judgment against the insurance company; the contract being one of indemnity only, to which the employe was not a party.

Garrett v. Insurance Co., 17 C. C. n. s. 197 (1910); affirming 9 N. P. n. s. 412; 20 L. D. 181 (C. P. 1909).

Section 9510-2. (Rights and remedies pass to personal representative in case of death of employee.) In case of the death of any employee by reason of the wrongful or negligent acts of his employer, or negligence or wrongful acts for which he is liable, then the personal representative or representatives of the deceased employee shall have all the rights and remedies that the employee would have had hereunder had death not resulted. (May 12, 1910, 101 v. 192.)

Section 9510-3. (Liability of insurance company for bodily injury or death. Cancellation or annulment void.) In respect to every contract of insurance made between an insurance company and any person, firm or corporation by which such person, firm or corporation is insured against loss or damage on account of the bodily injury or death by accident of any person for which loss or damage such person, firm or corporation is responsible, whenever a loss or damage occurs on account of a casualty covered by such contract of insurance, the liability of the insurance company shall become absolute, and the payment of said loss shall not depend upon the satisfaction by the assured of a final judgment against him for loss, or damage or death occasioned by such casualty. No such contract of insurance shall be cancelled or annulled by any agreement between the insurance company and the assured, after the said assured has become responsible for such loss or damage or death, and any such cancellation or annulment shall be void. (108 (Pt. 1) v. 385.)

The claim of the injured person against the insured must be reduced to judgment against the insured before an action may be brought against the insurance company. *Steinbach v. Maryland Casualty Co.*, 15 Ohio App. 392 (1921).

Section 9510-4. (When judgment creditor entitled to have insurance money applied to judgment.) Upon the recovery of a final judgment against any firm, person or corporation by any person, including administrators and executors, for loss or damage on account of bodily injury or death, if the defendant in such action was insured against loss or damage at the time when the right of action arose, the judgment creditor shall be entitled to have the insurance money provided for in the contract of insurance between the insurance company and the defendant applied to the satisfaction of the judgment, and if the judgment is not satisfied within thirty days after the date when it is rendered, the judgment creditor may proceed in a legal action against the defendant and the insurance company to reach and apply the insurance money to the satisfaction of the judgment. (108 (Pt. 1) v. 386.)

Section 9510-5. (Death of employee.) In case of the death of any employee by reason of the wrongful or negligent acts of his employer, or negligence or wrongful acts for which he is liable, then the personal representative or representatives of the deceased employee shall have all the rights and remedies that the employee would have had hereunder, had death not resulted. (May 12, 1910, 101 v. 192.)

Section 9510-6. (Interrogatories.) The plaintiff in any such action against any employer for damages for death or injury sustained by reason of the alleged wrongful act or negligence of such employer may attach to his petition interrogatories addressed to said defendant employer requiring him or it to fully disclose under oath, whether or not he or it carries any contract or policy of employees' liability insurance and if so, to disclose the name and location of the person, firm or corporation furnishing and providing the same together with the dates of the commencement and expiration of any such contract or policy and the amount thereof together with the terms and conditions of the same. (May 12, 1910, 101 v. 192.)

Section 9510-7. (Deposit required with superintendent of insurance.) An insurance company which is required by the provisions of paragraph two of section 9510, General Code,

to deposit fifty thousand dollars of bonds with the superintendent of insurance may, in lieu of such deposit, make a deposit of one hundred thousand dollars, in securities in which the company may be permitted to invest its assets by the laws of the state in which it is incorporated, with the superintendent of insurance or other officer of another state designated or permitted by the laws of such state to receive such deposit, for the benefit and security of all its policyholders. When the superintendent of insurance of this state is satisfied by the certificate of such superintendent of insurance or other officer of such other state that such deposit has been made as provided herein, he shall accept such certificate in lieu of the deposit required of such company by paragraph two of section 9510, General Code, and such company shall not then be required to maintain the deposit in this state provided for in said paragraph two of section 9510. (110 v. 3, § 1.)

Section 9510-8. (Other states.) When any such company organized under the laws of this state is required by the retaliatory or other laws or regulations of any other state or district, to make a deposit with the superintendent of insurance of this state, for the benefit of its policyholders, as a condition to the right of such company to transact business in such other state or district, the superintendent of insurance is authorized and directed to receive such deposit in the amount that may be so required and in any securities in which the company may be permitted to invest its assets under the laws of this state. And said superintendent shall deliver to any company so making such deposit a certificate of such deposit, setting forth the securities so deposited and the trust upon which he holds the same. (110 v. 3, § 2.)

Section 9510-9. (Value of securities.) Any deposit under any provision of this act shall be made and maintained in securities worth the amount of the required deposit; and such securities may be exchanged from time to time for other securities of the prescribed character worth the amount of the required deposit. So long as the company continues solvent it shall receive the interest on the deposited securities. (110 v. 3, § 3.)

Section 9510-10. (Securities may be withdrawn.) Any deposit so made may be withdrawn by the company when the superintendent, upon examination of the books of the company and affidavits of its principal officers and other evi-

dence, is satisfied and shall certify that all the obligations and liabilities which the deposit was made to secure have been paid or extinguished. (110 v. 3, § 4.)

Section 9511. (Limitation.) No company shall be organized to issue policies of insurance for more than one of the above four mentioned purposes, and no company organized for either one of such purposes shall issue policies of insurance of any other. But companies organized under subdivision two of the preceding section, which do the business of guaranteeing the fidelity of persons, holding places of public or private trust, who are required to or in their trust capacity do receive, hold, control, disburse public or private property, and guaranteeing the performance of contracts other than insurance policies, and executing and guaranteeing bonds and undertakings required or permitted in actions, proceedings or by law allowed, may indemnify bank depositors against loss by reason of bank suspension and failure. (R. S. Sec. 3641; April 25, 1904, 97 v. 407; April 1, 1902, 95 v. 81; April 21, 1898, 93 v. 170; April 13, 1894, 91 v. 138; April 11, 1893, 90 v. 157; March 16, 1891, 88 v. 102; April 30, 1885, 82 v. 185; R. S. 1880; April 14, 1874, 71 v. 65, § 8; S. & S. 299.)

Foreign companies, see Opins. Atty. Gen. 1915, p. 978; Rep. Atty. Gen. 1912, p. 721.

Effect of § 9607-2 on this section, see note to § 9607-2.

DOMESTIC.

Section 9512. (Articles to be approved by attorney-general.) The articles of incorporation of a company formed for the purpose of insurance, other than life insurance, must be forwarded to the secretary of state, who shall submit them to the attorney-general for examination. If found by him to be in accordance with the provisions of this chapter, and not inconsistent with the constitution and laws of this state, and of the United States, he shall certify and deliver them back to the secretary. He may reject any name or title of a company applied for when he deems it similar to one already appropriated, or likely to mislead the public. (R. S. Sec. 3632; April 27, 1872, 69 v. 140, § 1; S. & S. 205.)

Where the capital stock of a joint stock insurance company is less than the minimum authorized by § 9524, the articles can not be approved by the attorney-general.

Rep. Atty. Gen. 1904-1905, pp. 66, 37, 68.

A fire insurance company may amend its articles under § 8719.

Rep. Atty. Gen. 1911-1912, p. 98.

Section 9513. (Articles to be recorded by secretary of state.) Upon the approval of the articles by the attorney-general and secretary of state, the latter shall cause them to be recorded, and copied in the manner provided for life insurance companies, and a copy thereof to be deposited with the superintendent of insurance. He shall withhold from the company the certificate of authority if its name is so similar to that of any other company as to mislead the public. (R. S. Sec. 3633; April 27, 1872, 69 v. 140, § 2; May 14, 1878, 75 v. 557, §§ 1, 2.)

A mutual company must embody the word "mutual" in its name.

§ 9574.

4 Opins. Attys. Gen. 444 (1892).

Section 9514. (Subscription to stock.) The persons named in the articles of incorporation, or a majority of them, shall be commissioners to open books for the subscription of stock in the company, at such times and places as they deem proper, and shall keep them open until the full amount specified in the articles is subscribed. (R. S. Sec. 3635; April 27, 1872, 69 v. 140, § 4; S. & S. 206.)

Subscription contract, provisions required in § 6373-12.

Organization expense limited, § 6373-12.

Deposit of funds by promoters, § 6373-12.

Subscription to stock, in general, see § 8630.

Enforcement of subscriptions, see § 8674.

A subscription to stock must be in writing. *Fanning v. Insurance Co.*, 37 O. S. 339 (1881).

The incorporators are not required to file a certificate of subscription with the secretary of state. *Rep. Atty. Gen.* 1914, p. 229.

The superintendent of insurance as commissioner under the Blue Sky Law may issue a certificate to incorporators who have made a contract with brokers or others to sell the stock on commission. *Rep. Atty. Gen.* 1914, p. 147.

A verbal promise to take shares, while stock is being subscribed, which is necessary to authorize an organization, does not constitute the promisor a stockholder or a member of such corporation, and a promise to pay for such shares is without sufficient consideration. A recovery on such promise can not be had, in the absence of facts showing that the promisor is estopped from setting up such want of consideration. *Fanning v. Insurance Co.*, 37 O. S. 339 (1881).

Section 9515. (Election of directors.) Within one month after the subscription books are filled, and the articles of incorporation filed with the secretary of state, a majority of subscribers to the stock shall hold a meeting for the election of not less than five nor more than twenty-one directors, who must be stockholders or members. At any time thereafter the number may be increased or diminished between the same limits, at the will of stockholders represent-

ing a majority of the stock or a majority of the members. Each member of a mutual company shall be entitled to one vote, and each stockholder in other companies, to one vote for each share of stock he holds. If they so provide in their by-laws, mutual companies may elect directors for the term of three years, the term of office of one-third of the number elected to expire each year, and those who receive the highest number of votes at the first election to serve for the longest term. (R. S. Sec. 3636; April 28, 1873, 70 v. 180, § 5; April 10, 1863, 60 v. 75, § 1; S. & S. 217; S. & S. 206.)

Section 9516. (Directors to elect officers.) From their own number the directors shall choose by ballot, a president, and also fill vacancies that arise in the board, or in the presidency thereof. (R. S. Sec. 3642; March 5, 1883, 80 v. 41; R. S. 1880; April 23, 1872, 69 v. 140, § 10; S. & S. 208.)

Section 9517. (By-laws and regulations.) When convened at the office of the company the board of directors, or a majority of them, may appoint a secretary and other officers or agents necessary for transacting its business, and pay such salaries and take such securities as they judge reasonable. They may ordain and establish by-laws and regulations, not inconsistent with the constitution and laws of this state and of the United States, as to them appear necessary for regulating and conducting the business of the company. New by-laws or regulations shall not take effect until approved by the superintendent of insurance and a copy is filed in his office. The directors shall keep full and correct records of their transactions, which, at all times, shall be open to the inspection of the members or stockholders. (R. S. Sec. 3642; March 5, 1883, 80 v. 41; R. S. 1880; April 23, 1872, 69 v. 140, § 10; S. & S. 208.)

Section 9518. (Investment of capital.) No company organized under this chapter or incorporated under any law of this state, for the purpose provided in section ninety-five hundred and twelve, shall invest its capital or any part thereof, otherwise than in:

1. United States bonds;
2. Bonds of the State of Ohio or of any other state in the United States;
3. Bonds of a county, township, municipal corporation, school district or other political subdivision in this or any other state in the United States, issued in conformity with law and upon which default in the payment of interest has not been made;

4. Bonds and mortgages on unincumbered real estate within this or any other state of the United States, worth double the amount loaned thereon. If the amount loaned exceeds one-half the value of the land mortgaged, exclusive of structures thereon, such structures must be insured in an authorized fire insurance company other than the company making the loan, in an amount not less than the difference between half the value of such land exclusive of structures, and the amount loaned, and the policy assigned to the mortgagee;

5. The stock of a national bank located in this state, organized under the provisions of an act of congress entitled "an act to provide a national currency, secured by the pledge of United States stocks, and to provide for the circulation and redemption thereof," approved February 25, 1863, and acts amendatory thereof and supplementary thereto;

6. First mortgage bonds of railroads within this state, upon which default in the payment of the interest coupons has not been made within three years prior to the purchase thereof. (106 v. 115; R. S. Sec. 3637; March 19, 1902, 95 v. 59; April 22, 1873, 70 v. 147, § 6; S. & S. 206.)

Investment in car trust certificates or obligations is not authorized by this section.

2 Opins. Attys. Gen. 1128, 1131. (1882).

See notes to § 9343.

Section 9518-1. (Farm loan bonds legal investment.)

That in addition to the investments now provided by law, farm loan bonds issued under the provisions of the act of the congress of the United States, entitled "The Federal Farm Loan Act" approved July 17th, 1916, shall be a lawful investment for the capital and accumulations of insurance companies, organized under the laws of this state, both life and other than life, subject to the same regulations as are now provided for other investments by such companies. (107 v. 604.)

Section 9518-2. (Deposit of farm loan bonds.) Whenever a deposit of securities is required by law from a domestic insurance company, either life or other than life, or from a foreign insurance company, either life or other than life, as a condition upon which such company may be authorized to transact business in this state, farm loan bonds issued under the provisions of the act of the congress of the United States, entitled "The Federal Farm Loan Act," approved July 17, 1916, may be deposited for that purpose, in addition to other securities now specified by law. (107 v. 604, § 2.)

Section 9519. (Investment of accumulated funds or surplus.) Funds accumulated in the course of business, or surplus money over and above the capital stock of a company, may be loaned on or invested in the above named securities, or:

1. Bonds and mortgages on unincumbered real estate within this or any other state of the United States worth fifty per cent. more than the sum loaned thereon, exclusive of buildings, unless such buildings are insured in some company authorized to do business in this state, and the policy is transferred to a company making the investment;

2. Bonds of any state, county, township, municipal corporation, school district or other political subdivision in the United States, issued in conformity with law and upon which default in the payment of interest has not been made;

3. Stocks, bonds, or other evidences of indebtedness of any solvent, dividend-paying institution incorporated under the laws of this or any other state, or of the United States, except its own stock;

4. Negotiable promissory notes maturing in not more than six months from the date thereof, secured by collateral security through the transfer of any of the classes of securities described in this or the preceding section, with absolute power of sale within twenty days after default in payment at maturity. (106 v. 115; R. S. Sec. 3638; April 22, 1873, 70 v. 147, § 6.)

See note to § 9357.

Investment in bonds of a railroad company which has not completed its road is not authorized.

Rep. Atty. Gen. 1905-1906, p. 81.

Investment in car trust certificates or obligations is not authorized by this section.

2 Opins. Attys. Gen. 1128, 1131 (1882).

Section 9520. (Limitations on certain investments.) No company shall own more than one-fourth of the capital stock of a national bank, nor invest in or loan on the stocks and bonds, both included, of any railroad company, to an extent exceeding one-fifth of its own capital, nor in the aggregate shall the investment in and loan on all railroad property exceed one-fourth of its capital and surplus. Not more than one-half of its capital shall be loaned on mortgages of real estate, as above provided for the investment thereof, and not more than one-tenth of the capital actually existing of a company shall be invested in a single mortgage. The current market value of stocks, bonds, or other evidences of indebtedness above mentioned, in which the accumulations or surplus

money over and above the capital stock of an insurance company may be loaned or invested, must be at all times during the continuance of the loans at least twenty per cent more than the sum loaned thereon. (107 v. 156; R. S. Sec. 3639; April 22, 1873, 70 v. 147, § 6.)

Section 9521. (Liability of directors.) If an investment or loan be made in a manner not authorized by this chapter, the directors who make or authorize it shall be personally liable to the stockholders for loss occasioned thereby. (R. S. Sec. 3639; April 22, 1873, 70 v. 147, § 6.)

Section 9522. (Examination.) When a company notifies the superintendent of insurance that the proceedings required by section ninety-five hundred and twenty have been had, he shall make an examination of its condition, and if he finds that the capital required of the company has been paid in and is possessed by it in money, or in stocks, bonds, and mortgages as required by this chapter, he shall so certify. Or he may cause such examination to be made by a disinterested person specially appointed by him for the purpose, who shall certify his finding to the superintendent under oath. The signers of the articles of incorporation, or the officers of the company, shall also certify, under oath, that the capital exhibited is bona fide, its property. Such certificates shall be filed in the office of the superintendent. Thereupon the company shall file with the superintendent a certified copy of its articles of incorporation and approval of the attorney-general, and a copy of its by-laws and constitution. If the superintendent finds that the company is duly organized and has complied with the law entitling it to transact business and issue policies, unless he also finds the name assumed by it so nearly similar to that of another company doing business in this state as to lead to confusion or uncertainty on the part of the public, he shall furnish the company with his license reciting that it has complied with the law and is entitled to transact the business authorized, describing it, which license shall be the authority to commence business and issue policies. (R. S. Sec. 3640; April 22, 1904, 97 v. 156; April 27, 1872, 69 v. 140, § 7; S. & S. 207.)

Section 9523. (Renewal of license.) So long as such company complies with the law, the superintendent, annually upon its application, shall renew such license. Certified copies of which may be used in evidence for or against the company in all actions. (R. S. Sec. 3640; April 22, 1904, 97 v. 156; April 27, 1872, 69 v. 140, § 7; S. & S. 207.)

Section 9524. (Capital of joint stock companies.) Except as hereinafter provided, no joint stock insurance company shall be organized under this chapter, or permitted to do business in this state with a less capital than one hundred thousand dollars, which must be paid up before the company can transact business. But on the payment of twenty-five per cent of its capital stock, a live stock company may do business. (R. S. Sec. 3634; April 22, 1904, 97 v. 155; April 16, 1900, 94 v. 301; March 16, 1891, 88 v. 102; April 18, 1890, 87 v. 224; April 14, 1888, 85 v. 273; R. S. 1880; May 14, 1878, 75 v. 561, § 3; S. & S. 205.)

An association organized under § 9593 is not authorized to transact business on the "joint stock" plan.

State v. Association, 50 O. S. 145, 150 (1893).

The capital stock must be full paid before the company is authorized to commence business.

4 Opins. Attys. Gen. 221 (1889).

Section 9525. Repealed. (104 v. 202; R. S. Sec. 3634; April 22, 1904, 97 v. 155; April 16, 1900, 94 v. 301; March 16, 1891, 88 v. 102; April 18, 1890, 87 v. 224; April 14, 1888, 85 v. 273; R. S. 1880; May 14, 1878, 75 v. 561, § 3; S. & S. 205.)

Section 9526. Repealed. (104 v. 202; R. S. Sec. 3634; April 22, 1904, 97 v. 155; April 16, 1900, 94 v. 301; March 16, 1891, 88 v. 102; April 18, 1890, 87 v. 224; April 14, 1888, 85 v. 273; R. S. 1880; May 14, 1878, 75 v. 561, § 3; S. & S. 205.)

Section 9527. (Annual cash premiums collectable in advance.) Mutual fire insurance companies organized under this chapter may thereafter charge and collect in advance upon their policies a full annual premium in cash, but such policies shall not compel subscribers, insured or assured, to renew a policy nor pay a second or further annual or term premium. (R. S. Sec. 3634; April 22, 1904, 97 v. 155; April 16, 1900, 94 v. 301; March 16, 1891, 88 v. 102; April 18, 1890, 87 v. 224; April 14, 1888, 85 v. 273; R. S. 1880; May 14, 1878, 75 v. 561, § 3; S. & S. 205.)

Section 9528. Repealed. (104 v. 202; R. S. Sec. 3634; April 22, 1904, 97 v. 155; April 16, 1900, 94 v. 301; March 16, 1891, 88 v. 102; April 18, 1890, 87 v. 224; April 14, 1888, 85 v. 273; R. S. 1880; May 14, 1878, 75 v. 561, § 3; S. & S. 205.)

Section 9529. (Mutual associations excepted.) Nothing in sections ninety-five hundred and twenty-four, ninety-five hundred and twenty-five, ninety-five hundred and twenty-

six, ninety-five hundred and twenty-seven and ninety-five hundred and twenty-eight shall apply to associations for the mutual protection of their members, against loss by fire, organized as provided by law. (R. S. Sec. 3634; April 22, 1904, 97 v. 155; April 16, 1900, 94 v. 301; March 16, 1891, 88 v. 102; April 18, 1890, 87 v. 224; April 14, 1888, 85 v. 273; R. S. 1880; May 14, 1878, 75 v. 561, § 3; S. & S. 205.)

The plan of mutual insurance companies provided for by §§ 9524 to 9527 differs radically from the system of mutual insurance contemplated by § 9593 et seq.

Richards v. Canning Co., 7 N. P. 68; 9 L. D. 70 (C. P. 1900).

State v. Association, 50 O. S. 145, 150 (1893).

Section 9530. (Transfers of stock.) Transfers of stock may be made on the books of the company by any shareholder, or his legal representative, subject to such reasonable restrictions as the directors make in the by-laws, and also, to any provisions of the laws of this state relating thereto. (R. S. Sec. 3646; April 27, 1872, 69 v. 140, § 12; S. & S. 208.)

Section 9531. (How stock increased.) When in the opinion of its directors, a company organized under this chapter requires an increased amount of capital, if authorized by the holders of two-thirds of the stock, they shall file with the secretary of state a certificate setting forth the amount of desired increase. Thereafter, the company shall be entitled to have the increased amount of capital fixed by such certificate. The examination of securities composing the capital stock thus increased shall be made as provided by law for capital stock originally paid in. (R. S. Sec. 3647; April 27, 1872, 69 v. 140, § 13; S. & S. 209.)

A fire insurance company can not reduce its capital stock under G. C. § 8700.

Rep. Atty. Gen. 1911-1912, pp. 110, 80, 126.

Nor can any changes be made in its capital stock except as authorized by this section. The number of its shares can not be increased by amendment, under § 8719.

Rep. Atty. Gen. 1911-1912, p. 126.

A surety or bonding company is not authorized to reduce its capital stock. Rep. Atty. Gen. 1912, p. 28.

Section 9532. (Dividends payable from surplus profits only.) No fire insurance company organized under a law of this state shall make a dividend except from the surplus profits arising from its business, and in estimating such profits there shall be reserved therefrom:

First. An unearned premium fund computed in accord-

ance with the requirements of section ninety-five hundred and ninety.

Second. All sums due the company on bonds and mortgages, bonds, stocks, and book accounts, of which no part of the principal nor the interest thereon has been paid during the preceding year, and on which an action has not been commenced, or which, after judgment obtained thereon, has remained more than two years unsatisfied, and on which interest has not been paid.

Third. All interest due or accrued, and remaining unpaid, for which the company does not hold securities as hereinbefore provided. (R. S. Sec. 3648; April 26, 1904, 97 v. 443; April 10, 1900, 94 v. 121; April 14, 1888, 85 v. 273, 274; R. S. 1880; 70 v. 147, § 14; S. & S. 209.)

A surplus dividend fund, no part of which is payable to policyholders as a cash payment, but which is applied as a credit to reduce the premium upon reinsurance or renewals, and which is otherwise unclaimable, is not a debt which may be deducted from credits in the tax return of the company.

French v. Insurance Co., 12 L. D. 183 (1901).

Nor is the sum set aside as unearned premiums, as provided in this section, a debt.

Insurance Co. v. Cappelar, 38 O. S. 560, 568 (1883).

See Hynicka v. Insurance Co., 4 N. P. n. s. 297; 17 L. D. 80 (1906).

Section 9533. (Dividends contrary to law.) A dividend made contrary to the provisions of the preceding section shall subject the company which makes it to a forfeiture of its charter, and each stockholder who receives it to a liability to the creditors of the company to the extent of the dividend received, besides the other penalties and punishments prescribed by law. (R. S. Sec. 3648; April 26, 1904, 97 v. 443; April 10, 1900, 94 v. 121; April 14, 1888, 85 v. 273, 274; R. S. 1880; 70 v. 147, § 14; S. & S. 209.)

Section 9534. (Scrip dividends; interpretation of words.) The two preceding sections shall not prevent the declaration of scrip dividends by participating or mutual companies, yet no such dividend shall be declared to an amount in excess of, or be paid except from profits, after reserving all sums above provided, including the whole amount of premiums on unexpired risks. The word "year," wherever used in this and the two preceding sections shall mean the calendar year, and the "profits" of a mutual insurance company are that portion of its cash funds not required for payment of losses and expenses nor set apart for any purpose required by law. (R. S. Sec. 3648; April 26, 1904, 97 v. 443; April 10, 1900, 94 v. 121; April 14, 1888, 85 v. 273, 274; R. S. 1880; 70 v. 147, § 14; S. & S. 209.)

Section 9535. (Accumulation of permanent fund.) In its by-laws any such company may provide for the accumulation of a permanent fund, by reserving a portion of the net profits, to be invested and be a reserve for the security of the insured. Such permanent fund in such sum as may be determined by the board of directors shall be separate and apart from such surplus as may be accumulated in the discretion of the company or its board of directors. The permanent fund so accumulated shall be used for the payment of losses and expenses, whenever the cash funds of the company in excess of an amount equal to its liabilities are exhausted. (107 v. 649; R. S. Sec. 3648; April 26, 1904, 97 v. 443; April 10, 1900, 94 v. 121; April 14, 1888, 85 v. 273, 274; R. S. 1880; 70 v. 147, § 14; S. & S. 209.)

Section 9536. (What real estate company may hold.) No company organized under this chapter shall purchase, hold, or convey real estate, except for the purposes and in the manner herein set forth:

1. Such as is requisite for its convenient accommodation in the transaction of its business.

2. Such as is mortgaged to it in good faith, by way of security for loans previously contracted, or for money due.

3. Such as is conveyed to it in satisfaction of debts previously contracted in its legitimate business, or for money due.

4. Such as is purchased at sales upon judgment, decree, or mortgages obtained or made for such debts. (R. S. Sec. 3649; April 27, 1872, 69 v. 140, § 15; S. & S. 209.)

The restrictions of this section do not apply to foreign companies.

4 Opins. Attys. Gen. 617 (1894).

Section 9537. (Disposal of real estate.) Real estate so acquired, but which is not necessary for the accommodation of the company in the transaction of its business, shall be disposed of within two years after title thereto is acquired, unless the company procures a certificate from the superintendent of insurance that its interests will suffer materially by a forced sale thereof. The sale then may be postponed for such period as the superintendent directs in such certificate. (R. S. Sec. 3649; April 27, 1872, 69 v. 140, § 15; S. & S. 209.)

Section 9538. Repealed. (104 v. 202; R. S. Sec. 3650; passed April 14, 1888; took effect July 1, 1888; 85 v. 273, 275; April 15, 1882, 79 v. 133; R. S. 1880; April 27, 1872, 69 v. 140, § 16.)

Section 9539. (For what purposes debt may be created.)

No such company shall borrow money or create a debt unless for the purpose of necessary office buildings, to continue beyond the period when such an assessment may be collected and applied to the payment thereof, and no member shall be assessed for liabilities incurred prior to his membership. (R. S. Sec. 3650; passed April 14, 1888; took effect July 1, 1888; 85 v. 273, 275; April 15, 1882, 79 v. 133; R. S. 1880; April 27, 1872, 69 v. 140, § 16.)

Section 9540. (Enforcement of assessments.)

If a member neglects for thirty days after the publication of such notice, and after demand for payment, to pay the sum assessed upon him as his proportion of such loss, the directors may sue for and recover the whole amount of contingent liability, with costs of suit. Execution shall only issue for assessments and costs as they accrue, and every such execution must be accompanied by a list of losses for which the assessment is made. If the whole amount of liability is insufficient to pay the loss occasioned by any fire or fires, the sufferers insured toward making good their respective losses, shall receive a proportional share of the whole amount of such liability, according to the sums by them respectively insured. No member ever shall be required to pay for a loss occasioned by fire, or inland navigation, more than the whole amount of such liability. (R. S. Sec. 3651; passed April 14, 1888; took effect July 1, 1888; 85 v. 273, 275; R. S. 1880; April 27, 1872, 69 v. 140, § 16.)

Extent of liability and defenses, see note to § 9607-16.

Section 9541. (How assessments and notice proved.)

In actions for the recovery of assessments duly levied by the directors of a mutual fire insurance company of this state, or for money due on the liability of the members of such a company, the official statement of its president or secretary, under seal, and sworn to, shall be received in court as evidence of the facts essential for making it, and that the assessment, for which an action is commenced was duly levied, and notice thereof given. (R. S. Sec. 3652; passed April 14, 1888; took effect July 1, 1888; 85 v. 273, 276; R. S. 1880; 39 v. 35, § 1; S. & C. 352.)

It has been held that parol evidence of the making of an assessment, which is denied in the answer, is inadmissible, unless the proper foundation is laid for introducing secondary evidence, and that the records of the company, or a duly examined and proven copy thereof, showing the action of the proper authorities in making the assessment should be produced, or its absence accounted for.

Insurance Co. v. Bowersox, 6 C. C. 1; 3 C. D. 321 (1891).

Section 9542. (Accident companies authorized.) Companies may be organized for the special purpose of insuring persons against accidental personal injury or loss of life, while traveling by railroad, steamboat, or other mode of conveyance, and making all and every insurance connected with accidental loss of life, or personal injury caused by accident, of any description; against expenses and loss of time occasioned by sickness or other disability, on such terms and conditions for such periods of time, and confined to such countries, localities, and persons, as may be provided for in the by-laws of the company. (R. S. Sec. 3670; May 1, 1885, 82 v. 210; R. S. 1880; February 7, 1865, 62 v. 12, § 1; S. & S. 230.)

Mutual protective accident associations, see § 9445 et seq.

Companies organized under this section must have the amount of capital required by § 9524.

2 Opins. Attys. Gen. 1018 (1881).

Nature of accident insurance. A policy issued by an accident insurance company, as applicable to injuries resulting in death, is but a contract of life insurance limited to specified risks.

Insurance Co. v. Sayler, 2 N. P. n. s. 305, 309; 15 L. D. 137 (Super. Ct. Cin. 1904); affirming, 1 N. P. n. s. 217.

Life and accident insurance is a contract whereby one party, for a stipulated consideration, agrees to indemnify another against injuries by accident, or death from any cause not excepted in the contract.

State v. Railway, 68 O. S. 9, 30 (1903).

POLICIES.

Premiums. A condition in a policy that "the actual payment of the respective premiums on the date when due or within seven days thereafter, whether the insured is entitled to indemnity at the time or not is a condition precedent to the renewal of this policy for another term" is not a condition precedent to recovery of indemnity for injuries received after payment of one premium and before the next premium fell due.

Smith v. Assurance Co., 12 N. P. n. s. 97; 22 L. D. 763 (C. P. 1911).

Where a railway employe assigned his wages for several months, for premiums falling due in monthly installments, the policy providing that it should be "binding only for such insurance period as is covered by an installment of premium actually paid" and that the policy should be void if the insured "shall fail to leave in the hands of the paymaster any installment of premium as it shall fall due" and after the premium had been paid for one month the employe left the employ of the railway, drawing all of his wages, and was injured the day following the expiration of the period actually paid for in money, it was held that the policy was forfeited.

Herbert v. Insurance Co., 3 C. C. n. s. 7; 13 C. D. 225 (1901); aff'd, no rev., 68 O. S. 687.

Accident insurance premiums are not necessities under G. C. § 12946-1 and an assignment of future wages for premiums is invalid. Rep. Atty. Gen. 1913, p. 848.

Risk. Provisions of policy.

Death or injury "through external, violent and accidental means."

Held to be within provision:—

Death by accidental drowning.

Association v. Hubbell, 56 O. S. 516 (1897).

Injury caused by a fall due to a temporary and unexpected physical disorder.

Casualty Co. v. Bird, 18 C. C. 488; 10 C. D. 211 (1899).

Where an insured was seen on a steamer in midocean in the evening, but was not found the next day, although diligent search was made, and has never been seen since, the presumption is that the man died by drowning, either from accident or the violence of another, the presumption being against suicide.

Insurance Co. v. Rosch, 3 C. C. n. s. 156; 13 C. D. 491 (1902); aff'd, no rep., 69 O. S. 561.

Dilation of the heart following a cold water bath is not an accident, where there is no evidence that anything occurred which the insured had not planned, except the dilation and its consequences. Casualty Co. v. Johnson, 91 O. S. 155 (1914); reversing, 1 Ohio App. 22, 15 C. C. n. s. 513; 24 C. D. 76.

Freezing to death through exposure is an accident. Casualty Co. v. Wheeler, 13 Ohio App. 140; 30 O. C. A. 257 (1919); motion to certify record overruled, 17 O. L. R. 304.

"Voluntary exposure to unnecessary danger." This term does not embrace every exposure of the assured that might have been avoided by the exercise of due care on his part. It relates to dangers of a substantial character of which he at the time had knowledge, and to which he purposely exposed himself, intending at the time to assume all the risks.

Association v. Hubbell, 56 O. S. 516 (1897).

Attempting to cross slough in public road is not, when.

See Association v. Hubbell, 56 O. S. 516 (1897).

The above term does not include voluntary exposure to a necessary danger or involuntary exposure to an unnecessary danger.

Insurance Co. v. Gulick, 1 C. C. n. s. 477; 15 C. D. 395 (1903).

A provision in a policy limiting the liability of the insurer for injury resulting "from exposure to obvious risk of injury or obvious danger" is valid. Where the issue is whether the injury occurred while the insured was exposing himself to obvious danger, and there is no substantial conflict in the testimony, but the testimony discloses a variety of circumstances from which different minds might reasonably arrive at different conclusions, the issue should be submitted to the jury. Hickman v. Insurance Co., 92 O. S. 87 (1915).

Entering or leaving moving conveyances. A policy contained this exception:—"This insurance does not cover entering or trying to enter or leave a moving conveyance using steam as a motive power." A freight train, moving slowly, overtook the insured while walking along a railroad track, the ground being slippery and icy, and it occurred to him to step on the caboose and ride. As he was about to step on, but before he touched the car he slipped and fell and was injured by the rear wheels. Held, that his acts, after determining to get on the car, were within the exception.

Huston v. Insurance Co., 66 O. S. 246 (1902).

Death or injury due to disease. Death caused by blood poisoning due to a cut or scratch on finger, accidentally sustained, renders insurance company liable. The death is due to accident, not disease.

Rheinheimer v. Insurance Co., 77 O. S. 360 (1907); distinguishing, Insurance Co. v. Dorney, 68 O. S. 151.

Where the death of the insured was due to rupture of the stomach, the coat of the stomach having been weakened at the point of rupture by a gastric ulcer which had partially healed, and the insured had over-exerted himself by lifting a heavy stone, the insurance company was held not liable.

Insurance Co. v. Dorney, 68 O. S. 151 (1903).

A stipulation for non-liability for death or injury due to disease is available as a defense notwithstanding §§ 9391 and 9392.

Insurance Co. v. Dorney, 68 O. S. 151 (1903).

Hazardous occupation. A provision reducing the amount of the policy where the insured is injured while engaged in an occupation classed by the company as more hazardous than the occupation stated in the application, does not apply to an isolated act performed in an emergency. Fidelity Co. v. Patty, 2 Ohio App. 312; 19 C. C. n. s. 392 (1913); motion to certify record overruled, 16 O. L. R. 466.

Double indemnity. A provision for double indemnity in case of injury while riding in a passenger elevator does not apply where the insured is injured while on a hand hoist or lift for use of employes, so constructed that only the person operating it can ride thereon. Ray v. Insurance Co., 19 N. P. n. s. 140 (1916).

Misrepresentation by insured. In an action to recover an amount payable on the death of the insured, a clause avoiding the policy for misrepresentation of weekly earnings is no defense. Such clause applies only to the weekly indemnity of the insured in case of injury, and not to loss in case of death.

Insurance Co. v. Leibus, 8 C. C. n. s. 201; 18 C. D. 700 (1906).

Hernia. Where a policy excepted death caused by hernia from the risk, the company was held liable where an injury from an accident resulted in hernia and caused the death of the insured.

Miner v. Insurance Co., 2 N. P. 103; 3 L. D. 289 (C. P. 1895).

Notice. A provision in a policy that written notice to the company within 30 days from the date of injury is of the essence of the contract will ordinarily be upheld. But where, during such 30-day period, the insured was justified in believing that the injury was trivial, but thereafter it developed that the injury was serious and the insured gave written notice immediately upon learning of its serious character, the question whether the notice was given in time is one of fact for the jury. Employers Co. v. Roehm, 99 O. S. 343 (1919); American Casualty Co. v. Roehm, 99 O. S. 350 (1919); affirming, 10 Ohio App. 418; 29 O. C. A. 486; not following Insurance Co. v. Myers, 62 O. S. 529.

Under a policy requiring notice within ten days of the accident, and, in case of death, a notice within ten days thereof, it was held that the giving notice of accident by the insured was not a condition precedent to a recovery by the beneficiary after death. Gibbs v. Commercial Travellers, 14 Ohio App. 439; 32 O. C. A. 197 (1920); motion to certify record overruled, 19 O. L. R. 15.

Where the beneficiaries had no knowledge of the existence of the policy, until four months after the death of the insured, and notice was given immediately upon its discovery, the condition of the policy for immediate notice was held to be complied with.

Accident Co. v. Card, 13 C. C. 154; 7 C. D. 504 (1897); aff'd, no rep., 60 O. S. 583.

Failure to give notice within ten days after the accident, as required by the policy, is excused where the insured was in a state of delirium during all of such time.

Indemnity Co. v. Fletcher, 5 C. C. 633; 3 C. D. 308 (1891).

Immediate notice is in time, if given with due diligence in view of the circumstances.

Indemnity Co. v. Fletcher, 5 C. C. 633; 3 C. D. 308 (1891).

That the local agent of the insurance company, who had written the insurance, heard of the accidental death of the insured, is not notice to the company.

Accident Co. v. Card, 13 C. C. 154; 7 C. D. 504 (1897); aff'd, no rep., 60 O. S. 583.

Failure of the insured to inform any one of the existence of the policy, so that immediate notice could be given, is not such negligence as will relieve the company from liability.

Accident Co. v. Card, 13 C. C. 154; 7 C. D. 504 (1897); aff'd, no rep., 60 O. S. 583.

The proofs of death need not give every detail of the accident. Affidavits showing in general the manner of death is sufficient.

Accident Co. v. Card, 13 C. C. 154; 7 C. D. 504 (1897); aff'd, no rep., 60 O. S. 583.

Total disability. Under a clause providing for certain benefits if the insured is "totally unable to labor" or "to earn a livelihood in any employment", evidence that an insured had lost his right hand and was unemployed during the period for which benefits are claimed is sufficient for submission to the jury of the question whether he is able to earn a livelihood in any employment. Hughes v. Railway, 15 N. P. n. s. 604 (1914).

Forfeiture of policy in case of autopsy without notice. A condition of forfeiture in the event of an autopsy without notice to the company is unreasonable and invalid. Gibbs v. Commercial Travelers, 14 Ohio App. 439; 32 O. C. A. 197 (1920); motion to certify record overruled, 19 O. L. R. 15.

ACTIONS.

Provision in policy limiting time within which suit may be brought. Failure to bring suit, within the time limited in the policy, is not excused by ignorance on the part of the beneficiary that the death was caused by accident.

Coldham v. Insurance Co., 2 N. P. 358; 2 L. D. 314 (1894); affirmed. 8 C. C. 620; 4 C. D. 548; 57 O. S. 657.

Pleading. The plaintiff must set forth in the petition the facts which resulted in the death of the insured.

Koch v. Insurance Co., 7 O. L. R. 643 (1910).

But a judgment will not be reversed for failure to allege that death was caused solely by the accident, where the answer affirmatively alleged another cause.

Insurance Co. v. Leibus, 8 C. C. n. s. 201; 18 C. D. 700 (1906).

Evidence and burden of proof. The burden is on the insurance company to prove, by affirmative evidence, breach of conditions avoiding the policy.

Casualty Co. v. Bird, 18 C. C. 488; 10 C. D. 211 (1899).

Insurance Co. v. Gulick, 1 C. C. n. s. 477; 15 C. D. 395 (1903).

Contra, Armstrong v. Insurance Co., 4 Ohio App. 46; 22 C. C. n. s. 129 (1914); holding that where the only issue is whether the insured died as the result of "external, violent and accidental means" "the

burden is on the plaintiff to show affirmatively that it was from one of the causes specified.

An autopsy paper signed by physicians making a post mortem examination may be used to refresh the memory of witnesses, but is not admissible in evidence where the signers had not been placed under oath and the cross examination privilege accorded. *Armstrong v. Insurance Co.*, 4 Ohio App. 46; 22 C. C. n. s. 129 (1914).

Evidence of sudden faintness, immediately preceding a fall and injury, do not conclusively prove that the fall was caused by vertigo.

Casualty Co. v. Bird, 18 C. C. 488; 10 C. D. 211 (1899).

Section 9543. (Deposit of accident companies.) When a company so organized desires to do business in another state, by the laws of which, to qualify it therefor, it is required to make a deposit of securities assigned in trust for the benefit of its policy-holders with an officer of this state, the state treasurer shall receive such deposit, and issue therefor to the company his receipt, giving a pertinent description of the securities and a certificate of the market value thereof. He also shall issue a like certificate to the superintendent of insurance, who shall place it on file in his office. Such company may exchange these securities for other like securities, in whole or part, as far as its business requires, and wholly withdraw them if it discontinues business in such other state. Such changes or withdrawals of securities at once shall be duly certified by the treasurer to the superintendent of insurance. (R. S. Sec. 3670; May 1, 1885, 82 v. 210; R. S. 1880; February 7, 1865, 62 v. 12, § 1; S. & S. 230.)

Where a company discontinues business in other states it may withdraw the deposit. Rep. Atty. Gen. 1912, p. 441.

Section 9544. (Consolidation.) When a joint stock fire and marine insurance company of this state, determines by a vote of the holders of two-thirds of its stock to consolidate and make joint stock with another like company or companies engaged in or incorporated for like business, and each agrees by such vote to the consolidation, the companies by a vote of the holders of a majority of the stock so consolidated, may determine under which corporate organization or articles of association of the consolidating companies, and under what name, their future business shall be conducted. (R. S. Sec. 3671; January 31, 1873, 70 v. 19, § 1.)

This section does not authorize consolidation of an Ohio company with a foreign company. Opins. Atty. Gen. 1915, p. 69.

Section 9545. (Rights and duties of consolidated companies.) Upon filing with the superintendent of insurance a certificate of such consolidation, the companies thenceforth

shall be consolidated under the corporate organization or articles of association and corporate name chosen. Thereupon also all franchises, rights, equities, property, and estate, of whatever name or nature, belonging to or vested in either of the consolidating companies, immediately, upon and by the act of such consolidation shall become the property and estate of and be vested in the consolidated company, and the corporate existence of the consolidating companies thenceforth cease, and be merged in the consolidation. Such consolidated company shall have the exclusive right and power to demand, sue for, collect, convey, and dispose of the rights, equities, property, and estate aforesaid, or any part thereof, under its own name, and all debts, liabilities, and obligations of the consolidating companies shall be assumed and paid by it. (R. S. Sec. 3671; January 31, 1873, 70 v. 19, § 1.)

Section 9546. (Distribution of stock of consolidated company.) Upon such a consolidation the just and true value of each outstanding share of the capital stock of each of the consolidating companies shall be ascertained by their respective directors through a suitable valuation of all the assets and liabilities thereof at the time of the consolidation, and new shares of the consolidated company be apportioned to each stockholder, equal to the sum ascertained to be the just and true value of his shares in each or either of the consolidating companies. The shares thus apportioned shall be substituted for his original shares, and all certificates of shares in the consolidating companies must be surrendered when the new certificates of the shares so apportioned are issued. But a stockholder in either of the companies so consolidating who refuses to agree thereto, shall be entitled to receive for the stock by him owned its just market value at the time thereof, to be paid to him previous to such consolidation. (R. S. Sec. 3672; January 31, 1873, 70 v. 19, § 2.)

Section 9547. (Election of directors.) Immediately upon the consolidation of such companies, their directors shall elect from their members the directors for the consolidated company, who shall serve until their successors are elected and qualified. (R. S. Sec. 3673; January 31, 1873, 70 v. 19, § 3.)

Section 9548. (Capital stock limited.) The capital stock of such consolidated company may be equal to, but by virtue of such consolidation, shall not exceed the aggregate au-

thorized capital of the consolidating companies. (R. S. Sec. 3674; January 31, 1873, 70 v. 19, § 4.)

Section 9549. (Filing of certificate of consolidation.) Within thirty days after such consolidation a certificate, setting forth the fact thereof, and the name and organization adopted thereby, shall be filed in the office of the secretary of state. (R. S. Sec. 3675; January 31, 1873, 70 v. 19, § 5.)

Section 9550. Repealed. (104 v. 202.)

Section 9551. Repealed. (104 v. 202.)

Section 9552. Repealed. (104 v. 202.)

Section 9553. Repealed. (104 v. 202.)

Section 9554. (Bonds may be approved by probate judge.) An insurance company which, by the terms of its charter, is required to have its official bonds approved by a judge of the common pleas court at its option may have them approved by the probate judge of the county in which the office of the company is located. (R. S. Sec. 3685; February 2, 1857, 54 v. 17, § 1; S. & C. 363.)

Section 9555. (May reinsure risks.) A fire, marine, fidelity, accident, plate-glass, boiler or other insurance company organized or existing under or by virtue of the laws of this state, by and with the approval of the superintendent of insurance, may reinsure all risks undertaken by it in any company authorized by law to transact a similar class of insurance business in this state. Nothing herein shall prevent such a company from reinsuring any risks or fractional parts thereof not situated in this state in any company or companies duly licensed by such superintendent or like authority, of the state in which such risks may be located, to transact the business of insurance in that state. (April 26, 1904, 97 v. 446, § 1; R. S. § 3691-13; April 14, 1884, 81 v. 179.)

Reinsurance in unlicensed foreign companies prohibited: § 5439.

A contract of reinsurance of liability risks made in another state by a foreign company which has not made the deposit required by § 9510 is a violation of the Ohio laws for which its license to do other business in Ohio may be revoked. State v. Tomlinson, 101 O. S. 459 (1920).

Property located outside of Ohio can not be reinsured in unlicensed foreign companies.

5 Opins. Attys. Gen. 934 (1903).

Reinsurance defined.

Insurance Co. v. Insurance Co., 38 O. S. 11, 15 (1882).

Where an insurance company, after having taken a risk and reinsured in another company to indemnify itself against loss on its policy, discharges its liability by payment of a less sum than that for which the original insurance was effected, the sum so paid by it is the amount of damage sustained, and the measure of indemnity to be recovered from the reinsuring company; provided such sum is within the amount of the reinsurance policy, and does not exceed the amount of actual loss, and such policy contains no condition for prorating loss or limiting liability.

Insurance Co. v. Insurance Co., 38 O. S. 11 (1882).

A reinsurance policy, containing a condition that "the insurance may also be, at any time, terminated at the option of the company, by giving notice to that effect, and refunding a ratable proportion of the premium" is not separable. It applies to the entire reinsurance and does not permit the cancelling of one policy only.

Insurance Co. v. Insurance Co., 13 L. D. 226 (1902).

Section 9556. (Business extended to damage by water, lightning, etc.) All companies organized or admitted for the purpose of insuring against loss or damage by fire, may insure against loss or damage by water, caused by the breakage or leakage of sprinklers, pumps, tanks, water pipes and fixtures connected therewith, and by lightning, explosions from gas, dynamite, gunpowder, and other like explosions, and tornadoes: and may also insure against loss by the theft of automobiles and accessories, and against damage thereto from this cause. (June 9, 1911, 102 v. 359, § 1; R. S. Sec. 3641a; April 9, 1891, 88 v. 304; March 27, 1884, 81 v. 93; April 18, 1883, 80 v. 170.)

Effect of § 9607-2 on this section, see note to § 9607-2.

RECIPROCAL OR INTER-INSURANCE CONTRACTS.

Section 9556-1. (Exchange of reciprocal or inter-insurance contracts.) Individuals, partnerships and corporations of this state, herein designated subscribers, are authorized to exchange reciprocal or inter-insurance contracts with each other, and with individuals, partnerships and corporations of other states, districts, provinces and countries, providing indemnity among themselves from any loss which may be insured against by any fire insurance company or association under other provisions of the law. Such contracts and the exchange thereof and such subscribers, their attorneys and representatives shall be regulated by this act and by no other insurance law unless such law is referred to in this act, and no law hereafter enacted shall apply to them, unless they be expressly designated therein. (107 v. 747, § 1.)

This section relates to fire insurance only. State v. Gearheart, 103 O. S. 263 (1921).

Section 9556-2. (How contracts executed.) Such contracts may be executed by an attorney or other representative, herein designated "attorney," duly authorized by and acting for such subscribers under powers of attorney, and such attorney may be a corporation. The principal office of such attorney shall be maintained at such place as may be designated by the subscribers in the powers of attorney. (107 v. 747, § 2.)

Section 9556-3. (Schedule of fees. Declaration under oath filed with superintendent.) Every such attorney shall pay to the superintendent of insurance for the use of the state the following fees:

For filing declaration, twenty-five dollars;

For filing each financial statement required by this act, twenty dollars;

For filing each certificate of license, and certified copy thereof, two dollars;

For each copy of a paper filed in his office, twenty cents per folio;

For affixing the seal of office and certifying any paper, one dollar.

The attorney shall file with the superintendent of insurance a declaration, verified by his oath, or when the attorney is a corporation, by the oath of its duly authorized officers, setting forth:

(a) The name of the attorney and the name or designation under which such contracts are issued, which name or designation shall not be so similar to any name or designation adopted by an attorney, or by any insurance organization in the United States, prior to the adoption of such name of designation by the attorney, as to confuse or deceive, unless such other attorney or organization shall consent thereto in writing.

(b) The location of the principal office.

(c) The kind or kinds of insurance to be effected.

(d) A copy of each form of policy, contract or agreement under or by which such insurance is to be effected.

(e) A copy of the form of power of attorney, under which such insurance is to be effected.

(f) That applications have been made for indemnity upon at least seventy-five separate risks, aggregating not less than one and one-half million dollars, represented by

executed contracts or bona fide applications to become concurrently effective.

(g) That there is in the possession of such attorney assets of not less than fifty thousand dollars, available for the payment of losses.

(h) A financial statement in form prescribed for the annual statement.

(i) The instrument authorizing service of process as provided for in this act. (107 v. 747, § 3.)

Section 9556-4. (Action on contract; procedure.) Action on any contract of indemnity made by such attorney and actions to recover taxes, and all other actions, may be brought against the attorney in the county where the cause of action arises, or where the claimant resides. In any such action against such attorney summons and process shall be served on the superintendent of insurance and must be made in duplicate, and when so made shall have the same force and effect as if it had been served on such attorney and his subscribers personally; and judgment shall be rendered accordingly. By receipt of his license, every such attorney shall be held to have appointed the superintendent of insurance the agent and attorney for himself and for his subscribers to accept service of such summons and process, and such authority shall continue so long as any liability remains outstanding in this state against the attorney or his subscribers on any such contracts of indemnity issued by any such attorney or his subscribers. Upon filing his declaration the attorney shall deliver to the superintendent of insurance an instrument executed by him for and on behalf of all his subscribers, stipulating the authority aforesaid relating to actions and process. When any such summons or other process is served on the superintendent of insurance, he shall forthwith forward by registered mail prepaid one of the duplicate copies, directed to the attorney at his principal office as designated in his declaration or amendment thereof. The party commencing such action shall, at the time of such service pay to the superintendent of insurance for the use of the state a fee of two dollars, which shall be refunded to such party as part of the taxable costs, if he prevail in the action. (107 v. 748, § 4.)

Section 9556-5. (Amount of reserve fund to be maintained.) Every such attorney shall create and maintain a reserve fund equal to fifty per cent. of the amount of advance premiums or deposits received and receivable on un-

expired contracts of indemnity running one year or less from date of issue and a pro rata amount of premiums or deposits received or receivable on unexpired contracts of indemnity running more than one year from date of issue. If, upon examination or otherwise, it appears to the superintendent of insurance that the assets, invested as permitted by the laws regulating the investments of insurance companies, and moneys accumulated by any such attorney, after deducting therefrom a reserve fund computed as herein provided, are less than the liabilities incurred and unpaid, such reserve fund shall be restored within thirty days from the service of a requisition for that purpose by the superintendent of insurance upon the attorney. If any such attorney or other person shall make any advancements to restore any such impairment, the claim for the same against his subscribers shall be deferred to claims for losses. If such reserve fund is not restored as so required, the superintendent of insurance may revoke the license of the attorney. (107 v. 749, § 5.)

Section 9556-6. (Annual financial statement filed with superintendent.) Every such attorney shall file with the superintendent of insurance on or before March 1 of each year, a financial statement for the year ending December 31 of the year preceding, on form furnished by the superintendent of insurance, which shall conform as nearly as may be to the form of statement, from time to time, adopted by the National Convention of Insurance Commissioners, and containing such exhibits of the condition and transactions of the attorney as the superintendent of insurance, in such form and otherwise, may reasonably prescribe. Such statement shall be verified by the oath of the attorney, or of the principal officer thereof if the attorney is a corporation. Such attorney shall not be required to furnish lists of names and addresses of subscribers, except in case of an unpaid final judgment. (107 v. 749, § 6.)

Section 9556-7. (Contents of statement; computation of tax; payment.) In such annual statement the attorney shall set forth the gross amount of premiums or deposits received by him during the preceding calendar year on contracts of indemnity covering risks within the state. He shall also set forth therein, in separate items premiums paid for cancellations, premiums or deposits returned and credited ratably to subscribers, and consideration received for reinsurance during such year. The superintendent of insurance

shall compute a tax of $2\frac{1}{2}$ per cent., and in case of fire insurance an additional one-half of one per cent. fire marshal tax on the balance of such gross amount of premiums or deposits, after deducting premiums and deposits so returned and credited and considerations received for reinsurances, and prior to November first mail to such attorney, at his principal office, designated in his declaration or amendment thereof, a statement of the amount of the tax so charged, which amount the attorney shall pay to the treasurer of state for the use of the state on or before December first of such year, or within thirty days after receipt of such notice. No further taxes shall be imposed upon such attorney or his subscribers or their representatives for the privilege of transacting business in the state. If an attorney shall cease doing business in the state, he shall thereupon make report to the superintendent of insurance of the premiums or deposits subject to taxation, not theretofore reported, and forthwith pay to the superintendent of insurance a tax thereon computed according to law. If such attorney fail to make any report for taxation, or fail to pay any tax as herein required, his subscribers shall be liable to the state for such unpaid taxes, and a penalty of not more than twenty-five per cent. per annum after demand therefor. Service of process in any action to recover such tax or penalty shall be made according to the requirements of the law relating to actions against the attorney and his subscribers. (107 v. 749, § 7.)

Section 9556-8. (Examination by superintendent of books and affairs; expense.) The superintendent of insurance may make examinations of the books and affairs of any such attorney, including the records of names of subscribers, and the attorney and his deputies shall facilitate such examinations and furnish all information which the superintendent may reasonably demand. The expense of such examinations shall be paid by the treasurer of state, on the warrant of the auditor of state, upon the certificate of the superintendent of insurance. But if an examination is made upon the demand of the attorney, the expense thereof shall be paid by such attorney, upon certificate and itemized bills furnished by the superintendent. Provided that when the superintendent shall apply in writing to the governor, and the governor shall direct, in writing any such examination, and shall fix the compensation of examiners, other than the regular salaried assistants, then such attorney shall pay to the superintendent the actual expense of such examination upon the certificate and itemized bills furnished by

the superintendent. Provided that when the principal office of the attorney is located in another state the superintendent may accept, in lieu of the foregoing, a certified copy of the report of examination by the insurance department of that or another state. (107 v. 750, § 8.)

Section 9556-9. (Power and right to exchange contracts.)

Any corporation now or hereafter organized shall, in addition to the rights, powers and franchises specified in its articles of incorporation, have full power and authority as a subscriber to exchange insurance contracts of the kind and character herein mentioned. The right to exchange such contracts is hereby declared to be incidental to the purposes for which such corporations are organized, and as fully granted as the right and powers expressly conferred upon the corporation. (107 v. 751, § 9.)

Section 9556-10. (License to attorneys; revocation.)

Upon compliance with the requirements of this act the superintendent of insurance shall issue a license to the attorney, authorizing him to make such contracts of indemnity, which license shall specify the kind or kinds of insurance and shall contain the name of the attorney, the location of his principal office, and the name or designation under which such contracts of indemnity are issued. So long as such attorney complies with the requirements of this act, the superintendent annually, upon application of the attorney, shall renew the license. The superintendent may revoke or suspend the license of any attorney: When he shall not be in possession of fifty thousand dollars of assets, invested as permitted by the laws regulating the investments of insurance companies and moneys accumulated by such attorney, or any attorney in case of breach of any of the conditions imposed by this act, upon reasonable notice in writing to the attorney, so that he may appear and show cause why such license should not be revoked or suspended. (107 v. 751, § 10.)

Section 9556-11. (List of names and addresses of persons authorized to solicit must be filed with superintendent; revocation of authority.)

Every attorney shall certify in duplicate to the superintendent of insurance the names and addresses of the persons authorized by him to solicit powers of attorney or applications for such contracts of indemnity in this state. The authority of such persons shall continue until the first day of the next April, unless cancelled by the attorney and certificate of such cancellation is filed with

the superintendent, or unless the license of the attorney or authority of such person shall be revoked or suspended by the superintendent; and expiring certificates of such persons' authority may be renewed in like manner to continue until the first day of the next April. The superintendent shall record the names and addresses of such persons in such manner that names of such duly authorized persons may conveniently be inspected and shall thereupon certify and deliver to the attorney a list of the names of all persons so recorded. If the superintendent shall find that any such person has wilfully violated or refused or failed to comply with any provision of this act or has been convicted of the violation of any law of the United States, or of this or any state, he may refuse or revoke the authority of such person and cancel his name on the superintendent's records, and shall thereupon notify such person and the attorney of such revocation. Thereafter such person shall not act as representative of any attorney until new certificate of his authority by the attorney thereafter appointing him, shall be duly filed with and approved by the superintendent. No person shall act for any such attorney in placing insurance or making such contracts of indemnity, unless the attorney shall have such license, nor unless the unexpired, unrevoked and unsuspended certificate of such persons' authority is filed with the superintendent. Any person shall be individually liable on any contract of indemnity made, issued or accepted through him as representing any attorney not licensed by the superintendent to make such contracts of indemnity. (107 v. 751, § 11.)

Section 9556-12. (Contracts may be solicited without license for purposes of organization.) For the purposes of organization and upon issuance of permit by the superintendent of insurance, powers of attorney and applications for such contracts may be solicited without license, but no such attorney or other person shall make any such contracts of indemnity until he shall comply with the provisions of this act. No such attorney shall make any contracts of re-insurance or risks located in this state with any company, association or person not authorized by law to transact business in this state, and no such attorney shall re-insure all risks undertaken by him without the consent of the superintendent of insurance. (107 v. 752, § 12.)

Section 9556-13. (Penalty for violations of law.) Any attorney, or other person who shall violate any provision of

this act, or fail to comply with any duty imposed upon him by any provision of this act, for which violation or failure no penalty is elsewhere provided by law, shall be fined not exceeding five hundred dollars. (107 v. 752, § 13.)

Section 9557. Repealed. (104 v. 202; R. S. Sec. 3654; April 26, 1904, 97 v. 444; May 9, 1894, 91 v. 211; April 11, 1893, 90 v. 159; April 17, 1891, 88 v. 308; April 14, 1888, 85 v. 273, 276; R. S. 1880, 70 v. 147, § 18; S. & S. 211.)

Section 9558. Repealed. (104 v. 202; R. S. Sec. 3654; April 26, 1904, 97 v. 444; May 9, 1894, 91 v. 211; April 11, 1893, 90 v. 159; April 17, 1891, 88 v. 308; April 14, 1888, 85 v. 273, 276; R. S. 1880, 70 v. 147, § 18; S. & S. 211.)

FOREIGN.

Section 9559. (Foreign companies must obtain license.)

Except surety companies which are admitted to guarantee the fidelity of persons holding places of public or private trust who may be required to or do in their trust capacity receive, hold, control and disburse public or private moneys or property, and guarantee the performance of contracts other than insurance policies and execute and guarantee bonds required or permitted in all actions or proceedings, or by law allowed, a company, association, or partnership, incorporated, organized or associated under the laws of another state of the United States or of a foreign government, for any of the purposes mentioned in this chapter, which does a banking or other kind of business in connection with insurance, shall not, directly or indirectly, transact any business of insurance in this state, nor shall any such company, association or partnership do any such business in this state until it procures from the superintendent a certificate of authority so to do; nor shall any person or corporation act as agent in this state for such a company, association or partnership, directly or indirectly, in procuring applications for insurance, taking risks or in any way transacting the business of insurance, until it procures from the superintendent a license so to do, stating that the company, association or partnership has complied with all the requirements of this chapter applicable to it, and depositing a certified copy of such license in the office of the recorder of the county in which the office or place of business of such agent or agents is established. (R. S. Sec. 3656; April 22, 1904, 97 v. 166; May 9, 1894, 91 v.

129; April 17, 1891, 88 v. 340; May 15, 1878, 75 v. 572, § 20; April 24, 1873, 70 v. 147, § 1.)

Agent's license, see § 644 et seq.

Foreign life insurance companies, see § 9365.

Foreign mutual life associations, see § 9435.

Foreign insurance companies and associations, whether incorporated or not, are required to procure a license.

State v. Ackerman, 51 O. S. 163, 169 (1894).

It is said that a foreign insurance company, the majority of whose stock is held by a holding company, is not entitled to do business in Ohio.

Rep. Atty. Gen. 1910-1911, p. 540.

It is said that this section does not authorize the admission of a company organized under territorial laws.

3 Opins. Attys. Gen. 1055 (1054).

Sections 646 et seq., 9365 et seq., and 9559 et seq. are statutes in pari materia and should be construed together.

5 Opins. Atty. Gen. 658 (1902).

Citing, State v. Guilbert, 58 O. S. 637.

Discretionary power of superintendent of insurance. The issue of a license is a ministerial and not a judicial act.

State v. Insurance Co., 49 O. S. 440 (1892).

Where a foreign insurance company, tendering compliance with Ohio laws, applies for a license, the superintendent of insurance has no mere arbitrary discretion to refuse it admission.

State v. Moore, 42 O. S. 103 (1884).

But the superintendent may inquire into the financial soundness of the company, and if, upon such inquiry made in good faith, he is not satisfied of its financial soundness, he has discretionary power to refuse it admission, and his exercise of such discretion will not be controlled by mandamus.

State v. Moore, 42 O. S. 103 (1884).

The superintendent has discretionary power to refuse a license to an agent who has previously solicited insurance, without a license, and offered rebates of premium.

Vorys v. State, 67 O. S. 15 (1902).

Effect of certificate of authority. The certificate, so long as it remains in force, confers the right and privilege of carrying on business in the state. Such privilege is a franchise, which emanates from the state.

State v. Ackerman, 51 O. S. 163 (1894).

Failure to obtain certificate. Ouster by quo warranto. A foreign company exercising, in this state, franchises and privileges without authority of law may be ousted therefrom by quo warranto.

State v. Insurance Co., 47 O. S. 167 (1890).

State v. Insurance Co., 49 O. S. 440 (1892).

A foreign company or association which transacts insurance business in the state without a certificate of authority is unlawfully exercising a franchise under G. C. § 12303 and may be ousted from the transaction of such business.

State v. Ackerman, 51 O. S. 163 (1894).

Where the acts of a foreign unincorporated insurance association are such as appertain to corporations, or are done after the manner of corporations, it is acting as a corporation without being legally incorporated within G. C. § 12303.

State v. Ackerman, 51 O. S. 163 (1894).

A license or certificate of authority from the superintendent of in-

insurance is not a bar to a proceeding in quo warranto where the insurance company is charged with exercising franchises without authority of law.

State v. Insurance Co., 49 O. S. 440 (1892).

Effect on contracts.

See Insurance Co. v. Parks, 1 C. S. C. R. 574 (1871).

Insurance Co. v. McMillen, 24 O. S. 67 (1873).

Insurance Co. v. Ellis, 32 O. S. 388 (1877).

Suit by unlicensed company for premiums. A foreign insurance company, doing business in this state without complying with this section, can not maintain an action in the state courts to recover premiums.

Casualty Co. v. Banking Co., 12 C. C. n. s. 200; 21 C. D. 428 (1908).

Suit in another state.

See Insurance Co. v. Parks, 1 C. S. C. R. 574 (1871).

Doing business in the state; what constitutes. A foreign fire insurance company which maintains an office in Ohio, in which contracts of insurance are made respecting property in other states, is engaged in the insurance business in Ohio, although it insures no property in Ohio and makes no contracts with citizens of this state.

State v. Insurance Co., 1 C. C. n. s. 4; 14 C. D. 387 (1903).

The acceptance, by a foreign insurance company in its home state, of an application for insurance sent by mail by a resident of Ohio is said not to be the transaction of business in Ohio.

Rep. Atty. Gen. 1904-1905, p. 121.

Rep. Atty. Gen. 1906-1907, p. 146.

Banking business. The loaning of its money by an insurance company upon property in this state is not banking business, although the company restricts its loans to its policyholders.

Bank v. Insurance Co., 41 O. S. 1 (1884).

Hall v. Kummero, 7 N. P. 394; 5 L. D. 176 (Dist. Ct. 1883).

In State v. Insurance Co., 14 Ohio 6 (1846) it was held that a clause in the special charter of an insurance company, prohibiting the exercise of banking powers, prohibited only the issue of currency, and did not prohibit the receiving of money on deposit.

For taxation of insurance company, transacting banking business under a special charter, see

Ohio, etc., Co. v. Debolt, 16 How. (57 U. S.) 416; 3 O. F. D. 170.

The special charter of an insurance company, authorizing it to loan its funds, but prohibiting it from engaging in the business of exchange or of money broker, was held not to prohibit the purchase of a bill of exchange.

Bank v. Insurance Co., 12 O. S. 601 (1861).

Section 9560. (Capital necessary of foreign company.)

No company, association or partnership organized under the laws of another state, shall take risks or transact business of insurance in this state, directly or indirectly, unless possessed of the amount of actual capital required by similar companies formed under the provisions of this chapter, nor unless the capital stock of the company is paid up and invested as required by the laws of the state where it was organized, and if a live stock insurance company, until it has deposited in such state or in this state, for the benefit of its policy-holders, securities approved by the insurance

department of such state in an amount equal to one-fourth of its entire capital stock. If the company is a mutual fire insurance company it must have actual cash assets of the amount and description required of such companies of this state, after organization, invested as required by the law of the state where the company was organized. Such companies also must have either premium notes or contingent liability of the amount required of similar fire insurance companies of this state, which contingent liability may be either in writing or be expressed in the policies issued by the company. (R. S. Sec. 3656; April 22, 1904, 97 v. 166; May 9, 1894, 91 v. 139; April 17, 1891, 88 v. 340; May 15, 1878, 75 v. 572, § 20; April 24, 1873, 70 v. 147, § 1.)

A mutual fire insurance company organized under the laws of another state, but similar to domestic companies, which has at least \$50,000 in premium notes, on which at least \$10,000 in cash has been paid before commencing business, was held entitled, so far as capital is concerned, to be admitted to do business in this state.

State v. Moore, 42 O. S. 103 (1884).

Where a foreign insurance company, by a special act of the general assembly of its home state, was authorized to increase its capital stock to a certain amount, but did not increase its actual capital stock or file a certificate of increase, its capital stock, in the opinion of the attorney general, must be deemed to be the increased amount authorized by the special act.

Rep. Atty. Gen. 1910-1911, p. 542.

Compare, 3 Opins. Attys. Gen. 1054 (1887).

Section 9561. (Companies shall file waiver.) Any such company desiring to transact business by an agent in this state, shall file with the superintendent of insurance a written instrument, duly signed and sealed, authorizing any of its agents in Ohio to acknowledge service of process therein for and in behalf of the company, consenting that service of process, mesne or final, upon any agent, shall be as valid as if served upon the company according to the laws of this or any other state or country, and waiving all claim or right of error by reason of such acknowledgment of service; also, consenting that suit may be brought against it in the county where the property insured was situated, or was insured, or the application for insurance taken, and that service of process made therein by the sheriff of such county, by sending a copy thereof by mail, addressed to the company at the place of its principal office located in the state where it was organized, or, if it is a foreign company, to it at the place of its principal office in the United States, at least thirty days prior to taking judgment in such suit, shall be as valid as if personally made upon the company according to the laws of this state, or any other state or government;

also, if suit be brought against it after it ceases to do business in this state, and there is no agent of the company in the county in which it is brought upon whom service of process can be made that service upon it may be had by the sheriff sending a copy thereof, so mailed, and within such time. But the sheriff's return must show the time and manner of such service. (R. S. Sec. 3657; April 22, 1904, 97 v. 159; May 15, 1878, 75 v. 572, § 20.)

Service by mail under this section is valid.

Mohr v. Insurance Co., 10 W. L. B. 82; 12 Am. L. R. 168 (1883).

Where a foreign insurance company has appointed an agent in compliance with this section, service may be made upon such agent in an action brought in federal court.

Runkle v. Insurance Co., 2 Fed. 9; 5 W. L. B. 217; 4 O. F. D. 620 (C. C. Ohio 1880).

Barrow Steamship Co. v. Kane, 170 U. S. 100, 107 (1898).

The filing of a motion to dismiss an action "for the reason that this court has no jurisdiction of the case, it appearing from the petition on file that said defendant is a foreign insurance company, and that no part of the alleged cause of action arose in this state" was held to be a voluntary appearance and a waiver of any defect in the summons.

Handy v. Insurance Co., 37 O. S. 366 (1881).

A cause of action against a foreign insurance company on a policy for a loss occurring in another state is cognizable by the courts of this state.

Handy v. Insurance Co., 37 O. S. 366 (1881).

Fire Insurance Co. v. Milling Co., 243 U. S. 93 (1917).

Where a foreign insurance company wrongfully collected assessments in excess of rates specified in its policy, the insured was held entitled to an accounting and judgment, where his proof did not necessitate an "exhaustive visitation and examination of the books of the company". Insurance Co. v. Douds, 103 O. S. 398 (1921).

Section 9562. (Statement required of foreign company.)

Every such company, association, or partnership, shall also file with the superintendent of insurance a certified copy of its charter, or deed of settlement, together with a statement, under the oath of its president, vice-president, or other chief officer, and the secretary of the company, stating the name of the company, the place where it is located, and the amount of its capital, with a detailed statement of the facts and items required by sections ninety-five hundred and seventy-four and ninety-five hundred and ninety of companies organized under the laws of this state. They also shall file with the superintendent a copy of their last annual report, if one was made, under any law of the state by which it was incorporated. (R. S. Sec. 3658; May 15, 1878, 75 v. 572, § 20; R. S. 1880.)

Section 9563. (Revocation of license of foreign company.)

If such company, association or partnership doing business

in this state, makes an application for a change of venue, or to remove a suit begun in a court therein, in which it has been sued by a citizen of this state, to the United States district or circuit court, or to any federal court, or enters into any compact or combination with other insurance companies, or requires its agents to enter into any compact or combination with other insurance agents or companies, for the purpose of controlling the rates charged for fire insurance on property in this state, or of controlling the rates per cent amount of commission or compensation to be allowed agents for procuring contracts for such insurance on such property, the superintendent of insurance forthwith shall revoke and recall the license to it to do business in this state, and no renewal thereof shall be granted for three years after its revocation. Such company, association or partnership also shall be prohibited from transacting any business in this state until again duly licensed and authorized. (R. S. Sec. 3659; April 14, 1900, 94 v. 165; May 1, 1891, 88 v. 485; May 4, 1885, 82 v. 231; R. S. 1880; May 15, 1878, 75 v. 572, § 20.)

Revocation of licenses.

General power as to, § 617.

Of unsound foreign company, § 635.

For non-payment of excise tax, § 5434.

For placing risks with unauthorized company or agent, § 5441.

Injunction, not mandamus, is the proper remedy to prevent wrongful revocation of a license.

State v. Hahn, 50 O. S. 714, 718 (1893); overruling, State v. Reinmund, 45 O. S. 214.

This section is probably unconstitutional in part. A state may not revoke the license of a foreign corporation because such corporation has removed a suit to federal court. Terral v. Burke Construction Co., — U. S. —; 66 L. Ed. 223 (1922); overruling Doyle v. Insurance Co., 94 U. S. 535.

The license of a foreign company may be revoked by the superintendent for violations of the Ohio laws, other than those expressly enumerated by statute as causes for revocation. State v. Tomlinson, 101 O. S. 459 (1920).

It is said that the superintendent of insurance has power to revoke a license which was issued, by mistake, to a foreign company not legally entitled to do business in Ohio.

3 Opins. Attys. Gen. 169 (1883).

Combination of insurance agents as a violation of the anti-trust act.

See note to § 6391.

Section 9564. (Foreign companies may have common agent.) Nothing in the preceding section shall prevent one or more of such companies from employing a common agent or agents to supervise defective structures, or advise respecting them, and to suggest improvements for lessening

their fire hazards, or advise as to the relative values of risks. (R. S. Sec. 3659; April 14, 1900, 94 v. 165; May 1, 1891, 88 v. 485; May 4, 1885, 82 v. 231; R. S. 1880; May 15, 1878, 75 v. 572, § 20.)

Several companies are not authorized by this section to have a common agent to "advise" concerning rates charged for insurance. The advice should be limited to the desirability of the risk from a physical or moral standpoint.

4 Opins. Attys. Gen. 841 (1898).

A "common agent" can not publish "advisory rates."

4 Opins. Attys. Gen. 841, 844 (1898).

Section 9565. (What companies shall make deposit.) A company incorporated by or organized under the laws of a foreign government, shall deposit with the superintendent of insurance, for the benefit and security of its policy-holders residing in the United States, a sum not less than one hundred thousand dollars in stocks or bonds of the United States, the state of Ohio or a municipality or county thereof, which shall not be received by the superintendent at a rate above their par value. Stocks and securities so deposited may be exchanged from time to time for other like securities. So long as the company so depositing continues solvent and complies with the laws of this state, the superintendent shall permit it to collect the interest or dividends on such deposits. (R. S. Sec. 3660; April 22, 1904, 97 v. 154; February 27, 1894, 91 v. 40; April 24, 1873, 70 v. 147, § 21; S. & S. 212.)

Taxation of securities deposited, see § 5437.

Collection of claims from securities, see § 641.

Withdrawal of deposit, when business discontinued, see § 656.

Farm loan bonds may be deposited. § 9518-2.

The deposit required of a foreign company doing an employers' liability business, only, in Ohio, is \$50,000 under § 9510. This section does not apply to such a company.

5 Opins. Attys. Gen. 30 (1900).

This section was not repealed by the amendment of § 656 (101 v. 147) providing for the withdrawal of deposits by companies retiring from business in Ohio.

Rep. Atty. Gen. 1911-1912, p. 817.

Section 9566. (What deemed capital of foreign company.) For the purposes of this chapter the capital of a foreign company doing fire insurance business in this state shall be deemed to be the aggregate value of its deposits with the insurance or other departments thereof, and of the other states of the United States, for the benefit of policy-holders in the United States, and its assets and investments in the United States certified according to the provisions of

this chapter. Such assets and investments must be held within the United States and invested in and held by trustees, who are citizens of the United States, appointed by the board of directors of the company and approved by the insurance commissioner of the state where invested, for the benefit of the policy-holders, and creditors in the United States. The trustees so chosen may take, hold and convey real and personal property for the purpose of the trust, subject to the same restrictions as companies of this state. All property and investments, cash and bank deposits and premiums in course of collection and agents' balances actually owned and held in the United States may be admitted as assets of such company of a foreign country doing insurance business other than life, if investments and assets of similar character are allowed and admitted as such, by the laws of the state in which the company has its head office, to companies organized in such state doing similar business therein. (R. S. Sec. 3660; April 22, 1904, 97 v. 154; February 27, 1894, 91 v. 40; April 24, 1873, 70 v. 147, § 21; S. & S. 212.)

Section 9567. (Annual statements.) Every company other than a life company, organized by act of congress, or under the laws of another state or government, annually, at the time, and in the form and manner required of similar companies organized under the laws of this state, shall file a statement of its condition and affairs in the office of the superintendent of insurance. A company organized under or incorporated by a foreign government shall also furnish a supplementary statement for the year ending on the preceding thirty-first day of December, verified by the oath of the manager of such company residing in the United States, which shall comprise a report of its business and affairs in the United States, as required from companies organized in this state, together with any other information that may be required by such superintendent. If such annual statement be satisfactory evidence to him of the solvency and ability of the company to meet all its engagements at maturity, and that the deposit is maintained as hereinbefore provided, the superintendent shall issue renewal certificates of authority to the agents of the company, certified copies of which shall be filed in the recorder's office of each county wherein an agency is located, during the month of January in each year, or within sixty days thereafter. Such certificates shall be the authority of such agents to issue new policies in this state for the ensuing year. (R. S. Sec. 3661; April 27, 1872. 69 v. 140, § 22; S. & S. 213.)

DOMESTIC AND FOREIGN.

Section 9568. (Deposit required of guaranty company.)

No company organized under the laws of this state to transact the business of guaranteeing the fidelity of persons holding places of public or private trust, who are required to or in their trust capacity do receive, hold, control, disburse public or private property, and guaranteeing the performance of contracts other than insurance policies, or of executing or guaranteeing bonds or undertakings required or permitted in actions, proceedings or by law allowed, shall commence business until it has deposited with the superintendent of insurance two hundred thousand dollars in securities permitted by sections ninety-five hundred and eighteen and ninety-five hundred and nineteen, which shall be held for the benefit and security of all the policy-holders of the company, and not be received by him at a rate above their par value. (R. S. Sec. 3641; April 25, 1904, 97 v. 407; April 1, 1902, 95 v. 81; April 21, 1898, 93 v. 170; April 13, 1894, 91 v. 138; April 11, 1893, 90 v. 157; March 16, 1891, 88 v. 102; April 30, 1885, 82 v. 185; R. S. 1880; April 14, 1874, 71 v. 65, § 8; S. & S. 229.)

The execution of the bond of a public officer by a surety company, as surety, in consideration of a premium paid, is not a mere contract of suretyship, but is a contract of insurance.

Bryant v. Bonding Co., 77 O. S. 90, 99 (1907).

National banks may insure their deposits with surety companies as sureties. 13 O. L. R. 37 (Opinion of U. S. Attorney General).

Federal farm loan bonds may be deposited. § 9518-2.

Section 9569. (Foreign guaranty company.) Any such company organized under the laws of another state, territory, district or country shall not be licensed to transact such business in this state unless at least two hundred thousand dollars of its assets are invested in securities permitted by sections ninety-five hundred and eighteen and ninety-five hundred and nineteen, or in securities permitted by the laws of the state, district or territory in which it is organized, and they are deposited with the superintendent of insurance in this state, or the superintendent of insurance or other officer of another state, district or territory designated by the laws thereof to receive them, and if such securities are deposited with him, and the superintendent of insurance of this state is furnished with a certificate of such officer under his hand and official seal that he, as such officer, holds in trust on deposit for the benefit of all the policy-holders of such company the securities above mentioned, giving the

items thereof, and stating that he is satisfied such securities are worth at least two hundred thousand dollars. Securities so deposited with such superintendent may be exchanged from time to time for other like securities, and so long as the corporation depositing them continues solvent and complies with the laws of this state, he shall permit it to collect the interest or dividends on such deposit. (R. S. Sec. 3641; April 25, 1904, 97 v. 407; April 1, 1902, 95 v. 81; April 21, 1898, 93 v. 170; April 13, 1894, 91 v. 138; April 11, 1893, 90 v. 157; March 16, 1891, 88 v. 102; April 30, 1885, 82 v. 185; R. S. 1880; April 14, 1874, 71 v. 65, § 8; S. & S. 229.)

Under an earlier form of this section, foreign companies, which had deposited the requisite securities in another state, were required to deposit \$30,000 of additional securities in Ohio. On an amendment, dispensing with the additional deposit in this state, deposits made prior to the amendment could not, in the opinion of the attorney general, be withdrawn so long as any obligations secured thereby remained.

5 Opins. Attys. Gen. 673 (1902).

Federal farm loan bonds may be deposited. § 9518-2.

Section 9570. (Estoppel of company executing bond.)

A company which executes a bond as surety under the foregoing provisions in any proceeding to enforce the liability which it has assumed to incur shall be estopped to deny its corporate power to execute such instrument or assume such liability. (R. S. Sec. 3641; April 25, 1904, 97 v. 406; April 1, 1902, 95 v. 81; April 21, 1898, 93 v. 170; April 13, 1894, 91 v. 138; April 11, 1893, 90 v. 157; March 16, 1891, 88 v. 102; April 30, 1885, 82 v. 185; R. S. 1880; April 14, 1874, 71 v. 65, § 8; S. & S. 229.)

The execution of the bond of a public officer by a surety company, as surety, in consideration of a premium paid, is not a mere contract of suretyship, but is a contract of insurance. The language of such a contract should be construed, if ambiguity exists, most strongly against the surety.

Bryant v. Bonding Co., 77 O. S. 90, 99 (1907).

See Rankin v. U. S. F. & G. Co., 86 O. S. 267 (1912).

Indemnity Co. v. Granite Co., 100 O. S. 373 (1919).

A paid surety will not be released from his obligation of suretyship by changes in the contract guaranteed, unless such changes operate injuriously to affect materially his rights and liabilities. Indemnity Co. v. Commissioners, 107 O. S. 51 (1923).

The bond of a public officer, with a surety company as surety, should not be cancelled at the expiration of his term of office. Opins. Atty. Gen. 1915, p. 1376.

"Fraud or dishonesty" of a bank cashier "amounting to embezzlement or larceny" which a surety company promises "to make good and reimburse" comprehends such dishonest and fraudulent conduct resulting in loss as is equivalent to embezzlement or larceny, and is not confined to

the technical offenses mentioned, or such misappropriation as would subject the cashier to a conviction for embezzlement or larceny.

Cutts v. Spear, 8 N. P. n. s. 445; 19 L. D. 608 (C. P. 1909).

See Rankin v. U. S. F. & G. Co., 86 O. S. 267 (1912).

Term of bond. Liability for premiums. A bond procured by a state officer guaranteeing the faithful performance of duty by such officer, which is in terms indefinite as to duration, will, in the absence of any stipulation to the contrary, be regarded as remaining in force during his term of office and he will be liable for the premiums. But where the application, a part of the contract, imports that the bond is to run indefinitely, one year at a time, providing the annual premium is paid, the contract continues only during mutual assent of the parties. On refusal of the officer to assent to a renewal and pay the premium, the obligation of the company to the state for the future conduct of the officer does not attach, and the company can not recover premiums from the officer.

Bryant v. Bonding Co., 77 O. S. 90 (1907).

A bond being executed for one year to indemnify a bank against the dishonesty of its cashier occurring during the term of the bond, or any renewal thereof, and discovered within six months of such term, or renewal, and there being a subsequent instrument to continue the former in force for another year according to its terms and conditions the instruments will be construed as though the bond had been originally executed for two years, there being no terms employed in either instrument to indicate the intention that an act of dishonesty occurring in the first year must be discovered within six months from the expiration of that year.

Rankin v. U. S. F. & G. Co., 86 O. S. 267 (1912).

Cutts v. Spear, 8 N. P. n. s. 445; 19 L. D. 608 (C. P. 1909).

False answers in application. Written statements by a corporation, accompanying an application for a fidelity bond, relating to the past conduct of employes concerned, in part as an inducement for the issue of the bond, and intended to be part of the contract, are in the nature of warranties, and their falsity in any material particular will defeat recovery thereon.

Trustees v. Deposit Co., 76 O. S. 253 (1907).

But where a surety bond recited that it "is issued on the express understanding that the employee has not within the knowledge of the employer at any former period been a defaulter", which provision followed other provisions invalidating the bond for untrue statements in the application, it was held that former defalcations of the employee unknown to the employer constituted no defense to a suit on the bond, unless it appeared that the statements in the application were intentionally false, or were recklessly made without any reasonable grounds on the part of the employer to believe the statements to be true, and without any reasonable effort on his part to discover the truth. Legler v. Guaranty Co., 88 O. S. 336 (1913); reversing, 10 N. P. n. s. 601; 23 L. D. 98.

Liability for dishonesty in matters not connected with employee's duties. Where the application represented that the duties of an employee of a loan company were to receive and deposit money and endorse checks for deposit only, with no authority to sign checks, pay out or withdraw money, and the bond indemnified the employer against loss in connection with the duties as specified, the surety company is not liable for dishonesty of such employee in inducing the company to make a loan to a fictitious person, and forging the name of the fictitious borrower to the check of the loan company.

Trustees v. Deposit Co., 76 O. S. 253 (1907).

When the cashier of a bank, by a certificate which he knows to be

false, extends to one as a depositor of the bank a credit to which he is not entitled, and this is done pursuant to an arrangement that the cashier shall derive financial benefit from the transaction, and loss to the bank results, there arises a liability upon a bond to indemnify the bank for all losses arising "from the fraud or dishonesty of the cashier amounting to embezzlement or larceny."

Rankin v. U. S. F. & G. Co., 86 O. S. 267 (1912).

Notice to surety company. A provision in a bond of that character requiring the obligee upon the discovery of an act which may create a liability under the instrument to give notice thereof to the obligor at "the earliest practical moment" contemplates such and only such delay as in view of all circumstances may be reasonably necessary for the directors to acquire precise information respecting the default of the cashier and to enable them to determine whether it is of the grave character contemplated by the terms of the bond; and whether the giving of a notice 45 days after the first information of the bank's condition is a compliance with the provision should be determined by the jury under proper instructions.

Rankin v. United States F. & G. Co., 86 O. S. 267 (1912).

Recovery of funds misappropriated. A bonding company, having paid the liabilities of a defaulting trustee to his successor, and taken an assignment of the rights of the trust estate, is the real party in interest to recover funds of the trust estate misapplied by the defaulting trustee.

Healy v. Second N. B., 22 L. D. 502 (1911).

Co-suretyship. Where several surety companies are bound by separate instruments on account of the same principal, and each company, by its bond, limits its liability, in the event of default on the part of the principal, to such proportion of the total loss sustained by the obligee as the penalty named in its bond bears to the total amount of the bonds furnished by the principal to the obligee, the suretyship of each company is a separate and distinct transaction and the relation of co-suretyship among them does not arise, nor does the right of contribution exist.

Where, in such case, collateral or securities are placed by the principal in the hands of one of the companies to indemnify it against any loss it might incur by reason of its obligation on its bond, none of the other companies, in the event of the default of the principal is entitled to any part of such collateral or securities to indemnify it against a loss incurred on account of its bond.

Assets Realization Co. v. Bonding Co., 88 O. S. 216 (1913).

Bonds securing performance of contracts. A surety company, surety on a bond to secure performance of a contract to furnish labor and materials on a structure, at his own risk, cost and expense, is liable to a materialman, who furnishes materials therefor, on default of the principal. Indemnity Co. v. Granite Co., 100 O. S. 373 (1919); State v. Watts, 100 O. S. 380 (1919).

Section 9571. (Sufficiency of bonds executed by guaranty company.) When a bond, recognizance or undertaking is required or permitted by law, with one or more sureties, its execution or the guaranteeing thereof, as the case may be, as sole surety, by a company authorized to guarantee the fidelity of persons holding places of public or private trust, to guarantee the performance of contracts other than insur-

ance policies, and to execute and guarantee bonds and undertakings in actions or proceedings or by law allowed is sufficient, and when so executed and guaranteed, shall be a full compliance with every requirement of law, ordinance, rule or regulation that such bond, or recognizance must be executed and guaranteed by one surety or two or more sureties, or that such sureties, shall be residents or householders or freeholders. (R. S. Sec. 3641c; April 22, 1904, 97 v. 182; April 27, 1896, 92 v. 320; April 11, 1893, 90 v. 157; February 3, 1891, 88 v. 14.)

A bond executed by a surety company as sole surety is a sufficient compliance with statutes requiring "sureties" or "two or more sureties" on an official bond. Opins. Atty. Gen. 1915, p. 283.

The amendment of Rev. Stats. § 3641c (97 v. 182) requiring bonds of executors, administrators, trustees, etc., to be executed by surety companies, and prohibiting the acceptance of personal sureties, was held unconstitutional.

State v. Robins, 71 O. S. 273 (1904).

Section 9572. (Allowance of premium.) A judge, court or officer, whose duty it is to pass upon the account of an assignee, trustee, receiver, guardian, executor, administrator or other fiduciary, required by law to give bond as such, whenever any fiduciary has given bond with a surety company as surety thereon, in the settlement of his account as such fiduciary, shall allow a reasonable sum paid such a company authorized under the laws of this state so to do, for becoming his surety, not above half of one per cent per annum on the amount of the bond; unless it is in double the amount of the liability of the fiduciary, when the sum so allowed must not exceed a fourth of one per cent per annum. Such company must have complied and continued to comply with the laws of this state relative to it, and with requirements as to justification, prescribed by the head of the department, court, judge, or officer required to approve or accept the bond. The bond or recognizance also must be approved by the head of the department, court, judge or officer required to approve or accept it. (R. S. Sec. 3641c; April 22, 1904, 97 v. 182; April 27, 1896, 92 v. 320; April 11, 1893, 90 v. 157; February 3, 1891, 88 v. 14.)

This section does not apply to the premium on the bond of an officer or employe of a municipal corporation. Rep. Atty. Gen. 1912, p. 407.

Section 9573. (Bonds of public officers.) The two preceding sections authorize such company to become surety upon the bond required by law of any state officer, except the superintendent of insurance, and of any county, town-

ship or municipal officer. Such company may be accepted by the officer or officers required to approve such bond, in lieu of the sureties now required by law. (R. S. Sec. 3641c; April 22, 1904, 97 v. 182; April 27, 1896, 92 v. 320; April 11, 1893, 90 v. 157; February 3, 1891, 88 v. 14.)

The council of a municipality is not authorized to provide for payment, by the municipality, of premiums on the official bonds of its officers.

Rep. Atty. Gen. 1910-1911, p. 376.

Rep. Atty. Gen. 1905-1906, p. 66.

Citing, *State v. Robins*, 71 O. S. 273, 295.

Section 9574. Repealed. (104 v. 202; April 14, 1910, 101 v. 99; R. S. Sec. 3653; April 27, 1872, 69 v. 140, § 17.)

Section 9575. (Lien of mutual companies for premium notes.) All buildings insured by a mutual company must be pledged to such company, together with the right and title of the assured in the lands upon which they are situated, to the amount of the premium note or contingent liability, and the company shall have a lien thereon to the amount of such note or liability, but the lien shall not take effect until the company files with the recorder of the county in which the property insured is located, a certificate, stating the date, number, and amount of premium notes, or contingent liability, and such a description of the property insured as will enable a person readily to identify it. (R. S. Sec. 3663; passed April 14, 1888; took effect July 1, 1888, 85 v. 273, 278; R. S. 1880; April 27, 1872, 69 v. 140, § 24.)

A lien of premium notes, provided for in the special charter of a company organized prior to constitution of 1851, was held unenforceable, as against a mortgagee, by a third person to whom the assessment had been assigned.

Shaw v. Shaw, 4 West L. M. 159 (C. P. 1862).

Section 9576. (Duty of recorder.) The recorder must record and index the certificate in his book of liens, for which he shall receive fifty cents. Liens heretofore acquired by such a company shall continue in force under this chapter. (R. S. Sec. 3663; passed April 14, 1888; took effect July 1, 1888, 85 v. 273, 278; R. S. 1880; April 27, 1872, 69 v. 140, § 24.)

Section 9577. (Cancellation of policies.) A fire insurance company doing business under the laws of this state which issue policies of insurance covering property located herein, and on such policies receives from the persons insured either cash payments of premium, or notes subject to

assessment for payment of losses, or notes for the installments of premium, shall be required to insert in every policy so issued an obligation to cancel it, upon the written request of the person insured on conditions as provided in the next following five sections. (R. S. Sec. 3664; April 4, 1878, 75 v. 88, § 1.)

This section does not apply to property located outside of Ohio, although the policy thereon was issued in Ohio. *Automobile Ins. Co. v. Guaranty Corp.*, 240 Fed. 222 (D. C. N. Y. 1917).

Sections 9577 to 9582 apply only to cases in which the policy is cancelled at the request of the insured and not to cases where the cancellation is by the insurance company.

Insurance Co. v. Brecheisen, 50 O. S. 542 (1893).

The parties are free to fix the terms and conditions under which a policy may be cancelled by the company; but when the insurance is terminated upon the request of the insured, the parties must comply with § 9577 et seq.

Insurance Co. v. Brecheisen, 50 O. S. 542 (1893).

An agent of the insured, authorized to procure a policy of insurance, has no implied authority, after he has procured and delivered it to the insured, to receive notice of cancellation and discharge the policy.

Johnson v. Insurance Co., 66 O. S. 6 (1902).

The obligation to redeem a policy, under this section, is not a debt which may be deducted from credits in the tax return of the company, until the insured exercises his option to cancel the policy.

Insurance Co. v. Cappellar, 38 O. S. 560, 570 (1883).

French v. Insurance Co., 12 L. D. 183 (1901).

Where an insured wrote to the insurer: "Consider your policy No. 39 as canceled from the 18th inst. and make a new policy from that date for one year, with privilege added, at same rate" and the insurer replied, "I can not agree to proposed change and therefore cancel, pro rata, charging returned premium." A loss occurring subsequently, prior to the expiration of the policy, it was held that the letter of the insured was not a cancellation but, until accepted, a mere proposition, which was indivisible, and if not accepted as a whole the entire contract remained unaltered.

Wilkins v. Insurance Co., 1 C. S. C. R. 349 (1871).

Cancellation by insurance company. Where a policy provided that it might be canceled by the company "on giving notice to that effect," it was held that notice of cancellation from the company terminated the insurance, and that return of the unearned premium was not a condition precedent to such cancellation.

Insurance Co. v. Brecheisen, 50 O. S. 542 (1893).

Where a policy provided for a cancellation by the company upon a five days' notice, a finding by the jury that notice was not given will not be set aside where the testimony as to notice was directly contradictory.

Insurance Co. v. Plato, 3 C. C. n. s. 207; 13 C. D. 35 (1901); *aff'd*, no rep., 68 O. S. 701.

An agent representing several companies issued a policy in one company. His authority being revoked by that company he induced the insured to surrender the policy, and accept a policy in another of his companies, by representing that the first company had more insurance in the block than it desired. The insured had no knowledge of the revocation of his authority.

Held, that such delivery of the policy for cancellation bound the first company.

Insurance Co. v. Stambaugh, 76 O. S. 138 (1907).

Where an agent is advised of acts of the insured, claimed to be in violation of the policy, and the policy is returned to the agent, who notifies the company of the act complained of, it is the duty of the company to act within a reasonable time and to return the policy or the unearned premium. Where the company fails to instruct the agent within a reasonable time and the policy is returned to the insured, the company can not avoid liability on a subsequent loss by reason of the acts of which it had knowledge before the return of the policy.

Bank v. Insurance Co., 83 O. S. 309 (1911).

Cancellation for non-payment of premiums.

See notes to §§ 9587 and 9420.

Section 9578. (Rates of cancellation for cash policies.)

When a policy issued on the cash plan is cancelled, in accordance with the provisions of the preceding section, the companies so issuing may retain customary short rates, as established and charged by companies doing a cash business, for the time the policy has been in force, and return to the insured the unearned premium on the policy for unexpired time. (R. S. Sec. 3665; April 4, 1878, 75 v. 88, § 2.)

Section 9579. (Rates of cancellation of mutual companies.) When policies issued on the mutual plan are so canceled, the companies so issuing must surrender to the insured the note or notes received from him for premium or payment of losses. Such policies first shall be sent to the secretary or agent of the company, and within sixty days after receipt thereof for cancellation the premium note shall be returned. But the assured first shall pay his proportion of all losses which actually occurred up to the date when the policy was received. The company shall not be liable for any loss under any such policy after it is returned for cancellation. (R. S. Sec. 3666; April 4, 1878, 75 v. 88, § 3.)

Payment of a loss by a mutual insurance company to the insured together with cancellation of the policy and surrender of his premium note do not relieve the insured from liability for assessments to pay debts incurred during the term of the insurance.

Swing v. Rose, 75 O. S. 355, 368 (1906).

Section 9580. (Rates when premiums paid in installments.) When policies issued on the installment plan are so canceled, the companies so issuing may collect of the insured customary short rates for the time the policy has been in force, to be computed on the full term of insurance mentioned in the policies as charged by such companies. On receipt of such short rates they must return all installment notes then unpaid, and refund to the insured any premium collected in excess of the short rates. (R. S. Sec. 3667; April 4, 1878, 75 v. 88, § 4.)

Section 9581. (Premium notes not negotiable.) When companies doing business under the laws of this state receive notes in consideration of premiums on their policies, they must place on the face of each note the following words: "It is hereby understood and agreed that this note is not transferable." (R. S. Sec. 3668; April 4, 1878, 75 v. 88, § 5.)

Section 9582. (Superintendent to enforce provisions.) When it comes to the knowledge of the superintendent of insurance, or an officer having charge of the insurance department, that any provision of the five preceding sections has been violated, he at once shall proceed to make a thorough investigation in regard to it, and on sufficient proof of such violation, revoke the certificate of authority of the company guilty thereof. (R. S. Sec. 3669; April 4, 1878, 75 v. 88, § 6.)

Section 9583. (Extent of liability under policy.) A person, company, or association insuring any building or structure against loss or damage by fire or lightning, by a renewal of a policy, shall cause such building or structure to be examined by his or its agent, and a full description thereof to be made, and its insurable value fixed, by him. In the absence of any change increasing the risk without the consent of the insurers, and also of intentional fraud on the part of the insured, in case of total loss, the whole amount mentioned in the policy or renewal upon which the insurer receives a premium, and in case of a partial loss, the full amount thereof, shall be paid. (R. S. Sec. 3643; March 5, 1879, 76 v. 26, § 1.)

This section applies to all policies issued after it went into effect (July 1, 1879) insuring any building or structure against loss by fire.

Insurance Co. v. Leslie, 47 O. S. 409 (1890).

The sole purpose of this section is to fix a value on the insured building or structure which should be unquestionable in case of total loss, and without regard to any other controversies which might arise.

Insurance Co. v. Werner, 76 O. S. 543, 553 (1907).

Section 9583 does not apply to a policy covering personal property. *Insurance Co. v. Dennison*, 93 O. S. 404 (1917).

Building or structure. A boiler and engine may constitute a structure. *Insurance Co. v. Luce*, 11 C. C. 476; 5 C. D. 210 (1896).

Although foundation walls are not a part of the building or structure (§ 9585) the fact that the description of the building in the policy includes the foundation, does not prevent the application of this section, where the building is totally destroyed, except the foundation.

Insurance Co. v. McBee, 85 O. S. 161 (1911); affirming, 12 C. C. n. s. 228; 21 C. D. 469.

Under a policy covering an ice manufacturing plant, the cooling tower and machinery therein were held to be a part of the structure

where the machinery and buildings were used as an entirety. *Hartford Ins. Co. v. Storage Co.*, 9 Ohio App. 403; 28 O. C. A. 273 (1918).

Examination by agent. The examination required to be made relates to the physical condition of the property such as an inspection would disclose.

Webster v. Insurance Co., 53 O. S. 558 (1895).

It is not required that the examination shall extend to the uses, purposes and surroundings of the building or structure, nor to its ownership, incumbrances, possession or exposures.

Insurance Co. v. Werner, 76 O. S. 543, 553 (1907).

The neglect or omission of the agent to make the examination of the property, and fix its insurable value, can not defeat or affect the operation of the statute.

Insurance Co. v. Leslie, 47 O. S. 409 (1890).

Kreisser v. Gas Light Co., 2 C. C. n. s. 597; 14 C. D. 313 (1901).

Where there has been no intentional fraud, a condition of the property at the time of insurance, which the agent by making the required examination could have reasonably discovered, can not defeat recovery on the policy.

Insurance Co. v. Leslie, 47 O. S. 409 (1890).

Insurance Co. v. Kukral, 7 C. C. 356; 4 C. D. 633 (1893).

Change increasing the risk. The words "any change increasing the risk" refer to some physical change in the insured property. They were not intended to include or apply to anything distinct from, or accidentally related to, the *corpus* of the building or structure.

Insurance Co. v. Werner, 76 O. S. 543 (1907).

See *Sun Fire Office v. Clark*, 53 O. S. 414 (1895).

Webster v. Insurance Co., 53 O. S. 558 (1895).

The "change" does not relate to a change relating to incumbrances.

Webster v. Insurance Co., 53 O. S. 558 (1895).

See *Insurance Co. v. Bowersox*, 5 C. C. 444; 3 C. D. 218; *aff'd*, no rep., 51 O. S. 567.

Nor to a change of occupancy or a vacancy.

Werner v. Insurance Co., 76 O. S. 543 (1907).

Nor to a change relating to other insurance.

Sun Fire Office v. Clark, 53 O. S. 414 (1895).

In such cases it is not necessary for the insurance company to allege and prove that the risk was increased by the incumbrance, additional insurance, etc.

Insurance Co. v. Werner, 76 O. S. 543 (1907).

Additional insurance increases the risk, as a matter of law.

Sun Fire Office v. Clark, 53 O. S. 414 (1895).

Fraud. A fraudulent and excessive schedule in a proof of loss constitutes a defense under a clause in the policy which provides that fraud before or after a loss shall avoid the policy, although the actual loss equalled the amount of the insurance.

Insurance Co. v. Beverly, 14 C. C. 468; 8 C. D. 37 (1897).

Where a mortgagee was not a party to the procuring of the policy, and had no knowledge of fraud, fraudulent representations and concealments on the part of the mortgagor in procuring the insurance are no defense against the mortgagee.

Insurance Co. v. Boland, 8 C. C. n. s. 325 (1904); *aff'd*, no rep., 72 O. S. 645; 73 O. S. 393.

Statements in the application concerning a condition or value, which should have been discovered on the examination, are not fraudulent.

Insurance Co. v. Leslie, 47 O. S. 409 (1890).

Total loss.

What constitutes. Where a building is so far destroyed by fire as to lose its identity and specific character as a building, and the parts that remain can not be used to advantage in its reconstruction, there is a total loss.

Insurance Co. v. Drackett, 63 O. S. 41 (1900).

A loss may be total although part of the structure may not be consumed by fire, where the cost of removal and replacement of the unconsumed portion would exceed the value of the materials thus saved.

Insurance Co. v. Fish Co., 14 C. C. 160; 7 C. D. 468 (1897); aff'd, no rep., 61 O. S. 643.

Whether the loss was total or partial is a question for the jury.

Insurance Co. v. Fish Co., 14 C. C. 160; 7 C. D. 468 (1897); aff'd, no rep., 61 O. S. 643.

Amount recoverable. In the absence of any increase in the risk or intentional fraud, the measure of liability in case of total loss is the full amount named in the policy.

Insurance Co. v. Leslie, 47 O. S. 409 (1890).

Insurance Co. v. Hull, 51 O. S. 270, 278 (1894).

Insurance Co. v. Hock, 8 C. C. 341; 4 C. D. 553 (1894).

Insurance Co. v. Mirick, 38 W. L. B. 172 (1897).

Hubbard v. Executor, 6 N. P. 249; 8 L. D. 111 (1899).

Hilliard v. Insurance Co., 7 N. P. 561; 5 L. D. 576 (1895).

Where there is no intentional fraud, it is not competent for the company to prove that the value of the property is less than the amount of the policy, and statements of the assured in the application, in reference to the value of the property and its conditions, are immaterial.

Insurance Co. v. Leslie, 47 O. S. 409 (1890).

Insurance Co. v. Kukral, 7 C. C. 356; 4 C. D. 633 (1893).

Schilds v. Insurance Co., 6 N. P. 134; 8 L. D. 45 (1890).

See Insurance Co. v. McClucklin, 40 O. S. 42 (1883).

The fact that there is more than one policy on the property (see § 9584) does not prevent the application of this section in the settlement of the loss. Where the loss is total each company must pay the full amount specified in its policy.

Insurance Co. v. McBee, 85 O. S. 161 (1911); affirming, 12 C. C. n. s. 228; 21 C. D. 469.

Insurance Co. v. Fish Co., 14 C. C. 160; 7 C. D. 468 (1897); aff'd, no rep., 61 O. S. 643.

Where a life tenant has received from the insurance company the full amount of the policy, which is in excess of the value of the life estate, the life tenant is not liable to the remaindermen for the amount of the excess.

Hubbard v. Executor, 6 N. P. 249; 8 L. D. 111.

Provisions of policy inconsistent with statute. This section enters into and becomes part of every fire insurance contract and supersedes and annuls all terms in any such contract which differ from its provisions.

Insurance Co. v. McBee, 85 O. S. 161 (1911).

Insurance Co. v. Leslie, 47 O. S. 409 (1890).

The provisions of this section are founded on public policy and can not be waived by agreement.

Insurance Co. v. Drackett, 63 O. S. 41 (1900).

Conditions of a policy providing for a different rule or measure of liability are in conflict with this section and of no binding force.

Insurance Co. v. Leslie, 47 O. S. 409 (1890).

The following provisions have been held inconsistent with this section:

That the amount of loss shall be estimated according to the actual

value of the property at the time of the fire, and not more than it would cost the insurer or insured to restore the same.

Insurance Co. v. Leslie, 47 O. S. 409 (1890).

Giving the insurer the option to rebuild in case of total loss.

Insurance Co. v. Russell, 65 O. S. 230 (1901); s. c., 6 N. P. 325; 8 L. D. 613.

See Good v. Insurance Co., 43 O. S. 394 (1885).

Limiting the liability of the insurer to its proportion of the loss, in the event of other insurance. Insurance Co. v. Dennison, 93 O. S. 404 (1917); Insurance Co. v. Mfg. Co., 9 Ohio App. 403, 28 O. C. A. 273.

Requiring the amount of loss to be determined by appraisers or arbitrators.

Insurance Co. v. Drackett, 63 O. S. 41 (1900).

Insurance Co. v. Leslie, 47 O. S. 409 (1890).

Insurance Co. v. Luce, 11 C. C. 476; 5 C. D. 210 (1896).

By consenting to arbitrate the amount of loss, the insured does not waive the right to maintain an action and recover as for a total loss.

Insurance Co. v. Drackett, 63 O. S. 41 (1900).

Insurance Co. v. Fish Co., 14 C. C. 160; 7 C. D. 468 (1897); aff'd, no rep., 61 O. S. 643.

Insurance Co. v. Gray, 2 C. C. n. s. 265; 14 C. D. 268 (1902); aff'd, no rep., 69 O. S. 542.

Insurance Co. v. Luce, 11 C. C. 476; 5 C. D. 210 (1896).

Requiring a mortgagee, for whose benefit as additional security the policy was issued, to exhaust the mortgaged property before he was entitled to "demand or recover" under the policy.

Insurance Co. v. Mirick, 38 W. L. B. 172 (1897).

Where the building is a total loss, except the foundation, the fact that the foundation walls are included as a part of the description of the building does not entitle the company to an appraisalment.

Insurance Co. v. McBee, 85 O. S. 161 (1911); affirming 12 C. C. n. s. 228; 21 C. D. 469.

The following provisions in policies have been held valid and not inconsistent with this section:

Prohibiting additional insurance without consent of the insurer.

Sun Fire Office v. Clark, 53 O. S. 414 (1895).

Providing that the policy should be void if the building became vacant.

Insurance Co. v. Werner, 76 O. S. 543 (1907); approving, Insurance Co. v. Wells, 42 O. S. 519; overruling, Moody v. Insurance Co., 52 O. S. 12.

Providing that an incumbrance procured or suffered on the property, without consent of the insurer, should invalidate the policy.

Webster v. Insurance Co., 53 O. S. 558 (1895); affirming, 7 C. C. 511; 4 C. D. 704.

But a cognovit judgment was held not to be an incumbrance which invalidated the policy unless it was alleged and proved that the risk was increased thereby.

Insurance Co. v. Bowersox, 5 C. C. 444; 3 C. D. 218 (1891); aff'd, no rep., 51 O. S. 567.

Estoppel. A claim for a less amount than that to which the assured is entitled will not estop assured from claiming full amount; nor will any estimate of value made by assured in his proof of loss affect his right to the full amount.

Schild v. Insurance Co., 6 N. P. 134; 8 L. D. 45 (1899).

Section 9584. (When two or more policies on same property.) When there are two or more policies upon the same

property, each policy shall contribute to the payment of the whole or the partial loss in proportion to the amount of insurance mentioned in each policy. In no case shall the insurer be required to pay more than the amount mentioned in its policy. (R. S. Sec. 3643; March 5, 1879, 76 v. 26, § 1.)

Where a building or structure is totally destroyed by fire, the fact that there is more than one policy on the property does not prevent the application of § 9583 in the settlement of the loss.

Insurance Co. v. McBee, 85 O. S. 161 (1911); affirming, 12 C. C. n. s. 228; 21 C. D. 469.

Insurance Co. v. Fish Co., 14 C. C. 160; 7 C. D. 468 (1897); aff'd, no rep., 61 O. S. 643.

Where the loss is partial the amount should be ascertained and paid in the proportions specified. Where the loss is total, the proportion of each company is the amount specified in its policy.

Insurance Co. v. McBee, 85 O. S. 161 (1911); affirming, 12 C. C. n. s. 228; 21 C. D. 469.

Where an appraisal of the amount of a partial loss was had, and there is concurrent insurance, the amount recoverable by the insured is limited to a proportionate amount of the loss determined by the award, unless it is void or set aside.

Insurance Co. v. Ries, 80 O. S. 272 (1909).

Where the insured compromised claims under some of the policies, the other companies were held to be liable for such share of the entire loss as the sum insured bears to the whole amount.

* Good v. Insurance Co., 43 O. S. 394 (1885).

In the case of a partial loss, a provision in a policy, limiting the liability of the company in the event of other insurance to its proportion of the loss, is in violation of §§ 9583 and 9584. The insurer is liable for the full amount of the partial loss. Insurance Co. v. Dennison, 93 O. S. 404 (1917).

Where each of several policies covering personal property provided that liability thereunder should not be for a greater proportion of the loss than its amount should bear to the whole insurance, it was held that the insured was entitled to a judgment against each company for the whole amount of the loss, but that payment of one judgment for the whole loss was a satisfaction of all judgments.

Insurance Co. v. Sample, 2 N. P. n. s. 629; 15 L. D. 421 (1905); aff'd, no rep., 76 O. S. 577.

Sections 9583 and 9584 do not apply to policies on personal property. A provision in one of several policies covering the same property, limiting the liability of the insurer to its proportion of the loss is valid. Insurance Co. v. Dennison, 93 O. S. 404 (1917).

Section 9585. (Cellar and foundation not to be considered.) The cellar and foundation walls shall not be included or considered a part of the building or structure in settling losses, anything in the application or policy to the contrary notwithstanding. (R. S. Sec. 3691; Rev. Stats. of 1880.)

This section does not prohibit an insurance company from insuring the cellar and foundation walls if the parties agree; but, when insured in the same policy with the building or structure, the cellar and foundation walls must be insured for a specific sum and described separately from the building or structure.

Insurance Co. v. McBee, 85 O. S. 161 (1911); affirming, 12 C. C. n. s. 228; 21 C. D. 469.

The fact that foundation walls are included in the description of the building does not prevent the application of § 9583 where the building is totally destroyed, except the foundation. In such case the insured need not submit to an appraisalment.

Insurance Co. v. McBee, 85 O. S. 161 (1911); affirming, 12 C. C. n. s. 228; 21 C. D. 469.

Section 9586. (Solicitor agent of company.) A person who solicits insurance and procures the application therefor, shall be held to be the agent of the party, company or association, thereafter issuing a policy upon such application or a renewal thereof, anything in the application or policy to the contrary notwithstanding. (R. S. Sec. 3644; April 22, 1904, 97 v. 160; March 5, 1879, 76 v. 26, § 2.)

Agents of life insurance company, see § 9407.

A corporation may act as agent for an insurance company, when authorized by its charter.

Rep. Atty. Gen. 1908-1909, p. 176.

A bank or trust company has no power to act as agent for an insurance company.

Rep. Atty. Gen. 1908-1909, p. 195.

Duties required by law to be discharged by the company can not, by contract, be imposed upon a general agent.

Rep. Atty. Gen. 1908-1909, p. 173.

This section makes the person soliciting the insurance the agent of the company issuing the policy, and puts it out of the power of the company to change that relation, or avoid the consequences growing out of it, by stipulating in the policy that he shall be considered the agent of the insured.

Insurance Co. v. Leslie, 47 O. S. 409, 415 (1890).

Insurance Co. v. Chamberlain, 132 U. S. 304 (1889).

This section was held not to make the solicitor an agent of the company for all purposes, as, for instance, for the purpose of receiving notice of loss. Insurance Co. v. Silberman, 24 C. C. n. s. 511 (1904).

A sub-agent duly appointed is the agent of the company, and his acts in this capacity are binding upon the company.

Krumm v. Insurance Co., 40 O. S. 225 (1883).

Where an insurance broker, authorized to place all insurance for a person, applied to another agent for insurance in a company represented by the latter, it was held that, under this section, both agents were to be considered the agents of the insurance company.

Insurance Co. v. Provision Co., 13 C. C. 661; 7 C. D. 563 (1895).

See Johnson v. Insurance Co., 66 O. S. 6 (1902).

This section was not intended to give a mere solicitor of insurance all the powers of a general agent, or change the rules of the common law as to the authority of an agent to bind his principal.

McBee v. Insurance Co., 11 N. P. n. s. 75 (C. P. 1910).

The issuance of a policy, by an insurance company on the recommendation of the agent, is prima facie evidence that the agent was authorized to make the contract.

Hilliard v. Insurance Co., 7 N. P. 561; 5 L. D. 576.

Application filled up by agent. A soliciting agent, procuring for a company risks and applications on which policies are issued, is, in filling

up such application, the agent of the company, and not the assured; and if the agent makes a mistake in wrongly stating facts which were correctly given him by the insured, the company is bound by and responsible for such mistake.

Insurance Co. v. Williams, 39 O. S. 584 (1883).

Phoenix Insurance Co. v. Bowersox, 6 C. C. 2; 3 C. D. 321 (1892); aff'd, no rep., 51 O. S. 567.

Herbert v. Insurance Co., 3 C. C. n. s. 7; 13 C. D. 235 (1901); aff'd, no rep., 68 O. S. 687.

Insurance Co. v. Pyle, 44 O. S. 19, 28 (1886).

Whether the facts were correctly stated by the insured is a question for the jury.

Phillips v. Insurance Co., 13 C. C. 679; 6 C. D. 266 (1894).

Where a policy, written by an agent of the company, by mutual mistake insufficiently described the place where the property was located, the policy may be reformed by the court, if the mistake is shown by clear and convincing proof. Fire Ins. Co. v. Machine Co., 96 O. S. 442 (1917); affirming, 6 Ohio App. 313; 28 O. C. A. 462. See Box Board Co. v. Insurance Co., 4 Ohio App. 26; 25 C. C. n. s. 339 (1914).

Where an agent, in filling up an application for burglary insurance, construes a question, to suit the circumstances of the particular case, he acts for the company, and the company can not escape liability on the ground of incorrect statements in the application, based on a contrary construction.

Kandar v. Indemnity Co., 10 C. C. n. s. 449; 20 C. D. 260 (1907).

Where an agent fills up in his own language an application from statements of the insured, fully and truthfully made, receives the premium and issues a policy executed by the insurer on such application, the insurer can not defeat a recovery on the policy by denying the truth of the application, nor the authority of the agent in the transaction, although he has transcended his authority, unless the insured is chargeable with knowledge of his having exceeded his authority.

Insurance Co. v. McGookey, 33 O. S. 555 (1878).

May act for insured, when. A general agent representing several insurance companies may become the agent of a person desiring insurance, to select a company and procure a policy from it.

Johnson v. Insurance Co., 66 O. S. 6, 14 (1902).

Insurance Co. v. Shoemaker, 22 W. L. B. 315.

But such agent has no implied authority to receive notice of cancellation of the policy, after it has been procured and delivered to such person.

Johnson v. Insurance Co., 66 O. S. 6, 14 (1902).

The direction by the manager of an insured, to an insurance agent to keep insurance alive and to effect other insurance in the place of insurance cancelled, does not constitute the insurance agent the common agent of the insurer and insured as to policies issued four years after the manager had severed his connection with the insured. Box Board Co. v. Insurance Co., 4 Ohio App. 26; 25 C. C. n. s. 339 (1914).

POWERS OF AGENT.

To appoint sub-agent. An agent, with full power in a large territory to receive proposals for fire insurance, fix rates of premium, countersign, issue, renew and consent to the transfer of policies, which have been signed by the president and secretary, may appoint a sub-agent to solicit applications subject to his approval.

Krumm v. Insurance Co., 40 O. S. 225 (1883).

See § 654.

To extend credit for premiums. Authority to make contracts of insurance, and issue policies, carries with it authority to extend credit for premiums, in the absence of restrictions on the authority of which the insured has notice.

Machine Co. v. Insurance Co., 50 O. S. 549 (1893).

But where the policy provides that the agent has no such power, an extension of time of payment granted by the agent is of no effect.

Insurance Co. v. Hook, 62 O. S. 256 (1900).

Where an agent, with no express authority to extend credit, delivered the policy to the insured and agreed to extend credit, and the amount of the premium was charged against the agent by the insurance company, and was paid after a loss, it was held that a clause making payment of the premium necessary to the taking effect of the insurance was waived.

Insurance Co. v. Kelly, 24 O. S. 345 (1873).

To make preliminary contract of insurance. A general agent may bind the company by a preliminary contract for insurance. Where the agent represents several companies he must designate, in some way, the company for which he contracts, but notice to the company is not necessary.

Insurance Co. v. Bennett, 1 N. P. 71; 1 L. D. 60 (1894); *aff'd*, no rep., 56 O. S. 749.

See *Krum v. Insurance Co.*, 40 O. S. 225 (1883).

Palm v. Insurance Co., 20 Ohio 529 (1851).

Insurance Co. v. Whitman, 75 O. S. 312 (1906).

To waive conditions of policies. A stipulation in a policy that "no agent has authority to waive or alter anything in this policy contained," is, after acceptance of the policy by the insured, both notice to and an agreement by, the insured that an agent has no such authority.

Insurance Co. v. Myers, 62 O. S. 529 (1900).

But knowledge by the agent, of facts as to the insurability of property, at the time the policy is issued, is the knowledge of the company, and operates as a waiver, although the policy contains a non-waiver clause. *Foster v. Insurance Co.*, 101 O. S. 180 (1920).

Knowledge by the agent of facts occurring subsequent to the issuance of the policy may not be a waiver. *Insurance Co. v. Titus*, 82 O. S. 161 (1910).

A "non-waiver" clause in the policy does not prevent a waiver by acts and conduct of authorized agents. *Insurance Co. v. Cochran*, 104 O. S. 427 (1922).

Conditions in a policy can only be waived by an agent in the manner stipulated in the policy. Where the policy requires that a waiver, or consent, be endorsed on the policy, a verbal waiver or consent is inoperative.

Insurance Co. v. Titus, 82 O. S. 161, 171 (1910).

Walsh v. Insurance Co., 6 C. C. n. s. 1; 17 C. D. 313 (1905).

Billings v. Insurance Co., 6 C. C. n. s. 567; 17 C. D. 552 (1905).

But see *Insurance Co. v. Malony*, 33 W. L. B. 147, in which a judgment based on a waiver by post card, received by the insured from an agent, was affirmed by an evenly divided court. (Supreme Court without report, 1897.)

See also *McKelvey v. Insurance Co.*, 1 Ohio App. 184; 20 C. C. n. s. 88; 24 C. D. 443 (1913), in which the endorsement on the policy was incomplete but the agent had knowledge of the facts before issuing the policy.

The power of an agent to waive conditions in a policy of fire insurance is not different from the same power in life insurance.

Insurance Co. v. Baldwin, 62 O. S. 368 (1900); (approving, as to such power, *Insurance Co. v. Hook*, 62 O. S. 256).

Where a policy of life insurance provided that it contained the entire contract; that its terms could not be modified except in writing and signed by certain executive officers, and that no agent had authority to extend the time of payment of any premium or note, the insured can not recover on a verbal modification of such policy made by an agent, extending the policy one year and waiving the payment of premium, in the absence of knowledge and acts by the company constituting an estoppel.

Insurance Co. v. Hook, 62 O. S. 256 (1900).

An agent authorized to waive in writing certain printed provisions may write into the policy provisions in conflict with such printed provisions, and the written provision is a waiver of such conflicting printed provisions.

Bank v. Insurance Co., 83 O. S. 309 (1911).

Authority to make, execute and deliver a policy is not authority to make a subsequent verbal contract waiving any provision of a policy, and the company is not bound thereby unless it ratifies the verbal waiver.

Bank v. Insurance Co., 83 O. S. 309 (1911).

Where it does not appear that a solicitor of fire insurance was authorized to waive a provision in the policy against other insurance, or that the agents who wrote the policy consented to such waiver, or had knowledge of other insurance, a policy will not be reformed to provide for such waiver.

McBee v. Insurance Co., 11 N. P. n. s. 75 (1910).

A waiver of notice and proof of loss was upheld although the policy provided that no agent was authorized to waive any of the terms and condition of the policy.

Insurance Co. v. Danison, 38 W. L. B. 163 (Supreme Ct., without report, 1897).

After a fire the insured paid to the agent an assessment which was then so long overdue that the insurance was suspended under the terms of the policy. The agent remitted the premium to the company which returned it with instructions to refund to the insured, which the agent failed to do until six or eight months after the fire. Held to be a waiver of the suspension of the policy. *Insurance Co. v. Billman*, 18 C. C. n. s. 261 (1909); *aff'd*, no rep. 82 O. S. 451.

Apparent authority. Persons dealing with a duly authorized agent may rely upon a continuance of such authority, until they are notified of its revocation.

Insurance Co. v. Stambaugh, 76 O. S. 138 (1907).

An agent representing several companies issued a policy in one company. His agency being revoked by that company, he induced the insured to surrender the policy and accept a policy in another of his companies, by representing that the first company had more insurance in the block than it desired, the insured not knowing of the revocation of his authority. The second company was held liable under the substituted policy; the insured having a right to rely on the continuance of the authority to represent the first company, the delivery of the policy for cancellation bound the first company, and the delivery of a duly executed policy bound the second company.

Insurance Co. v. Stambaugh, 76 O. S. 138 (1907).

An agent, entrusted with the policy and authorized to deliver it, was held to bind the company by accepting notice of additional insurance and endorsing the same upon the policy.

Where such agent erased a material stipulation from the policy, and delivered it to the insured, who had no knowledge of the circumstances of the erasure, or of the want of authority to make it, the company is bound to the same extent as if the erasure were authorized.

Insurance Co. v. Kelly, 24 O. S. 345 (1873).

Section 9587. (How contracts evidenced.) Policies or contracts of insurance made or entered into by the company may be made either with or without its seal. They shall be subscribed by the president or such other officer as the directors designate for that purpose, and be attested by the secretary. When so subscribed and attested, they shall be obligatory on the company. (R. S. Sec. 3645; April 27, 1872, 69 v. 140, § 11; S. & S. 208.)

CONTRACTS OF FIRE INSURANCE.

The contract of insurance, other than that of life or accident, is one of indemnity.

State v. Laylin, 73 O. S. 90, 97 (1905).

See State v. Insurance Co., 1 C. C. n. s. 4, 9; 14 C. D. 387 (1903).

Insurance Co. v. Butler, 38 O. S. 128 (1882).

An insurance policy is a contract between the insured and the insurer, whereby for an agreed premium the insurer undertakes to compensate the insured for loss on a specified subject by specified perils. Insurance Co. v. Cochran, 104 O. S. 427 (1922).

Distinction between open and valued policies.

See Insurance Co. v. Butler, 38 O. S. 128, 134 (1882).

Valued policies, see § 9583 and note.

Parol contracts of insurance. A valid contract of insurance may be made by parol, when not forbidden by statute, or by a provision of the company's charter of which the insured has notice; and the assent of the parties to the agreement may be shown by their acts and the surrounding circumstances, as well as by their words.

Machine Co. v. Insurance Co., 50 O. S. 549 (1893).

See Insurance Co. v. Wall, 31 O. S. 623 (1877).

Contra, Cockerill v. Insurance Co., 16 Ohio 148 (1847); (overruled, see 31 O. S. 633).

Where nothing is said in the negotiations about special rates of insurance, or special conditions of the policy, it will be presumed that those which were usual and customary were intended.

Machine Co. v. Insurance Co., 50 O. S. 549 (1893).

A policy may be modified or altered by parol.

Halliday v. Insurance Co., 1 W. L. B. 286 (1876).

This section refers to the final policy to be issued and not to contracts for policies or intermediary contracts for insurance.

Bartels v. Insurance Co., 2 O. L. R. 408; 15 L. D. 452 (C. P. 1905).

A provision in the charter of an insurance company requiring that "all policies or contracts of insurance shall be subscribed by the president or some other officer designated by the board of directors for that purpose" was held not to disable the company from binding itself by contracts for policies and intermediary insurance executed in other modes and by other agents, but to merely prescribe the manner in which the final contract or policy should be executed.

Insurance Co. v. Kelly, 24 O. S. 345, 364 (1873).

Insurance Co. v. Colt, 89 U. S. 560 (1874).

A parol contract of insurance, as distinguished from a parol agreement to issue a policy, must not be executory, but must take effect in praesenti.

Insurance Co. v. Whitman, 75 O. S. 312 (1906).

Full and clear proof is necessary to establish the relation of insurer and insured, in parol, before delivery of the policy.

Insurance Co. v. Whitman, 75 O. S. 312 (1906).

In an action to recover on a written policy, and an alleged verbal modification thereof, statements of the agent who solicited the policy, prior to and contemporaneous with its issue, are inadmissible to vary its terms. In the absence of fraud or mistake, such statements are merged into the written contract.

Insurance Co. v. Hook, 62 O. S. 256 (1900).

Agreement to issue policy; specific performance.

See Suydam v. Insurance Co., 18 Ohio 459 (1849).

Neville v. Insurance Co., 19 Ohio 452 (1850).

Where the property was transferred and the policy assigned, a verbal agreement, by an agent authorized to make contracts and issue policies, that the assigned policy should have the effect of a new policy, was held binding.

Insurance Co. v. Wall, 31 O. S. 628 (1877).

When contract takes effect.

Before delivery of policy. In the absence of a stipulation in the application or policy, making actual delivery of the policy a condition precedent to the consummation of the contract, the actual delivery or non-delivery of the policy is not of itself conclusive evidence of the completion of the contract; but the unconditional acceptance of the application by the insurer is a consummation of the contract.

Insurance Co. v. Whitman, 75 O. S. 312 (1906).

Machine Co. v. Insurance Co., 50 O. S. 549 (1893).

Insurance Co. v. Plato, 3 C. C. n. s. 207; 13 C. D. 35 (1901); aff'd, no rep., 69 O. S. 701.

Johnson v. Insurance Co., 66 O. S. 6 (1902).

Bennett v. Insurance Co., 27 W. L. B. 15 (1891).

Where there is no oral agreement for insurance prior to the policy, if a policy has been executed in form, but has not passed out of the possession of the insurer or his agent, and no premium has been paid, the contract is prima facie incomplete; and the burden is upon the party who asserts that there is a contract, to show that the policy became operative by the intention of both parties.

Where, there being no oral agreement for insurance to take effect prior to the issue of the policy, upon an application for insurance at less than the regular rate, an agent wrote up and countersigned a policy and, without parting with possession thereof, wrote to the applicant that he had "issued" a policy, but would hold it until he heard from the company, and the company thereafter rejected the risk and the agent forwarded the policy to the company, no contract of insurance was consummated, although the applicant received no notice of refusal of the risk.

Insurance Co. v. Whitman, 75 O. S. 312 (1906).

The general agent of a fire insurance company may bind it by a preliminary contract for insurance. Where the agent represents several companies he must designate, in some way, the company for which he contracts, in order to bind it, but notice to the company is not necessary.

Insurance Co. v. Bennett, 1 N. P. 71; 1 L. D. 60 (Super. Ct. Cin. 1894); aff'd, no rep., 56 O. S. 749; s. c., in special term, 27 W. L. B. 15.

The company can not ratify the agent's contract in part and reject it in part, without consent of the insured, and the insured may recover on the agent's contract, if he had no knowledge of the attempted modification thereof by the company. Insurance Co. v. Houek, 32 O. C. A. 429 (1922); motion to certify record overruled.

Where an agent, representing several companies, on being requested by telephone to write a policy for a given amount on certain property

replied that he would do so, and thereafter wrote a policy in one of his companies, and the building was destroyed by fire before delivery of the policy or payment of the premium, the company was held liable where there was no claim made that the policy was not delivered because of failure to pay premium.

Insurance Co. v. Plato, 3 C. C. n. s. 207; 13 C. D. 35 (1901); *aff'd*, no rep., 68 O. S. 701.

See also *Insurance Co. v. Shoemaker*, 22 W. L. B. 315.

When a contract of insurance has been completed by the party applying for insurance doing all that is required on his part, although the agent acting for the company has no power to issue the policy, the risk commences from the time of making such contract, if there be no stipulation to the contrary. Where such application, together with the premium note, is mailed to the office of the company, from which the policy is to issue, the company is liable, although the loss occurs before the arrival of the letter containing the application.

Palm v. Insurance Co., 20 Ohio 529 (1851).

Krumm v. Insurance Co., 40 O. S. 225 (1883).

If such contract be fair and strictly within the rules of the company, such liability will exist, although there be printed on the blank application the qualification that the policy will issue "if approved" by the company. Such qualification only saves the company the right to object to an unfair contract.

Palm v. Insurance Co., 20 Ohio 529 (1851).

Delivery. In the absence of any other evidence to show assent of the company to a contract of insurance, delivery of the policy must be shown.

Insurance Co. v. Whitman, 75 O. S. 312, 320 (1906).

Requisites of a valid delivery.

See *Insurance Co. v. Whitman*, 75 O. S. 312, 320.

Delivery of a duly executed policy, by an authorized agent, binds the company although the policy was accepted by the insured as a substitute for a policy in another company, which had revoked the authority of the same agent to act for it, the insured having no knowledge that the substitution was wrongful.

Insurance Co. v. Stambaugh, 76 O. S. 138 (1907).

An insurance agent negotiated for the plaintiff, through underwriters, a policy in one company. A few months later the underwriters notified the agent that the company would cancel the policy. The agent assented for the plaintiff but said that he would take the usual five days to obtain other insurance. Thereupon the underwriters offered to rewrite the policy in another company. The plaintiff, through the agent, assented, and a new policy was delivered the same day at two o'clock. A fire occurred at six o'clock. Held, that the court properly submitted to the jury the question as to the time the contract took effect, and the finding of the jury that it went into effect at the time of delivery is not contrary to law.

Ensel v. Lumber Ins. Co., 88 O. S. — (1913).

Before payment of premium. A policy takes effect before payment of premium in the absence of a stipulation on the subject.

See *Plato v. Insurance Co.*, 3 C. C. n. s. 207; 13 C. D. 35 (1901); *aff'd*, no rep., 68 O. S. 701.

An agent authorized to make contracts of fire insurance and issue policies may waive payment in cash of the premiums and give time for payment, unless there are restrictions in the policy of which the insured has notice; and such waiver may be express or implied.

Machine Co. v. Insurance Co., 50 O. S. 549 (1893).

Where, under an arrangement with the insured by which his insur-

ance was to be maintained up to a specified amount by renewals or new policies, it was the custom of the agent to charge the premiums as policies were issued, or renewed, and have periodical settlements with the insured, when the premiums would be paid, a credit for a premium so charged to the next settlement period may be implied.

Machine Co. v. Insurance Co., 50 O. S. 549 (1893).

Cancellation of policies.

See § 9577 and note.

Renewal. Where an agreement was made between an insurance company and a policyholder to renew the policy, nothing being said as to a change in its provisions, and a renewal policy, containing a new clause which materially affected the right of the policyholder to recover, was delivered but not read by the insured, the insured upon discovering the change may have the policy reformed by striking out the added clause. Under the circumstances the insured was held not guilty of laches. *Roberts v. Insurance Co.*, 2 Ohio App. 463; 21 C. C. n. s. 433 (1914); s. c., 27 O. C. A. 10; 28 C. D. 253; motion to certify record overruled, 13 O. L. R. 420.

Insurable interest. The following have been held to have an insurable interest:

Vendee in possession under a land contract, who has paid a part of the purchase money.

Insurance Co. v. McCulloch, 21 O. S. 176 (1871).

Little v. Insurance Co., 9 N. P. n. s. 377; 20 L. D. 315 (C. P. 1910).

Owner of an equitable interest.

Little v. Insurance Co., 9 N. P. n. s. 377; 20 L. D. 315 (C. P. 1910).

Mortgagee.

See Brewing Co. v. Insurance Co., 81 O. S. 1 (1909).

Insurance Co. v. Krumm, 12 C. C. n. s. 364 (1909).

Husband in dwelling house used as homestead, the legal title being in his wife, and the policy being issued to husband and wife jointly.

Webster v. Insurance Co., 53 O. S. 558 (1895).

Landlord in permanent improvements and fixtures placed in the building by a tenant.

Insurance Co. v. Carson, 17 W. L. B. 357 (Super. Ct. Cin.).

A wife having no individual interest in a crop, raised on shares by a third person under a contract with her husband who subsequently became insane, has no insurable interest which will support a policy issued to the wife and third person jointly.

Nessley v. Insurance Co., 10 N. P. n. s. 59 (C. P. 1908).

A stockholder has no insurable interest in property belonging to the corporation.

Phillips v. Insurance Co., 20 Ohio 174 (1851).

A total alienation of the property by the insured extinguishes his insurable interest, although the policy contains no condition against alienation.

West v. Insurance Co., 27 O. S. 1, 7 (1875).

Manufacturing Co. v. Insurance Co., 10 O. S. 348 (1859).

The policy does not pass to the grantee of the property by operation of law.

Gilbert v. Port, 28 O. S. 276 (1876).

But an invalid judicial sale, which is subsequently set aside, does not extinguish the insurable interest of the mortgagor in possession.

Insurance Co. v. Sampson, 38 O. S. 672 (1883).

PROVISIONS, TERMS AND CONDITIONS OF POLICY.

Where a life insurance policy was accepted by the insured, remained in his possession for nine years, and nine annual premiums were paid by him, he is conclusively presumed to have knowledge of all the stipulations and provisions of the policy.

Insurance Co. v. Hook, 62 O. S. 256 (1900).

Construction. Policies of insurance should be construed, like other contracts, so as to give effect to the intention and express language of the parties.

Insurance Co. v. Myers, 62 O. S. 529 (1900).

West v. Insurance Co., 27 O. S. 1 (1875).

A policy should be construed strongly against the insurer and liberally in favor of the insured.

Swander v. Insurance Co., 1 C. C. n. s. 233, 237; 15 C. D. 3 (1903).

Holterhoff v. Insurance Co., 3 Am. L. R. 272 (1874).

Snapp v. Insurance Co., 8 O. S. 458, 461 (1858).

See Insurance Co. v. Schild, 69 O. S. 136, 139 (1903).

Exceptions in a policy should be strictly construed, and where there are two interpretations which are equally fair, the one which gives the greater indemnity should prevail.

Blackwell v. Insurance Co., 48 O. S. 533, 540 (1891).

Provisions for disabilities and forfeitures should, when the intent is doubtful, be strictly construed against those for whose benefit they are introduced.

Webster v. Insurance Co., 53 O. S. 558 (1895).

Swander v. Insurance Co., 1 C. C. n. s. 233, 235; 15 C. D. 3 (1903).

Ensel v. Insurance Co., 88 O. S. 269 (1913).

But where the language has a plain meaning, and is not inconsistent with other clauses or provisions of the policy, effect must be given to it.

Transportation Co. v. Insurance Co., 170 Fed. 279 (C. C. A. 1909).

In case of conflict between the printed provisions of a policy and those inserted in writing at the time the contract is executed, the latter will prevail.

Bank v. Insurance Co., 83 O. S. 309 (1911).

But the special provision will override the general provision only where the two can not stand together. If reasonable effect can be given to both, each will be retained.

Insurance Co. v. Roost, 55 O. S. 581 (1897).

A condition, in a printed form of policy, of doubtful meaning susceptible of two or more constructions, will be construed most favorably to the insured.

Bank v. Insurance Co., 83 O. S. 309 (1911).

Stipulations rendering a policy void for forbidden hazards are construed to avoid liability during the existence of the forbidden hazard, but no longer.

Insurance Co. v. Burget, 65 O. S. 119, 123 (1901).

A stipulation rendering a policy "void," for certain causes, may become the subject of construction because of the variety of senses in which the word is used.

Insurance Co. v. Burget, 65 O. S. 119 (1901).

A policy containing a stipulation that "this entire policy shall be void" on certain named conditions, is not a severable risk, although the amount of insurance is distributed among different classes or articles of property.

Insurance Co. v. Schild, 69 O. S. 136 (1903).

Waiver. Conditions in a policy may be waived by the insurance company or its authorized agents.

Bank v. Insurance Co., 83 O. S. 309 (1911).

A "non-waiver" clause in the policy does not prevent a waiver by acts and conduct of authorized agents. *Insurance Co. v. Cochran*, 104 O. S. 427 (1922).

Knowledge by the agent, of facts as to the insurability of property, at the time the policy is issued, is the knowledge of the company, and operates as a waiver, although the policy contains a non-waiver clause. *Foster v. Insurance Co.*, 101 O. S. 180 (1920).

Knowledge by the agent of facts occurring subsequent to the issuance of the policy may not be a waiver. *Insurance Co. v. Titus*, 82 O. S. 161 (1910).

See also note to § 9586. *Authority to waive conditions of policy.*

As to the application. Where the written application is referred to in the policy and expressly made a part of the contract, it becomes a part thereof as fully as if embodied in the policy.

Byers v. Insurance Co., 35 O. S. 606 (1880).

Where a policy provided that "any false representations made by the assured of the condition or occupancy of the property, or any material fact—material to the risk" would avoid the risk, it was held that representations concerning a matter material to the risk contained in the application, if untrue in fact, would avoid the policy, whether made intentionally or otherwise.

Byers v. Insurance Co., 35 O. S. 606 (1880).

See *Pyle v. Insurance Co.*, 44 O. S. 19.

This rule has been modified by statute in some respects. See § 9583.

An omission to answer questions in the application does not constitute fraud, and where a policy is issued on the application, the omission is waived.

Insurance Co. v. McCulloch, 21 O. S. 176 (1871).

Insurance Co. v. Hock, 8 C. C. 341; 4 C. D. 553.

See also note to § 9586, *Application filled up by agent.*

A statement in the application that the property was unincumbered, when in fact a mortgage had been executed and delivered, avoids the policy.

Hutchins v. Insurance Co., 11 O. S. 477.

Concealment of any material fact. Where the interest of the insured in a building was acquired from a railroad company by written contract, in which he agreed to demolish the building and release the railroad from all damage by fire caused by it, and the underwriters thoroughly inspected the risk on the premises before they wrote the policy, but did not inquire for the contract nor ask any questions, and the insured made no statement about it, it was held that it was for the court to say whether his failure to mention the release was a material concealment.

Ensel v. Insurance Co., 88 O. S. 269 (1913).

The underwriters were held to be advised of the nature and extent of the interest of the insured as an element of the risk where the subject of insurance was described in the policy as follows: "On his interest in the lumber in Wabash Elevator No. 4 while on the premises, situated, . . . It is understood that the building is in progress of demolition and said insurance is to cover above described lumber while on the premises."

Ensel v. Insurance Co., 88 O. S. 269 (1913).

An incorrect statement in a proof of loss, terming the loss a "fire" loss, does not avoid a policy under a clause avoiding the policy for concealment or misrepresentation of material facts, where the policy covered a loss by lightning, and the loss was a collapse of the building caused, according to the insured's contention, by lightning. *Hartford Ins. Co. v. Storage Co.*, 9 Ohio App. 403; 28 O. C. A. 273 (1918).

Premiums. See also above, *When contract takes effect*, and note to § 9420.

Where a policy is made and accepted on the express condition that "the entire policy shall be void . . . if the premium, or any note given therefor, shall have been due and unpaid for thirty days at the time any loss or damage shall happen to the property insured" the policy immediately becomes void, if the premium or note be not paid within thirty days after payment is due. No demand of payment or notice of intention to insist on the forfeiture is necessary on the part of the insurer.

Insurance Co. v. Wilson, 70 O. S. 354 (1904).

As to title. Where a policy covering a farm dwelling and farm implements is issued to a wife and husband, the dwelling being occupied as a homestead, and the implements used on the farm, a warranty and representation in the application that the property is owned by them jointly will not be held to be untrue merely because the title to the dwelling is wholly in the wife and the title to the implements is in the husband.

Webster v. Insurance Co., 53 O. S. 558 (1895).

——. Condition avoiding policy if the "interest of the insured be other than an unconditional and sole ownership, or if the subject of insurance be a building on ground not owned by the insured in fee simple." Such a condition does not bar recovery on the policy where the agent who issued the policy had knowledge that the insured's title was a leasehold only, and the insured had no knowledge of the condition until after a loss had occurred. *Foster v. Insurance Co.*, 101 O. S. 180 (1920).

Under a clause, attached to the policy by an authorized agent, providing that it should cover property held in trust, or on commission, or sold but not removed, etc., the condition as to sole ownership was held to be waived.

Bank v. Insurance Co., 83 O. S. 309 (1911).

Such a condition does not bar recovery by a vendee who has been in possession under a land contract for more than twenty years although he has not paid all of the purchase price and has not received a deed.

Little v. Insurance Co., 9 N. P. n. s. 377; 20 L. D. 315 (C. P. 1910).

Breach of such a condition is no defense to the insured, in an action for assessments brought by the receiver of a mutual insurance company.

Webber v. Swing, 36 W. L. B. 179 (Supreme Court, without report, 1896).

Where the policy covered both the building and merchandise therein, in specified amounts, it was held that the contract was severable and that a breach of condition as to the land did not defeat recovery for the loss of the merchandise.

Coleman v. Insurance Co., 49 O. S. 310 (1892).

The risk is not severable where the stipulation is that "this entire policy shall be void" if the interest of the insured is not that of absolute ownership.

State v. Insurance Co., 2 N. P. n. s. 111; 14 L. D. 523 (1904); *aff'd*, no rep., 73 O. S. 341.

Insurance Co. v. Schild, 69 O. S. 136 (1903).

Where the property insured was lumber in a building in process of demolition and not part of the real estate, the fact that the building was on ground not owned by the insured was held not to constitute a defense.

Ensel v. Lumber Insurance Co., 88 O. S. 269 (1913).

A purchaser of machines, under a contract, the title being retained by the seller until the expiration of the patents, and stipulated sums paid to the patentee meanwhile, is not the unconditional and sole owner.

State v. Insurance Co., 2 N. P. n. s. 111; 14 L. D. 523 (1904); aff'd, no rep., 73 O. S. 341.

A vendor is not an unconditional and sole owner, where he has executed a land contract and the vendee has taken possession, and is not in default. Likewise a corporation is not such an owner, where its sole stockholder has executed a land contract in his own name. Insurance Co. v. Brown, 16 C. C. n. s. 518; 25 C. D. 69 (1905).

The interest of a purchaser under a conditional sale contract, before full payment, is not unconditional and sole ownership. Muskovitz v. Insurance Co., 3 Ohio App. 422; 21 C. C. n. s. 250; 26 C. D. 324 (1914).

— Against change "in the title, interest or possession by sale, transfer or conveyance" of the property. Violation of such a stipulation avoids the policy although the policy requires the insurer to consent to alienation, if requested within a certain time after the sale.

Insurance Co. v. Lindsey, 26 O. S. 348 (1875).

A conveyance by a husband to his wife of an undivided half interest in the property, without consent of the insurance company, violates the condition against alienation, where the insured was married subsequent to the issuance of the policy. Ohio Co. v. Wanda, 19 N. P. n. s. 133 (1915).

— Held to constitute a violation.

An assignment for creditors.

Insurance Co. v. Waters, 65 O. S. 157 (1901).

Guenzburger v. Insurance Co., 3 N. P. 140; 4 L. D. 220.

Execution of a trust deed for the purpose of paying off mortgage incumbrances, the residue of the proceeds of sale to be returned to the insured.

Insurance Co. v. Black, 6 C. C. n. s. 132; 17 C. D. 86 (1905).

Conveyance reserving a life estate.

Insurance Co. v. Archer, 36 O. S. 608 (1881).

Judicial sale, although set aside after the loss.

Manufacturing Co. v. Insurance Co., 10 O. S. 347 (1859).

But see, Insurance Co. v. Sampson, 38 O. S. 672 (1883).

Sale by land contract, the vendee paying a part of the purchase price and taking possession.

Lees v. Insurance Co., 45 W. L. B. 335 (1901).

Insurance Co. v. Brown, 16 C. C. n. s. 518; 25 C. D. 69 (1905).

Conveyance of an undivided one-half interest by husband to wife, where the marriage occurred subsequent to the issuance of the policy. Ohio Co. v. Wanda, 19 N. P. n. s. 133 (1915).

— Held not to constitute a violation. (The wording of the condition is not, in all the cases cited below, the same as given above. In some cases, the condition, is merely against a sale or transfer.)

A mortgage.

Sun Fire Office v. Clark, 53 O. S. 414 (1895).

Byers v. Insurance Co., 35 O. S. 606 (1880).

Prows v. Insurance Co., 2 C. S. C. R. 14 (1870).

A land contract agreeing to convey the property at a future day on payment of the purchase price.

Trumbull v. Insurance Co., 12 Ohio 305 (1843).

Peck v. Hale, 11 Ohio App. 418; 30 O. C. A. 423 (1919).

The retirement of a partner and sale of his interest to the remaining partners.

West v. Insurance Co., 27 O. S. 1 (1875).

See Walker v. Insurance Co., 2 Handy 256 (1856).

A sale and transfer of merchandise followed by a resale and re-transfer to the insured.

Insurance Co. v. Lewis, 1 C. C. 79; 1 C. D. 47 (1885); aff'd, no rep., 19 W. L. B. 173.

Transfer to a trustee for the sole use and benefit of the insured.

Wood v. Insurance Co., 17 N. P. n. s. 273 (1913).

Transfer by one tenant in common to his co-tenants.

Insurance Co. v. Sockman, 15 C. C. 105; 8 C. D. 404 (1896); aff'd, no rep., 58 O. S. 717.

Delivery of possession to mortgagee.

Insurance Co. v. Hayes, 17 O. S. 432 (1867).

The appointment of a receiver to collect rents *pendente lite* in an action to forfeit the leasehold interest of the insured, where the receiver is not, and the insured is, in actual physical possession of the property. Foster v. Insurance Co., 101 O. S. 180 (1920).

The sale of an undivided interest, by the sole owner of a stock of merchandise, to a person who entered into partnership with him, was held not to violate a condition against a sale or transfer.

Blackwell v. Insurance Co., 48 O. S. 533 (1891).

Where an authorized agent of the insurance company endorsed on the policy a consent to the transfer of the property, the consent was held binding although only a part of the purchase price was paid and a mortgage was given to secure the balance. The mortgage did not avoid the policy.

Insurance Co. v. Brown, 4 C. C. n. s. 78; 14 C. D. 52 (1903).

Insurance Co. v. Ashton, 31 O. S. 477 (1877).

Where a deed was deposited in escrow for delivery to the purchaser when the purchase money was paid, and a fire occurred while the deed was held in escrow, and the insurance money paid to the vendor, as between vendor and purchaser it was held that the policy did not become void because of change of ownership and that the purchaser was entitled to the proceeds of insurance. Peek v. Hale, 11 Ohio App. 418, 30 O. C. A. 473 (1919).

Against assignment of the policy. The retirement of a partner and sale of his interest to the remaining partners does not avoid the policy.

West v. Insurance Co., 27 O. S. 1 (1875).

A "mortgage clause" attached to a policy at the time it is executed, which makes the loss, if any, payable to the mortgagee as his interest may appear is not an assignment of the policy to the mortgagee.

Brewing Co. v. Insurance Co., 81 O. S. 1 (1909).

Where the insurer consented in writing to an assignment of a policy, the terms of which limited the parties to the policy as issued and such additional modifying terms as are endorsed thereon in writing, a rider restricting liability of the insurer, which had been delivered by the insurer to the assignor of the policy but never attached to the policy, is not binding on the assignee. Auglaise Box Board Co. v. Insurance Co., 4 Ohio App. 26; 25 C. C. n. s. 339 (1914).

Against incumbrances. A stipulation avoiding the policy if any part of the property shall be incumbered by mortgage without the consent of the company is not within the provisions of § 9583. Such an incumbrance invalidates the policy.

Webster v. Insurance Co. 53 O. S. 558 (1895).

A vessel is a chattel and a mortgage thereof a "chattel mortgage" under a stipulation avoiding the policy "if the subject of insurance be personal property and be or become incumbered by a chattel mortgage."

Transportation Co. v. Insurance Co., 170 Fed. 279 (C. C. A. 1909).

A policy is avoided by a condition against incumbrances although

the insured made no representations regarding incumbrances, and the amount of incumbrances is small in comparison to the value of the property.

Hickey v. Insurance Co., 20 C. C. 385; 11 C. D. 135 (1900).

That the agent of the insurance company had notice or knowledge of a mortgage incumbrance and received premiums is not a waiver of a condition against incumbrances, where the policy required all wavers to be indorsed on the policy.

Insurance Co. v. Titus, 82 O. S. 161 (1910).

Insurance Co. v. Kreidel, 11 C. C. n. s. 193; 20 C. D. 677 (1908).

Smith v. Insurance Co., 19 O. S. 287 (1869).

Hammel v. Insurance Co., 4 C. C. n. s. 380; 14 C. D. 101 (1902).

Where the agent of the company, learning of the execution of a chattel mortgage, informed the insured of its effect on the insurance, and the policy was returned to the agent who notified the company, it was held to be the duty of the company to act within a reasonable time, and either return the unearned premium or the policy, and that where the agent returned the policy to be insured, retaining the premium, the condition of the policy was waived.

Bank v. Insurance Co., 83 O. S. 309 (1911).

The following have been held to be violations of a condition against incumbrances:

A mortgage given by a corporation to secure its bonds, which were not sold, but were pledged to secure its obligations.

Transportation Co. v. Insurance Co., 170 Fed. 27 (1909).

An unrecorded mortgage.

Hutchins v. Insurance Co., 11 O. S. 477 (1860).

A chattel mortgage. *Muskovitz v. Insurance Co.*, 3 Ohio App. 422; 21 C. C. n. s. 250 (1914).

The following have been held not to be such violations of a condition against incumbrances as to invalidate the insurance.

Substitution of one mortgage for another without increasing the amount.

Insurance Co. v. Dannison, 38 W. L. B. 163 (1897).

A cognovit judgment, where it was not alleged or proved that the risk was increased thereby.

Insurance Co. v. Bowersox, 5 C. C. 444; 3 C. D. 218 (1891); aff'd, no rep., 51 O. S. 567.

But see *Insurance Co. v. Werner*, 76 O. S. 543 (1907).

Dower of a widow under a policy payable to the "heirs" of her husband.

Insurance Co. v. Britton, 31 O. S. 488 (1877).

A railroad mortgage covering a building in process of demolition, the lumber in which was sold by the railroad company to the insured, the mortgage containing a provision permitting the railroad company to dispose of equipment and material, replacing the same with new.

Ensel v. Lumber Insurance Co., 88 O. S. 269 (1913).

Where consent of the company to a transfer of the property was indorsed on the policy, and the sale was made in part for cash, and a mortgage given to secure the balance, the consent to the transfer was held to include consent to the terms of sale, and the mortgage did not avoid the policy.

Insurance Co. v. Brown, 4 C. C. n. s. 78; 14 C. D. 52 (1903); aff'd, no rep., 68 O. S. 655.

Insurance Co. v. Ashton, 31 O. S. 477 (1877).

— **Mortgage clause.** A "mortgage clause" attached to the policy at the time of its execution by an authorized agent of the company, making the loss, if any, payable to the mortgagee as his interest may

appear is a waiver of a condition against incumbrance in the printed portion of the policy.

Bank v. Insurance Co., 83 O. S. 309, 332 (1911).

Such a clause is not an assignment of the policy to the mortgagee.

Brewing Co. v. Insurance Co., 81 O. S. 1 (1909).

The mortgagee is bound by the award of appraisers, required by the policy in case of disagreement between the insured and the insurer as to the amount of the loss, although the mortgagee was not a party to, and had no notice of, the appraisalment and award; in the absence of fraud or collusion.

Brewing Co. v. Insurance Co., 81 O. S. 1 (1909); reversing 11 C. C. n. s. 28; 20 C. D. 390.

A mortgagor is not the agent of the mortgagee in procuring insurance on the mortgaged property for the benefit of the mortgagee as his interest may appear and in accordance with an agreement so to do. And where the mortgagee was not a party to the procuring of the policy, and had no knowledge of fraud, fraudulent representations and concealments on the part of the mortgagor in procuring the insurance constitute no defense against the mortgage.

Insurance Co. v. Boland, 8 C. C. n. s. 325 (1904); aff'd, no rep., 72 O. S. 645; 73 O. S. 393.

Construction of ambiguous clause relating to binding effect on mortgage, of conditions in policy.

See Bank v. Insurance Co., 83 O. S. 309, 336 (1911).

A policy for the benefit of a mortgagee as additional security provided that the insured could not "demand or recover" any part of the insurance until the mortgaged property was exhausted. Upon a total loss the mortgagee was held entitled, under § 9583, to maintain an action on the policy before it was determined by a foreclosure and sale how much of the insurance money was required to pay the mortgage debt.

Insurance Co. v. Mirick, 38 W. L. B. 172 (1897).

A stipulation in the policy, that its conditions and provisions should apply to the interest of the mortgagee, renders inapplicable as to the mortgagee conditions avoiding the policy for (a) non-operation of a manufacturing plant, (b) foreclosure proceedings and (c) as to vacancy of the premises. (A different rule prevails in federal courts.) Trust Co. v. Insurance Co., 1 Ohio App. 447; 17 C. C. n. s. 411; 24 C. D. 218 (1913).

It has been held that a mortgagee under the so-called "union mortgage clause" of the standard fire policy of New York, New Jersey and Connecticut may recover on the policy although neither he nor the mortgagor present proof of loss as required of the "insured" by a condition in the policy.

Insurance Co. v. Krumm, 12 C. C. n. s. 364 (1909).

Compare Brewing Co. v. Insurance Co., 81 O. S. 1 (1909).

Other insurance. Additional insurance increases the risk, as a matter of law, and a condition avoiding the policy, if other insurance is placed on the property, is not prohibited by § 9583.

Sun Fire Office v. Clark, 53 O. S. 414 (1895).

Other insurance placed on property, without the consent of the insurance company, in violation of a condition avoiding the policy therefor, defeats recovery on the policy, unless the condition is waived by the company or an authorized agent.

McBee v. Insurance Co., 11 N. P. n. s. 75 (C. P. 1910).

Insurance Co. v. France, 51 O. S. 604 (decided without opinion, 1894).

Sun Fire Office v. Clark, 53 O. S. 414 (1895).

A condition against other insurance in a policy issued to a railroad on a warehouse was held to be violated by subsequent insurance covering the warehouse and other property of the railroad.

Insurance Co. v. Railroad Co., 28 O. S. 69 (1875).

A condition against other insurance in a policy issued to a lessor, is not violated by other insurance procured by his lessee, in the name of the lessor, with loss payable to lessee, without the knowledge of the lessor.

Insurance Co. v. Carson, 23 W. L. B. 224.

See Bates v. Insurance Co., 2 C. S. C. R. 195 (1872).

The procuring of new policies which never took effect, because of conditions therein, was held not to be a violation of a condition against other insurance.

Insurance Co. v. Holt, 35 O. S. 189 (1878).

Where a contract for intermediary insurance and for a policy on the same risk was made subject to the conditions in the printed policy, which required all additional insurance to be endorsed on the policy, it was held that no endorsement was required to be made on the contract for intermediary insurance.

Insurance Co. v. Holt, 35 O. S. 189 (1878).

A slip attached to the policy providing that "other concurrent insurance permitted to the amount of \$....." was held to be a waiver of the condition against other insurance except by agreement added to the policy, where the agent had knowledge of the other insurance, before the policy was issued. McKelvey v. Insurance Co., 1 Ohio App. 184; 20 C. C. n. s. 88; 24 C. D. 443 (1913).

A provision in a policy limiting the liability of the insurer to its proportion of the loss, in the event of other insurance, is valid as to personal property but is in violation of §§ 9583 and 9584 as to buildings. Insurance Co. v. Dennison, 93 O. S. 404 (1916).

Where a question in an application regarding other insurance was not answered, a condition requiring notice of prior insurance was held to be waived.

Insurance Co. v. Kelly, 24 O. S. 345 (1873).

Where the application was filled in by the agent, who was told by the applicant that he had other insurance, but the agent wrongly entered in the application that there was no other insurance, the condition against other insurance is no defense to the company.

Herbert v. Insurance Co., 3 C. C. n. s. 7; 13 C. D. 235 (1901); aff'd, no rep., 68 O. S. 687.

Evidence that an agent of the insured called, by telephone, the office of the insurance company and notified the person answering the call that additional insurance had been taken out, and that the reply was "all right," has been held competent.

Insurance Co. v. Hock, 8 C. C. 341; 4 C. D. 553 (1894); affirmed without passing on the effect of the evidence as to notice by telephone, 56 O. S. 735.

Reformation of a policy to provide for a waiver of the condition against other insurance was refused where it was not shown that the agent who solicited the insurance was authorized to waive the condition, or that the agent who wrote the policy consented to the waiver or had knowledge of other insurance.

McBee v. Insurance Co., 11 N. P. n. s. 75 (C. P. 1910).

As to vacancy. A condition avoiding the policy if the building shall become vacant, unoccupied or uninhabited, without the knowledge or consent of the insurer, is valid, and there can be no recovery under the policy for a loss by fire while the building is vacant.

Insurance Co. v. Werner, 76 O. S. 543 (1907); approving Insurance Co. v. Wells, 42 O. S. 519 (1885); overruling Moody v. Insurance Co., 52 O. S. 12 (1894); (and reversing 6 N. P. n. s. 514; 16 L. D. 524; 1 Hosea 405).

Such a condition is not inconsistent with § 9583 and it is not necessary for the insurance company to allege and prove that the risk was increased by the vacancy.

Insurance Co. v. Werner, 76 O. S. 543 (1907).

Under such a condition a policy is avoided where a tenant moves out and leaves the house vacant, without the knowledge of the owner.

Insurance Co. v. Wells, 42 O. S. 519.

A condition against non-operation of a manufacturing plant for more than 30 consecutive days is not nullified by a rider reading: "privilege of temporarily ceasing operations, not exceeding thirty days at any one time, without notice to the company." Watson v. Insurance Co., 23 C. C. n. s. 363; 26 C. D. 351 (1913).

Where a tenant moved out, and the son of the owner slept in the house during the day and worked nights, having only a cot, a chair and an alarm clock in the house; and the family of the owner resided next door and obtained water from a cistern in the kitchen of this house, and the owner went through the house every day, and a fire occurred late at night, it was held that in legal effect the house was unoccupied.

Insurance Co. v. Baldwin, 62 O. S. 368 (1900).

Where the agent of the company has knowledge of the vacancy, the condition is waived.

Insurance Co. v. McBee, 12 C. C. n. s. 228; 21 C. D. 469 (1909); aff'd, 85 O. S. 161.

Where the condition of manufacturing property was the same at the time the policy was written and delivered as it was at the time of the fire, a condition against vacancy and non-operation will not defeat recovery.

Gump v. Insurance Co., 15 C. C. n. s. 428; 24 C. D. 36 (1912); aff'd, no rep., 86 O. S. 325.

But where the policy provided that no agent should have power to waive any condition of the policy, except in writing endorsed on the policy, it was held that knowledge by the agent that the establishment was idle, at the time the policy was written and thereafter remained idle, did not entitle the insured to recover. Watson v. Insurance Co., 23 C. C. n. s. 363; 26 C. D. 351 (1913); not following Gump v. Insurance Co., *supra*.

A condition against vacancy does not avoid a policy as against a mortgagee, under certain forms of mortgage clauses. Trust Co. v. Insurance Co., 1 Ohio App. 447; 17 C. C. n. s. 411; 24 C. D. 218 (1913).

As to change in location of property. Under a stipulation that "this policy shall become void, unless consent in writing is endorsed by the company hereon, if any change takes place in the location of the property," the insured may recover for the loss of chattels destroyed at a location to which they were removed with the insurer's consent, notwithstanding their previous removal to another location without such consent.

Insurance Co. v. Burget, 65 O. S. 119 (1901); affirming 17 C. C. 619.

Such a stipulation should be construed with reference to its purpose and, thus construed, it does not exempt the insurer from liability because of a change in the location of insured chattels without its consent if the hazards of such location are not operative at the time of loss.

Insurance Co. v. Burget, 65 O. S. 119 (1901).

Where goods insured "while located and contained as described herein and not otherwise" are removed to another location, without consent of the company endorsed on the policy, as required by the policy, there can be no recovery for a loss after the removal, notwithstanding the insured notified the agent of the company of the proposed removal, and the agent promised to see that proper entries were made to preserve the insurance.

Walsh v. Insurance Co., 6 C. C. n. s. 1; 17 C. D. 313 (1905).

(The wording of the stipulation in this case differed from that involved in Insurance Co. v. Burget, 65 O. S. 119 supra).

See also Insurance Co. v. Vorhis, 1 C. C. 326; 1 C. D. 180 (1885).

Under a policy on household goods and chattels "all contained in the above described dwelling," the company is not liable for loss by fire of a toy patrol wagon while standing in the yard of the premises and near to, but not within, the dwelling, and which had never been kept within the dwelling.

Bruck v. Insurance Co., 5 O. L. R. 46; 17 L. D. 751 (C. P. 1907).

Use of premises. Where the policy stipulates that it shall be void if certain kinds of business, enumerated in the policy, and called "hazardous" or "specially hazardous" are carried on in the premises, a violation of such stipulation avoids the policy whether the risk is increased or not.

Matthews v. Insurance Co., 2 C. S. C. R. 109 (1872).

Harris v. Insurance Co., 4 O. S. 285 (1854).

But a temporary use of premises for such prohibited use, for the purpose of repair, was said not to avoid the policy.

Harris v. Insurance Co., 4 O. S. 285 (1854).

See Insurance Co. v. Frick, 2 Am. L. R. 336.

A stipulation avoiding the policy if "gasoline, or any of the products of petroleum or coal oil are deposited, stored or kept, or used for light in the premises," was held not violated where gasoline was kept in a tank underground, thirty-five feet from the buildings insured, and vaporized by means of machinery, and the vapor conveyed into the building in pipes, and used to light the buildings.

Insurance Co. v. Sinclair, 1 C. C. 498; 1 C. D. 276 (1886); aff'd, no rep., 25 W. L. B. 153.

See Insurance Co. v. Insurance Co., 5 O. S. 450 (1856).

Insurance Co. v. Brown, 16 C. C. n. s. 518, 522 (1905).

Nor is such a stipulation violated by keeping gasoline in a pint bottle near the gasoline engine, for use in starting the engine, where the main supply of gasoline is kept in a separate building, and where the insurer's agent knew that the premises were used for manufacturing, with power generated by such engine.

Gump v. Insurance Co., 15 C. C. n. s. 428; 24 C. D. 36 (1912); aff'd, no rep., 86 O. S. 325.

And where the insurer's agent knew that the premises were lighted by gas generated on the premises, recovery is not defeated by a provision that "this entire policy (unless otherwise provided by agreement endorsed thereon or added thereto) shall be void . . . if illuminating gas or vapor be generated in the described building. Insurance Co. v. Roberts, 27 O. C. A. 10; 28 C. D. 253 (1915); motion to certify record overruled, 13 O. L. R. 420; s. c., 2 Ohio App. 463; 21 C. C. n. s. 433.

Under a stipulation avoiding the policy if certain articles were kept on the premises, the insured can not recover by showing a custom to keep small quantities as a part of stock of merchandise.

Beer v. Insurance Co., 39 O. S. 109 (1883).

See Insurance Co. v. Corey, 8 West L. J. 470 (1851).

Under a floating policy covering all merchandise "situated anywhere in the United States except while on premises occupied by the insured for manufacturing purposes" the exception applies only to places where actual work of manufacturing is carried on, and does not include raw materials stored in a separate building adjacent to a manufacturing plant. *Insurance Co. v. Sherwin-Williams Co.*, 23 C. C. n. s. 390 (1913).

Excepting certain risks. A provision in a policy that the insurance company "shall not be liable for loss caused directly or indirectly by riot" exempts it from all loss due to riot, whether from fire or otherwise, and where the building was destroyed by a fire which had spread from another building set on fire by rioters, the company was held not liable.

Insurance Co. v. Whitelaw, 1 C. C. n. s. 412; 15 C. D. 197 (1903);
aff'd, no rep., 73 O. S. 365.

The printed part of a policy provided that "this insurance does not apply to or cover any loss by explosion, unless fire ensues, and then the loss or damage by fire only." A special clause, attached to the policy provided "that this policy insures against any loss or damage caused by lightning . . . subject in all other respects to the terms and conditions of the policy." A quantity of powder stored in a powder house in the neighborhood was struck by lightning, and the force of the explosion of the powder totally destroyed the property insured. Held, that the loss being occasioned by the explosion which was excepted from the risk, the company was not liable.

Insurance Co. v. Roost, 55 O. S. 581 (1897).

See also *Insurance Co. v. Parker*, 23 O. S. 85 (1872).

Insurance Co. v. Foote, 22 O. S. 340 (1872).

Iron safe clause. A stipulation requiring the insured to keep a set of books containing a complete record of business transacted, does not make it necessary for the insured to keep a scientific set of books. Books from which it is possible to fairly ascertain the amount of goods on hand at the time of the fire, are sufficient.

Insurance Co. v. Clark, 2 C. C. n. s. 585; 14 C. D. 33 (1902).

Insurance Co. v. Kistner, 5 C. C. n. s. 165; 16 C. D. 569 (1904);
reversed on other grounds, 75 O. S. 374.

The fact that the cash book of a country store had not been placed in the safe at ten o'clock at night, and was destroyed by a fire occurring at that hour, does not constitute a defense under the iron safe clause, where a lunch counter connected with the store was in operation at that hour.

Insurance Co. v. Kistner, 5 C. C. n. s. 165; 16 C. D. 569 (1904);
reversed on other grounds, 75 O. S. 374.

Where the insured kept his books in his store only in the day time when in use, and at his house when not in use, the iron safe clause was held not to be violated.

Billings v. Insurance Co., 2 N. P. n. s. 21; 14 L. D. 387 (1904);
aff'd, 6 C. C. n. s. 567; 17 C. D. 552.

And where the insured was accustomed to remove his books from the premises at night, but on the night of the fire, through forgetfulness of an employee, the books were left in the building and burned, the iron safe clause does not defeat recovery, where the insured produced the original pencil copy of his inventory, and written evidence substantially showing his purchases and sales between the time when the inventory was taken and the fire. *Old Colony Co. v. Schultz*, 7 Ohio App. 469; 27 O. C. A. 501 (1917).

Notice and proof of loss. Where a policy stipulates that proofs of loss must be forwarded within a reasonable time, but provides no

penalty except that payment on the policy will be delayed until the proofs are furnished, the right to recover on the policy does not depend upon the time when the proofs are furnished.

Insurance Co. v. Gray, 2 C. C. n. s. 265; 14 C. D. 268 (1902); aff'd, no rep., 69 O. S. 542.

Trust Co. v. Insurance Co., 1 Ohio App. 447; 17 C. C. n. s. 411; 24 C. D. 218 (1913); aff'd, no rep. 92 O. S. 516.

Wood v. Insurance Co., 17 N. P. n. s. 273 (1913).

Under a condition avoiding the policy if proof of loss is not presented to the company within sixty days after the occurrence of a fire, failure to present the proofs within the time limit defeats recovery on the policy.

Billings v. Insurance Co., 6 C. C. n. s. 567; 17 C. D. 552 (1905); affirming 2 N. P. n. s. 21; 14 L. D. 387.

Insurance Co. v. Lindsey, 26 O. S. 348 (1875).

Insurance Co. v. McGookey, 33 O. S. 555 (1878).

But notice may be waived by the insurance company, and such waiver need not be in writing but may arise from acts and conduct of the company after expiration of the time specified. Whether acts amount to a waiver is a question for the jury. Insurance Co. v. Euce, 2 Ohio App. 299; 21 C. C. n. s. 465; 25 C. D. 169 (1913).

Notice should be given in the manner specified in the policy. Notice to the soliciting agent may be insufficient. Insurance Co. v. Silberman, 24 C. C. n. s. 511 (1904).

But an agent who is authorized to issue and countersign policies and collect premiums is a general agent and notice to him is sufficient. Wood v. Insurance Co., 17 N. P. n. s. 273 (1913).

Where a policy requires proof of loss to be made "forthwith" proof may be made within a reasonable time.

Kirk v. Insurance Co., 6 W. L. B. 200 (Dist. Ct. 1881); aff'd, no rep., 11 W. L. B. 228.

See Indemnity Co. v. Fletcher, 5 C. C. 633; 3 C. D. 308 (1891).

"Immediate" notice means notice within a reasonable time.

Crane v. Insurance Co., 3 N. P. 318; 4 N. P. 309 (Super. Ct. Cin. 1896); aff'd, no rep., 59 O. S. 617.

Although an answer in a proof of loss may be wrong, and fail to give the information intended, yet where not misleading, nor harmful to the company, and the information sought is given elsewhere in the proof, the proof is sufficient.

Insurance Co. v. Strong, 1 C. C. n. s. 502; 15 C. D. 101 (1901); aff'd, no rep., 68 O. S. 708.

A requirement that the magistrate or notary public living nearest the place of fire certify that he has examined the circumstances and believes that the insured has honestly sustained loss to the amount stated, is complied with where the magistrate adopts and endorses the statements of the insured in his proofs, when such endorsement is based upon knowledge and investigation.

Insurance Co. v. Strong, 1 C. C. n. s. 502; 15 C. D. 101 (1901); aff'd, no rep., 68 O. S. 708.

A verbal waiver of a condition, requiring proofs of loss, is invalid where the policy requires all waivers to be endorsed on the policy.

Billings v. Insurance Co., 6 C. C. n. s. 567; 17 C. D. 552 (1905); affirming 2 N. P. n. s. 21; 21 L. D. 387.

See Stacy v. Insurance Soc., 1 C. C. n. s. 441; 15 C. D. 67 (1903); reversed, no rep., 72 O. S. 593.

A waiver of the time for presenting proofs of loss may be made after expiration of the time limited in the policy therefor.

Insurance Co. v. Kukral, 7 C. C. 356; 4 C. D. 633 (1893); aff'd, no rep., 51 O. S. 609.

Objections to preliminary proofs are waived, if not made when the proofs are presented, and the insured is informed by the underwriters that the claim is rejected on other grounds.

Insurance Co. v. Boyle, 21 O. S. 119 (1871).

Proof of loss verified by an attorney at law for a non-resident client, the client having no knowledge of the facts, was held sufficient.

Gump v. Insurance Co., 15 C. C. n. s. 428, 24 C. D. 36 (1912); aff'd, no rep., 86 O. S. 325.

It has been held that a mortgagee, under the so-called "union mortgage clause" of the standard fire policy of New York, New Jersey and Connecticut may recover on the policy although neither he nor the mortgagor present proof of loss as required of "the insured" by a condition in the policy.

Insurance Co. v. Krumm, 12 C. C. n. s. 364 (1909).

Compare Brewing Co. v. Insurance Co., 81 O. S. 1 (1909).

Where a stipulation in a policy gave the insurer the right to examine the insured under oath, and notice was served on the insured of the time and place of the examination and the name of the person before whom the same was to be held, and the insured attended but refused to submit to examination, the insured can not recover on the policy.

Mahoney v. Insurance Co., 3 N. P. n. s. 246; 16 L. D. 131 (Super. Ct. Cin. 1905); aff'd, no rep., 74 O. S. 503.

Appraisement. (a) In case of total loss. Where the loss is total, a stipulation requiring the amount of loss to be determined by appraisers is in conflict with § 9583. The insured need not comply with such condition.

Insurance Co. v. Drackett, 63 O. S. 41 (1900).

Insurance Co. v. Leslie, 47 O. S. 409 (1890).

Insurance Co. v. Luce, 11 C. C. 476; 5 C. D. 210 (1896).

Insurance Co. v. McBee, 12 C. C. n. s. 229; 21 C. D. 469 (1909); aff'd, 85 O. S. 161.

By consenting to have the amount of loss determined by appraisers, the insured does not waive the right to maintain an action and recover as for a total loss.

Insurance Co. v. Drackett, 63 O. S. 41 (1900).

Insurance Co. v. Fish Co., 14 C. C. 160; 7 C. D. 468 (1898); aff'd, no rep., 61 O. S. 643.

Insurance Co. v. Luce, 11 C. C. 476; 5 C. D. 210 (1896).

Where an award has been made, and an action is thereafter brought for a total loss, there can be no recovery unless a total loss is proven, and the only question for the jury is whether the loss is partial or total.

Insurance Co. v. Gray, 2 C. C. n. s. 265; 14 C. D. 268 (1902); aff'd, no rep., 69 O. S. 542.

— (b) Where the loss is partial. Stipulations in a policy making the ascertainment of the amount of loss by appraisers, in case of disagreement between the parties, a condition precedent to an action by the insured, are valid, when the loss is partial. The petition, in an action by the insured, must allege an award by the appraisers or a legal excuse for its absence.

Graham v. Insurance Co., 75 O. S. 374 (1906); (overruling Insurance Co. v. Finn, 60 O. S. 513).

Insurance Co. v. Carnahan, 63 O. S. 258 (1900).

Fire Ass'n v. Appel, 76 O. S. 1. 7 (1907).

Assurance Co. v. Weinberger, 23 C. C. n. s. 246 (1912).

Under many of the forms of such stipulation, in general use, no obli-

gation rests on the insurer to demand an appraisal, but the burden rests on the insured to show that he has performed, or offered to perform, the condition as to appraisal.

Graham v. Insurance Co., 75 O. S. 374 (1906).

Where the insurer, upon receiving the proof of loss, disputes the amount claimed, and demands an appraisement, a disagreement exists sufficient to be the foundation for an appraisal.

Insurance Co. v. Carnahan, 63 O. S. 260 (1900).

Weil v. Insurance Co., 23 C. C. n. s. 281; 27 C. D. 263 (1914).

A letter from the insurer to the insured, stating that it had reason to believe, from information before it, that the loss was caused by a cyclone and not by lightning; and also that the cash value of the property was less, and the salvage more, than claimed in the proofs, is not a denial of liability by the insurer, or a waiver of the stipulation for an appraisal. In such case, the insured can not give his reasons for not demanding an appraisal.

Everett Co. v. Insurance Co., 9 N. P. n. s. 241, 290; 20 L. D. 171 (1909); aff'd, no rep., 81 O. S. 573.

A demand by the insurer for an appraisement, accompanied by a request to the insured to meet the insurers at a time and place convenient to, and to be designated by, the insured, for the purpose of selecting appraisers, is an offer to perform. A neglect to comply with such demand, under a claim that there was no disagreement as to the amount of loss until the goods saved were sold by the insured, is a refusal to perform on the part of the insured.

Insurance Co. v. Carnahan, 63 O. S. 260 (1900).

Where appraisers are chosen, and begin work, but the appraisement is stopped before completion, or the award is made invalid by default of one of the parties, the other party is not bound to enter into a new appraisement, when not required by the policy.

Fire Ass'n v. Appel, 76 O. S. 1 (1907).

Where the appraiser appointed by the insurer withdraws, without the fault of either party, and refuses to proceed further, it is the right and duty of the insurer to choose another. Where the insurer refuses to choose another appraiser, or proceed further, but demands a new appraisement, such conduct is a waiver of the condition.

Fire Ass'n v. Appel, 76 O. S. 1 (1907).

The insurer has no right to refuse to appoint an appraiser, as provided in the policy, on the ground that work has been done toward restoring the building. Hartford Ins. Co. v. Storage Co., 9 Ohio App. 403; 28 O. C. A. 273 (1918).

A stipulation for an appraisement was held not to be a stipulation for an arbitration, and where the appraisers and umpire had before them a list of the property destroyed, and the insured's statement in detail as to his loss, the appraisement was not set aside because the appraisers refused to hear evidence. Such a submission is not to be judged by the rules applicable to arbitration and award.

Insurance Co. v. Ries, 80 O. S. 272 (1909).

Compare Insurance Co. v. Romeis, 15 C. C. 697; 8 C. D. 633 (1898).

A mortgagee, holding a policy with the usual "mortgage clause" attached, making the loss, if any, payable to him as his interest may appear, is in the absence of fraud or collusion, bound by the award of appraisers, required and provided for in the policy, although he was not a party to, and had no notice of, the appraisement or award.

Brewing Co. v. Insurance Co., 81 O. S. 1 (1909); affirming 11 C. C. n. s. 28; 20 C. D. 390.

Denial of liability by an adjuster, on the ground that the insured had himself caused the fire, is not a waiver of an appraisal, in the

absence of evidence showing that the adjuster was authorized by the company to deny liability. *Assurance Co. v. Kehoe*, 24 C. C. n. s. 465 (1913).

Where the insured alleged that there was no disagreement as to the amount of loss and that he had performed all the conditions on his part to be performed, such allegations are not put in issue by a general denial.

Insurance Co v. Titus, 82 O. S. 161 (1910).

Where there is concurrent insurance, and an appraisal was had, the amount recoverable is limited to a proportionate amount of the loss so determined, and the insured can not recover more unless the appraisal is void or is set aside. If only voidable he should in his petition unite a cause of action to set it aside. If void he may plead its invalidity in his reply, where performance of all conditions is alleged in the petition.

Insurance Co. v. Ries, 80 O. S. 272 (1909).

A former statute (Rev. Stats. § 3643b) requiring arbitrators to be residents of the county in which the loss occurred was held constitutional.

Insurance Co. v. Packet Co., 6 N. P. 173; 7 L. D. 571 (Super. Ct. Cin. 1898).

Limiting time for bringing suit. A provision in a policy limiting the time within which suit may be brought thereon is valid, provided the period of limitation is not unreasonable.

Appel v. Insurance Co., 76 O. S. 52 (1907).

(Twelve months) *Insurance Co. v. Schwan*, 1 C. C. 192; 1 C. D. 105 (1885).

(Six months) *Insurance Co. v. Howle*, 19 C. C. 621; 10 C. D. 290 (1900).

*See *Insurance Co v. Gierl*, 16 C. C. 294; 9 C. D. 162; *aff'd*, no rep., 57 O. S. 671.

A provision that "no suit or action . . . shall be sustainable . . . nor unless commenced within six months next after the fire" is unambiguous and will be enforced in a suit on a policy commenced more than six months after the date of the fire, where no extrinsic facts are alleged excusing delay in bringing the suit.

Appel v. Insurance Co., 76 O. S. 52 (1907).

The time begins to run from the date of fire notwithstanding the policy also contains a provision "that the loss shall not be payable until sixty days after proofs of loss have been received by the company."

Insurance Co. v. Appel, 76 O. S. 52 (1907).

Where a provision required suit to be brought within twelve months after the loss, it was held that the time began to run from the time of the fire.

Insurance Co. v. Schwan, 1 C. C. 192; 1 C. D. 105 (1885).

Meyer v. Insurance Co., 6 N. P. 34; 7 L. D. 573.

Where a petition shows on its face that suit is brought after the time limited, a sufficient excuse for the delay must be alleged.

Minerick v. Insurance Co., 1 Cleve. L. R. 217.

See *Meyer v. Insurance Co.*, 6 N. P. 34; 7 L. D. 573; *aff'd*, 9 L. D. 596.

But where suit is brought within the twelve months stipulated time, and fails otherwise than on its merits, a second suit brought within twelve months after dismissal of the first suit may be maintained, although brought more than twelve months after the fire. G. C. § 11233; *Cortesi v. Insurance Co.*, 5 Ohio App. 109; 25 C. C. n. s. 509 (1915); motion to certify record overruled, 14 O. L. R. 193.

The waiver of a proof of loss and the denial of liability under the

policy is a waiver of a condition providing that the suit shall only be brought after sixty days after proof of loss.

Insurance Co. v. Kukral, 7 C. C. 356; 4 C. D. 633 (1893); aff'd, no rep., 51 O. S. 609.

A provision in a Lloyd's policy that "no action shall be brought to enforce the provisions of this policy, except against the general manager as attorney in fact and representing all of the underwriters, and each of the underwriters hereby agrees to abide by the result of any suit so brought," is valid and binding.

Transportation Co. v. Gilchrist, 2 C. C. n. s. 505; 14 C. D. 165 (1902).

Gilchrist v. Transportation Co., 21 C. C. 19; 11 C. D. 350 (1900).

A policy limitation as to the time of bringing suit has been held binding upon the guardian of an imbecile. Stradley v. Insurance Co., 21 N. P. n. s. 286 (1918).

Subrogation. Where the insured property is destroyed through the wrongful act or neglect of a person other than the insured, the insurer, upon payment of the loss, is subrogated to the rights of the insured against such third person.

Oil Co. v. Insurance Co., 15 C. C. 355; 8 C. D. 145 (1898).

Railroad Co. v. Falk, 62 O. S. 297 (1900).

See Shields v. Cincinnati Traction Co., 13 N. P. n. s. 133 (C. P. 1911).

In an action brought by the insured against a railroad company under G. C. § 8970, the insurance company, having made payment of a portion of the loss, may intervene for the purpose of being subrogated to the extent of its payment. The amount recovered should be adjudged to the insured and insurer according to the interest of each.

Railroad Co. v. Falk, 62 O. S. 297 (1900); affirming 16 C. C. 125; 8 C. D. 765.

The insurance company has no greater rights than those of the insured. Insurance Co. v. Railway, 74 O. S. 30, 36 (1906).

Where the interest of the insured was acquired from a railroad company by written contract, in which he agreed to demolish the building and release the railroad from all damage by fire caused by it, and the underwriters inspected the risk before writing the policy, and did not inquire for the contract nor ask questions about it, the policy was held not invalidated thereby, there being no express stipulation for forfeiture for such cause.

Ensel v. Insurance Company, 88 O. S. 269 (1913).

A provision in a policy for subrogation can only be used to work a forfeiture strictissime juris. It is inserted by the insurer for its own benefit and is to be construed most strictly against the insurer and in favor of the insured.

Ensel v. Lumber Insurance Co., 88 O. S. 269 (1913).

Where the insurer refused, on request, to contribute to the prosecution of an action against the wrong-doer, and, after payment of the insurance, the insured recovered a judgment against the wrong-doer, he is liable to the insurer for no more, if anything, than the surplus of the amount recovered from the wrong-doer, which remains after full satisfaction of his uncompensated loss, and expenses of recovery.

Newcomb v. Insurance Co., 22 O. S. 382 (1872).

Where the insurer pays part of the loss, and agrees with the insured to jointly sue the wrong-doer, the insured can not compromise and dismiss the action without consent of the insurer. In such case the insurer may bring suit against the insured for a violation of the agreement and of his duty as a trustee.

Insurance Co. v. Stang, 18 C. C. 464; 9 C. D. 576 (1897).

Compromise with insured. Where, by threats of a groundless criminal prosecution, an insured is induced to accept less than the amount justly due on his policy, and to surrender to the policy, he may sue for the balance due without tendering back the money so received.

Insurance Co. v. Hull, 51 O. S. 270 (1894).

But where acceptance of the less sum was not induced by threats of a criminal prosecution, but the liability of the insurer was in dispute, the insured can not sue without returning or tendering back the amount received, although the settlement was procured by fraudulent representations.

Insurance Co. v. Burke, 69 O. S. 294 (1903).

Fraud or mistake in inducing a compromise must be pleaded.

Casualty Co. v. Jordan, 3 O. L. R. 133; 17 C. D. 696 (1905).

Section 9588. (Restrictions in advertisements.) No fire insurance company, organized under the laws of this state, or admitted to do business therein, in any public advertisement, card, or circular, shall include in a statement of assets, any item of value, of a class or character not admitted by the superintendent of insurance of this state in the annual reports of such companies. And every such advertisement, card, or circular, containing a statement of assets, in all cases also must contain a full statement of all the liabilities of the company, including the reinsurance reserve, which in no case shall be less than that required by law for its annual report. (R. S. Sec. 3661a; April 25, 1904, 97 v. 419; April 12, 1880, 77 v. 185).

The sale of a fire insurance agency business, with good will, does not affect the right of the insurance companies to revoke the authority of the purchaser and to appoint a new agent. Custom of insurance agents does not entitle the purchaser to an injunction against the new agent, to prevent the securing of renewals by the new agent. *Bryson Co. v. Archer*, 18 C. C. n. s. 437 (1912); *aff'd*, no rep. 89 O. S. 413.

Section 9589. (Forfeiture.) Any violation of the preceding section, after the second notice from the superintendent of insurance will render such company liable to a forfeiture of one thousand dollars, and each subsequent violation to a like forfeiture to be recovered for the benefit of the common school fund of the county, in an action to be instituted by the prosecuting attorney in the name of the state, against such company. (R. S. Sec. 3661b; April 12, 1880, 77 v. 185, 186.)

Section 9589-1. (Rebates and special advantages in policies, etc., prohibited.) No corporation, association or co-partnership engaged in the state of Ohio in the guaranty, bonding, surety or insurance business, other than life insurance, nor any officer, agent, solicitor, employe or representa-

tive thereof shall pay, allow or give, or offer to pay, allow or give, directly or indirectly, as inducements to insurance, and no person shall knowingly receive as an inducement to insurance any rebate of premium payable on the policy, nor any special favor or advantage in the dividends or other benefits to accrue thereon, nor any paid employment or contract for services of any kind or any special advantage in the date of the policy or date of the issue thereof, or any valuable consideration or inducement whatsoever not plainly specified in the policy or contract of insurance or agreement of indemnity, or give or receive, sell or purchase, or offer to give or receive, sell or purchase, as inducements to insurance or in connection therewith any stock, bonds, or other obligations of an insurance company or other corporation, association, partnership or individual. But the provisions of this act shall not apply, however, to prevent the payment to a duly authorized officer, agent or solicitor of such company, association or co-partnership of commissions at customary rates on policies or contracts of insurance effected through him by which he himself is insured, provided such officer, agent or solicitor holds himself out as such and has been engaged in such business in good faith for a period of six months prior to any such payment; nor shall this act prohibit a mutual fire insurance company from paying dividends to policyholders at any time after the same has been earned. (April 13, 1911, 102 v. 81; April 12, 1910, 101 v. 117.)

See § 644-3.

This section does not prohibit agents from extending credit for premiums. Rep. Atty. Gen. 1912, p. 734.

For similar statute applying to life insurance companies, see §§ 9404-9406.

Section 9589-2. (Testimony. Incrimination.) No person shall be excused from attending or testifying or producing any books, papers or other documents before any court or magistrate having jurisdiction, upon any investigation, proceeding or trial for a violation of any of the provisions of this act, upon the ground or for the reason that the testimony of evidence, documentary or otherwise, required of him may tend to incriminate or degrade him, but no person shall be prosecuted or subject to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he may so testify or produce evidence, documentary or otherwise, except for perjury committed in so testifying. (April 13, 1911, 102 v. 81; April 12, 1910, 101 v. 117.)

Section 9589-3. (Penalty.) Every corporation which shall violate any of the provisions of this act, upon conviction thereof, shall be fined in any sum not less than one hundred dollars and not exceeding five hundred dollars to be recovered by action in the name of the state, and every officer, agent or solicitor, or other person who shall violate any of the provisions of this act, upon conviction thereof shall be fined in any sum not less than one hundred dollars nor exceeding five hundred dollars, and of the fines which shall be levied and collected for the violation of any of the provisions of this act, shall be paid to the county treasurer for the benefit of the common school fund. (April 13, 1911, 102 v. 81; April 12, 1910, 101 v. 117.)

Section 9589-4. (Revocation of license.) It shall be the duty of the superintendent of insurance upon conviction of any agent for violation of any of the provisions of this act, to revoke the license of the agent so offending, and no license shall be granted to such agent for a period of three years after such revocation. (April 13, 1911, 102 v. 81; April 12, 1910, 101 v. 117.)

Section 9590. (Annual report. Contents. Reinsurance.) The president or vice-president and secretary of each insurance company organized under the laws of this or any other state, and doing business in this state, annually, on the first day of January, or within sixty days thereafter, shall prepare, under oath, and deposit in the office of the superintendent of insurance a statement of the condition of such company on the thirty-first day of December then next preceding, exhibiting the following facts and items, and in the following form:

First. The amount of the capital stock of the company, specifying the amount paid and unpaid.

Second. The property or assets held by the company, specifying:

1. The value of the real estate owned by such company, where it is situated and the value of buildings thereon.

2. The amount of cash on hand and deposited in banks to the credit of the company, specifying in what banks it is deposited.

3. The amount of cash in the hands of agents and in course of transmission.

4. The amount of loans secured by bonds and mortgages, which are first liens on real estate, and on which there is less than one year's interest due.

5. The amount of loans on which interest has not been paid within one year.

6. The amount due the company on which judgments have been obtained and the cash value thereof.

7. The amount of stocks in this state, the United States, of any city of this state, and of any other stocks owned by the company, specifying the amount, number of shares, and the par and market value of each kind of stock.

8. The amount of stock held as collateral security for loans with the amount loaned on, and the par and market value of each kind of stock.

9. The amount of unpaid assessments on stock, premium notes or contingent liabilities.

10. The amount of interest due and unpaid and the amount of interest accrued but not due.

11. The amount of premium notes or contingent liabilities on which policies are issued.

12. The number of policies in force.

13. The amount insured under all policies in force.

14. The amount of premiums received thereon.

15. The amount and description of all other assets.

Third. The liabilities of the company, specifying:

1. The amount of losses due and unpaid.

2. The amount of claims for losses resisted by the company.

3. The amount of losses incurred during the year, including those claimed and not due, and those reported to the company upon which no action has been taken.

4. The amount of dividends declared and due and unpaid.

5. The amount of dividends either cash or scrip, declared but not due.

6. The amount of money borrowed and the security given for its payment.

7. The amount required for reinsurance, being in stock companies a sum equal to fifty per cent of the whole amount of premiums, received and receivable on unexpired risks and policies running one year or less from date of policy and a pro rata amount of all premiums, received and receivable, on unexpired risks and policies running more than one year from date of policy; and in mutual companies a sum equal to fifty per cent of the cash premiums on unexpired risks and policies running one year or less from date of policy and a pro rata amount of all cash premiums on unexpired risks and policies running more than one year from date of policy. But all companies shall be charged the full amount

of premiums, received and receivable, on all unexpired ocean and marine risks.

8. The amount of all other existing claims against the company.

Fourth. The income of the company during the preceding year, specifying:

1. The amount of cash premiums received.

2. The amount of notes or contingent assets received for premiums.

3. The amount of interest money received.

4. The amount of income received from other sources.

Fifth. The expenditure during the preceding year, specifying:

1. The amount of losses paid during the year, stating how much of them accrued, prior, and how much subsequent to the date of the preceding statement, and the amount at which losses were estimated in each preceding statement.

2. The amount of dividends paid during the year.

3. The amount of expenses paid during the year, including commissions and fees to agents and officers of the company.

4. The amount paid for taxes.

5. The amount of all payments and expenditures.

6. Amount of script dividend declared. (110 v. 16; R. S. Sec. 3654; April 26, 1904, 97 v. 444; May 9, 1894, 91 v. 211; April 11, 1893, 90 v. 159; April 17, 1891, 88 v. 308; April 14, 1888, 85 v. 273, 276; R. S. 1880; 70 v. 147, § 18; S. & S. 211.)

A company organized under a special charter, before the adoption of the constitution of 1851, is subject to such reasonable regulations as the legislature may prescribe, which regulations serve to secure the ends for which the company was created, and not being repugnant to the franchises and privileges granted in the charter, such a company will not be exempt from a compliance with §§ 9557, 9590 and 9591, unless such exemption appears to have been clearly granted by its charter.

State v. Eagle Insurance Co., 50 O. S. 252 (1893).

Insurance Co. v. Ohio, 153 U. S. 446, 453 (1894).

Section 9591. (Special reports; when required.) The statement of such a company, whose capital is composed in whole or part of notes, in addition to what is above required, shall exhibit the amount of notes which originally formed its capital, and also what proportion of such notes is still held by the company and considered capital. Every company organized under a law of this state which fails to make and deposit such statement, or to reply to an inquiry of the superintendent of insurance with respect to it, shall be subject to a forfeiture of five hundred dollars, and an additional

five hundred dollars for every month it thereafter continues to transact any business of insurance, to be recovered by action in the name of the state, and, on collection, paid into the state treasury for the benefit of the state common school fund. (R. S. Sec. 3655; January 21, 1887, 84 v. 5; May 11, 1886, 83 v. 416; R. S. 1880; April 27, 1872, 69 v. 140, § 19; S. & S. 212.)

Section 9591-1. (Annual statement must contain a schedule of its experience as to liabilities. How determined.)
The indebtedness for outstanding losses under insurance against loss or damage resulting from accident to or injuries suffered by an employe or other person and for which the insured is liable, and under insurance against loss from liability on account of the death of or injury to an employe not caused by the negligence of the employer, shall be determined as follows: Each corporation which writes policies covering any of said kinds of insurance shall include in the annual statement required by law a schedule of its experiences thereunder, in the United States and foreign countries in the case of corporations organized in the United States, and in the United States only in the case of corporations organized outside of the United States, giving each calendar year's experience separately, and crediting or charging each item to the year in which the policy to which it relates was written, as follows: (1) the earned premiums on all such policies written during the period of ten years immediately preceding the date as of which the statement is made, being the gross premiums on all such policies including excess and additional premiums and premiums in course of collection, less return premiums and premiums on cancelled policies, and less the unearned premiums on policies in force as shown in such annual statement; (2) the amount of all payments of whatsoever nature made by reason or on account of injuries covered by such policies written during said period. This amount shall include medical and surgical attendance, payments to claimants, legal expenses, salaries and expenses of investigators, adjusters, and field men, rents, stationery, telegraph and telephone charges, postage, salaries and expenses of office employes, home office expenses, and all other payments made on account of such injuries, whether such payments are allocated to specific claims or are unallocated; (3) the number of suits being defended at the date as of which the statement is made under policies written during said period, except suits in which liability is not dependent upon negligence of the insured, and a charge of seven hundred and fifty dollars for each suit; (4) the number of deaths

for which the insured are liable without proof of negligence, covered by policies written during said period, and not paid for at the date as of which the statement is made and a charge of the amount necessary to pay for such deaths; (5) the number of unpaid claims at the date as of which the statement is made on account of non-fatal injuries for which the insured are liable without proof of negligence, covered by policies written during said period, and a charge equal to the present value of the estimated future payments; (6) the loss ratio determined from the foregoing as to each year separately, using as the divisor the earned premiums shown in item (1) and as the dividend the amount of payments shown in item (2) plus the amounts charged in items (3), (4), and (5); (7) the number of suits being defended at the date as of which the statement is made under policies written more than ten years prior to such date, except suits in which liability is not dependent upon negligence of the insured; (8) the number of deaths for which the insured are liable without proof of negligence, covered by policies written more than ten years prior to the date as of which the statement is made, and not paid for at such date; (9) the number of unpaid claims at the date as of which the statement is made on account of non-fatal injuries for which the insured are liable without proof of negligence, covered by policies written more than ten years prior to such date. (June 12, 1911, 102 v. 477.)

Section 9591-2. (Distribution of unallocated payments.)

All unallocated payments in item (2) section 1 [G. C. § 9591-1] made in a given calendar year subsequent to the first four years in which a corporation has been issuing such policies shall be distributed as follows: thirty-five per centum shall be charged to the policies written in that year, forty per centum to the policies written in the preceding year, ten per centum to the policies written in the second year preceding, ten per centum to the policies written in the third year preceding and five per centum to the policies written in the fourth year preceding; and such payments made in the first four calendar years in which a corporation has been issuing such policies shall be distributed as follows: in the first calendar year one hundred per centum shall be charged to the policies written in that year; in the second calendar year fifty per centum shall be charged to the policies written in that year and fifty per centum to the policies written in the preceding year; in the third calendar year forty per centum shall be charged to the policies written in that year, forty per centum to the policies written in the preceding

year and twenty per centum to the policies written in the second year preceding; and in the fourth calendar year thirty-five per centum shall be charged to the policies written in that year, forty per centum to the policies written in the preceding year, fifteen per centum to the policies written in the second year preceding and ten per centum to the policies written in the third year preceding, and a schedule showing such distribution shall be included in such annual statement. (June 12, 1911, 102 v. 477.)

Section 9591-3. (Indebtedness for outstanding losses charged and how same to be determined.) Each such corporation shall be charged with indebtedness for outstanding losses upon such policies determined as follows: (10) for all suits being defended under policies written more than ten years prior to the date as of which the statement is made, except suits in which liability is not dependent upon negligence of the insured, one thousand dollars for each suit; (11) for all suits being defended under policies written more than five years and less than ten years prior to the date as of which the statement is made, except suits in which liability is not dependent upon negligence of the insured, seven hundred and fifty dollars for each suit; (12) for all deaths for which the insured are liable without proof of negligence, covered by policies written more than five years prior to the date as of which the statement is made, the amount necessary to pay for such deaths; (13) for all unpaid claims on account of non-fatal injuries for which the insured are liable without proof of negligence under policies written more than five years prior to the date as of which the statement is made, the present value of the estimated future payments; (14) for the policies written in the five years immediately preceding the date as of which the statement is made an amount determined as follows: multiply the earned premiums of each such five years as shown in item (1) by the loss ratio ascertained as in item (6) on all the policies written in the first five years of the said ten-year period, using as the divisor the sum of the earned premiums shown in item (1) for such first five years, and as the dividend the sum of the payments shown in item (2) for such first five years plus the sum of the charges in items (3), (4) and (5) for such first five years; but the ratio to be used shall in no event be less than fifty per centum at and after December thirty-first, nineteen hundred and eleven, nor less than fifty-one per centum at and after December thirty-first, nineteen hundred and twelve, nor less than fifty-two per centum at and after December thirty-first, nineteen hundred and thirteen, nor

less than fifty-three per centum at and after December thirty-first, nineteen hundred and fourteen, nor less than fifty-four per centum at and after December thirty-first, nineteen hundred and fifteen, nor less than fifty-five per centum at and after December thirty-first, nineteen hundred and sixteen; and from the amount so ascertained in each of the last five years of said ten-year period deduct all payments made under policies written in the corresponding year as shown in item (2), and the remainder in the case of each year shall be deemed the indebtedness for that year; provided, however, that if the remainder in the case of any year of the first three years of the five years immediately preceding the date as of which the statement is made shall be less than the sum of the three following items for that year at that date—(a) the number of suits, except suits in which liability is not dependent upon negligence of the insured, being defended under policies written in that year, and a charge of seven hundred and fifty dollars of each suit; (b) the amount necessary to pay for all deaths for which the insured are liable without proof of negligence, covered by policies written in that year; and (c) the present value of estimated unpaid claims on account of non-fatal injuries for which the insured are liable without proof of negligence, covered by policies written in that year,—then the sum of said items (a), (b) and (c) shall be the indebtedness for that year. (June 12, 1911, 102 v. 477.)

Section 9591-4. (What corporations included.) A corporation which has been issuing such policies for a period of less than ten years shall nevertheless include in its annual statement a schedule as hereinbefore required for the years in which it shall have issued such policies, and shall be charged with an indebtedness determined in the same manner; but in determining the indebtedness for policies written in the five years immediately preceding the date as of which the statement is made, the minimum ratios hereinbefore prescribed shall be used, subject to the same deductions and provisions as in the case of corporations that have been issuing such policies for ten years or more. (June 12, 1911, 102 v. 477.)

Section 9592. (Attorney-General to institute suits.) On the request of the superintendent of insurance, the attorney-general shall institute such action against a company so delinquent, in the court of appropriate jurisdiction in Franklin county, or in the court of appropriate jurisdiction of the county in which it is located or has its principal place of

business, as he prefers. (R. S. Sec. 3655; January 21, 1887, 84 v. 5; May 11, 1886, 83 v. 416; R. S. 1880; April 27, 1872, 69 v. 140, § 19; S. & S. 212.)

CHAPTER 1-1.

RATE-MAKING BUREAUS.

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| § 9592-1. Bureau of rating. | § 9592-11. Hearing upon complaint of discrimination; order review. |
| § 9592-2. How bureau composed; apportionment of expense. | § 9592-12. Agreements relative to rates must comply with this act. |
| § 9592-3. Place of office. | § 9592-13. Enforcement of agreements. |
| § 9592-4. Specification of bureau in application. | § 9592-14. Disapproval of agreement; service of order; review. |
| § 9592-5. Inspection of risk; record. | § 9592-15. Act does not apply to mutual protective associations. |
| § 9592-6. Inquiries by superintendent of insurance. | § 9592-16. Violation of act a misdemeanor; penalty. |
| § 9592-7. Examination of rating bureau; report. | § 9592-17. Insurer shall not pay fine of agents. |
| § 9592-8. Discrimination between risks prohibited. | § 9592-18. Sections 9563 and 9564 unaffected. |
| § 9592-9. Any deviation shall be uniform to all risks. | |
| § 9592-10. No contract shall be made placing insurance with particular company. | |

Section 9592-1. (Bureau of rating.) Every fire insurance company or other insurer authorized to effect insurance against the risk or loss or damage by fire or lightning in this state shall maintain or be a member of a rating bureau. No such insurer shall be a member of more than one rating bureau for the purpose of rating the same risk. (107 v. 743, § 1.)

Section 9592-2. (How bureau composed; apportionment of expense.) A rating bureau may consist of one or more insurers, and when consisting of two or more insurers, shall admit to membership any authorized insurer applying therefor. The expense of the bureau shall be shared in proportion to the gross premiums less return premiums and premiums on marine and farm risks received by each member during the preceding year in this state, to which may be added a reasonable annual fee. Each member shall have one vote. (107 v. 744, § 2.)

Section 9592-3. (Place of office.) Every such rating bureau shall maintain an office within this state. (107 v. 744, § 3.)

Section 9592-4. (Specification of bureau in application.) Every fire insurance company or other insurer aforesaid

shall, in its annual application for license, specify each rating bureau making rates upon property located within this state of which it is a member, and during the year, file written notice of any other such rating bureaus of which it shall become a member. (107 v. 744, § 4.)

Section 9592-5. (Inspection of risk; record.) Every rating bureau engaged in making rates or estimates for rates for fire insurance on property in this state, shall inspect every risk specifically rated by it upon schedule, and make a written survey of such risk, which shall be filed as a permanent record in the office of such bureau. A copy of such survey shall be furnished to the owner upon request. (107 v. 744, § 5.)

Section 9592-6. (Inquiries by superintendent of insurance.) The superintendent of insurance may address inquiries to any individual, association or bureau, which is or has been engaged in making rates or estimates for rates for fire insurance upon property in this state, in relation to the organization, maintenance or operation, or any other matter connected with its transactions, and may require the filing of schedules, rates, forms, rules, regulations, and such other information as may be required, and it shall be the duty of every such individual, association or bureau, or some officer thereof, to promptly make such filing, or reply to such inquiries in writing. (107 v. 744, § 6.)

Section 9592-7. (Examination of rating bureau; report.) The superintendent of insurance shall have power to examine any such rating bureau as often as he deems it expedient to do so, and shall do so not less than once every three years. A report thereof shall be filed in his office. The superintendent of insurance may waive such examination upon the filing with him of a report of such examination made by some other insurance department or proper supervising officer within such three years. A statement with regard to such examination shall be made in the annual report of the superintendent of insurance. (107 x. 744, § 7.)

Section 9592-8. (Discrimination between risks prohibited.) No fire insurance company or other insurer against the risk of fire or lightning, nor any rating bureau, shall fix or charge any rate for fire insurance upon property in this state which discriminates unfairly between risks in the application of like charges and credits, or which discriminates un-

fairly between risks of essentially the same hazards and having substantially the same degree of protection against fire. (107 v. 744, § 8.)

Section 9592-9. (Any deviation shall be uniform to all risks.) Any deviation of any company or insurer from the schedule of rates established and maintained by the bureau which it maintains, or of which it is a member, shall be uniform in its application to all of the risks in the class for which the variation is made, and no such uniform deviation shall be made unless notice thereof shall be filed with the bureau of which the insurer is a member, and the superintendent of insurance of his state, at least fifteen days before such uniform variation is in effect, and schedules providing for such variation shall be filed with the rating bureau and the superintendent of insurance showing the amended basis rate and amended charges and credits and application of the amended schedules to individual risks in the class affected. (107 v. 745, § 9.)

An agent of a mutual company may charge a uniform "survey fee" for writing policies, without violating this section. Opins. Atty. Gen. 1918, p. 771.

Section 9592-10. (No contract shall be made placing insurance with particular company.) Except as contained in the policy and the usual agreement for other insurance, no such insurance company or insurer or rating bureau shall make any contract or agreement with any person insured or to be insured that the whole or any part of any insurance shall be written by or placed within any particular company, insurer, agent or any group of companies, insurers or agents. (107 v. 745, § 10.)

Section 9592-11. (Hearing upon complaint of discrimination; order; review.) The superintendent of insurance may upon written complaint that discrimination in rates exists between risks in the application of like charges or credits, or discrimination between risks of essentially the same hazard and having substantially the same degree of protection against fire, order a hearing for the purpose of determining such questions of discrimination, and the review of such questions and the rates complained of before said superintendent shall be had only after due notice to all parties interested, and if upon such hearing the superintendent shall determine that the rate complained of is discriminatory he shall have power to order the discrimination removed, but

no such discrimination shall be removed by increasing the rate or rates on any risk or class of risks affected by such order unless it shall be made to appear to the superintendent of insurance that such increase is justifiable and an order of approval has been filed in the office of the superintendent of insurance. Any party in interest being dissatisfied with any order of the superintendent of insurance may within thirty days from the issue of such order and notice thereof commence an action in the supreme court for the purpose of reviewing such order and such cause shall be duly set for hearing and proceed as in other cases. During the pendency of such court proceedings the order shall be suspended, and in the event of final determination against any insurer, any overcharge during the pendency of such proceedings shall be refunded by the insurer to the persons entitled thereto. (107 v. 745, § 11.)

Section 9592-12. (Agreements relative to rates must comply with this act.) No fire insurance company or any other insurer, and no rating bureau, or any representative of any fire insurance company or other insurer or rating bureau, shall enter into or act upon any agreement with regard to the making, fixing or collecting of any rate for fire insurance upon property within this state except in compliance with this act. (107 v. 745, § 12.)

Section 9592-13. (Enforcement of agreements.) Any such agreement may be made and enforced provided the same be not contrary to public policy and is in writing, and prior to its taking effect, a copy thereof be filed with the superintendent of insurance and with each rating bureau of which any of the parties thereto shall be a member or subscriber. (107 v. 746, § 13.)

Section 9592-14. (Disapproval of agreement; service of order; review.) The superintendent of insurance may, after due notice and hearing, upon complaint or upon his own motion, make an order disapproving any such agreement. No such agreement shall be in force, nor shall any rights be based thereon, after service of a copy of such order upon each of the parties to such agreement, and upon each bureau with which such agreement is required to be filed. Service may be made by mail and shall be completed upon the expiration of a reasonable time for transmission fixed in such order. Any person in interest being dissatisfied with the order or refusal to make an order by the superintendent

of insurance may within thirty days from the issuance of such order or refusal and notice thereof commence an action in the supreme court against the superintendent of insurance as defendant to review any action of said superintendent either in making or refusing to make any such order and such cause shall thereupon proceed as herein provided in section 11 (G. C. § 9592-11). (107 v. 746, § 14.)

Section 9592-15. (Act does not apply to mutual protective associations.) This act shall not apply to mutual protective associations organized under the provisions of section 9593 of the General Code. (107 v. 746, § 15.)

Section 9592-16. (Violation of act a misdemeanor; penalty.) Any violation of the provisions of this act by any fire insurance company or other insurer authorized to effect insurance against the risk of loss or damage by fire or lighting in this state, or by any rate making bureau or officer or agent of either shall be a misdemeanor and on conviction shall be punishable by a fine of not less than twenty-five dollars nor more than two hundred dollars for each such violation, and in the event any insurer, insurance company, individual or rating bureau shall be found guilty of violation of the provisions of this act and subjected to the penalty herein provided and the same shall not be paid within thirty days the superintendent of insurance may in his discretion revoke the license of such insurer or insurance company and suspend the certificate of authority of such person or rating bureau until such fine has been paid. (107 v. 746, § 16.)

Section 9592-17. (Insurer shall not pay fine of agents.) It shall be unlawfully for any insurer to pay, either directly or indirectly, any fine assessed against any of its agents, solicitors or other representatives under this act. (107 v. 746, § 17.)

Section 9592-18. (Sections 9563 and 9564 unaffected.) Nothing herein shall be construed as repealing or affecting the provisions of sections 9563 and 9564 of the General Code. (107 v. 747, § 18.)

CHAPTER 2.

MUTUAL PROTECTIVE.

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| § 9593. | Organization of mutual protection associations and scope of business. | § 9600. | Renewal of certificate. |
| § 9594. | What articles of incorporation shall set forth. | § 9601. | Repealed. |
| § 9595. | Filing of certificate. | § 9602. | Annual statement. |
| § 9596. | Directors and officers. | § 9603. | Failure to make statement. |
| § 9597. | Powers of association. | § 9604. | Mutual associations may organize as companies. |
| § 9598. | Constitution and by-laws. | § 9605. | Certificate of superintendent of insurance. |
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| | | § 9607. | Policies and by-laws. |

Section 9593. (Organization of mutual protection associations and scope of business.) Any number of persons of lawful age, not less than ten in number, residents of this state, or an adjoining state and owning insurable property in this state, may associate themselves together for the purpose of insuring each other against loss by fire and lightning, cyclones, tornadoes or wind storms, hail storms and explosions from gas, on property in this state, and also assess upon and collect from each other such sums of money, from time to time, as are necessary to pay losses which occur by fire and lightning, cyclones, tornadoes, wind storms, hail storms and explosions from gas to any member of such association. The assessment and collection of such sums of money shall be regulated by the constitution and by-laws of the association, which shall require such assessments to be made directly and specifically upon the members and to be paid directly and specifically by them and not out of any fund deposited with the association or other trustee in anticipation of assessments or in any other manner except that any such association may borrow money for the payment of losses and expenses, such loans not to be made for a longer period than the collection of their next assessment; and such association may also accumulate a surplus from its assessments not exceeding two dollars on each one thousand dollars of insurance in force, such surplus to be used in paying losses and expenses that may occur and if invested to be under the provisions of sections ninety-five hundred and eighteen and ninety-five hundred and nineteen of the General Code. Such associations may only insure farm buildings, detached dwellings, schoolhouses, churches, township buildings, grange buildings, farm implements, farm products, live stock, household goods, furniture, pleasure and utility vehicles, motor vehicles; steam, gas, gasoline and oil engines; motor truck, tractors, electric motors, elec-

tric appliances, lighting systems and other property not classed as extra hazardous and such property may be located within or without the limits of any municipality; provided that an association whose membership is restricted to persons engaged in any particular trade or occupation and its insurance confined in any particular kind or description of property may insure property classed as extra hazardous and located in any county or counties in this state; and an association whose membership is so restricted and whose insurance is so confined and which insures property classed as extra hazardous as herein provided may also accumulate from its assessments a surplus not exceeding the average yearly losses and expenses of the association as shown by the reports of the association to the department of insurance of the state of Ohio for the preceding three years, such surplus to be used in paying losses and expenses that may occur and if invested to be under the provisions of sections ninety-five hundred and eighteen and ninety-five hundred and nineteen of the General Code. (107 v. 696; 102 v. 422; May 18, 1910, 101 v. 294; R. S. Sec. 3686; April 22, 1904, 97 v. 150; April 25, 1898, 93 v. 335; April 15, 1889, 86 v. 377, 380; February 27, 1885, 82 v. 71; April 14, 1884, 81 v. 185; R. S. 1880; March 30, 1877, 74 v. 66, § 1.)

This section does not authorize a corporation for profit either to its officers or members, and any scheme by which profits are made is unauthorized.

State v. Fire Ass'n, 42 O. S. 555 (1885).

A corporation can not be organized under this section "for profit," or to do a "general fire insurance business."

Rep. Atty. Gen. 1910-1911, p. 210.

A mutual protective association is not authorized to do business on the "joint stock" nor on the "contingent liability" plan, as defined in § 9524 et seq., but must confine itself to insuring its members, who agree to be assessed specifically to pay losses and incidental expenses.

State v. Mutual Fire Ass'n, 50 O. S. 145 (1893).

State v. Fire Ass'n, 42 O. S. 555 (1885).

Such associations are empowered to make and enforce their members' contracts of indemnity, by which the members agree to be assessed specifically for such amounts as may be necessary to pay losses occurring to the members, and also to pay incidental expenses.

State v. Fire Ass'n, 42 O. S. 555 (1885).

The system of insurance contemplated by § 9593 et seq. differs essentially and radically from the plan of mutual insurance companies provided for by § 9607-1 et seq.

Richards v. Canning Co., 7 N. P. 68; 9 L. D. 70 (C. P. 1900).

See State v. Fire Ass'n, 42 O. S. 555, 563 (1885).

An association organized under § 9593 et seq. may classify risks, by adopting rules and regulations by which the amount to be paid a member may be determined by the amount of his insurance and the respective hazard of his risk. But such classification can not be extended to a division of the members so that a member is liable to contribute only

toward payment of losses occurring in his class. There can be only one class of members with mutual obligations and rights.

5 Opins. Attys. Gen. 579 (1901).

Opins. Atty. Gen. 1919, p. 1129; 17 O. L. R. 371.

Contra, 4 Opins. Attys. Gen. 633, 635 (1895).

An association can not be formed under this section to insure members against loss by accidental breakage of glass.

An association may be formed under this section only to insure against losses from the causes specifically enumerated.

Rep. Atty. Gen. 1911-1912, p. 103.

Before the amendment of 107 v. 696, an association could not legally insure automobiles and motor trucks. Opins. Atty. Gen. 1915, p. 1783.

Insurance against theft is unauthorized. Rep. Atty. Gen. 1914, pp. 835, 965, 1679.

Agricultural society buildings are classed as extra-hazardous and may not be insured. Rep. Atty. Gen. 1913, p. 83.

Members.

See also § 9598.

Prior to the amendment of this section in 1898 (93 v. 335) it was held that non-residents of Ohio could not become members or directors.

State v. Mutual Fire Ass'n, 50 O. S. 145 (1893).

4 Opins. Attys. Gen. 729 (1896).

By the amendment of 1898 (93 v. 335) residents of an adjoining state and owning insurable property in this state may become members.

Persons become members by signing the constitution (§ 9598). But a person may be estopped, by accepting and holding a policy, from denying that he is a member.

Richards v. Lipp Co., 69 O. S. 359 (1903).

Richards v. Canning Co., 7 N. P. 68; 9 L. D. 70 (C. P. 1900).

Crandall v. Association, 8 N. P. 632; 10 L. D. 711 (1891); aff'd, no rep., 52 O. S. 674.

A corporation or partnership probably can not become a member of an association organized under § 9593 et seq.

Fire Ass'n v. Lynchburg Drug Mills, 8 C. C. 112, 117; 4 C. D. 352 (1893).

4 Opins. Attys. Gen. 819 (1898).

Rep. Atty. Gen. 1910-1911, p. 210.

A board of education is not an "owner" within the meaning of this section and can not insure property in a mutual protective association organized under § 9593 et seq.

Rep. Atty. Gen. 1911-1912, pp. 246, 1690.

Rep. Atty. Gen. 1912, p. 233.

County commissioners can not insure property in a mutual protective association. Rep. Atty. Gen. 1912, p. 1363.

It is said that a partnership is not estopped to defend against assessments on the ground that it was ineligible to membership, although it has received protection to its property.

4 Opins. Attys. Gen. 819 (1898).

A member is charged with constructive knowledge of the constitution and by-laws.

Crandall v. Association, 8 N. P. 632; 10 L. D. 711 (1891); aff'd, no rep., 52 O. S. 674.

Assessments. A contract can not be made with members by which they, upon an advance payment of an agreed annual amount, shall be exempt from assessments during the ensuing year, nor can a member's

liability to assessment be limited, without regard to the amount that may be necessary to pay losses.

State v. Fire Ass'n, 42 O. S. 555 (1885).

Such advance payment, based upon the hazards of the risk, without reference to the amount necessary to pay losses, is in fact a premium, and not a specific assessment authorized by this statute.

State v. Fire Ass'n, 42 O. S. 555 (1885).

Where the by-laws provided for an assessment at a certain date each year to pay the losses incurred and expenses, an amount sufficient to reimburse officers for money advanced to pay losses may be included in the assessment. Insurance Assn. v. Crow, 25 C. C. n. s. 65 (1903).

Prior to the amendment of 101 v. 294 assessments could be levied and collected in advance of losses.

State v. Association, 3 O. L. R. 248; 17 C. D. 838 (1905); aff'd, no rep., 74 O. S. 498.

The amendment of 101 v. 294 is not retroactive and associations organized prior to the amendment may receive deposits in advance and make assessments on such deposits.

Rep. Atty. Gen. 1911-1912, p. 801.

A membership fee, designed simply to cover the expense of entrance, may be imposed; but considerable sums of money, for the purpose of paying losses and expenses, can not be collected under any designation.

4 Opins. Attys. Gen. 633, 635 (1895).

5 Opins. Attys. Gen. 579 (1901).

Members are liable to assessments only for losses occurring during their membership, and are not liable for losses occurring before or after such membership.

State v. Fire Association, 42 O. S. 555 (1885).

An assessment levied by the board of directors or trustees, for the payment of losses and expenses, is presumed to be "necessary," in the absence of proof to the contrary.

Crandall v. Association, 8 N. P. 632; 10 L. D. 711 (1891); aff'd, no rep., 52 O. S. 674.

Funds derived from assessments to pay losses are in their nature trust funds to be applied to such losses; hence the application of such assessments or advance payments, in lieu of assessments, to the purchase of the assets of a like corporation, including real estate not necessary to its business or to the payment of losses to members of such other corporation, is a misapplication of such funds.

State v. Fire Ass'n, 42 O. S. 555 (1885).

Enforcement of assessments; defenses; assessments after insolvency, etc., see note to § 9607-16.

A person holding a policy, as an indemnity, which is expressly made subject to further assessments, is estopped from defending against an action for assessments on the ground that he is not a member of the association because he has not signed the constitution as provided by § 9598.

Richards v. Lipp Co., 69 O. S. 359 (1903).

Richards v. Canning Co., 7 N. P. 68; 9 L. D. 70 (C. P. 1900).

Policies. Where the first part of a policy, issued by an association organized under this chapter, resembles an ordinary absolute fire policy, its construction is governed by subsequent "mutual policy conditions" and the liability is restricted to that provided by the statute, constitution and by-laws of the association.

Fire Ass'n v. Lynchburg Drug Mills, 8 C. C. 112; 4 C. D. 352 (1893).

A member who has failed to pay assessments, within the time limited

in the by-laws, can not recover on his policy, unless the default is waived by the association.

Crandall v. Association, 8 N. P. 632; 10 L. D. 711 (1891); *aff'd*, no rep., 52 O. S. 674.

The loss is not a debt for which the trustees are personally liable, even though the certificate be in part *ultra vires*, if issued in good faith.

Manufacturer's Fire Ass'n v. Drug Mills, 8 C. C. 112 (1893); 4 C. D. 352.

A policy of a mutual assessment association agreeing, upon loss, to pay the member a fund collected by assessment on all the members, implies a promise to levy such assessment, and the insured need not seek specific performance but may sue at law for breach of such promise.

Hall v. Association, 25 W. L. B. 79 (C. P. 1891).

Section 9594. (What certificate of incorporation shall set forth. Change of name or location must be approved by superintendent.) Such persons shall make and subscribe a certificate setting forth therein:

1. The name by which the association is to be known;
2. The place which shall be regarded as its center or business office;

3. The object of the association, which shall only be one or more of the objects set forth in the preceding section, and to enforce any contract by them entered into whereby the parties thereto agree to be assessed specifically for incidental purposes and for the payment of losses which occur to its members. The kinds of property proposed to be insured and the casualties specified in such preceding section proposed to be insured against, also must be specified in such certificate. Such certificate may be amended to change the name of the association or the place which shall be regarded as its center or business office or its objects, at any meeting of members thirty days' notice of which, and of the business to come before it, has been given by a majority of the directors in a newspaper published and of general circulation in the county where the company's center or business office is located. Such amendment, if adopted by at least three-fifths vote of the members present and voting at the meeting so called and if not inconsistent with the constitution and laws of this state, and of the United States, shall be approved by the attorney general and secretary of state and such amendment and the certificate of approval by the attorney general shall be filed in the office of the secretary of state, and shall thereupon be in effect. After recording such amendment the secretary of state shall deposit a copy thereof with the superintendent of insurance.

In event of change of name of the association or change of the place of the center or business office, it shall be the duty of the superintendent of insurance, immediately upon

the approval by him of such change or changes, to certify the fact of such change or changes to the secretary of state of Ohio, who shall make note thereof on the files of his office relating to such association. (109 v. 282; R. S. Sec. 3687; 97 v. 150; 86 v. 377, 380; 82 v. 71, 72; 81 v. 185; R. S. 1880; 74 v. 66, § 2.)

Insurance companies are not authorized to incorporate under the general corporation law (§ 8623 to § 8743) but must organize under the special statutory provisions.

State v. Pioneer Live Stock Co., 38 O. S. 347 (1882).

Articles of incorporation. Opinions of attorney general. Corporations or firms can not act as incorporators, or become members.

Rep. Atty. Gen. 1910-1911, p. 210.

4 Opins. Attys. Gen. 819 (1898).

Ten or more incorporators must execute the articles. Rep. Atty. Gen. 1914, p. 835.

The articles must show that the incorporators have the qualifications required by § 9593 et seq.: that they are "persons of lawful age" and "residents of this state" or an adjoining state and owning insurable property in Ohio. Opins. Atty. Gen. 1919, p. 18.

Articles of incorporation should contain all the statements prescribed by this section.

Rep. Atty. Gen. 1910-1911, pp. 223, 245.

"Real and personal property" is not such a specification of the property proposed to be insured as is contemplated in this section. A more definite designation such as residences, office buildings, household goods, merchandise, etc., is required.

Rep. Atty. Gen. 1910-1911, p. 245.

The articles must state that the members agree to be assessed specifically.

Rep. Atty. Gen. 1908-1909, p. 58.

Rep. Atty. Gen. 1912, p. 19.

Opins. Atty. Gen. 1915, p. 904.

Opins. Atty. Gen. 1920, p. 1013.

The kinds of losses to be insured against, and the property to be insured, must be specified; and the articles must state that the property insured shall be in Ohio. Rep. Atty. Gen. 1912, p. 20; Opins. Atty. Gen. 1918, p. 603; Opins. Atty. Gen. 1915, p. 1783; Opins. Atty. Gen. 1919, p. 18; Opins. Atty. Gen. 1920, p. 1013; Opins. Atty. Gen. 1921, p. 33.

The words "Mutual Company" can not be included in the name.

3 Opins. Attys. Gen. 597 (1885).

Articles of incorporation which stated that the purpose of the association was "to organize an order of property owners, with a general council, empowered to impose and collect annual dues and assessments, thereby providing a fund to protect its members against losses by fire" were rejected as not in compliance with § 9593.

4 Opins. Attys. Gen. 427 (1892).

Amendment of articles. An amendment to the articles of a mutual protective association must be made under the general corporation law (§§ 8719-8743). It must be adopted by its members and certified to the secretary of state by the president and secretary of the association. Opins. Atty. Gen. 1919, p. 1129; 17 O. L. R. 371.

Section 9595. (Filing of certificate.) The certificate shall be filed in the office of the secretary of state. A copy thereof, duly certified by him shall be evidence of the existence and due incorporation of the association for the purposes therein named. (R. S. Sec. 3688; March 30, 1877, 74 v. 66, § 3.)

Section 9596. (Directors and officers.) When such certificate is so filed, and a certified copy thereof forwarded to the association, the persons named therein shall elect their directors, a president, secretary, treasurer, and such other officers as are necessary for the complete performance of all the business and objects of the association, to serve for one year. Such officers thereafter shall be chosen in the manner, and at the time fixed upon in the constitution, but directors shall not be chosen for a longer period than three years. (R. S. Sec. 3689; April 30, 1886, 83 v. 106, 107; R. S. 1880; March 30, 1877, 74 v. 66, § 4.)

Non-residents who are ineligible to membership can not become directors or trustees.

State v. Mutual Fire Ass'n, 50 O. S. 145 (1893).

The trustees are not personally liable for a loss upon a certificate issued in good faith.

Fire Ass'n v. Drug Mills, 8 C. C. 112; 4 C. D. 352 (1893).

See Kelley v. Bender, 22 C. C. 144; 12 C. D. 181 (1901).

G. C. § 8666.

This section provides for the officers authorized to conduct the business. An association can not, by its articles, grant this power to a general council.

4 Opins. Attys. Gen. 427 (1892).

Section 9597. (Powers of association.) The association so organized shall be held to be a body corporate for all such purposes, and may sue and be sued, plead and be impleaded, in all courts of law and equity, but in no instance shall the power to insure against losses by fire or tornadoes be exercised to other than members thereof. (R. S. Sec. 3689; April 30, 1886, 83 v. 106, 107; R. S. 1880; March 30, 1877, 74 v. 66, § 4.)

An association organized under this chapter is not authorized to do business on the "joint stock" nor on the "contingent liability" plan, authorized by § 9525 et seq., but must confine itself to insuring its members who agree to be assessed specifically to pay losses and incidental expenses

State v. Mutual Fire Ass'n, 50 O. S. 145 (1893).

State v. Fire Ass'n, 42 O. S. 555 (1885).

Section 9598. (Constitution and by-laws.) Every such association shall adopt such constitution and by-laws not inconsistent with the constitution and laws of this state or

the United States, as in the judgment of its members best will subserve its interests and purposes. All persons who sign such constitution shall be considered and held to be members of the association, and be held in law to comply with all of its provisions and requirements. (R. S. Sec. 3690; April 24, 1904, 97 v. 150; April 19, 1883, 80 v. 197; R. S. 1880; March 30, 1877, 74 v. 66, § 5.)

This section does not authorize a regulation by which a policy may be declared forfeited, for the non-payment in advance of an annual deposit or premium, whether an assessment to pay losses during such period should be necessary or not.

State v. Fire Ass'n, 42 O. S. 555 (1885).

To become a member of the association under this section, a person must sign his name to the constitution.

State v. Mutual Fire Ass'n, 50 O. S. 145, 149 (1893).

Richards v. Swain, 7 N. P. 68; 9 L. D. 70 (1900).

But where a policy was issued in good faith by an association and held by the insured as an indemnity, upon the condition set out in the policy that it is made and accepted subject to the express agreement by the insured that he will pay further assessments, the insured is estopped from defending against an action for assessments on the ground that he is not a member of the association because he has not signed the constitution.

Richards v. Lipp Co., 69 O. S. 359 (1903).

Richards v. Hale, 1 C. C. n. s. 181; 14 C. D. 468 (1903).

Richards v. Swaim, 7 N. P. 68; 9 L. D. 70 (1900).

In the absence of direct allegation and proof that a policyholder has not signed the constitution, the presumption is that he has signed it.

Richards v. Hale, 1 C. C. n. s. 181; 14 C. D. 468 (1903).

A member is charged with constructive knowledge of the constitution and by-laws, while in stock or old line companies a policyholder is charged with notice of only such provisions as are brought to his notice in the application or policy.

Crandall v. Association, 8 N. P. 632; 10 L. D. 711 (1891); aff'd, no rep., 52 O. S. 674.

A change in the constitution and by-laws can only be made by a majority of the members of the association itself, and not by the directors merely, although the constitution provides for the latter method.

Insurance Co. v. Bachman, 39 W. L. B. 324 (1898).

Section 9599. (What shall be filed with superintendent of insurance.) Before granting insurance, such association shall file with the superintendent of insurance a copy of its articles of incorporation duly certified to by the secretary of state, and a copy of its constitution, by-laws, and forms of certificates of membership or insurance. If the superintendent finds that it was duly organized and has complied with the law, he shall issue to it his certificate reciting such compliance, which certificate shall be the authority of the association to commence business and grant insurance. (R. S. Sec. 3690; April 24, 1904, 97 v. 150; April 19, 1883, 80 v. 197; R. S. 1880; March 30, 1877, 74 v. 66, § 5.)

Section 9600. (Renewal of certificate.) Upon filing its annual statement, the superintendent, annually, shall issue a renewal of such certificate to the association if he finds that it has complied with the law. For each such certificate and renewal every association shall pay to the superintendent for the use of the state five dollars. (R. S. Sec. 3690; April 24, 1904, 97 v. 150; April 19, 1883, 80 v. 197; R. S. 1880; March 30, 1877, 74 v. 66, § 5.)

Section 9601. Repealed. (April 4, 1910, 101 v. 103; R. S. Sec. 3690; April 24, 1904, 97 v. 150; April 19, 1883, 80 v. 197; R. S. 1880; March 30, 1877, 74 v. 66, § 5.)

Section 9602. (Annual statements.) The president, or vice-president, and secretary of every such association annually on the first day of January, or within thirty days thereafter, shall prepare under oath and deposit in the office of the superintendent of insurance a statement of the condition of such association on the thirty-first day of December then next preceding, exhibiting such facts as are enumerated in section ninety-five hundred and ninety, and applicable to such associations, and such other information necessary to reveal the financial condition of the association, as the superintendent requires in a printed form by him to be supplied for that purpose. (R. S. Sec. 3690; April 24, 1904, 97 v. 150; April 19, 1883, 80 v. 197; R. S. 1880; March 30, 1877, 74 v. 66, § 5.)

Immaterial variations between a report filed pursuant to this section and the actual condition of the association do not warrant the ouster of the association by quo warranto.

State v. Association, 3 O. L. R. 248; 17 C. D. 838 (1905); aff'd, no rep., 74 O. S. 498.

Section 9603. (Failure to make statement.) Every such association which fails to make and deposit such statement or to reply to any inquiry of the superintendent of insurance, shall be subject to a forfeiture of five hundred dollars and an additional five hundred dollars for every month that it continues thereafter to transact any business of insurance. (R. S. Sec. 3690; April 24, 1904, 97 v. 150; April 19, 1883, 80 v. 197; R. S. 1880; March 30, 1877, 74 v. 66, § 5.)

Section 9604. (Mutual associations may organize as companies.) Any mutual fire insurance association organized under section ninety-five hundred and ninety-three, doing business and having the number of policies and amount of insurance in force and the amount of assets required in

order to organize a mutual fire insurance company, may reorganize as such mutual fire insurance company in the following manner: The board of trustees of such association shall give notice, by publication in a newspaper of general circulation, and published in the county wherein its principal office is situated, at least three consecutive weeks before such application is made, of their intention to so organize, and thereupon make application to the superintendent of insurance respecting their desire to assume the requirements of the laws governing mutual fire insurance companies organized and doing business under the laws of this state, setting forth the amount of insurance carried, the number of policies in force, and the amount of its assets and liabilities. (R. S. Sec. 3690-1; March 24, 1890, 87 v. 88, § 1.)

Section 9605. (Certificate of superintendent of insurance.) If by examination, or otherwise, of the condition of such association, the superintendent of insurance is satisfied that it possesses the required amount of assets, and the number and amount of policies in force required to organize a mutual fire insurance company, he shall so certify upon a certificate of incorporation, containing the requisite statements required to incorporate a mutual fire insurance company, which certificate, after having been duly executed shall be delivered to the secretary of state, who shall record it and issue his certificate of incorporation as in other cases for change of name, capital or location of an incorporated company, charging only such fees therefor as authorized by law in other cases for change in capital or location of company. (R. S. Sec. 3690-1; March 24, 1890, 87 v. 88, § 1.)

Section 9606. (How rights of policyholders affected.) Thereafter the business of such fire insurance association shall be conducted as and be subject to all laws governing mutual fire insurance companies. All members thereof shall be members of such reorganized company, to the time of the expiration or cancellation of their policies, and entitled to all the benefits of such, precisely as if original members, with out exchanging policies or contracts, and entitled to all the benefits as if original members thereof. (R. S. Sec. 3690-2; March 24, 1890, 87 v. 88, § 2.)

Section 9607. (Policies and by-laws.) After such change in the plan of insurance by such association, and the organization of such mutual fire insurance company, policies thereafter issued shall be in the name and by the authority of

the company, and the policies theretofore in force, and the by-laws, rules and regulations of such association, if not in conflict with the laws governing mutual fire insurance companies, shall remain in full force and effect until they have terminated or been lawfully changed by the company or its board of directors. (R. S. Sec. 3690-3; March 24, 1890, 87 v. 88, § 3.)

CHAPTER 2-1.

MUTUAL FIRE INSURANCE.

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| § 9607-1. Terms relating to corporations and associations defined. | § 9607-18. When trustees or directors personally liable. |
| § 9607-2. Organization of mutual companies; kinds of insurance allowed to transact. Fire. Liability. Disability. Automobile. Steam boiler. Use and occupancy. Miscellaneous. | § 9607-19. When foreign company shall be admitted to transact business. |
| § 9607-2a. Amendment of articles. | § 9607-20. Alien Company admitted to do business, when. |
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| § 9607-4. Bond prerequisite to solicitation, for insurance or acceptance of premiums. | § 9607-22. Every domestic, foreign or alien company shall contain the word "mutual"; exception. |
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| § 9607-10. Stipulation or provision as to contingent liability. | § 9607-28. What companies held organized under laws of this state. |
| § 9607-11. Investment of assets. | § 9607-29. Refusal to make report forfeits charter. |
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| § 9607-14. When company shall be deemed impaired; assessment. | § 9607-33. Securities specified; registration. |
| § 9607-15. When impaired company may continue to issue policies. | § 9607-34. Collection and deposit of principal and interest. |
| § 9607-16. Record of the order for assessment. Liability of the policyholder. | § 9607-35. Exchange of securities. |
| § 9607-17. Petition to have court examine assessment and necessity therefor. Effect of decree. When | § 9607-36. Certification under seal of deposits. |
| | § 9607-37. Examination of securities, annually. |
| | § 9607-38. Surrender of securities upon termination of liability; examination of records. |

Section 9607-1. (Terms relating to corporations and associations defined.) In this act, unless the context otherwise requires, "company" includes corporations and asso-

ciations. "Domestic" designates companies organized under the laws of this state. "Foreign" designates companies organized under the laws of another state or territory. "Alien" designates companies organized under the laws of any country other than the United States, or some state, province or territory thereof. The terms "surplus" or "net assets" shall be deemed to mean funds and assets invested as required or permitted by the laws of the state, territory or district where the company is organized, in excess of all liabilities including unearned premium reserve, but excluding from such assets all contingent liabilities of policyholders or members. (104 v. 202, § 1.)

Section 9607-2. (Organization of mutual companies; kinds of insurance allowed to transact. Fire. Liability. Disability. Automobile. Steam boiler. Use and occupancy. Miscellaneous.) A domestic mutual company may be organized by a number of persons, not less than twenty, to carry on the business of mutual insurance and to reinsure and to accept reinsurance as authorized by law and its articles of incorporation. Such persons shall execute articles of incorporation which, if not inconsistent with the constitution and laws of this state and of the United States, shall be approved by the attorney general and secretary of state, and such articles and the certificate of approval by the attorney general shall be recorded by the secretary of state who shall deposit a copy thereof with the superintendent of insurance. A mutual or a stock company may transact only the first kind of insurance, or may transact such as it may elect of the other kinds of insurance, following:

I. FIRE INSURANCE. Against loss or damage to property and loss of use and occupancy by fire, lightning, hail, tempest, flood, earthquake, frost or snow, explosion, fire ensuing, and explosion, no fire ensuing; except explosion by steam boiler or flywheels; against loss or damage by water caused by the breakage or leakage of sprinklers, pumps or other apparatus, water pipes, plumbing, or their fixtures, erected for extinguishing fires, and against accidental injury to such sprinklers, pumps, other apparatus, water pipes, plumbing or fixtures; against the risks of inland transportation and navigation; upon automobiles, whether stationary or operated under their own power, against loss or damage by any of the causes or risks specified in this subsection, including also transportation, collision, liability for damage to property resulting from owning, maintaining or using automobiles and including bur-

glary and theft of automobiles and accessories, but not including loss or damage by risk of bodily injury to the person. To insure against loss resulting to the members of any mutual or stock company or association of any kind whatsoever from assessments levied against all members thereof in pursuance of the conditions of any policy of insurance, contract, statute or law.

2. **LIABILITY INSURANCE.** Against loss, expense or liability by risk of bodily injury or death by accident, disability, sickness or disease suffered by others for which the insured may be liable or have assumed liability not including workmen's compensation.

3. **DISABILITY INSURANCE.** Against bodily injury or death by accident, and disability by sickness.

4. **AUTOMOBILE INSURANCE.** Against loss, expense and liability resulting from the ownership, maintenance or use of any automobile or other vehicle, provided no policies shall be issued under this sub-section against the hazard of fire alone.

5. **STEAM BOILER INSURANCE.** Against loss or liability to persons or property resulting from explosions or accidents to boilers, containers, pipes, engines, flywheels, elevators and machinery in connection therewith and against loss of use and occupancy caused thereby and to make inspections and issue certificates of inspection thereon.

6. **USE AND OCCUPANCY INSURANCE.** Against loss from interruption of trade or business which may be the result of any accident or casualty.

7. **MISCELLANEOUS INSURANCE.** Against loss or damage by any hazard upon any risk not provided for in this section, which is not prohibited by statute or at common law from being the subject of insurance, excepting life insurance. (110 v. 116; 107 v. 647, § 1; 104 v. 202, § 2.)

Effect of § 9607-2 on §§ 9510, 9511 and 9556. The attorney general has ruled that §§ 9510, 9511 and 9556 have been supplanted by § 9607-2, basing his opinion upon the following language in § 9607-2: "A mutual or stock company may transact only the first kind of insurance, or may transact such as it may elect of the other kinds of insurance, following:"

The conclusion reached by the attorney general was, that fire insurance companies, whether stock or mutual, have only the powers conferred by § 9607-2; that the powers conferred by § 9607-2 are available to either stock or mutual companies but powers mentioned in §§ 9510 and 9556, but not mentioned in § 9607-2 may not be exercised by either stock or mutual companies; that in some respects the powers conferred by § 9607-2 are broader than those enumerated in § 9510; and that a company originally organized under § 9510 may obtain the additional powers by amending its articles of incorporation.

Opins. Atty. Gen. 1919, p. 925; 17 O. L. R. 308; Compare, Opins. Atty. Gen. 1918, p. 1348.

In *State, ex rel., v. Gearheart*, 103 O. S. 263 (1921), a foreign stock company claimed certain powers by virtue of § 9607-2. But the court said (p. 265): "This section is a part of the chapter dealing with 'mutual fire insurance companies'. It is difficult to comprehend how it can be stretched to include the relator."

Powers of mutual company. A mutual company is not necessarily an assessment company. It is authorized to collect premiums in advance, accumulate a surplus and in general transact business on practically the same plan as stock companies, except that a mutual company must provide in its policies for contingent mutual liability.

5 Opins. Attys. Gen. 343, 347 (1900).

A mutual company may borrow money to carry on its legitimate business.

2 Opins. Attys. Gen. 1040.

Limitation as to kinds of insurance. A mutual company may be organized to transact any or all of the kinds of insurance mentioned in § 9607-2. Opins. Atty. Gen. 1917, p. 2186.

But a fire insurance company originally organized under § 9510 may, by amendment, acquire only the fire insurance powers granted by subsection 1 of § 9607-2. Opins. Atty. Gen. 1918, p. 1348.

Automobile insurance. Paragraph 4 of § 9607-2 authorizes insurance on automobile property, against theft, property damage, collision, liability to the public, and against fire. *State v. Tomlinson*, 101 O. S. 509 (1920).

But does not authorize reciprocal insurance. *State v. Gearheart*, 103 O. S. 263 (1921).

Liability insurance. Insurance to physicians against loss by malpractice was authorized by §§ 9510 and 9385. Opins. Atty. Gen. 1915, pp. 2274, 2284. *Contra*, Rep. Atty. Gen. 1914, p. 996; Rep. Atty. Gen. 1906-1907, p. 137.

For employers liability insurance, see notes to §§ 9510 and 9510-1.

A provision in a policy of liability insurance, limiting the amount of insurance to \$5,000 on account of injuries to one person is valid, and the insured can not recover more from the company. *Klein v. Assurance Corp.*, 9 Ohio App. 241; 29 O. C. A. 175 (1919); affirming, 19 N. P. n. s. 426.

Where, at the time of the accident, it did not appear that bodily injuries were sustained, but such injuries developed subsequently, it is sufficient that notice be given to the company immediately after the insured learned of the injuries. *Fisher Co. v. General Accident Corp.*, 8 Ohio App. 176; 29 O. C. A. 300 (1917); *Employers Liability Corp. v. Roehm*, 99 O. S. 343 (1919); affirming, 29 O. C. A. 486; 10 Ohio App. 418.

Use and occupancy insurance. Before the enactment of § 9607-2 insurance against the "loss of use" of property was not authorized. Rep. Atty. Gen. 1912, p. 721.

Health insurance. A provision that to constitute total disability the insured must be "strictly, necessarily and continuously within the house and there regularly and personally attended by a legally qualified physician" does not bar recovery by an insured who, under the advice of his physician, went out for air and to his physician's office for treatment.

Assurance Co. v. Dickson, 15 C. C. n. s. 228 (1912).

Section 9607-2a. (Amendment of articles; notice; approval by attorney general and secretary of state; deposit of copy.) Such articles of incorporation may be amended at any meeting of members, thirty days' notice of which, and of the business to come before it, has been given by a majority of the directors in a newspaper published and of general circulation in the county where the company's principal place of business is located. Such amendment, if adopted by at least three-fifths vote of the members present and voting at the meeting so called and if not inconsistent with the constitution and laws of this state, and of the United States, shall be approved by the attorney general and secretary of state and such amendment and the certificate of approval by the attorney general shall be filed in the office of the secretary of state, and shall thereupon be in effect. After recording such amendment the secretary of state shall deposit a copy thereof with the superintendent of insurance. (109 v. 283.)

Section 9607-3. (Legal existence of company; power of original incorporators.) The company shall have legal existence subject to the limitations prescribed in this act, from the filing of its articles of incorporation with the secretary of state, and the original incorporators shall have power to fix and call the first meeting and adopt by-laws which thereupon shall be filed with the superintendent of insurance, and to elect the first officers and directors who shall continue in office until the first annual meeting of the members. (104 v. 202, § 3.)

Section 9607-4. (Bond prerequisite to solicitation for insurance or acceptance of premiums.) No such domestic company shall solicit applications for insurance, or accept premiums, until it has filed with the superintendent of insurance its bond (with sureties) in the sum of ten thousand dollars, conditioned upon the faithful accounting for all funds and property which it may receive or possess, nor until it has procured the certificate of the superintendent of insurance approving such bond and the sureties thereon. The premiums received on subscriptions for insurance shall be held by the company in trust for the respective subscribers until policies of insurance are issued to them. (104 v. 202, § 4.)

Section 9607-5. (Conditions upon which license shall issue.) No such domestic company shall issue policies or effect insurance until the superintendent of insurance has,

by his license, authorized it to do so; nor shall such license be issued or renewed unless the company shall comply, as to each kind of insurance which it shall effect, with the following conditions:

1. It shall hold bona fide applications for insurance upon which it shall issue simultaneously, or it shall have in force, at least twenty policies to at least twenty members for the same kind of insurance upon not less than one hundred separate risks, each within the maximum single risk described herein.

2. "The maximum single risk" shall not exceed twenty per cent. of the admitted assets or three times the average risk or one per cent. of the insurance in force, whichever is the greater, any reinsurance taking effect simultaneously with the policy being deducted in determining the maximum single risk.

3. It shall have collected a premium upon each application, which premium shall be held in cash or securities in which insurance companies are authorized to invest and shall be equal, in case of fire insurance to not less than twice the maximum single risk assumed subject to one fire nor less than ten thousand dollars, and in any other kind of insurance to not less than five times the maximum single risk assumed. (107 v. 647, § 2; 104 v. 202, § 5.)

Section 9607-6. (Every policyholder a member.) Except as otherwise provided by law, every policy-holder of a domestic mutual company shall be a member while his policy is in force, and entitled to one vote and no more. (104 v. 202, § 6.)

Section 9607-7. (Cash advance premiums.) A domestic mutual company may, in its articles of incorporation, or in its by-laws, provide for a cash premium payable in advance and a contingent liability of the policy-holder of not less than one, nor more than ten times the cash premium in each policy, and may further provide for policies not exceeding on any one risk five per cent. of the company's assets, to be issued for cash premiums payable in advance without contingent liability of the policy-holder. (104 v. 202, § 7.)

For interpretation of former analogous sections, see 4 Opins. Atty. Gen., pp. 517, 520, 499; 3 Opins. Atty. Gen. 761.

Section 9607-8. (How by-laws amended.) The by-laws of such company may be amended at any meeting of the board

of directors, but such amendment shall not become effective unless and until the same is approved by the superintendent of insurance. (107 v. 647, § 6; 104 v. 202, § 8.)

Section 9607-9. (Maximum premium; when policy may be issued for cash premium.) The maximum premium payable by any member, may be a cash premium and an additional contingent premium not less than the cash premium, or may be solely a cash premium. No policy shall be issued for a cash premium without an additional contingent premium unless the company has a surplus which is not less in amount than the capital stock required of domestic stock insurance companies transacting the same kind of insurance. (107 v. 647, § 3; 104 v. 202, § 9.)

Section 9607-10. (Stipulation or provision as to contingent liability.) Every such mutual company shall set forth in every insurance policy which it issues upon a cash premium and contingent liability, either a stipulation of the contingent liability of the policy-holder or the provision in the article of incorporation or by-laws fixing the contingent liability. Such contingent liability shall cease with the expiration of the time for which a cash premium has been paid in advance, except for liability incurred during said time. (104 v. 202, § 10.)

Section 9607-11. (Investment of assets.) No domestic mutual company shall invest any of its assets otherwise than as provided for the investment of assets of stock fire insurance companies, and in computing the assets, liabilities and surplus of such company, no contingent liability or unauthorized investments shall be considered. (104 v. 202, § 11.)

Section 9607-12. (Money advanced not a liability against company; exception.) Any director, officer or member of any domestic mutual insurance company, or any other person, may advance to such company any sum or sums of money necessary for the purpose of its business, or to enable it to comply with any requirement of the law, or as a cash guarantee fund. Such moneys, and such interest thereon as may have been agreed upon, not exceeding eight per centum per annum, shall not be a liability or claim against the company, or any of its assets, except as herein provided, and shall be repaid only out of the surplus earnings of such company; and, except as otherwise approved and ordered by the superintendent of insurance, no part of the principal thereof

shall be repaid until the surplus of the company remaining after such repayment is equal in amount to the principal of the money so advanced. Such advancement and repayment shall be subject to the approval of the superintendent of insurance, provided that this section shall not affect the power to borrow money which any such company possesses under other laws. No commission or promotion expenses shall be paid by the company, in connection with the advance of any such money to the company, and the amount of any such unpaid advance shall be reported in each annual statement. (107 v. 649, § 4; 104 v. 202, § 12.)

Section 9607-13. (Expense shall not exceed forty per cent. of premium income.) Subsequent to the first calendar year after organization, the expense of management of any such domestic company shall not exceed in any one calendar year forty per centum of its premium income in such year; provided that the income on policies issued on the premium note or assessment plan shall be computed according to the annual basic premium. (104 v. 202, § 13.)

Section 9607-14. (When company shall be deemed impaired; assessment.) Except as otherwise provided by law, any domestic mutual company having a contingent liability, which is not possessed of assets above its unearned premium sufficient for the payment of incurred losses and expenses, shall be deemed to be impaired and shall make an assessment for the amount needed to pay such losses and expenses upon its members liable to assessment, in proportion to and within the limits of their several liabilities. (104 v. 202, § 14.)

Section 9607-15. (When impaired company may continue to issue policies.) If the impairment be not more than twenty-five per cent. of such company's reinsurance reserve fund, computed according to law, the superintendent of insurance may permit it to continue to issue policies for such period as he may designate, not exceeding ninety days.

If such impairment be not restored within the period designated, or exceeds twenty-five per cent. of such reinsurance reserve, it shall be unlawful for the company to issue new policies until such impairment be restored and until authorized by the superintendent of insurance or by a court in a proper proceeding. (104 v. 202, § 15.)

Section 9607-16. (Record of the order for assessment. Liability of policy-holder.) Such company shall cause to be

recorded in a book kept for that purpose the order for such assessment, with a statement which shall set forth the condition of the company at the date of the order, the amount of its assets and of its deposit notes or other contingent funds liable to the assessment, the amount which the assessment calls for, and the particular losses or other liabilities which it is to provide for. The said record shall be made and signed by the directors who voted for the order, before any part of the assessment is collected, and any person liable to the assessment may inspect and take a copy of the same.

Each policy-holder shall be liable to pay his proportional part of any assessments which may be laid by the company in accordance with law and his contract, on account of losses and expenses incurred while he was a member, if he is notified of such assessment within one year after the expiration or cancellation of his policy; and when an assessment is ordered, the directors shall forthwith cause written notice and demand for payment to be made upon each person subject thereto, by mail or personal service. (104 v. 202, § 16.)

Forfeiture of insurance for non-payment of assessments. Where the holder of a policy leaves the payment of assessments to his bookkeeper, who proves a defaulter and fails to pay them, such act is not an unavoidable accident or mistake, for which a court will grant relief against forfeiture.

Graveson v. Life Ass'n, 8 C. C. 172; 6 C. D. 327 (1894).

See Insurance Co. v. Troy, 20 C. C. 644; 10 C. D. 761 (1900).

The fact that the forfeiture of the policy was not declared sooner by the association than it had a right to do, does not amount to a waiver of its right to forfeit the policy.

Graveson v. Life Ass'n, 8 C. C. 172; 6 C. D. 327 (1894).

Phoenix Insurance Co. v. Hoffer, 2 C. C. 131; 1 C. D. 403 (1890); reversed, 23 W. L. B. 108.

After a fire the insured paid to the agent an assessment which was then so long overdue that the insurance was suspended under the terms of the policy. The agent remitted the premium to the company which returned it with instructions to refund to the insured, which the agent failed to do until six or eight months after the fire. Held to be a waiver of the suspension of the policy. Insurance Co. v. Billman, 18 C. C. n. s. 261 (1909); aff'd, no rep. 82 O. S. 451.

Enforcement of assessments.

See §§ 9540, 9541.

Extent of liability. A member of a mutual fire company is not liable for assessments levied to pay losses occurring before he became a member or after his membership ceased.

State v. Fire Ass'n, 42 O. S. 555 (1885).

Wilhelm v. Parker, 17 C. C. 234; 9 C. D. 724 (1898).

After the policy has expired and the policy and premium notes surrendered, the insured is not liable for assessments made to pay subsequent losses, but he remains liable for losses occurring during the life of his policy.

Wilhelm v. Parker, 17 C. C. 234; 9 C. D. 724 (1898).

Leverone v. Brown, 12 C. C. n. s. 277 (1909).

The estate of a decedent, who had effected mutual fire insurance during his life, is liable for assessments; and is jointly liable with the heirs for assessments made after his death during the term of the policy.

In re Lones' Estate, 57 Bull. 122.

Defenses.

Statute of limitations. An action to recover assessments must be brought within six years after demand is made.

Mills & Co. v. Whitmore, 22 C. C. 467; 12 C. D. 338 (1901).

Where, after insolvency, an assessment for the full amount of the liability of a policyholder was made by the court, and subsequently another assessment is made on all policyholders, covering the same liability, but adding the probable costs of collection of the assessment, the statute begins to run on the first assessment and is not revived by the second assessment.

Swing v. Crane, 11 C. C. n. s. 297 (1908); aff'd, no rep., 79 O. S. 461.

See Swing v. Cultivator Co., 9 C. C. n. s. 45; 19 C. D. 365 (1906); reversed, no report, 77 O. S. 610.

Compromise. The directors have power to compromise a claim for assessments, and return the premium notes to the member, and such compromise is a defense against subsequent assessments made to pay losses occurring prior to the compromise.

Wadsworth v. Davis, 13 O. S. 123 (1862).

See Swing v. Rose, 75 O. S. 355, 369 (1906).

Necessity for or amount of assessment. Where an assessment is made by a court, in a dissolution proceeding to which the corporation is a party, such decree is binding upon the policyholders as to the necessity for and amount of the assessment, although the individual policyholders were not parties to the proceeding.

Swing v. Rose, 75 O. S. 355 (1906).

But policyholders may defend on other grounds.

Swing v. Crane, 11 C. C. n. s. 297 (1908); aff'd, no rep., 79 O. S. 461.

Cancellation of policy. Where a policy was cancelled in good faith by the company, on the ground that the risk was undesirable, and the premium note was returned to and accepted by the insured, he is relieved from liability on such note, and the receiver of the company can not recover thereon.

Mansfield v. Furniture Co., 12 C. C. 222; 4 C. D. 473 (1896); aff'd, no rep., 54 O. S. 653.

See Wadsworth v. Davis, 13 O. S. 123 (1862).

Wilhelm v. Parker, 17 C. C. 234; 9 C. D. 724 (1898).

But the insured, and his surety on the premium note, are liable for the earned portion of the premium, although the policy provides that in case of loss the amount due for premium is to be deducted from the amount payable by the insurer.

Irwin v. Insurance Co., 2 Dis. 68 (1858).

Payment of loss to insured. Although a policyholder has suffered a loss, which is paid to him by the company, he remains liable for his share of the losses which occurred during the life of the policy.

Swing v. Rose, 75 O. S. 355, 368 (1906).

Mansfield v. Houston, 20 C. C. 662; 10 C. D. 807 (1897); aff'd, no rep., 58 O. S. 690.

Insurance Co. v. Society, 117 Mass. 199 (1875).

Machine Co. v. Partridge, 25 N. H. 369 (1852).

Insurance not in force because of default of insured. Where the insurance is not in force because of default in payment of installments on a premium note, the maker of the note is liable for assessments.

Insurance v. Sorter, 1 Cleve. L. R. 133 (1878).

Insurance Co. v. Leavy, 136 Pa. St. 499 (1890).

Huntley v. Perry, 38 Barb. 569 (N. Y.).

Fraud. Ignorance of insured of assessment character of insurance. Non-compliance with law by company. A mutual company which issues a policy without the word "mutual" thereon as required by § 9607-22, and by falsely representing that there is no contingent liability thereon, induces its acceptance, commits a fraud on the policyholder. A person who, after he had notified the agent that he would not accept any assessment insurance, received such a policy and retains it until he receives a notice of an assessment, is not liable to the receiver of the company.

Williams v. Receiver, 10 C. C. n. s. 422; 20 C. D. 197 (1907).

Swing v. Crane, 11 C. C. n. s. 297 (1908); aff'd, no rep., 79 O. S. 461.

But where the policy shows on its face that it is issued by a mutual company, a policyholder can not defend on the ground of fraud as against innocent creditors, although he was deceived as to the character of the insurance.

Mansfield v. Ice Co., 28 W. L. B. 113 (C. P. 1892).

Insurance Co. v. Sorter, 1 Cleve. L. R. 133 (1878).

Mansfield v. Woods, 29 W. L. B. 111 (C. P. 1893).

Earlier cases held that a member can not avoid liability on the ground that the corporation was not properly organized to do business or had not complied with the law.

Mansfield v. Woods, 29 W. L. B. 111 (1893).

Insurance Co. v. Horner, 17 Ohio 407 (1848).

See Richards v. Swain, 7 N. P. 68; 9 L. D. 70 (1899).

Section 9607-17. (Petition to have court examine assessment and necessity therefor. Notice to parties interested. Hearing and report. Effect of decree. When further collection may be stayed.) If the directors by authority of statute make an assessment or call on the members for money, or vote that there exists a necessity for such assessment, or call, they or any person interested in the company as an officer, policy-holder or creditor may apply to a court of competent jurisdiction by a petition in the nature of a bill in equity, praying for the court to examine such assessment or call, the necessity therefor, and all matters connected therewith, and to confirm, amend or annul the assessment or call, or to order the same to be made as law and justice may require; but if an application is made by any party except the company, or a receiver, or the insurance superintendent, the court may decline to exercise jurisdiction thereof. If the directors unreasonably neglect to make an assessment or call to satisfy an admitted or ascertained claim upon the company, any judgment creditor, or any person holding such claim, or the insurance superintendent, may make application to the court. Upon such application, if

made by the directors, or upon an order of the court, if made by any other person, the directors shall set forth the claims against the company, its assets, and all other facts and particulars appertaining to the matter.

The court before which such application is filed shall order notice to be given by publication or otherwise to all parties interested, and upon the return thereof shall examine the assessment or call, and the necessity therefor, and all matters connected therewith. Any parties interested may appear and be heard thereon. All questions that arise shall be heard and determined as in other equity cases.

The application shall be referred to a master who shall appoint a time and place to hear all parties interested, and who shall give personal notice thereof in writing to the insurance superintendent, and through the post-office, so far as he is able, to all persons liable upon said assessment or call. The master shall hear the parties, and report upon the correctness of the assessment or call, and all other matters connected therewith. The court may confirm, amend or annul the assessment or call, or order one to be made; and may make such orders and decree as under all the circumstances justice and equity require. If the assessment or call is altered or amended, or one is ordeerd to be made, the directors shall forthwith proceed to vote the same in legal form, and the record of such vote shall be set forth in a supplemental bill or answer.

When an assessment or call has been so confirmed, ascertained or established, a decree shall be entered which shall be final and conclusive upon the company and all persons liable to the assessment or call, as to the necessity of the same, the authority of the company to make or collect the same, the amount thereof, and all formalities connected therewith. An assessment or call altered or amended by vote of directors and decree of the court thereon shall be binding upon all parties who would have been liable under it as originally made, and in all legal proceedings shall be held to be such original assessment or call. All such proceedings shall be at the cost of the company and in all cases the court may control the disposition of the funds collected under such proceedings.

If the court finds that the net proceeds of any assessment or call will not be sufficient to furnish substantial relief to those having claims against the company, it may decree that no assessment shall be collected; and if, upon the application of the insurance superintendent or a member of the company, or of any person interested, the court is of

the opinion that further attempts to collect an assessment then partially collected will not benefit those having claims against the company, it may stay the further collection of said assessment. (104 v. 202, § 17.)

Section 9607-18. (When trustees or directors personally liable.) The trustees or directors of any such company shall be personally liable for any losses upon risks taken after the superintendent of insurance has issued his requisition to restore any deficiency in the assets and before such deficiency is restored. Provided that nothing herein shall be construed to require any mutual fire insurance company, now doing business on the premium note plan, to keep on hand any cash reinsurance reserve or funds invested in securities, other than their premium notes, when the premium notes amount in gross to three per centum of the amount at risk by the company. (104 v. 202, § 18.)

Section 9607-19. (When foreign company shall be admitted to transact business.) A foreign mutual company shall be admitted to transact the kinds of insurance authorized by its charter or articles of incorporation to the extent and with the privileges and powers permitted by law to domestic mutual companies when such company shall be solvent and shall transact its business according to the requirements of law applicable to like domestic mutual insurance companies. (107 v. 649, § 5; 104 v. 202, § 19.)

A foreign company which issued a contract providing for assessments at certain specified rates was held not authorized to levy assessments in excess thereof. *Insurance Co. v. Douds*, 103 O. S. 398 (1921); *aff'd*, — U. S. — (1923); 67 L. Ed. 488.

Section 9607-20. (Alien company admitted to do business, when.) An alien mutual company, transacting the business of insurance authorized in this act [G. C. §§ 9607-1 to 9607-29] on the mutual plan, in accordance with the laws of the country, state or province in which it was organized, may be admitted to transact such business within this state upon complying with the laws applicable to it, when its assets—invested according to the laws of the state where its assets are held in the United States, pledged for the payment of its liabilities in the United States—exceed its liabilities in the United States by two hundred thousand dollars. (104 v. 202, § 20.)

Section 9607-21. (When license of foreign or alien company may be revoked.) Whenever the superintendent of in-

insurance shall find that any foreign or alien mutual company, doing business in this state, does not have the qualifications required of such company for admission to this state, or that it has not complied with the law, he may revoke the license of such company to transact business in this state. (104 v. 202, § 21.)

Section 9607-22. (Every domestic, foreign or alien company shall contain the word "mutual", exception.) The name of every such domestic, foreign and alien mutual company shall contain the word "mutual."

This section shall not apply to any company now licensed to do business in this state, whose name does not now contain the word "mutual," unless it does now, or hereafter shall, issue policies which are subject to contingent liability or assessment. (104 v. 202, § 22.)

A mutual company which issues a policy without the word "mutual" thereon, and, by falsely representing that there is no contingent liability thereon, induces its acceptance, commits a fraud on the policyholder. A person who, after he had notified the agent that he would not accept any assessment insurance, receives such a policy and retains it until he receives notice of an assessment, is not liable to the receiver of the company.

Williams v. Receiver, 10 C. C. n. s. 422; 20 C. D. 197 (1907).

Swing v. Crane, 11 C. C. n. s. 297 (1908); aff'd, no rep., 79 O. S. 461.

But where the policy shows on its face that it is issued by a mutual company, a policyholder can not defend on the ground of fraud as against innocent creditors, although he was deceived as to the character of the insurance.

Mansfield v. Ice Co., 28 W. L. B. 113 (C. P. 1892).

Insurance Co. v. Sorter, 1 Cleve. L. R. 133 (1878).

Mansfield v. Woods, 29 W. L. B. 111 (C. P. 1893).

Earlier cases held that a member can not avoid liability on the ground that the corporation was not properly organized to do business or had not complied with the law.

Mansfield v. Woods, 29 W. L. B. 111 (1893).

Insurance Co. v. Horner, 17 Ohio 407 (1848).

See Richards v. Swaim, 7 N. P. 68; 9 L. D. 70 (1899).

Section 9607-23. (Company having similar name of another not permitted.) No such domestic, foreign, or alien mutual company shall be permitted to transact business if its name is so similar to any name already in use by any company organized or doing business in the United States, as to be confusing or misleading to the public, unless the company whose name is so similar shall consent thereto. The superintendent of insurance and secretary of state shall determine all questions respecting such similarity of names, and if they fail to agree, the attorney general shall determine

whether any proposed name may be adopted or used. (104 v. 202, § 23.)

Section 9607-24. (Maintenance of unearned premium reserve.) Every domestic, foreign and alien mutual company shall maintain an unearned premium reserve of fifty per centum of the cash premiums received and receivable on unexpired risks and policies running one year or less from date of policy, and a pro rata amount of all cash premiums received and receivable on all other unexpired risks and policies. (104 v. 202, § 24.)

Section 9607-25. (Retaliatory law shall not apply, when.) No retaliatory law of this state, relating to insurance companies, shall apply to any such mutual company organized under the laws of any state which has a similar law exempting mutual fire insurance companies from the retaliatory laws of such state. (104 v. 202, § 25.)

Section 9607-26. (Laws applicable.) The laws of this state governing corporations and the laws relating to insurance, to the extent they are now or hereafter may be applicable to any such mutual companies and not in conflict with the provisions of this act [G. C. §§ 9607-1 to 9607-29], are hereby made specifically applicable to such mutual companies. (104 v. 202, § 26.)

Section 9607-27. (Companies and associations not affected by this act.) This act shall not affect any company now doing business within this state on the premium note plan, nor any mutual protective association now or hereafter organized or doing business under the provisions of Tit. IX, Div., III, Subdiv. II, Chap. 2 of the General Code or amendments thereof, unless such company or association elect to reorganize under the provisions of this act [G. C. §§ 9607-1 to 9607-29]; provided also that the sections repealed by this act shall remain in force, so far as applicable, to any such company or association not so electing. (104 v. 202, § 27.)

Section 9607-28. (What companies held organized under laws of this state.) Every mutual fire insurance company created by or organized under a general or special law of this state and doing business herein upon or without the premium note plan, which by its policy, by-laws or public statements of its financial affairs claims the benefit of the

guarantee fund or the contingent liability of its policy-holders as provided for in this act [G. C. §§ 9607-1 to 9607-29], shall be held as having organized under the laws of this state now in force, and be governed by the portions thereof as applicable to such company. (104 v. 202, § 29.)

Section 9607-29. (Refusal to make report forfeits charter.) Any mutual company which neglects to make and forward to the superintendent of insurance an annual report of its affairs, as required by law, or refuses to allow him free access to its books and papers, and to investigate its financial standing if organized under the laws of this state, shall thereby forfeit its charter, and the superintendent of insurance shall proceed without delay to bring its affairs to a close. (104 v. 202, § 30.)

Section 9607-31. (Deposit of securities to transact business outside state.) That any domestic mutual fire insurance company, for the protection of all its policies, may deposit with the superintendent of insurance of Ohio, securities of the kind hereinafter described, in such sum as shall be necessary to enable such company to transact business in any other state under the laws of said state. (107 v. 500, § 1.)

Section 9607-32. (Execution of receipt; record of securities.) Said superintendent of insurance shall execute his receipt therefor to the depositing company, safely keep such securities as provided by law until same be withdrawn by the depositing company as hereinafter provided, and also keep in his office a record in which shall be entered the name of the company so owning and depositing such securities, the name of the debtor, the par value and serial number of each such security, the date of its maturity, and the date of maturity and amount of each installment of interest to become due. (107 v. 500.)

Section 9607-33. (Securities specified; registration.) Said securities shall consist of United States bonds, bonds of the state of Ohio or bonds of a county or incorporated city of this state, issued in conformity with law, not estimated above their par value, which, before being deposited, shall be registered by the company in favor of "the superintendent of insurance of the state of Ohio in trust for the benefit and security of all the policy-holders of said company." (107 v. 500.)

Federal farm loan bonds may be deposited. § 9518-2.

Section 9607-34. (Collection and deposit of principal and interest.) Said superintendent of insurance shall collect and pay over to the depositing company the principal and interest on said securities as same mature, but before receiving the proceeds of the principal sum of any deposited security, the company shall substitute securities of the required character equal in amount to those maturing. (107 v. 501.)

Section 9607-35. (Exchange of securities.) Such depositing company at any time may exchange for any securities so deposited other securities of like character which shall be deposited and handled in all respects as said original deposit. (107 v. 501.)

Section 9607-36. (Certification under seal, of deposits.) Upon request of the depositing company, said superintendent of insurance shall certify under the seal of his office to the insurance department of any other state, or to any other interested person, to the fact of such deposit, and the amount and description of the securities so on deposit. (107 v. 501.)

Section 9607-37. (Examination of securities, annually.) Every insurance company having securities deposited in the office of the superintendent of insurance, may, once during each calendar year, at such proper time as the company may select, cause its securities so deposited to be examined by its president, secretary or other agent whom it may designate for that purpose. (107 v. 501.)

Section 9607-38. (Surrender of securities upon termination of liability; examination of records.) No part of the securities so deposited shall be surrendered by said superintendent of insurance to the depositing company until liability shall have terminated on all policies for whose benefit the securities have been deposited. When liability on all such policies shall have terminated, the depositing company may apply to said superintendent of insurance for the surrender of the deposited securities, thereupon the president or principal officer and secretary of the company shall make oath that all liability on such policies has terminated and said superintendent of insurance shall cause an examination to be made of the records and files of the company and if it appear that liability no longer exists, the superintendent shall surrender such securities to the depositing company. Such superintendent of insurance, ninety (90) days prior to the time of surrendering same, shall advise of the contem-

plated withdrawal by registered mail addressed to all persons who may have been notified of the fact of such deposit under section 9607-36 hereof. (107 v. 501.)

CHAPTER 3.

LIVE STOCK.

§ 9608.	Association for insurance against loss by death of domestic animals.	§ 9615.	Examination.
§ 9609.	Certificate of organization.	§ 9616.	Applications necessary.
§ 9610.	Certificate to be filed.	§ 9617.	When company may commence business.
§ 9611.	Election of officers.	§ 9618.	When charter shall be forfeited.
§ 9612.	Constitution and by-laws.	§ 9619.	Bond of secretary and treasurer.
§ 9613.	Annual statement; renewal certificate; fee.	§ 9620.	Directors.
§ 9614.	Failure to make statement.		

Section 9608. (Association for insurance against loss by death of domestic animals.) Any number of persons of lawful age, residents of this state, not less than five, may associate themselves together for the purpose of becoming a body corporate, and insure themselves, and any person becoming a member of such corporation, in accordance with the rules and regulations thereof, against loss from death of domestic animals, and assess upon and collect from each other such sums of money, from time to time, as are necessary to pay losses which occur from the death of such animals to any member of the corporation, and incidental expenses and may assess upon and collect from each other an amount equal to the average yearly losses and expenses, such average yearly losses and expenses to be based upon the preceding three years, the same to be treated as a surplus; such surplus to be used in paying losses and expenses that may occur, and if invested, to be under the provisions of sections 9518 and 9519 of the General Code. (June 9, 1911, 102 v. 355; R. S. Sec. 3691-1; April 15, 1889, 86 v. 377.)

The articles of incorporation must show that all the incorporators are residents of Ohio.

Rep. Atty. Gen. 1910-1911, p. 223.

In case of failure to pay a certificate, the holder need not seek specific performance to levy assessments, but may sue at law for the sum stipulated in certificate.

Hall v. Live Stock Ass'n, 25 W. L. B. 79 (C. P. 1891).

Section 9609. (Certificate of organization.) Such persons shall make and subscribe a certificate, setting forth therein:

1. The name by which the corporation is to be known.

2. The place which is chosen as its principal office.
3. The object of the corporation, which shall only be to enable its members to insure each other against loss from death of domestic animals, and to enforce any contract by them entered into, whereby they specifically agree to be assessed for the payment of losses and incidental expenses.
4. An acknowledgment of the signing of such certificate before a notary public, or other officer authorized to take the acknowledgments of deeds and mortgages. (R. S. Sec. 3691-2; April 15, 1889, 86 v. 378, § 2.)

Section 9610. (Certificate to be filed.) Such certificate shall be filed in the office of the secretary of state, and a copy thereof duly certified by such secretary, shall be evidence of the existence and due incorporation of the company for the purposes therein named. (R. S. Sec. 3691-3; April 15, 1889, 86 v. 378, § 3.)

Section 9611. (Election of officers.) When such certificate is so filed, and a certified copy thereof forwarded to the company, the persons named therein shall elect their directors, a president, secretary, treasurer, and such other officers as are necessary for doing the business and accomplishing the objects of the company, to serve for one year, or until their successors are duly elected and qualified. Such officers shall thereafter be elected annually, by the members of the association, at such time as is fixed upon in the constitution. Such company so organized shall not insure against loss by death of domestic animals for others than members of the company who are bona fide residents of this state. (R. S. Sec. 3691-4; April 15, 1889, 86 v. 378, § 4.)

Section 9612. (Constitution and by-laws.) Every such company shall adopt such constitution and by-laws consistent with the constitution and laws of this state and the United States, as in the judgment of its members best will subserve its interests and purposes. All persons who obtain insurance in the company shall thereby become members thereof, with power to vote at regular meetings of members, upon all subjects, and also be held, in law, to comply with all the provisions and requirements of the company. (R. S. Sec. 3691-5; April 15, 1889, 86 v. 378, § 5.)

Where the constitution and by-laws of an association provided that payment of dues entitled the person to membership, "so long as he carries insurance and for one year thereafter," members were liable for assessments, in the opinion of the attorney general, during the entire year of

their membership, regardless of whether they had property insured during all of such period.

Rep. Atty. Gen. 1908-1909, p. 343.

Section 9613. (Annual statement. Renewal certificate. Fee.) The president, or vice-president, and secretary of such company, annually on the first day of January, or within thirty days thereafter shall prepare, under oath, and deposit in the office of the superintendent of insurance, a statement of the condition of the company on the thirty-first day of December then next preceding, exhibiting such facts as are enumerated in section ninety-five hundred and ninety, applicable to such companies, and such other information as is necessary to reveal the financial condition and general management of the company, as the superintendent requires in a printed form, to be by him supplied for that purpose.

Upon filing its annual statement, the superintendent shall annually issue a renewal certificate to such company, if he finds the company has complied with the law. For filing each such annual statement and for each certificate and renewal certificate, every such company shall pay to the superintendent for the use of the state, five dollars to cover the cost of filing annual statement and fee for issuing such certificate. (April 23, 1910, 101 v. 129; R. S. Sec. 3691-5; April 15, 1889, 86 v. 378, § 5.)

Section 9614. (Failure to make statement.) Any such company failing to make and deposit such statement, or to reply to any inquiry of the superintendent of insurance, shall be subject to a forfeiture of five hundred dollars, and an additional five hundred dollars for every month it thereafter transacts any business of insurance, and shall forfeit its right to do the business contemplated by this chapter. The superintendent by proceedings in quo warranto shall enforce such forfeiture. (R. S. Sec. 3691-5; April 15, 1889, 86 v. 378, § 5.)

Section 9615. (Examination.) The superintendent of insurance, whenever he deems it advisable, may cause an examination of the affairs of such company to be made by one or more disinterested persons, at the expense of the company, the expense not to exceed five dollars per day for each person employed. If upon such examination, it appears that it is exercising powers or franchises contrary to law, the superintendent shall institute proceedings in quo warranto against the company, and if it be found, in such proceedings, that it has exercised powers or franchises contrary to law, a forfeiture of its right to do business shall be declared. (R. S. Sec. 3691-6; April 15, 1889, 86 v. 379, § 6.)

Section 9616. (Applications necessary.) No company organized under this chapter shall issue any certificate or policy of insurance until bona fide applications for insurance to the amount of fifty thousand dollars have been filed with the secretary of the company, and a statement of such fact sworn to by the secretary and president, filed with and approved by the superintendent of insurance. The treasurer of such company shall not receive money, as treasurer, until he has filed with the superintendent his bond, payable to the state of Ohio, for the benefit of the members of such company, in the sum of ten thousand dollars, with security, to be approved by the superintendent. Such bond shall be conditioned for the faithful application of all money coming into his hands as treasurer. (R. S. Sec. 3691-7; April 15, 1889, 86 v. 379, § 7.)

Section 9617. (When company may commence business.) When the statement of the secretary and president, and the bond of the treasurer required by the preceding section, are filed and approved by the superintendent of insurance, he shall issue, to such company, his certificate, certifying that fact, and such certificate shall constitute the authority of the company to commence business. (R. S. Sec. 3691-8; April 15, 1889, 86 v. 379, § 8.)

Section 9618. (When charter may be forfeited.) Should the amount at risk in such company be reduced below fifty thousand dollars, it shall issue no more certificates or policies of insurance until bona fide applications, sufficient to restore the insurance to such amount have been secured, and a sworn statement of that fact is filed with and approved by the superintendent of insurance, and by him certified to the company. If such company fails to restore such amount, for the period of six months, it shall forfeit its right to do business. When its liabilities exceed seven per cent of the amount of risk in force, as determined by the last preceding assessment, such company shall be deemed to be insolvent, and to have forfeited its charter. Such forfeiture shall be enforced by the superintendent of insurance by proceedings in quo warranto. (108 (Pt. 1) v. 72; R. S. Sec. 3691-9; 86 v. 380, § 9.)

Section 9619. (Bond of secretary and treasurer.) The treasurer and secretary of such companies shall give bond for the faithful performance of their duties, to the directors or trustees thereof, in such sum and with such security as are prescribed in the by-laws of the company, the security

to be approved by its directors or trustees. (R. S. Sec. 3691-10; April 15, 1889, 86 v. 380, § 10.)

Section 9620. (Directors.) The directors or trustees of such company before qualified, shall take an oath, to be administered by any officer authorized to take acknowledgments of deeds, faithfully to perform their official duties. (R. S. Sec. 3691-11; April 15, 1889, 86 v. 380, § 11.)

CHAPTER 4.

CREDIT GUARANTY.

§ 9621.	Organization.	§ 9629.	Annual statements.
§ 9622.	Capital stock.	§ 9630.	Companies of other states.
§ 9623.	Increase of capital stock.	§ 9631.	When company of other state exempted from making deposit.
§ 9624.	Investment of capital.	§ 9632.	Forfeiture of right to do business.
§ 9625.	Certificate and authority to do business.	§ 9633.	Examination.
§ 9626.	Deposits.		
§ 9627.	Powers.		
§ 9628.	May purchase certain accounts.		

Section 9621. (Organization.) Any number of persons, not less than five, may associate and form a company to guarantee and indemnify merchants, manufacturers, traders and those engaged in business, and giving credit, from loss and damage by reason of giving and extending credit to their customers and those dealing with them, by making, acknowledging and filing articles of incorporation pursuant to, and by complying with sections ninety-three hundred and forty, ninety-three hundred and forty-one and ninety-three hundred and forty-two. (R. S. Sec. 3691-14; May 2, 1902, 95 v. 345; May 21, 1894, 91 v. 415.)

Under the language of paragraph two of § 9510 permitting a company to "guarantee the performance of contracts other than insurance policies" a credit insurance company may be organized or admitted under § 9510 et seq.

4 Opins. Attys. Gen. 535. (1893).

A credit insurance bond required notice of insolvency of each debtor, within a fixed time, and provided that knowledge by or notice to any agent or representative other than certain designated officers should not estop the company from enforcing any provisions of the policy or be a waiver. The insured, within the time fixed, gave notice on a blank form furnished by the company but did not fully comply with the requirements as to notice. The company began an investigation and one of the designated officers corresponded with the insured and had full knowledge of all facts of which the insured was required to give notice. Held, knowledge of the officer was notice to the company, and its action waived the more formal notice. *Koblitz v. Indemnity Co.*, 92 O. S. 272 (1915).

An insured notified his insurer that a debtor had been adjudged

a bankrupt. The insurer replied that it had been informed that the debtor was "closed out under execution" and the proof showed that the latter was correct. Held, immaterial, as the bond covered either event, and the insured had prompt and sufficient notice of the threatened loss, and did not dispute liability on the ground of defective notice. *Casualty Co. v. Fechheimer*, 220 Fed. 401 (C. C. A. Ohio 1915).

Bond construed; provisions as to losses during terms of original and renewal bonds, and amount of loss to be born by insured. *Casualty Co. v. Fechheimer*, 220 Fed. 401 (C. C. A. Ohio 1915).

Section 9622. (Capital stock.) No such company shall be organized with a less capital than one hundred thousand dollars, the whole of which, before proceeding to business, shall be paid in and invested in treasury notes, in stocks or bonds of the United States, in stocks or bonds of the state of Ohio, or a municipality or county thereof, or in mortgages on unincumbered real estate within this state, worth double the amount loaned thereon at the time the loan is made. (R. S. Sec. 3691-15; May 2, 1902, 95 v. 345; May 21, 1894, 91 v. 415.)

Section 9623. (Increase of capital stock.) Such company may increase its capital stock as provided in section ninety-three hundred and forty-five. (R. S. Sec. 3691-16; May 2, 1902, 95 v. 345; May 21, 1894, 91 v. 415.)

Section 9624. (Investment of capital.) Such company may invest its capital stock and change such investment as provided in section ninety-three hundred and forty-six. But it shall not commence business until it has made the deposit of securities required by such section, which shall be held and controlled by the superintendent of insurance for the purpose and in the manner provided in sections ninety-three hundred and forty-six, ninety-three hundred and forty-seven and ninety-three hundred and forty-eight. (R. S. Sec. 3691-17; May 2, 1902, 95 v. 345; May 21, 1894, 91 v. 415.)

Section 9625. (Certificate and authority to do business.) When such company is fully organized and has deposited the requisite amount of securities as hereinbefore provided, together with a certified copy of the papers required by this chapter, unless he finds the name assumed by it so nearly similar to that of another company organized in this state as to lead to uncertainty or confusion on the part of the public, the superintendent of insurance shall furnish such company with a certificate of such deposit and of authority to transact business. (R. S. Sec. 3691-18; May 2, 1902, 95 v. 345; May 21, 1894, 91 v. 415.)

Section 9626. (Deposits.) No such company shall undertake any business or risk until it also deposits with the superintendent of insurance, for the benefit and security of its policy-holders, fifty thousand dollars in bonds of the United States, the state of Ohio, or a county, township, city or other municipality in this state, which he shall not receive at more than their par value, but which may be exchanged from time to time, for other securities, and so long as it continues solvent and complies with the laws of this state, he shall permit it to collect the interest on such deposits. (R. S. Sec. 3691-19; May 2, 1902, 95 v. 345; May 21, 1894, 91 v. 415.)

Section 9627. (Powers.) When such company has complied with all of the foregoing requirements, it may agree to pay to merchants, manufacturers, dealers and persons engaged in business and giving credit, the debt or debts, or such part thereof as is agreed upon, or which may be thereafter owing to them; and to indemnify them from loss on account thereof in such an amount or per cent as is agreed upon, and to charge and receive therefor such sum or per cent as the consideration for such an agreement, guaranty or indemnity, as is agreed upon between it and the person guaranteed or indemnified, and to buy, hold, own and take an assignment of any claims, accounts and demands so guaranteed, and to hold, own and collect them, and enforce collection thereof by action the same as the original holder and owner might or could do. Such corporation may also guarantee the payment of money for personal services under contract of hiring. (R. S. Sec. 3691-19; May 2, 1902, 95 v. 345; May 21, 1894, 91 v. 415.)

Section 9628. (May purchase certain accounts.) Such corporation may use its capital stock, or funds accumulated in the course of its business to purchase or pay for any claim or demand, the payment of which it has guaranteed, or against the loss of which it has indemnified the holder. Such of its capital stock or accumulated funds as are not so used shall be vested in the same classes of securities in which the deposit to be made with the superintendent of insurance is required to be invested. But when on account of losses or otherwise, the amount of its funds falls below such sum as hereinbefore is required to be deposited, no further guaranty of indemnity shall be issued until the deficiency has been made good. (R. S. Sec. 3691-19; May 2, 1902, 95 v. 345, § 7; May 21, 1894, 91 v. 415.)

Section 9629. (Annual statement.) The president or vice-president of each company organized under this chapter, or under the laws of another state, or the general manager for the United States of a company organized for like purposes under the laws of a foreign government, and doing business in this state, annually, on the first day of January, or within thirty days thereafter, shall prepare under oath and deposit in the office of the superintendent of insurance a statement of the condition of such company on the thirty-first day of December then next preceding, exhibiting the following facts and items, in the following form:

First. The amount of the capital stock of the company, specifying the amount paid and unpaid.

Second. The property or assets held by the company specifying:

1. The value of the real estate owned by it, where it is situated, and the value of the buildings thereon.

2. The amount of cash on hand and deposited in banks to the credit of the company, specifying in what banks it is deposited.

3. The amount of cash in the hands of agents and in the course of transmission.

4. The amount of loans secured by bonds and mortgages which are first liens on real estate and on which there is less than one year's interest due.

5. The amount of loans on which interest has not been paid within one year.

6. The amount due the company on which judgments have been obtained, and the cash valued thereof.

7. The amount of stocks in this state, the United States, of any city in this state, and of any other stocks owned by the company, specifying the amount, number of shares, and the par and market values of each kind of stocks.

8. The amount of stock held as collateral security for loans, with the amount loaned on, and the par and market values of each kind of stock.

9. The amount of unpaid assessments on stock, premium notes or contingent liabilities.

10. The amount of interest due and unpaid, and the amount of interest accrued but not due.

11. The amount of premium notes or contingent liabilities on which policies or bonds of guaranty or indemnity are issued.

12. The number of policies or bonds of guaranty or indemnity in force.

13. The amount of premiums received thereon.

14. The amount and description of all other assets.

15. The amount guaranteed under all policies in force.

Third. The liabilities of the company, specifying:

1. The amount of losses due and unpaid.

2. The amount of claims for losses resisted by the company.

3. Gross losses in process of adjustment or in suspense, including all reported and supposed losses.

4. The amount of dividends declared and due and unpaid.

5. The amount of dividends, either cash or scrip, declared, but not due.

6. The amount of money borrowed, and the security for their payment.

7. The amount of all other existing claims against the company.

Fourth. The income of the company during the preceding year, specifying:

1. The amount of cash premiums received.

2. The amount of notes or contingent assets received for premiums.

3. The amount of interest money received.

4. The amount of income received from other sources.

Fifth. The expenditure during the preceding year, specifying:

1. The amount of losses paid during the year, stating how much thereof accrued prior to and how much after the date of the preceding statement, and the amount at which losses were estimated therein.

2. The amount of dividends paid during the year.

3. The amount of expenses paid during the year, including commissions and fees to agents and officers of the company.

4. The amount paid for taxes.

5. The amount of all payments and expenditures.

6. The amount of scrip dividend declared. (R. S. Sec. 3691-20; May 2, 1902, 95 v. 346; May 21, 1894, 91 v. 415.)

Section 9630. (Companies of other states.) Any corporation, company or association organized under the laws of another state of the United States or of a foreign government to transact a like business as that hereinbefore provided for, may be admitted and licensed to do business in this state. As a condition precedent to being admitted, and transacting business in this state, it shall deposit with the superintendent of insurance the following:

1. A certified copy of its charter or articles of incorporation;

2. If the applicant be a corporation, company or association organized under the laws of another state of the United States, a certificate from the insurance commission, commissioner or superintendent of insurance of its own state showing its authority to do such business, also a certificate from such officer that corporations, companies or associations of this state engaged in a like business, upon complying with the laws of such state, are legally entitled to do business therein;

3. A statement under oath of its president and secretary, or like officers, or of the general manager for the United States of a company organized under the laws of a foreign government, in the form herein provided for, of its business for the preceding year;

4. A copy of its policy, bond or guaranty, application and by-laws;

5. If the applicant be a corporation, company or association organized under the laws of another state of the United States, a certificate from the insurance commissioner, superintendent of insurance or other proper officer of its own state, that such company has invested at least one hundred thousand dollars of its assets in the interest paying bonds or stocks of the United States or of this state, or of some other state of the United States, of the market value of one hundred thousand dollars in the city of New York, or in bonds and mortgages on unincumbered real estate in this state, or in the state under the laws of which it is organized, of at least double the value of the amount loaned thereon, that such securities are held under the laws of such state by such officer for the benefit of all its policy, bond or guaranty holders, and also stating the character of the securities held by such officer and their value;

6. A duly certified copy of the resolution of its board of directors or authority, duly acknowledged before a notary public by the general manager for the United States of a company organized under the laws of a foreign government, appointing an attorney in this state upon whom service of summons or other process in all actions begun in this state may be made. (R. S. Sec. 3691-21; May 2, 1902, 95 v. 348; May 21, 1894, 91 v. 415.)

Section 9631. (When company of other state exempted from making deposit.) No deposit in this state shall be required of any corporation, company or association of another state, if it has made the deposit in its own state, referred to in the preceding section, and has filed with the superin-

tendent of insurance of this state the certificate mentioned in that section, as evidence of such deposit. But a corporation doing a credit guaranty business in this state, which is incorporated by or organized under the laws of a foreign government, shall make the deposit with the superintendent of insurance of such securities to the amount and for the purpose required by sections ninety-five hundred and sixty-five and ninety-five hundred and sixty-six. (R. S. Sec. 3691-22; May 2, 1902, 95 v. 349; May 21, 1894, 91 v. 415.)

Section 9632. (Forfeiture of right to do business.) A corporation so organized, or doing business in this state under the foregoing provisions, which fails or refuses to file a statement or report, shall thereby forfeit its right to do business, which forfeiture the superintendent of insurance shall enforce by proceedings in quo warranto; and upon his written request the attorney-general of the state shall institute such proceedings. (R. S. Sec. 3691-23; May 2, 1902, 95 v. 349; May 21, 1894, 91 v. 415.)

Section 9633. (Examination.) Such corporation, association or company shall be subject to examination by the superintendent of insurance under and pursuant to the provisions of the laws of this state relative to the examination of life insurance companies. (R. S. Sec. 3691-24; May 2, 1902, 95 v. 349; May 21, 1894, 91 v. 415.)

CHAPTER 5.

BURGLARY AND ROBBERY.

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| § 9634. License. | § 9638. Character of business to be conducted in this state. |
| § 9635. Requisites for beginning business. | § 9639. Liability of policyholders. |
| § 9636. Papers to be filed with superintendent of insurance. | § 9640. Appointment of attorney and service of process. |
| § 9637. When may begin to do business. | § 9641. Annual statements. |
| | § 9642. Revocation of authority. |

Section 9634. (License.) An insurance company organized or incorporated on the mutual plan under the laws of this or any other state for the purpose of insuring against loss or damage from burglary and robbery or attempt thereat, and securing against the loss of money and securities in course of transportation shall be authorized, admitted and licensed to do business in this state as hereinafter provided. (R. S. Sec. 3691-24a; April 16, 1900, 94 v. 350.)

A company to insure against theft should be organized under this chapter and not under § 9510. Rep. Atty. Gen. 1913, p. 88. *Contra*. 4 Opins. Atty. Gen. 526, 653 (1893).

Section 9635. (Requisites for beginning business.) Before such company may transact business in this state, except to solicit and receive applications for insurance and premiums, or parts thereof, as hereinafter provided, it shall have in force five hundred or more policies on which premiums are paid in cash, or evidenced by the written contracts of the policy-holders, on which not less than one-fifth of the amount has been paid in cash. The cash and contracts for premiums shall amount in the aggregate to a sum not less than one hundred thousand dollars. The premium contracts so held shall constitute a part of the valid assets of the company. (R. S. Sec. 3691-24b; April 16, 1900, 94 v. 351, § 2.)

Section 9636. (Papers to be filed with superintendent of insurance.) Every such company, association or partnership shall also file a certified copy of its charter, articles of incorporation or deed of settlement, together with a statement under the oath of the president or vice-president and secretary of the company for which he or they act, containing its name, the place where located, a detailed statement of its assets, the number of its policy-holders, the aggregate amount of premium contracts, the amount of cash on hand, in bank, or in the hands of agents, the amount of real estate, and how it is encumbered by mortgage, the number of shares of stock of every kind owned by the company, its par and market value, amount loaned on bond and mortgage, the amount loaned on other securities, and the kind and amount loaned on each, and the estimated value of the whole amount of such securities, and other assets or property of the company; also, its indebtedness, the amount of losses adjusted and unpaid, the amount incurred and in process of adjustment, the amount resisted by the company as illegal and fraudulent, and all other claims existing against the company; and for a company organized under the laws of another state, a copy also of the last annual report, if any, made under any law of such state. (R. S. Sec. 3691-24c; April 16, 1900, 94 v. 351, § 3.)

Section 9637. (When may begin to do business.) No agent shall be allowed to transact business for such company whose reinsurance reserve, as required herein is impaired to the extent of twenty per cent thereof, while such deficiency continues, nor shall any agent act for any company or companies hereinbefore referred to, directly or indirectly, in taking risks or transacting the business of burglary and robbery insurance or the insurance of the safe shipment of money and securities, without procuring from the superin-

tendent of insurance a certificate of authority, stating that such company has complied with all requirements of law, which apply to such companies. As to a company organized under the laws of another state there shall be added the name of the attorney appointed to act for it. (R. S. Sec. 3691-24c; April 16, 1900, 94 v. 351, § 3.)

Section 9638. (Character of business to be conducted in this state.) Such a company organized, admitted and licensed to transact business in this state, shall confine its line of business to that stated in the first section of this chapter, and within this state, to banks, bankers, loan companies, trust companies, city and county treasurers, and not issue any policy to any person, firm or corporation therein, other than banks, bankers, loan companies, trust companies, city and county treasurers. Every such company shall set aside a reinsurance reserve of fifty per cent of its premiums for unexpired term, whether collected in cash or represented by the obligations of the policy-holders, as written in its policies. (R. S. Sec. 3691-24d; April 16, 1900, 94 v. 352, § 4.)

Section 9639. (Liability of policyholders.) Policy-holders of a company organized and admitted to transact such business in this state shall be liable to pay the membership fee and premium on their insurance as paid or contracted to be paid at the time the policy is taken out, but not for any further or other assessments or claims on the part of the company or its policy-holders. The membership fees and premiums agreed upon may be collected in cash at the time the policy is issued or evidenced by written obligation of the policy-holder, as agreed upon by him and the company. Such payment or obligation shall be the limit of the liability of the policy-holder to the company for premium on his insurance. (R. S. Sec. 3691-24e; April 16, 1900, 94 v. 352, § 5.)

Section 9640. (Appointment of attorney and service of process.) No insurance company, association or partnership incorporated by or organized under the laws of another state of the United States for any of the purposes hereinbefore specified, directly or indirectly shall take risks or transact any business of insurance in this state by any agent therein, until it appoints the superintendent of insurance as an attorney on whom process of law can be served, and files in his office a written instrument duly signed and sealed, certifying such appointment. Any process issued by a court of record in this state, and served upon such attorney by the

proper officer of the county in which he resides or is found, shall be a sufficient service of the process upon such company. (R. S. Sec. 3691-24f; April 16, 1900, 94 v. 352, § 6.)

Section 9641. (Annual statements.) The statement and evidence of membership, assets and investments hereinbefore required shall be renewed from year to year in such manner and form as required by the superintendent of insurance with an additional statement of the amount of premiums received in this state during the preceding year, so long as such agency continues. The superintendent, on being satisfied that the membership, assets, securities and investments remain secure, as hereinbefore mentioned, shall furnish such renewal. (R. S. Sec. 3691-24g; April 16, 1900, 94 v. 352, § 7.)

Section 9642. (Revocation of authority.) If a corporation organized as hereinbefore provided, and doing business in this state, violates any of the provisions of this chapter, the superintendent of insurance shall revoke its authority to do business in this state, and no renewal of authority shall be granted to it for a period of one year after such revocation. (R. S. Sec. 3691-24g; April 16, 1900, 94 v. 352, § 7.)

PART XX.

BUILDING AND LOAN ASSOCIATIONS.

ORGANIZATION AND POWERS.

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Section 9643. (Definition of terms. Duty of secretary of state.) A corporation for the purpose of raising money to be loaned to its members, and others, shall be known in this chapter and in the laws relating to the department of building and loan associations, as a "building and loan association" or as a "savings association." Associations organized under the laws of this state shall be known as "domestic" associations and those organized under the laws of other states or territories as "foreign" associations. Associations may be organized and conducted under the general laws of Ohio relating to corporations, except as otherwise provided in this chapter; but, upon receipt of articles of incorporation and all papers relating thereto, the secretary of state shall forthwith transmit to the superintendent of building and loan associations a copy thereof and shall not record such articles of incorporation until duly authorized to do so by the superintendent of building and loan associations as herein-

after provided. (110 v. 65; May 11, 1908, 99 v. 528, § 1; R. S. Sec. 3836-1; May 1, 1891, 88 v. 469.)

Inspector of building and loan associations, §§ 674 to 695.

Foreign associations, §§ 678 to 681.

Building and loan associations are corporations formed for profit, having a capital stock. The respective powers and duties of the corporation, and its members, are to be decided according to the statutes of Ohio relating to such corporations.

Hinman v. Ryan, 3 C. C. 529; 2 C. D. 305 (1888).

This act does not grant "banking powers" within the meaning of article 13, § 7 of the constitution.

Bates v. Association, 42 O. S. 655 (1885).

A building and loan association is not a bank.

Rep. Atty. Gen. 1910-1911, p. 901.

A building association is not exempt from federal income taxes, where it has eliminated the element of mutual interest between its stockholders on the one hand and its depositors and borrowers on the other, and devotes itself to receiving deposits from, and loaning money to, the general public for the profit of its stockholders. Lilley B. & L. Co. v. Miller, 280 Fed. 143; 20 O. L. R. 91 (1922).
Decisions under former acts.

See Simpson v. Association, 38 O. S. 349 (1882).

Association v. Gallagher, 25 O. S. 208 (1874).

Sayle v. Loan Co., 2 C. C. n. s. 401; 15 C. D. 503 (1904); aff'd. no rep., 72 O. S. 639.

Association v. Vogeler, 7 N. P. 605; 5 L. D. 581.

Section 9643-1. (Superintendent of building and loan to certify to secretary of state. Misleading names.) Upon receipt of the articles of incorporation of such proposed building and loan association, the superintendent of building and loan associations shall immediately examine into all the facts connected with the formation of such proposed corporation, including its location and proposed incorporators, and if it appears that such corporation if formed, will be lawfully entitled to commence the business for which it is organized and entitled under the law to conduct, the superintendent of building and loan associations shall so certify to the secretary of state, who shall thereupon record such articles of incorporation. But the superintendent of building and loan associations may refuse to certify to the secretary of state, if upon such examination and investigation he has reason to believe that the proposed corporation is to be formed for any other than legitimate building and loan business, or that the character and general fitness of the persons proposed as incorporators in such corporation are not such as to command the confidence of the community in which such corporation is proposed to be located or that the public convenience and advantage will not be promoted by its establishment, or that the name of the proposed corporation is likely to mislead the public as to its character

or purpose; or if the proposed name is the same as one already adopted or appropriated by any existing building and loan association in this state, or so similar thereto as to be likely to mislead the public, unless the place of business of such proposed corporation is to be located in a county other than the one in which any corporation bearing such similar name is then doing business. (110 v. 65.)

Section 9643-2. (Appeal from order withholding certificate. Procedure on appeal. Application to probate court. Witness fees; how paid.) If the superintendent of building and loan associations withholds such certificate, an appeal may be made to a board composed of the governor, superintendent of building and loan associations and the attorney general. The decision of such board in the matter shall be final and the superintendent of building and loan associations shall thereupon so certify its action to the secretary of state. Such board shall prescribe the rules and procedure under which all appeals shall be made and heard, and may from time to time amend the same. Upon its order, the superintendent of building and loan associations shall summon in writing, under his seal, any person resident of this state, to appear before such board and testify in relation to any such appeal, and in the event of the failure of any person summoned to appear before such board to testify as herein provided, the superintendent of building and loan associations shall apply to the probate court of the county in which such proposed corporation is to be located to issue a subpoena to such person to appear before such board. Upon such application the probate judge shall issue a subpoena for the appearance forthwith of such persons before such board to give testimony. Whoever, being so subpoenaed, fails to appear or appearing, refuses to testify, shall be subject to like proceedings and penalties for contempt as witnesses in action pending in the probate court. Each witness who appears before the board or probate court by order of the superintendent of building and loan associations, shall receive for his attendance, the fees and mileage provided for witnesses in civil cases in the common pleas court, not limited, however, to county lines, which shall be audited and paid by the state out of moneys provided for, for the department of building and loan associations upon the presentation of proper voucher, sworn to by such witness and approved by the superintendent of building and loan associations. (110 v. 66.)

Section 9643-3. (When secretary of state shall record; copies.) Upon receipt of such certificate from the superintendent of building and loan associations, the secretary of state shall record said articles of incorporation; one copy thereof, duly certified by the secretary of state shall thereupon be furnished to the incorporators of such corporation, and one copy to the superintendent of building and loan associations, to be by him filed in his office. All certificates thereafter filed in the office of the secretary of state relating to such corporation shall be recorded and a certified copy thereof forthwith furnished the superintendent of building and loan associations and filed in his office. (110 v. 67.)

Section 9643-4. (Shall not establish branches; shall begin business within one year.) No association shall establish more than one office nor maintain branches other than those already established except with the approval of the superintendent of building and loan associations, previously had in writing, and any such association failing to commence business within one year from the date of issuance of articles of incorporation shall cease to exist and such articles of incorporation shall be null and void. (110 v. 67.)

Section 9644. (Name.) The name of every such corporation hereafter organized, or heretofore organized and hereafter changing its name, shall begin with any word it may select, and end with the word "company" or with the word "association." It also shall use its name in any order it designates, and if it so desires, with other words not forbidden by law, any one or more of the following words, or combinations of words, at its option: "Savings", "building", "loan", "savings and loan", or "building and loan". But such association shall not use the words "bank", "banking" or "trust", nor any one or more of them in combination. (May 11, 1908, 99 v. 528, § 2.)

The words "Loan and Savings Association" may be used in name.

Rep. Atty. Gen. 1909-1910, p. 102.

Prior to the enactment of this section the words "Loan and Trust Company" in a name were authorized.

Cramer v. Trust Co., 72 O. S. 395, 402 (1905).

Section 9645. (Capital stock. Names and addresses of officers. Amount of stock. Commissions for sale of stock. Certificate. When business may commence. What certificate shall contain.) Where capital stock is named in the articles of incorporation it shall be deemed to refer to the authorized capital and the organization may be completed and business

commenced when a sum equal to five per cent thereof is subscribed and paid in, which amount must thereafter be maintained, and the name and addresses of its officers and not less than two copies of its constitution and by-laws have been filed with the superintendent of building and loan associations, and approved by him and no such corporation shall transact any business whatever except such as is incidental and necessary to its preliminary organization until it has been authorized by the superintendent of building and loan associations to do so, and no amendment to such constitution or by-laws shall become effective until approved by him. The authorized capital of such corporation shall be not less than three hundred thousand dollars; provided that in cities the population of which exceed five thousand, such capital shall be not less than five hundred thousand dollars. The stock sold by any building and loan association shall be accounted for to the association in the full amount paid for the same. No commission or fee shall be paid to any person, association or corporation for selling such stock. The superintendent of building and loan associations shall refuse authority to commence business to any building and loan association, if commissions, contributions, or fees have been paid, or have been contracted to be paid, directly or indirectly by the building and loan association, or by anyone, to any person, association or corporation for securing subscriptions for or selling stock in such building and loan association. When a certificate is transmitted to the superintendent of building and loan associations, signed by the president, secretary or treasurer of such corporation notifying him that the required amount of capital stock of such corporation is subscribed, and paid in, and that such corporation has complied with all the provisions of law required to be done before it can be authorized to commence business, the superintendent of building and loan associations shall examine into its affairs, ascertain especially the amount of money paid in on account of its capital, the name and place of residence of each director, the amount of capital stock paid in of which each is the owner in good faith, and whether such corporation has complied with all the provisions of law required to entitle it to engage in business. If upon such examination of the facts referred to and of any other facts which may come to the knowledge of the superintendent of building and loan associations he finds that such corporation is lawfully entitled to commence business, he shall give it a certificate under his hand and official seal that it has complied with all the provisions required by law and is authorized to commence business. Books or rec-

ords shall be kept by every building and loan association, in which shall be entered the name and the last known address of each stockholder, the number of shares or fractions of shares or of stock deposits held by each and the time each person became a stockholder; also all transfer of stock, stating the time when made, the number of shares or of stock deposits and by whom transferred. (110 v. 67; May 11, 1908, 99 v. 528, § 3; R. S. Sec. 3836-2; May 1, 1891, 88 v. 469.)

Prior to the amendment of 110 v. 67 this section did not require any part of the five percent of the subscribed capital to be paid in before business was commenced. Rep. Atty. Gen. 1912, p. 905.

The charter of an association can not be forfeited for non-user unless it has continued for five years. Rep. Atty. Gen. 1912, p. 904; G. C. § 12323.

Section 9646. (Directors, term of office.) Directors may be elected for any term, not less than one year nor longer than three years. If such term be longer than one year, it shall be so arranged that as nearly as may be, the term of office of an equal number of directors will expire each year. (May 11, 1908, 99 v. 528, § 4; R. S. Sec. 3836-2; May 1, 1891, 88 v. 469.)

A director, who is neither the secretary nor treasurer, has no implied authority to bind the association by accepting deposits from members who are employes under him. In accepting such deposits he is the agent of the members and not of the association.

Hasselmeyer v. Building Co., 8 N. P. 195; 10 L. D. 570 (Super. Ct. Cin.).

Sachs v. Association, 4 N. P. 214; 6 L. D. 254 (Super. Ct. Cin. 1897).

A provision in the constitution of an association requiring all directors to be associated in some way with another corporation is ultra vires and void.

Rep. Atty. Gen. 1911-1912, p. 814.

Section 9647. (Powers.) Such corporation shall have all the powers set forth in the following sections of this chapter. (May 11, 1908, 99 v. 528, § 5; R. S. Sec. 3836-3; March 31, 1906, 98 v. 173; May 1, 1891, 88 v. 469.)

Section 9648. (Receiving of deposits; joint accounts.) To receive money on deposits, and all persons, firms, corporations and courts, their agents, officers and appointees may make such deposits and stock deposits, but such corporation shall not pay interest thereon exceeding the legal rate. When such deposits or stock deposits are made to the joint account of two or more persons, whether adults or minors, with a joint order to the corporation that such deposits or any part thereof are to be payable on the order of any one or more of such joint depositors, and to continue

to be so payable notwithstanding the death or incapacity of one or more of the persons making them, such account shall be payable to any one or more of such survivors or survivor or order notwithstanding such death or incapacity. No recovery shall be had against such corporation for amounts so paid and charged to such account. (May 11, 1908, 99 v. 528, § 6; R. S. Sec. 3836-3; March 31, 1906, 98 v. 173; May 1, 1891, 88 v. 469.)

The power to receive deposits of money, granted to building and loan associations, is not a grant of "banking powers" prohibited by section 7 of article 13 of the constitution.

Bates v. Association, 42 O. S. 655 (1885).

A building and loan association can not be depository for a county, municipality, township or school district. Rep. Atty. Gen. 1913, p. 859; Rep. Atty. Gen. 1910, 1911, p. 901.

An association should not accept deposits and issue certificates of deposit by number only, the name of the depositor not appearing on the certificate or on the books of the association. Rep. Atty. Gen. 1913, p. 861.

A depositor, who is not a stockholder, is not a member, but a creditor of the association. He can not be fined and is not entitled to share in the earnings.

Ashbrook v. Savings Co., 8 N. P. 246; 11 L. D. 360 (1901).

Turner Bauverein v. Woodburn, 27 W. L. B. 409 (C. P. 1892).

Where the constitution of a building and loan association specified the officers to whom, and place where, deposits should be made, the association is not liable for deposits made to other officers, or at other places, unless the association actually received the money. The burden of proof is on the depositor to show that his deposits were made in accordance with the rules, and this burden is not sustained by the mere introduction of the pass book showing entries of credits.

Sachs v. Association, 4 N. P. 214; 6 L. D. 254 (Super. Ct. Cin. 1897).

Hasselmeyer v. Building Co., 8 N. P. 195; 10 L. D. 570.

A guardian subject to control of an Ohio court is not authorized to invest funds of his ward in a certificate of deposit of a building and loan association. Opins. Atty. Gen. 1921, p. 1029.

Joint deposits. This section was not repealed by the enactment of the inheritance tax law, but if an association pays a joint deposit to the surviving depositor without retaining sufficient money to pay the inheritance tax thereon, the association is liable for the tax. Opins. Atty. Gen. 1919, p. 1271; 11 Dept. Rep. 169; G. C. § 5348-2.

Section 9649. (Stock issue; vote of holder. Loans.) To issue stock to members upon certificates or upon written subscription on such terms and conditions as the constitution and by-laws provide, but no initiation or membership fee shall be charged and if the stock is sold at a premium all such premiums shall be placed in the reserve fund of the association. Each member may vote his stock to the extent and in the manner provided by the constitution and by-laws, but no member shall cumulate his votes. (110 v. 67; May 11,

1908, 99 v. 529, § 7; R. S. Sec. 3836-3; March 31, 1906, 98 v. 173; May 1, 1891, 88 v. 469.)

Decisions prior to amendment of 110 v. 67. An association can not, by its action, authorize or permit a member to hold more than twenty shares of its stock in his own right.

State v. Association, 29 O. S. 92 (1876).

An executory contract between a building association and one of its members, in respect to shares claimed by him in his own right and in excess of twenty shares, is ultra vires, and can not be enforced by action.

Simpson v. Association, 38 O. S. 349 (1882).

The fact that a member is permitted to hold in his own right a number of shares greater than the maximum prescribed by the by-laws of the company, but not in excess of the number limited by statute, is not a matter of defense by such member against the claims of the company against such shares. The association may waive its rule.

Hagerman v. Association, 25 O. S. 186 (1874).

A person who has borrowed money on more than twenty shares is estopped to deny the right of the association to make the loan.

Association v. Arbeiter Bund, 6 W. L. B. 823; 10 Am. L. Rec. 485 (Dist. Ct. 1882).

A wife having signed a mortgage to secure a loan taken out by her husband in her name, for the purpose of evading this section, is estopped from defending against the mortgage on such grounds.

Association v. Leyden, 1 W. L. B. 126; 4 Am. L. Rec. 765 (Dist. Ct. 1876).

A member who has taken stock in the names of other persons, but really for himself, may exercise the privilege of withdrawal in their behalf.

Association v. Henderson, 3 W. L. B. 386; 6 Am. L. Rec. 755 (Dist. Ct. 1878).

See § 9651.

An association has no power to traffic in its own stock.

State v. Association, 35 O. S. 258 (1879).

An association, acting in good faith and reasonably, may compromise with a member and release him from liability on a subscription to stock.

State v. Association, 35 O. S. 258 (1879).

Wangerien v. Aspell, 47 O. S. 250 (1890).

Nature of stock. Unlike other corporations for profit, a share in a building association has, at the inception, only a nominal value. Its value is expected to increase by the lapse of time and the success of the association. It is contrary to the purpose and genius of a building association that a share in it should be paid up at the time of the subscription. This is done by the payment of small dues, and the crediting, at stated times, of the earnings in the way of dividends. When the aggregate dues with the credited earnings equal in amount the par value of a share of stock, it is paid up, and the owner, for that share, ceases to be a stockholder. He is entitled to the par value of his stock, but can no longer participate in the earnings of the association.

Minshall, C. J., in Eversmann v. Schmitt, 53 O. S. 174, 184 (1895); quoted in Cramer v. Trust Co., 72 O. S. 409 (1905).

See § 9675.

Stock in a building and loan association is not a legal investment for a commercial or savings bank or a trust company. Rep. Atty. Gen. 1914, p. 608.

Section 9650. (Assessments.) To assess and collect from members and others, such dues, fines, interest and premium on loans made, or other assessments, as may be provided for in the constitution and by-laws. Such dues, fines, premium or other assessments shall not be deemed usury, although in excess of the legal rate of interest. (May 11, 1908, 99 v. 529, § 8; R. S. Sec. 3836-3; March 31, 1906, 98 v. 173; May 1, 1891, 88 v. 469.)

Members. A borrowing member is one who receives in advance the par value of his shares and agrees, in consideration of such advance, to pay dues on the shares and interest on the loan until the dues paid and the dividends declared are equal to the par value of his shares. He then ceases to be a member, and is entitled to a cancellation of the mortgage given to secure the obligations arising from the loan.

Eversmann v. Schmitt, 53 O. S. 174 (1895).

Members, whether borrowers or non-borrowers, have a mutual interest in its affairs, and, sharing alike in its earnings, must assist alike in bearing its losses.

Eversmann v. Schmitt, 53 O. S. 174 (1895).

The difference between borrowing members and non-borrowing members is simply in the time at which each class is paid the par value of its shares.

Minshall, C. J., in Eversmann v. Schmitt, 53 O. S. 174, 185 (1895).

A manufacturing corporation may become a member of a building association in order to borrow money from the association to use in its business. Even if it had no such power it can not defend, on such ground, against a mortgage given to the building association.

Norwalk, etc., Co. v. Stamping Co., 14 C. C. 1; 7 C. D. 275 (1897); aff'd, no rep., 60 O. S. 603.

See § 9648.

State v. Association, 29 O. S. 92, 96 (1876).

In their dealings with the association members are charged with knowledge of the provisions of its constitution and by-laws.

See Hagerman v. Association, 25 O. S. 186 (1874).

Sachs v. Association, 4 N. P. 214; 6 L. D. 254 (Super. Ct. Cin. 1897).

Mortgage contracts between borrowing members and the association create vested rights, and can not be modified by the association without consent of such members.

Betz v. Association, 1 N. P. 42; 1 L. D. 58 (1894).

Where the constitution of an association provided that no one could become a member without acquiring stock, it was said that a by-law permitting any person desiring a straight loan to become a member by depositing \$10 was invalid. Rep. Atty. Gen. 1912, p. 740.

Termination of membership.

See 9651.

Dues. Where the constitution provides for the payment of dues until the amount of the capital is paid in full, such dues are analogous to payments of installments on subscriptions to stock in other corporations.

Hinman v. Ryan, 3 C. C. 529; 2 C. D. 305 (1888).

Where, by common consent, all members stopped paying dues before the stock was paid in full, borrowing members do not become in default thereby.

Hinman v. Ryan, 3 C. C. 529; 2 C. D. 305 (1888).

Where an association is in liquidation, under the dissolution statutes, the obligation to pay dues ceases, except as ordered by the court for the purpose of paying debts and equalizing the stockholders among themselves.

Hinman v. Ryan, 3 C. C. 529; 2 C. D. 305 (1888).

Association v. Fitzgerald, 8 N. P. 160; 11 L. D. 133 (1901).

An association may, by its by-laws, assess a reasonable fine for default in the payment of dues, but can not assess or collect more than one fine for non-payment of the same stated due.

Hagerman v. Association, 25 O. S. 186 (1874).

Association v. Gallagher, 25 O. S. 208 (1874).

A fine can not be imposed for failure to pay dues which accrue after liquidation of the association has been entered upon.

Association v. Fitzgerald, 8 N. P. 160; 11 L. D. 133 (1901).

The obligation to pay dues ceases upon notice of withdrawal given by a member in accordance with its constitution and by-laws.

Rehn v. Savings Co., 5 N. P. 314; 7 L. D. 398; s. c., 6 N. P. 185; 8 L. D. 594.

Except such dues as are necessary to pay losses.

Vincent v. Association, 5 N. P. 273; 7 L. D. 353; 39 W. L. B. 386 (1898).

Fines.

A fine is a penalty imposed in order to secure the prompt fulfillment of some duty or obligation. In building associations it is usually resorted to to compel the punctual payment of dues.

Association v. Fitzgerald, 8 N. P. 160; 11 L. D. 133 (1901).

An association may, by its by-laws, assess a reasonable fine for default in the payment of dues, but can not assess or collect more than one fine for non-payment of the same stated due.

Hagerman v. Association, 25 O. S. 186 (1874).

Association v. Gallagher, 25 O. S. 208 (1874).

An association can not assess a fine for default in the payment of interest on loans.

Hagerman v. Association, 25 O. S. 186 (1874).

Association v. Gallagher, 25 O. S. 208 (1874).

There is no limitation as to the amount of, or occasion for, fines, except as prescribed in the constitution or by-laws of the association, and there is no express limitation on the power of the association to adopt by-laws. There are limits, however, on the power to impose a fine.

(1) The amount must be reasonable. (2) It can be imposed only by way of punishment for some delinquency in the performance of a duty which the member may owe to the association by reason of his membership. (3) It is unreasonable that more than one fine should be imposed for the same delinquency.

Hagerman v. Association, 25 O. S. 186, 202 (1874).

Liability for fines does not cease on the making of an assignment for creditors, by the borrowing member.

Hutchinson v. Straub, 64 O. S. 413 (1901); affirming 16 C. C. 452;

9 C. D. 171.

Fines during pendency of foreclosure suit, see below *Mortgage securing dues, fines, etc.*

The payment of stated dues and fines can not be resisted by a member on the ground that the by-laws have not been adopted by a vote of the

directors, where the by-laws have been recorded, acted upon and enforced as the by-laws of the association.

Hagerman v. Association, 25 O. S. 186 (1874).

Interest. Interest on premiums can not be charged. The money actually advanced is the basis for the computation of interest.

Association v. Gallagher, 25 O. S. 208 (1874).

Although the association is in the hands of a receiver, and dues have stopped by common consent, a loan continues to draw interest, without any order of court. It is no defense to show that such interest is unnecessary to equalize the members.

Hinman v. Ryan, 3 C. C. 529; 2 C. D. 305 (1888).

Where the right of amendment is reserved in the constitution of the association, a borrowing member is bound by an amendment providing that interest should be charged only on the amount remaining due at the beginning of each year, and dividends paid only on the amount paid in during the current year.

Metz v. Building Co., 6 O. L. R. 418 (1908).

Not more than eight percent may be charged as interest. Rep. Atty. Gen. 1912, p. 907, G. C. § 8303.

Premiums. A premium is a bonus which a member agrees to pay for the privilege of having an advance made to him, by way of loan, of the par value of his stock.

Association v. Fitzgerald, 8 N. P. 160; 11 L. D. 133 (1901).

Under former statutes premiums could only be fixed by competitive bidding, and the association had no power to fix the premium as a condition of making the loan.

State v. Association, 35 O. S. 258 (1879).

State v. Association, 29 O. S. 92 (1876).

Bates v. Association, 42 O. S. 655 (1885).

But under the present statute competitive bidding is not required and the association may fix the amount of premium.

Association v. Roberts, 5 N. P. 86; 5 L. D. 489 (C. P.).

Cramer v. Trust Co., 72 O. S. 395, 406 (1905).

A premium is not usury, although, when added to the interest, it exceeds the legal rate of interest.

Cramer v. Trust Co. 72 O. S. 395 (1905).

Lucas v. Association, 22 O. S. 339 (1872).

Interest on premiums can not be charged.

Association v. Gallagher, 25 O. S. 208 (1874).

Where a premium is fixed by a rate per cent, the association can not recover the premium for a longer period than that fixed in the contract of loan. If the time of payment of the loan is extended either by a renewal of the note or mere forbearance to collect, no premium can be collected after the maturity of the note.

Association v. Stevens, 3 W. L. B. 113 (1878).

When liquidation of the association is entered upon, the obligation to pay further premiums ceases.

Association v. Fitzgerald, 8 N. P. 160; 11 L. D. 133 (1901).

The weekly installment of premium, fixed in and secured by a mortgage, can not be increased and covered by the mortgage unless the constitution and by-laws have reserved such right in plain and unmistakable language.

Burke v. Association, 7 W. L. B. 114 (Dist. Ct. 1882).

See Association v. Boning, 7 W. L. B. 174; 10 Am. L. Rec. 626 (Dist. Ct. 1882).

Extortionate premiums.

See Association v. Boning, 7 W. L. B. 174; 10 Am. L. Rec. 626 (Dist. Ct. 1882).

Other assessments.

See also § 9674.

The mortgage executed by a borrowing member contained a stipulation for the payment of such "assessments" as might be levied on him as a member. Upon insolvency of the association the receiver ascertained the "shortage" in the assets and made a pro rata assessment on the members to meet it. Held, that an assessment for such purpose was within the stipulation of the mortgage, and that the member was not entitled to its cancellation until such assessment was paid.

Eversman v. Schmitt, 53 O. S. 174 (1895).

Where a mortgagor has not defaulted on any of the conditions of his mortgage, he can not be fined or assessed any sum as an attorney fee.

Kesting v. Donahoe, 13 C. C. 653; 6 C. D. 262 (1895).

A stipulation for attorney fees in a building and loan mortgage is invalid. Attorney fees are not proper "other assessments."

East End Bldg. Ass'n v. McCaffery, 12 C. D. 685; 39 W. L. B. 75 (1898).

Rep. Atty. Gen. 1904-1905, pp. 130, 133.

Usury. This section, exempting building and loan associations from the operation of the usury statutes, is constitutional.

Cramer v. Trust Co. 72 O. S. 395 (1905).

Brooklin, etc., Co. v. Desnoyers, 4 C. C. n. s. 337; 16 C. D. 352 (1904).

Spies v. Loan & Trust Co., 4 C. C. n. s. 103; 14 C. D. 40 (1902).

Carmichael v. Savings & Loan Co., 15 L. D. 341 (1905).

Contra, Mykrantz v. Association, 19 C. C. 51; 10 C. D. 250 (1899).

A premium is not usury, although, when added to the interest, it exceeds the legal rate of interest.

Cramer v. Trust Co., 72 O. S. 395 (1905).

Lucas v. Association, 22 O. S. 339 (1872).

Association v. Roberts, 5 N. P. 86; 5 L. D. 489.

In an action to recover dues, etc., in an amount exceeding the legal rate of interest, an association must prove its corporate capacity, to show that it is a corporation which has the right to the amount demanded. Loan Co. v. Philen, 18 C. C. n. s. 410 (1910).

An association can not charge more than eight percent as interest. Rep. Atty. Gen. 1912, p. 907.

Under former statutes, in order to save the premium from being obnoxious to the laws against usury, it must have been paid for precedence in obtaining the loan and at competitive bidding.

Cramer v. Trust Co., 72 O. S. 395, 406 (1905).

Bates v. Association, 42 O. S. 655 (1885).

Competitive bidding is not required under the present statute.

Association v. Roberts, 5 N. P. 86; 5 L. D. 489 (C. P.).

Cramer v. Trust Co., 72 O. S. 395, 406 (1905).

Mortgage securing dues, fines, premiums, etc. Dues, fines, premiums and other assessments may be provided for in, and secured by, the mortgage of a borrowing member.

Hagerman v. Association, 25 O. S. 186 (1874).

Eversman v. Schmitt, 53 O. S. 174 (1895).

Foreclosure. The decree in foreclosure should be confined to the amount of dues, interest, fines, etc., that had accrued at the time the decree is rendered.

Risk v. Association, 31 O. S. 517 (1877).

Hagerman v. Association, 25 O. S. 186 (1874).

Association v. Leyden, 1 W. L. B. 126 (1876).

In such case the association is entitled to dues, interest, etc., up to the date of the decree of sale, and not merely to the first day of the term.

Windisch v. Korman, 5 W. L. B. 364 (Dist. Ct. 1880).

Hutchinson v. Straub, 16 C. C. 452; 9 C. D. 171 (1897); aff'd, 64 O. S. 413.

Where the assignee for creditors of the mortgagor brought a proceeding for authority to sell the land, the filing of an answer and cross petition therein by the association does not estop it from claiming fines accruing after the making of the assignment.

Hutchinson v. Straub, 64 O. S. 413 (1901); affirming 16 C. C. 452; 9 C. D. 171.

Where the premium is included in the note and mortgage, a stipulation making the entire amount of the note due immediately on failure to pay an installment is invalid, as it would amount to a forfeiture of the entire premium.

Hagerman v. Association, 25 O. S. 186, 205 (1874).

A provision in a mortgage that, on foreclosure, the amount shall be ascertained by taking the face of the mortgage and arrearage, and deducting the credits paid in, is invalid, its effect being to forfeit the rights of membership.

Association v. Eggen, 5 W. L. B. 752 (Dist. Ct. 1880).

Order of distribution. Computation of the amounts, in the order of distribution should be made by adding (1) amount found due by order of sale, (2) interest on that amount to confirmation, (3) dues and interest from order of sale to confirmation, (4) average interest on that amount, (5) present value of future dues and interest from date of confirmation.

Windisch v. Korman, 5 W. L. B. 364 (Dist. Ct. 1880).

Association v. Eggen, 5 W. L. B. 752 (1880).

See Association v. Flach, 1 C. S. C. R. 468 (1871).

Association v. O'Connor, 5 W. L. B. 853 (1880).

Hagerman v. Association, 25 O. S. 186, 205 (1874).

See also as to distribution.

Association v. Mueller, 8 W. L. B. 97 (1882).

Payments. Where the constitution of an association provided that payments should be made in money, payments of dues must be made in cash, and the giving of checks is not payment, and if a check is taken the officers are acting as the agents of the member in the matter of the collection of the check, unless it can be shown that the stockholders, by acquiescence in custom or otherwise, authorized a departure from the rule requiring cash payments.

Mueller v. Cohen, 27 W. L. B. 353 (1892).

Sachs v. Association, 4 N. P. 214; 6 L. D. 254 (1897).

Where the constitution of an association specified the officers to whom, and place where, payments should be made, the association is not bound by payments made to other officers or at other places unless the association actually received the money.

Sachs v. Association, 4 N. P. 214; 6 L. D. 254 (Super. Ct. Cin. 1897).

Hasselmeyer v. Building Co., 8 N. P. 195; 10 L. D. 570.

The burden of proof is upon the claimants to show payment made according to law, and this burden is not sustained by the mere introduction of the pass-book, showing credits to the amount claimed.

Sachs v. Association, 4 N. P. 214; 6 L. D. 254 (Super. Ct. Cin. 1897).

Section 9651. (Withdrawal of stock deposits.) To permit members to withdraw all or part of their stock deposits,

at such times, and upon such terms, as the constitution and by-laws provide. Any member, however, who withdraws his entire stock deposit, or whose stock has matured, shall be entitled to receive all dues paid in and dividends declared thereon, less all fines or other assessments, and less the pro rata share of all losses, if any have occurred. (May 11, 1908, 99 v. 529, § 9; R. S. Sec. 3836-3; March 31, 1906, 98 v. 173; May 1, 1891, 88 v. 469.)

An association may, in its constitution and by-laws, provide that stock deposits shall not be withdrawn until they have been paid in full. Opins. Atty. Gen. 1916, p. 1862.

A member who has taken stock in the names of other persons, but really for himself, may exercise the privilege of withdrawal in their behalf, and, on refusal of the association to refund, an action as for money had and received will lie.

Association v. Henderson, 3 W. L. B. 386; 6 Am. L. Rec. 755 (Dist. Ct. 1878).

The difference between borrowing and non-borrowing members is simply in the time at which each class is paid the par value of its shares.

Minshall, C. J., in Eversmann v. Schmitt, 53 O. S. 174, 185 (1895).

Where the constitution of an association provided that withdrawal claims could only be paid in the order of filing, a mortgagor, having purchased the withdrawal claim of a non-borrowing member which was not yet payable, can not compel the association to cancel his mortgage by tendering in payment the withdrawal claim.

Ward v. North Fairmount, etc., Co., 5 N. P. 133; 8 L. D. 489 (1897).

As the settlement of the liability of stockholders is a matter between creditors and stockholders, the association can not make deductions in allowing withdrawals to provide for possible losses.

Jungkuntz v. Association, 6 W. L. B. 428 (1881).

Mere notice of withdrawal does not change a member into a creditor.

Rehn v. Savings Co., 5 N. P. 314; 7 L. D. 398; s. c., 6 N. P. 185; 8 L. D. 594.

Association v. Howell, 39 W. L. B. 386; 5 N. P. 273; 7 L. D. 353 (1898).

An agreement, in a certificate of stock in a foreign building and loan association, that the stock shall mature at a certain time, can not be specifically enforced where the failure of the stock to mature was due to financial depression and not to the fault of the association.

Demland v. Loan Co., 20 C. C. 223; 11 C. D. 249 (1899).

This section prohibits an association from prescribing that a withdrawing member shall receive only a certain percentage of dividends declared, the balance being assessed against him as a withdrawal fee.

4 Opins. Attys. Gen. 454 (1892).

An agreement, in a certificate of stock, that the member shall be paid its full value at the end of five years, is of no effect as against a provision in the mortgage executed by the member, requiring him to pay dues, etc., until the full value of his stock is paid. He is not entitled to a cancellation of the mortgage until his stock is so paid.

Haynes v. Association, 2 N. P. 181; 3 L. D. 228 (C. P. 1895).

Where a shareholder made application for withdrawal, and, although other applications had been previously filed, and the association had no funds with which to pay them, the association issued its warrant for the full amount of the claim, and thereupon executed its note for the amount of the warrant, and cancelled the warrant, the transaction was held not to be ultra vires and the association was held liable on the note.

Pugh v. Loan Co., 1 N. P. n. s. 253; 14 L. D. 50 (Super. Ct. Cin. 1901); aff'd, no rep., 68 O. S. 730.

Amendment of statute and by-laws as to premiums and withdrawals, effect: See Windhorst v. Association, 7 W. L. B. 29 (1882).

An agreement by an association that retiring members may withdraw the amounts paid by them with interest in excess of eight percent was held not usurious.

Jungkuntz v. Association, 6 W. L. B. 428 (1881).

The obligation to pay dues ceases upon notice of withdrawal, given by a member in accordance with its constitution and by-laws.

Rehn v. Savings Co., 5 N. P. 314; 7 L. D. 398; s. c., 6 N. P. 185; 8 L. D. 594.

Except such dues as are necessary to pay losses of the association.

Vincent v. Loan Co., 5 N. P. 273; 7 L. D. 353 (1898).

Members, whether borrowers or non-borrowers, who withdraw, in good faith and cease to be members, are not liable for losses.

Eversman v. Schmitt, 53 O. S. 174, 189 (1895).

Wangerien v. Aspell, 47 O. S. 250, 261 (1890).

Compromise. An association has power to compromise with a member and release him from further obligation to the corporation, whether the indebtedness arose from a loan or on a subscription for stock. And where the parties to the compromise have acted in good faith, the transaction will not be rescinded because the released member was paid a greater sum of money than he would have received upon a pro rata distribution of the assets.

Wangerien v. Aspell, 47 O. S. 250 (1890).

State v. Association, 35 O. S. 258 (1879).

Eversmann v. Schmitt, 53 O. S. 174, 189 (1895).

Main Street, etc., Co. v. Richter, 16 C. C. 191; 9 C. D. 74 (1898).

A compromise which is unfair and inequitable is not binding and conclusive in an action to adjust liabilities and pay debts.

Main Street, etc., Co. v. Richter, 16 C. C. 191; 9 C. D. 74 (1898).

A compromise in violation of the constitution is invalid and does not release members, where there will be a deficiency as to remaining members.

McKeown v. Association, 5 W. L. B. 52 (1880).

Section 9652. (Withdrawal of deposits.) To permit withdrawal of deposits upon such terms and conditions as the association provides except by check or draft. But no such association shall be permitted to carry for any member or depositor any demand, commercial or checking account. Nothing in this chapter shall prevent members or depositors from withdrawing funds by non-negotiable orders. (May 11, 1908, 99 v. 529, § 9; R. S. Sec. 3836-3; March 31, 1906, 98 v. 173; May 1, 1891, 88 v. 469.)

A building and loan association is not a bank.

Rep. Atty. Gen. 1910-1911, p. 901.

An association may permit depositors to withdrawn funds by orders. Such orders should be non-negotiable and not made payable to order or to bearer. Orders may, however, be assigned. Opins. Atty. Gen. 1916, p. 1775.

Under a former statute which permitted associations to loan only to depositors, it was held that the loan was valid although a small de-

deposit only was made on the day of the loan and withdrawn on the next day.

Lockwood v. Robbins, 1 Cleve. L. R. 101 (1878):

See Bates v. Association, 42 O. S. 665 (1885).

Where a member, acting at the solicitation and in common with other members, cancelled a credit which he had in the association, with a direction that its amount be used to make good a shortage caused by the default of an officer, the member can not subsequently sue to set aside the cancellation of his credit, on the ground that the agreement constituted the compounding of a felony.

Richter v. Loan Co., 7 C. C. n. s. 360; 17 C. D. 793 (1905).

Section 9653. (Cancellation.) To cancel shares and parts of shares of stock upon which the credits have been withdrawn, or upon which loans have been repaid, and re-issue them as new stock. (May 11, 1908, 99 v. 529, § 10; R. S. Sec. 3836-3; March 31, 1906, 98 v. 173; May 1, 1891, 88 v. 469.)

The power to make loans on stock in the association, and to cancel such stock, applies only to stock owned by the borrower in his own right, and does not authorize a loan to a trustee, for his personal use, on stock in the association belonging to the trust estate.

Mook v. Akron S. & L. Co., 87 O. S. 273 (1913).

Section 9654. (Rules as to minors.) To issue stock to minors and receive deposits thereon and permit both stock and deposits to be withdrawn, transferred, pledged and voted by such minors as other stock and stock deposits; to receive deposits of money by or for minors and to pay them to such minors, or upon their order. The receipt or paid order of such minor, therefor, shall be a valid acquittance of the rights of all concerned. (May 11, 1908, 99 v. 529, § 11; R. S. Sec. 3836-3; March 31, 1906, 98 v. 173; May 1, 1891, 88 v. 469.)

Section 9655. (Property, leasing, holding of.) To lease, acquire, hold, encumber, convey and rent such real estate and personal property as is necessary for the transaction of its business, or necessary to enforce or protect its securities. (May 11, 1908, 99 v. 529, § 12; R. S. Sec. 3836-3; March 31, 1906, 98 v. 173; May 1, 1891, 88 v. 469.)

A building association has no power to purchase land on credit to be allotted among its members, and its notes given in part payment are void in the hands of holders with notice.

Vos v. Association, 9 W. L. B. 194 (1883).

Real estate of a building and loan association is taxable, whether purchased with profits or not.

Gruner v. Defiance, etc., Ass'n, 85 O. S. 484 (Supreme Court journal entry).

Section 9656. (Borrowing money.) To borrow money, not exceeding twenty per cent of the assets, and issue its evidence of indebtedness or other security therefor. (May 11, 1908, 99 v. 530, § 13; R. S. Sec. 3836-3; March 31, 1906, 98 v. 173; May 1, 1891, 88 v. 469.)

Under earlier statutes an association had no power to borrow money for the purpose of lending it.

State v. Association, 35 O. S. 258 (1879).

Where an association, being without funds to pay a withdrawing member, issued its warrant for the amount due, and thereupon executed and delivered its note to the member, cancelling the warrant, the transaction was held tantamount to borrowing money from the stockholder.

Pugh v. Loan Co., 1 N. P. n. s. 253; 14 L. D. 50 (Super. Ct. Cin. 1901); aff'd, no rev., 68 O. S. 730.

Section 9657. (Security for loan.) To make loans to members and other[s] on such terms and conditions as may be provided by the association and upon the following securities only:

First. Obligations secured by mortgage or deed of trust on real estate, which mortgages or deeds of trust may be made direct to the association or they may be made to third persons or corporations and pledged by them to the association as collateral. Such obligations shall be the first liens on real estate, but additional loans may be made where the association holds all prior mortgage liens. Nothing herein, however, shall prevent an association organized under this act from accepting additional security other than that herein provided where the primary and principal security is a first mortgage or deed of trust on real estate.

Second. Obligations secured by pledge of stock or of deposits in such association, but such loans shall not exceed either the paid-up value or the withdrawal value of such stock or deposits.

Third. Obligations secured by pledge of any of the securities provided for in section 9660 of the General Code not to exceed, however, ten per cent of the assets of the association.

Fourth. Building and loan companies that have been making loans primarily on other securities than those named in the above sections continuously since January 1, 1913, are authorized to continue the loaning on such securities. (110 v. 68; May 11, 1908, 99 v. 530, § 14; R. S. Sec. 3836-3; March 31, 1906, 98 v. 173; May 1, 1891, 88 v. 469.)

By making loans a building and loan association does not engage in the business of banking.

Association v. Gallagher, 25 O. S. 208 (1874).

Bates v. Association, 42 O. S. 655 (1885).

Dearborn v. Bank, 42 O. S. 617 (1885).

See State v. Association, 29 O. S. 92, 96, 97 (1876).

An association is not required to ascertain the use to which the borrower intends to apply the money.

Hagerman v. Association, 25 O. S. 186 (1874).

A building and loan association is not authorized to loan its funds upon the promissory note of the borrower, without other security.

Rep. Atty. Gen. 1904-1905, p. 115.

Where an association agrees to loan money for the purpose of building, the money to be advanced as the work progresses and as the borrower directs, the money can be paid only to parties designated by the borrower, and not to parties designated by the contractor.

Kesting v. Donahue, 13 C. C. 653; 6 C. D. 262 (1895).

Where the constitution and by-laws of an association provide that suit may be brought on a loan where the borrowing member is three months in arrears in the payment of his dues, an action brought before such three months have elapsed is prematurely brought.

Home, etc., Co. v. Tenney, 7 N. P. 130; 8 L. D. 391 (C. P. 1898).

The representative of an association, authorized to solicit subscriptions to its capital stock, collect dues and fines, solicit loans and cause property to be appraised upon which loans are to be made, is an agent of the association, although his compensation is derived from commissions paid by the borrowers.

McMullen v. Griggs, 3 C. C. n. s. 504; 13 C. D. 417 (1902).

The power to make loans on stock in the association, and to cancel such stock, applies only to stock owned by the borrower in his own right, and does not authorize a loan to a trustee, for his personal use, on stock in the association belonging to the trust estate.

Mook v. Akron S. & L. Co., 87 O. S. 273 (1913).

Chattel loans. This section, prior to the amendment of 110 v. 68, authorized a building and loan association to engage in the business of making loans on chattels. But the license required by G. C. § 6346-1 et seq. was required. Opins. Atty. Gen. 1916, p. 1223; Rep. Atty. Gen. 1904-1905, pp. 126, 132.

Former statutes.

Under earlier statutes an association had no power to loan to persons who were not members and depositors.

State v. Association, 35 O. S. 258, 262 (1879).

State v. Association, 29 O. S. 92 (1876).

Under such former statutes loans were made to members bidding the highest premium therefor.

Cramer v. Trust Co., 72 O. S. 395, 406 (1905).

State v. Association, 35 O. S. 258 (1879).

Under these statutes it was held that a person who applied to a building and loan association for a loan of money, and deposited therewith a sum of money, however small, for the purpose of making himself eligible as a borrower, and thereby received a loan, was estopped, when sued for the money by the association, from denying that he was in fact a depositor.

Bates v. Association, 42 O. S. 655 (1885).

That a loan to a depositor was not invalid, though he made a deposit the day the loan was made, and drew it out the day after.

Lockwood v. Robbins, 1 Cleve. L. Rep. 101 (1878).

And that an association had no power to refuse to loan its funds to members.

State v. Association, 35 O. S. 258 (1879).

State v. Association, 29 O. S. 92 (1876).

Mortgage. As security for dues, fines, premiums, etc., see note to § 9650.

A stipulation for attorney fees in a building and loan association mortgage is invalid.

East End Bldg. Ass'n v. McCaffery, 12 C. D. 685; 39 W. L. B. 75 (1898).

Rep. Atty. Gen. 1904-1905, pp. 130-132.

Even if valid, a provision for attorney fees could not be enforced where the mortgagor is not in default.

Kesting v. Donahue, 13 C. C. 653; 6 C. D. 262 (1895).

A representation by a prospective borrower, that he is the sole owner of the property upon which he desires the loan, whereas in fact he is the legal owner, with an equitable interest outstanding upon which the holder asserts no claim, is not such a false representation as to title as to relieve the association, after the mortgage is executed, from advancing the full amount stipulated in the mortgage contract.

McMullen v. Griggs, 3 C. C. n. s. 504; 13 C. D. 417 (1902).

An association may, to protect its mortgage security, pay taxes or assessments which appear on the tax duplicate to have been duly and legally assessed, where it has no knowledge of defects or illegality in the assessment. Payments so made are a first lien and can not be defeated, as between mortgagor and mortgagee, by showing illegality or irregularity in the assessment.

Bates v. Association, 42 O. S. 655 (1885).

The by-laws of an association required insurance on all mortgaged property, the policies to be deposited with the association, and that on failure of the borrower to procure or to renew insurance, the same should be done by the association at his expense. A borrower, on obtaining a loan, procured insurance and deposited the policy, but had no notice of its expiration and the association did not procure a renewal. Upon a loss by fire, it was held that the by-laws made the association the agent of the borrower, charged with the duty of holding the policy and renewing it, and having failed to renew the policy, it became liable to the borrower for the loss.

Geswine v. Loan Co., 3 C. C. n. s. 279; 13 C. D. 477 (1902).

Defenses. That more shares were issued to the borrower than are authorized by statute, see note to § 9649.

A borrower can not defend on the ground of defects in the incorporation of the association.

Lucas v. Association, 22 O. S. 339 (1871).

An association, acting in good faith and reasonably, may compromise with a member and release him from further obligation, whether the indebtedness be for a loan or on a subscription.

State v. Association, 35 O. S. 258 (1879).

Wangerien v. Aspell, 47 O. S. 250 (1890).

Section 9658. (Cancellation of loan.) To cancel such loans and release the securities on such terms as the board of directors may provide. (110 v. 69; May 11, 1908, 99 v. 530, § 15; R. S. Sec. 3836-3; March 31, 1906, 98 v. 173; May 1, 1891, 88 v. 469.)

The mortgage of a borrowing member may provide for and secure the payment of dues, fines, premiums and other assessments. The member is not entitled to cancellation of such a mortgage where any valid obligations of that character are unpaid.

Eversmann v. Schmitt, 53 O. S. 174 (1895).

Where mortgage provisions required the member to pay dues, premiums and interest until the full value of each share was paid to the association, the member is not entitled to a cancellation of the mortgage until his shares are full paid, although, in the certificate of stock, the association promised to pay him the full value of the shares in a shorter time.

Haynes v. Association, 2 N. P. 181; 3 L. D. 228 (1895).

Where an association provided in its by-laws that in case a shareholder who has received a loan shall die, "his or her heirs or legal representatives may return the same to the association," and receive the value of the stock as fixed by the by-laws, or they may continue the loan, held, that where they elected to return the loan, the amount to be returned was the money actually received plus the premium bid for precedence.

Association v. Bebout, 29 O. S. 252 (1876).

Amount of payments entitling borrower to cancellation, under former statutes.

See Windhorst v. Association, 7 W. L. B. 29 (Super. Ct. Cin. 1882).

Seibel v. Association, 43 O. S. 371 (1885).

Home, etc., Co. v. Tenney, 7 N. P. 130; 8 L. D. 391 (1898).

Section 9659. (Reserve and undivided profit fund.) To accumulate from the earnings a "reserve fund" for the payment of contingent losses, and an "undivided profit fund", both of which may be loaned and invested as other funds of the association. (May 11, 1908, 99 v. 530, § 16; R. S. Sec. 3836-3; March 31, 1906, 98 v. 173; May 1, 1891, 88 v. 469.)

An association is not required to list its surplus and profits for taxation, but real estate is subject to real estate taxes whether purchased with profits or not.

Gruner v. Defiance, etc., Ass'n, 85 O. S. 484 (Supreme Court journal Entry).

Rep. Atty. Gen. 1905-1906, p. 55.

Section 9660. (Idle funds, how invested.) To invest any of its idle funds, or any part thereof, in bonds or interest bearing obligations of the United States, or of the District of Columbia, or of the state of Ohio, or of any county, township, school district, or other political division in the state of Ohio, or of any incorporated city or village, in the state of Ohio; and in such other securities as now are or hereafter may be accepted by the United States to secure government deposits in national banks. But such investments at no time shall amount in the aggregate to more than twenty per cent of the assets of such corporation. (May 11, 1908, 99 v. 530, § 16; R. S. Sec. 3836-3a.)

French government bonds are not authorized. Opins. Atty. Gen. 1921, p. 914.

Idle funds may be invested in such securities as are accepted by the United States government to secure postal savings deposits in national banks. Opins. Atty. Gen. 1916, p. 1720.

Section 9661. (May deposit idle funds.) To deposit any of such funds or part thereof, in any financial institution that is subject to inspection by the United States, or by the state of Ohio; and receive therefor certificates of deposit. (May 11, 1908, 99 v. 530, § 16; R. S. Sec. 3836-4; May 1, 1891, 88 v. 469.)

Section 9662. (Consent of superintendent to sell, etc.) To buy but not to sell except with the written consent previously granted by the superintendent of building and loan associations interest bearing obligations secured by real estate mortgages, which shall in all respects comply with, and be within the rules adopted for making mortgage loans by the corporation making such investments. Such mortgage investments may be held and reported as mortgage loans. (110 v. 69; 106 v. 431; 99 v. 530, § 16.)

A mortgage on a 99 year leasehold, whether or not renewable forever, is not a real estate mortgage under this section. Opins. Atty. Gen. 1921, p. 451.

Nor do collateral trust notes secured by a trust deposit of real estate mortgage notes constitute real estate mortgages. Opins. Atty. Gen. 1921, p. 919.

Bonds secured by mortgage or deed of trust on real estate are authorized. Opins. Atty. Gen. 1922, p. 392.

Section 9663. (Distribution of earnings.) To make such annual or semi-annual distribution of the earnings as is hereinafter provided, and as the constitution and by-laws may prescribe. (May 11, 1908, 99 v. 530, § 17; R. S. Sec. 3836-3; March 31, 1906, 98 v. 173; May 1, 1891, 88 v. 469.)

See § 9673.

Section 9664. (Certificate of increase, decrease, etc., where filed.) To increase or decrease its authorized capital or the face value of its shares, or change the name of the corporation by a majority vote of its board of directors. A certificate of such action shall be made by the president and secretary, and duly filed with the secretary of state, after which in the use of the changed stock and changed name, all rights of all parties shall remain the same as before such change was made. (May 11, 1908, 99 v. 530, § 18; R. S. Sec. 3836-3; March 31, 1906, 98 v. 173; May 1, 1891, 88 v. 469.)

The directors may increase the capital stock or change the name of an association without notice to, or participation by, the stockholders. Rep. Atty. Gen. 1909-1910, p. 102.

Section 9665. (Dissolution.) To dissolve the corporation when by a majority vote of the stock entitled to be voted under its constitution and by-laws, which shall be consistent with the provisions of section ninety-six hundred and forty-nine, its continuance is deemed to be no longer desirable, but subject to the contract rights of its borrowers, and the vested rights of its members. (May 11, 1908, 99 v. 531, § 19; R. S. Sec. 3836-3; March 31, 1906, 98 v. 173; May 1, 1891, 88 v. 469.)

See § 693.

Dissolution when examination of association by inspector discloses unsound condition, see § 687.

Dissolution of corporations in general, §§ 11938 to 11978.

When, by general consent of members, an association determines to cease business, and the liquidation is left in the hands of the directors, the directors have the same power to dispose of assets, which they had while it was a going concern.

Roth v. Loan Co., 13 L. D. 154 (Super. Ct. Cin. 1902).

Where, on liquidation, certain of the directors agree to purchase property at its fair market value, provided the amounts due them from the association was credited on the purchase price, at their full face value, a member, who does not object to the price received, can not object that the other members are not likely to receive their claims in full and that the credits allowed to the purchasers are therefore too large. The transaction must be set aside as a whole, or upheld.

Roth v. Loan Co., 13 L. D. 154 (Super. Ct. Cin. 1902).

Where an association is in liquidation, the obligation to pay dues, fines, assessments, etc., ceases except as assessments are made to pay debts or equalize the members between themselves.

Hinman v. Ryan, 3 C. C. 529; 2 C. D. 305 (1888).

Association v. Fitzgerald, 8 N. P. 160; 11 L. D. 133 (1901).

But loans continue to draw interest, during the liquidation, until paid.

Hinman v. Ryan, 3 C. C. 529; 2 C. D. 305 (1888).

Receivership.

See Building Co. v. Rehn, 6 N. P. 185; 8 L. D. 594 (Super. Ct. Cin. 1899).

Schone v. Savings Co., 4 N. P. 216; 6 L. D. 246 (1897).

In re Home, etc., Co. Ass'n, 3 N. P. 145; 4 L. D. 272 (1897).

Invalid assignment for creditors.

See Association v. Jones, 64 O. S. 147 (1901).

Section 9666. (Amendment of articles.) To amend its articles of incorporation and its constitution and to increase or decrease the number of its directors by complying with all the requirements provided in its own constitution for the amendment thereof. The other officers of such corporation shall be such as its constitution and by-laws provide. (110 v. 69; May 11, 1908, 99 v. 531, § 20.)

Section 9667. (Constitution and by-laws.) To provide, by constitution adopted by its members, and by-laws adopted by its board of directors, for the proper exercise of the

powers herein granted, and the conduct and management of its affairs. (May 11, 1908, 99 v. 531, § 21; R. S. Sec. 3836-3; March 31, 1906, 98 v. 173; May 1, 1891, 88 v. 469.)

Members, in their dealings with the association, are charged with knowledge of the provisions of its constitution and by-laws.

See *Hagerman v. Association*, 25 O. S. 186 (1874).

Sachs v. Association, 4 N. P. 214; 6 L. D. 484 (Cin. Super. Ct. 1897).

By-laws may be amended although they contain no provision for amendments, and though they are signed by all the members.

Wangerien v. Aspell, 47 O. S. 250, 260 (1890).

It is not necessary to prove the adoption of by-laws by a formal vote of the members or directors. The adoption of by-laws is sufficiently proved by showing that they appear upon the records of the corporation, and have been uniformly acted upon and enforced as the by-laws of the association.

Hagerman v. Association, 25 O. S. 186 (1874).

Where the constitution provides that one of its articles shall not be changed or amended, in any manner, an amendment to such article must be unanimously adopted.

McKeown v. Association, 5 W. L. B. 52 (1880).

Amendments to the constitution and by-laws can not affect the rights of borrowers under existing contracts, unless the right to do so is reserved in plain and unmistakable language.

Betz v. Association, 1 N. P. 42; 1 L. D. 58 (C. P. 1894).

Burke v. Association, 7 W. L. B. 114 (Dist. Ct. 1882).

Association v. Boning, 7 W. L. B. 174 (Dist. Ct. 1882).

Wyatt v. Building Co., 12 L. D. 526 (1902).

A threatened change in the vested rights of a member may be enjoined.

Betz v. Association, 1 N. P. 42; 1 L. D. 58 (C. P. 1894).

Where a member has long acquiesced in operations of the company according to the constitution, and many rights of third persons have intervened so that the acts can not be undone or statu quo restored, such member is estopped from claiming that such operations were contrary to statute.

Ruehlman v. Association, 6 C. C. 285; 3 C. D. 456 (1892).

Deiringer v. Association, 2 L. D. 543 (1893).

Where the right of amendment is reserved in the constitution a borrowing member is bound by an amendment providing that interest should be charged only on the amount remaining due at the beginning of each year, and dividends paid only on the amount paid in during the current year.

Metz v. Building Co., 6 O. L. R. 418; 19 L. D. 161 (1908).

By-law requiring insurance on mortgaged property; liability of association for failure to renew policy deposited with it.

See note to § 9657.

Geswine v. Loan Co., 3 C. C. n. s. 279; 13 C. D. 477 (1902).

An association may, in its constitution or by-laws, provide for the appointment of an attorney.

Building Co. v. Kuehnert, 7 N. P. 264; 6 L. D. 502 (1896).

A provision in the constitution of an association requiring all directors to be associated in some way with another corporation is ultra vires and void.

Rep. Atty. Gen. 1911-1912, p. 814.

Where the constitution of an association provided that no one could become a member without acquiring stock, it was said that a by-law permitting any person desiring a straight loan to become a member by depositing \$10 was invalid. Rep. Atty. Gen. 1912, p. 740.

Section 9668. (Other powers.) To have all such other powers as are necessary and proper to enable such corporation to carry out the purpose of its organization. (May 11, 1908, 99 v. 531, § 22; R. S. Sec. 3836-3; March 31, 1906, 98 v. 173; May 1, 1891, 88 v. 469.)

Section 9669. (Depository of funds.) The board of directors shall designate a bank or banks, in which it shall cause the funds of such corporation to be deposited in its name. Such funds when so deposited, can be withdrawn only in such manner and for such purpose as is provided in the constitution and by-laws and authorized by law. Provided, however, the directors may designate a sum to be kept in the offices of such association for the transaction of current business. (110 v. 69; May 11, 1908, 99 v. 531, § 23; R. S. Sec. 3836-4; May 1, 1891, 88 v. 469.)

Under a former statute (R. S. § 3836-4) the secretary had no authority to withdraw funds from the depository.

Trustees v. Deposit Co., 76 O. S. 253, 268 (1907); s. c. 7 C. C. n. s. 66; 17 C. D. 662.

A cashier of a bank, who is also treasurer of a building association, can not bind the bank by entering on the books of the bank a fictitious credit to the building association, on the faith of which a dividend is paid.

Webb v. Stasel, 4 N. P. n. s. 587; 17 L. D. 317 (1906); s. c., 80 O. S. 122.

Former statute construed.

Rep. Atty. Gen. 1906-1907, p. 148.

Section 9670. (Bank books; officers, employees and bonds. Who eligible as bondsmen.) All bank books showing such deposits shall be open to the inspection of any director at any time. All officers and employees of building and loan associations having control or access to moneys or securities of such association in the regular discharge of their duties before entering upon their duties, shall give bond with two or more responsible freeholders or a surety company qualified to transact business in the state of Ohio, as surety thereon; such bond shall guarantee the faithful performance of duty on the part of said officers and employees, and the safe keeping and proper application of all moneys or property coming into their hands. All officers of such corporation on being re-elected to office shall renew their bonds. The amount and form of said bond and sufficiency of the surety thereon shall be approved by the board of directors, which form shall be substantially that prescribed by the superintendent of building and loan associations. If the sureties on such bonds are individuals, then each individual signing such bond shall make oath that he is the owner in fee

simple of unincumbered real estate, the actual value of which is not less than double the amount of such bond. Directors of building and loan associations to which bond is given shall not be eligible as bondsmen on such bonds but shall be individually liable for any loss to members, caused by their neglect to comply with the provisions of this section or any other provisions of law prescribing their duties, or the duties imposed upon them by the constitution and by-laws of such association, and the superintendent of building and loan associations may at any time require additional bond or security when, in his opinion, any such bond then in force is insufficient. (110 v. 69; May 11, 1908, 99 v. 531, § 23; R. S. Sec. 3836-4; May 1, 1891, 88 v. 469.)

A surety on the bond of the secretary of an association is not liable for acts beyond the scope of his authority. *Trustees v. Deposit Co.*, 76 O. S. 253 (1907); s. c., 7 C. C. n. s. 66; 17 C. D. 662.

In an action by a withdrawing shareholder for the amount of his paid-up installments, with dividends, the association may plead, by way of set-off and affirmative relief, its claim against him for moneys wrongfully paid out by him while acting as treasurer. *Gelhaus v. Association*, 4 N. P. 255; 6 L. D. 443 (1897).

An attorney of an association is not an officer, and his bond is not an official bond.

Building Co. v. Kuehnert, 7 N. P. 264; 6 L. D. 502 (1896).

But see § 9666.

It is competent for an association to appoint an attorney and to provide for a bond.

Building Co. v. Kuehnert, 7 N. P. 264; 6 L. D. 502 (1896).

And sureties on the bond of the attorney for an association are liable for a loss suffered through his negligence in loaning money upon property, the title to which was defective. Notice of the loss to the attorney or his sureties is not necessary, and estoppel or laches can not be a defense to the sureties where the attorney had knowledge of his mistake.

Dienst v. Building Co., 10 C. C. n. s. 46; 20 C. D. 537 (1907).

Where an officer embezzles funds of the association there is a civil as well as a criminal liability therefor.

Richter v. Loan Co., 7 C. C. n. s. 360; 17 C. D. 793 (1905).

Section 9671. (Reserve fund.) The amount to be set aside to the reserve fund, for the payment of contingent losses shall be determined by the board of directors, but in all permanent or perpetual associations, at least five per cent of the net earnings shall be set aside each year to such fund until it reaches at least five per cent of the total assets. All losses shall be paid out of such fund until it is exhausted. When the amount in such fund falls below five per cent of the assets as aforesaid, it shall be replenished by annual appropriations of at least five per cent of the net earnings as hereinbefore provided until it again reaches such amount.

(May 11, 1908, 99 v. 531, § 24; R. S. Sec. 3836-5; May 1, 1891, 88 v. 469.)

Both borrowing and non-borrowing members have an interest in the reserve fund.

Seibel v. Building Association, 43 O. S. 371, 375 (1885).

The word "losses" means the difference between the amount invested and the amount received back by the company when the investment is terminated. When a mortgage is foreclosed the taxes which are a lien and the court costs are "losses". But attorneys fees in the foreclosure suit and the cost of carrying the property when it is bid in by the association are "expenses" and can not be charged to the reserve fund. Rep. Atty. Gen. 1912, p. 742.

Section 9672. (Expenses, how paid.) All expenses of such association shall be paid out of the earnings only, and so much of the earnings as may be necessary must be set aside each year for such purpose. But charges incident to a loan, if paid by the borrower, shall not be deemed a part of the current expenses. (May 11, 1908, 99 v. 532, § 25; R. S. Sec. 3836-6; May 1, 1891, 88 v. 469.)

An association can not make an assessment upon its stock for the specific purpose of paying expenses.

4 Opins. Attys. Gen. 454 (1892).

Attorney fees in foreclosure cases are "expenses" and can not be paid out of the reserve fund, but must be paid out of earnings. Where property is bid in by the association, the repairs, taxes and insurance paid while the property is carried by the association are "expenses". Rep. Atty. Gen. 1912, p. 742.

Section 9673. (Dividends.) After payment of expenses and interest, a portion of the earnings to be determined by the board of directors, annually or semi-annually, shall also be placed in the reserve fund for the payment of contingent losses, as hereinbefore provided, and a further portion of such earnings to be determined by the board of directors, shall be transferred as a dividend annually or semi-annually, in such proportion to the credit of all members as the corporation by its constitution and by-laws provides, to be paid to them at such time and in such manner in conformity with this chapter as the corporation by its constitution and by-laws provides. Any residue of such earnings may be held as undivided profits to be used as other earnings, except that such undivided profit fund at no time shall exceed three per cent of the total assets of the association. (May 11, 1908, 99 v. 532, § 25; R. S. Sec. 3836-6; May 1, 1891, 88 v. 469.)

The value of a share may not be a proper basis for distribution of earnings due such share; but the amount of dues paid thereon and other credits due to it make such a basis.

Seibel v. Association, 43 O. S. 371 (1885).

Both borrowing and non-borrowing members are entitled to pro rata dividends.

Seibel v. Association, 43 O. S. 371 (1885).

Where a borrowing member was fully advised as to how dividends are declared, and received them several years on that basis, and allowed other members to be dealt with in the same way, and it is impossible to recast accounts, he will be estopped to deny the legality of the division.

Ruehlman v. Association, 6 C. C. 285; 3 C. D. 456 (1892).

Deiringer v. Association, 2 L. D. 543 (1893); aff'd, no rep., 36 W. L. B. 328.

Association v. Voegler, 7 N. P. 605; 5 L. D. 581 (1895).

A borrowing member is bound by an amendment to the constitution of the association, in which the right to amend was reserved, changing the method of crediting dividends.

Metz v. Building Co., 6 O. L. R. 418; 19 L. D. 161 (1908).

A member who acquiesced for seven years in interest and dividend settlements, made under an amendment to the constitution, and then made no claim until six years after final settlement of his loan, is estopped from claiming further earnings.

Metz v. Building Co., 6 O. L. R. 418; 19 L. D. 161 (1908).

Dividends under former statutes.

See Seibel v. Building Ass'n, 43 O. S. 371 (1885).

Ruehlman v. Association, 6 C. C. 285; 3 C. D. 456 (1892).

Turner Verein v. Woodburn, 27 W. L. B. 409 (1892).

Deiringer v. Carlisle, etc., Ass'n, 2 L. D. 543 (1893); aff'd, no rep., 36 W. L. B. 328.

Association v. Vogeler, 7 N. P. 605; 5 L. D. 581 (1895).

Where an association sells land by land contract for a price in excess of its cost, the excess can not be deemed "earnings" or "profits" until the entire amount of the cost to the association has been repaid to it.

Rep. Atty. Gen. 1911-1912, p. 812.

Section 9674. (Losses.) All losses shall be assessed in the same proportion and manner on all members after the amounts in the reserve fund and the undivided profit fund have been applied to the payment thereof. (May 11, 1908, 99 v. 532, § 25; R. S. Sec. 3836-6; May 1, 1891, 88 v. 469.)

Members, whether borrowers or non-borrowers, must assist in bearing its losses. Where the mortgage of a borrowing member secured the payment of "assessments," such member was held not entitled to a cancellation of his mortgage, as against the receiver of the association, until his share of an assessment made by the receiver, to pay losses, was paid.

Eversman v. Schmitt, 53 O. S. 174 (1895).

See Haynes v. Association, 2 N. P. 181; 3 L. D. 228 (1895).

Demland v. Loan Co., 20 C. C. 223; 11 C. D. 249 (1899).

The receiver of an insolvent association may make a pro rata assessment, which is binding on members, although they, as individuals, are not parties to the suit in which the receiver was appointed.

Eversman v. Schmitt, 53 O. S. 174 (1895).

Such assessment may be made by the court appointing the receiver.

Swing v. Rose, 75 O. S. 355 (1906).

Hinman v. Ryan, 3 C. C. 529; 2 C. D. 305 (1888).

The proper basis of assessment upon the stock of an insolvent association to pay its debts and equalize losses, both in the case of bor-

rowing and non-borrowing members, was held to be the dues and earnings which should stand to the credit of their stock.

Loan Co. v. Richter, 16 C. C. 191; 9 C. D. 74 (1898).

See in re Building Ass'n, 7 N. P. 518; 5 L. D. 518 (1897).

§ 9673.

A provision, in the constitution of an association, limiting the liability of members to the amount standing to their credit on the books of the association, is invalid.

Loan Co. v. Richter, 16 C. C. 191; 9 C. D. 74 (1898).

Members, whether borrowers or non-borrowers, who withdraw, in good faith, and cease to be members, can not again be brought into the association for the settlement of losses.

Eversmann v. Schmitt, 53 O. S. 174, 189 (1895).

Wangerien v. Aspell, 47 O. S. 250, 261 (1890).

But a compromise, not made in good faith, which works gross injustice or fraud upon other members, does not relieve the member from liability for losses.

Loan Co. v. Richter, 16 C. C. 191; 9 C. D. 74 (1898).

Notice of withdrawal does not relieve a member from liability for losses suffered before his withdrawal is completed.

Harrison Bldg. Ass'n. v. Howell, 39 W. L. B. 386; 5 N. P. 273; 7 L. D. 353 (1898).

Section 9675. (Listing of shares for taxation.) The shares and loans advanced to its members, shall be exempt from taxation, except that shares of stock upon which no loans have been made or money advanced by the company, shall be considered and held as credits. The members individually shall list for taxation the number of shares held by them, and the true value thereof in money, on the day preceding the second Monday in April each year, and they shall be assessed at such valuation for taxation and taxes as other property. (May 11, 1908, 99 v. 532, § 26; R. S. Sec. 3836-7; May 1, 1891, 88 v. 469.)

An association is not required to list its surplus and profits for taxation, but real estate is subject to real estate taxes whether purchased from profits or not.

Gruner v. Defiance, etc., Ass'n, 85 O. S. 484 (Supreme Court Journal Entry).

An association is not required to return any personal property to the county auditor under § 5404. Rep. Atty. Gen. 1913, p. 1375.

"Stock deposits" as "credits". The mere privilege of withdrawal of stock deposits does not make them taxable as "credits". But if the association follows a practice of allowing interest on stock deposits, without regard to dividends declared or losses sustained, then the stock deposits are taxable as moneys. Opins. Atty. Gen. 1921, p. 415; 19 O. L. R. 294.

PART XXI.

BANKS AND BANKING.

Sections 9676 to 9849 were repealed (108 (Pt. 1) v. 80) at the time of the enactment of the Banking Code of 1919, which is contained in §§ 710-1 to 710-189 inclusive.

TITLE COMPANIES, COLLATERAL LOAN COMPANIES AND MISCELLANEOUS PROVISIONS RELATING TO BANKS.

Title Guaranty and Trust Companies	Unknown Depositors
9850. Powers of such companies.	§ 9864. Annual report to probate judge.
9851. Capital required; deposit.	§ 9865. Who are to be deemed "unknown deposits."
9852. How deposit held.	§ 9866. Record to be kept by probate judge.
9853. Operation limited to one county; exception.	§ 9867. Fees for making such record.
9854. Treasurer to surrender surplus deposits.	§ 9868. Unknown deposits to be paid into county treasury.
9855. Laws by which such companies governed.	§ 9869. How such deposits reclaimed.
Collateral Loan Companies	§ 9870. Penalty for refusal or neglect to comply.
9857. Powers and limitations.	§ 9871. Recovery and disposition of penalties.
9858. Capital stock.	§ 9872. Who may sue; duty of prosecuting attorney.
9859. How loans made.	
9860. Insurance.	
9861. Memorandum of loans.	
9862. Redemption of pledges.	
9863. Sale of pledges.	

TITLE GUARANTEE AND TRUST COMPANIES.

Section 9850. (Powers of such companies.) A title guaranty and trust company may prepare and furnish abstracts and certificates of title to real estate, bonds, mortgages and other securities, and guarantee such titles, the validity and due execution of such securities, and the performance of contracts incident thereto, make loans for itself or as agent or trustee for others, and guarantee the collection of interest and principal of such loans; take charge of and sell, mortgage, rent or otherwise dispose of real estate for others, and perform all the duties of an agent relative to property deeded or otherwise entrusted to it. (R. S. Sec. 3821ggg; March 29, 1906, 98 v. 153; April 22, 1902, 95 v. 222.)

Banking and trust powers may be acquired. § 710-168 et seq.

A title guaranty company, organized under this section, is not under control of the state insurance department. It may issue a certificate or abstract of title, and guarantee the correctness thereof,

but is not authorized to do merely a title insurance business. Opins. Atty. Gen. 1917, pp. 1157, 1681.

Abstract companies have been permitted to acquire the powers of title guaranty and trust companies. Rep. Atty. Gen. 1914, pp. 1695, 868; 12 O. L. R. 497.

A state bank may not amend its articles so as to engage in the title guaranty and trust business. Opins. Atty. Gen. 1921, p. 1137.

A title guaranty and trust company may be a county depository under G. C. § 2715 et seq. A title company is not a bank, but may receive deposits for the sole purpose of loaning the same. A certificate or acknowledgment of the receipt of the money may be given, although the company can not issue ordinary certificates of deposit. Rep. Atty. Gen. 1914, p. 1743; 12 O. L. R. 553.

See articles by Chas. C. White, 19 O. L. R. 580 on "Some thoughts on title insurance." and by H. A. Hauxhurst, 18 O. L. R. 459, on "Certificates of Title and Title Insurance."

An abstract company, employed by the vendor of real estate, is not liable to the vendee for negligence in the making or certifying of an abstract of title, in reliance on which the vendee accepted a defective title and paid the purchase money. The abstract company is liable, as a general rule, only to the person who employed it.

Thomas v. Trust Co., 81 O. S. 432 (1910).

Section 9851. (Capital required; deposit.) No such company shall do business until its capital stock amounts to at least one hundred thousand dollars fully paid up, and until it has deposited with the treasurer of state fifty thousand dollars in securities permitted by sections ninety-five hundred and eighteen and ninety-five hundred and nineteen. Except such deposit, the capital shall be invested as the board of directors of such company prescribes. (R. S. Sec. 3821ggg; March 29, 1906, 98 v. 153; April 22, 1902, 95 v. 222.)

Section 9852. (How deposits shall be held.) The treasurer of state shall hold such fund or securities deposited with him as security for the faithful performance of all guarantees entered into and trusts accepted by such company, but so long as it continues solvent he shall permit it to collect the interest of, or dividends on, its securities so deposited, and to withdraw them or any part thereof, on depositing with him cash or other securities of the kind heretofore named so as to maintain the value of such deposit at fifty thousand dollars. (108 (Pt. 2) v. 1192; R. S. Sec. 3821ggg; March 29, 1906, 98 v. 153; April 22, 1902, 95 v. 222.)

Section 9853. (Operation limited to one county; exception.) Any company so organized shall be limited in its operation to only one county in this state, which shall be designated in its application for a charter, except, that if

it desires to issue its policies of title insurance in more than one county it may issue them in such other county or counties upon depositing with the treasurer of state an additional sum of fifty thousand dollars in securities as above provided, for each additional county in which it proposes to operate. (R. S. Sec. 3821ggg; March 29, 1906, 98 v. 153; April 22, 1902, 95 v. 222.)

This section authorizes the issue of title policies in other counties, if the required deposit is made. Opins. Atty. Gen. 1918, p. 520.

Section 9854. (Treasurer to surrender surplus deposits.)

If such a company has made deposits with the treasurer of state as herein required, it may request such treasurer to return to it securities in excess of the amount so required, and he shall surrender such excess to the company, taking proper receipts therefor. (R. S. Sec. 3821ggg; March 29, 1906, 98 v. 153; April 22, 1902, 95 v. 222.)

Section 9855. (Laws by which such companies governed.)

All companies doing the business of guaranteeing titles to real property shall comply with and be governed by the foregoing provisions relating thereto. But such companies heretofore organized and doing business thereunder, may continue business without prejudice to any rights thereby acquired or obligations incurred. (R. S. Sec. 3821ggg; March 29, 1906, 98 v. 153; April 22, 1902, 95 v. 222.)

COLLATERAL LOAN COMPANIES.

Section 9857. (Powers and limitations.) Corporations may be organized for the purpose of making loans on pledges of goods and chattels and upon mortgage thereof; but they shall not receive money on deposit, engage in banking, nor make loans upon security other than herein is provided. The names of such corporations shall begin with the word "The" and end with the words "Collateral Loan Company." (R. S. Sec. 3821q-1; April 21, 1904, 97 v. 134, § 1.)

A collateral loan company can not amend its articles of incorporation under § 8719. Rep. Atty. Gen. 1916, p. 1746.

Section 9858. (Capital stock.) The capital stock of such company shall not exceed five hundred thousand dollars in shares of fifty dollars each. When twenty thousand dollars have been duly subscribed and one-fourth of it actually paid in, the subscribers thereto may organize and transact business. (R. S. Sec. 3821q-2; April 21, 1904, 97 v. 134, § 2.)

A collateral loan company can not be incorporated with a capital stock of only \$10,000.

Rep. Atty. Gen. 1905-1906, p. 49.

A collateral loan company is not authorized to reduce its capital stock or the par value of its shares. Rep. Atty. Gen. 1915, p. 689.

Section 9859. (How loans made.) When such company has disposable funds, it shall loan on all goods and chattels offered, embraced within its rules and regulations, in the order offered; with the exception that it always shall discriminate in favor of small loans to the indigent. It may loan to four-fifths of the appraised value of gold and silver plate and ware, and to two-thirds of such value on other goods and chattels. The rate of interest charged shall not exceed eight per cent per annum, and other charges, including insurance, investigation of titles, and the expense of the custody and care of property offered as security must not exceed ten per cent of the amount loaned. (R. S. Sec. 3821q-3; April 21, 1904, 97 v. 134, § 3.)

If a loan company has not complied with the so-called "loan shark" law (G. C. § 6346-1 et seq.) a loan in excess of the legal rate is void. *Collateral Loan Co. v. Bell*, 17 N. P. n. s. 385 (1915).

Prior to the enactment of the "loan shark" law it was held that, in an action to recover interest exceeding the legal rate, a loan company must prove its corporate capacity, viz.: that it is a corporation having the right to such interest. *Loan Co. v. Philen*, 18 C. C. n. s. 419 (1910).

Section 9860. (Insurance.) Such company shall insure all pledged property in its possession against loss or damage by fire, in an amount equal to the appraised value thereof, to be ascertained when the loan is made. In case of loss or damage by fire it shall be liable to the pledgers of such property for the amount thereof after paying the principal, interest, loan charges and expenses. (R. S. Sec. 3821q-3; April 21, 1904, 97 v. 134, § 3.)

Section 9861. (Memorandum of loans.) Such company shall give to each pledger a card inscribed with its name, the article or articles pledged, name of the pledger, the amount loaned, the rate of interest, amount of loan charges and expenses, the date when made and date when payable. (R. S. Sec. 3821q-5; April 21, 1904, 97 v. 135, § 5.)

Section 9862. (Redemption of pledges.) A person who has deposited property with such company as a pledge to secure a loan, at any time before the maturity of such loan may redeem it, on payment of the principal sum borrowed with interest and other charges which have accrued at the

date of payment. (R. S. Sec. 3821q-4; April 21, 1904, 97 v. 135, § 4.)

Section 9863. (Sale of pledges.) If the property pledged is not redeemed upon the maturity of the loan it shall be sold at public auction. Notice specifying the time and place of such sale shall be mailed to the last known address of the pledger at least one week previous to the time of such sale. The net surplus from a sale, after paying loan charges and expenses, shall be held three years for the owner; when, if not demanded, it shall be forfeited to the company. (R. S. Sec. 3821q-5; April 21, 1904, 97 v. 135, § 5.)

UNKNOWN DEPOSITORS.

Section 9864. (Annual report to probate judge.) Every incorporated bank or banking association located in this state, whether now or hereafter incorporated or organized under the laws of this state, or of the United States, and every company, association, or person, who in this state keeps an office or other place of business, and engages in the business of lending money, receiving money on deposit, buying and selling bullion, or bills of exchange, notes, bonds, stocks, or other evidence of indebtedness, with a view to profit, annually, between the first and second Mondays of January, shall make out and return to the probate judge of the county in which such bank, office, or other place of business is located, under oath of the owner, or principal officer or manager thereof, a true and complete statement, setting forth, in alphabetical order, the names of all unknown depositors with such bank, company, association or person, together with the amount due to every such unknown depositor, including accrued interest and dividends. (March 6, 1888, 85 v. 65, § 1; R. S. Sec. 3821-89.)

Section 9865. (Who are to be deemed "unknown depositors.") Every corporation, company, association, or person, in whose name a deposit of any money, bullion, bill of exchange, note, stock, bond or other evidence of indebtedness has been made with any bank, company, association, or person, designated in the preceding section, shall be deemed an unknown depositor within the meaning thereof, when the date of the last bona fide item of debt or credit to the account of such depositor on the books of said bank is more than seven years prior to the time fixed by such section for the filing of such statement with the probate court of the proper county. In fixing the date of the last item of credit

to the account of a depositor, reference shall not be had to any item of credit for interest or dividends accrued on such deposit, unless it be entered upon a pass book presented by and returned to the depositor, or unless the depositor be a minor. (R. S. Sec. 3821-90; March 6, 1888, 85 v. 65, § 2.)

Section 9866. (Record to be kept by probate judge.) The probate judge of each county, on or before the third Monday of January, annually, shall record in a book kept for that purpose, entitled, "record of unclaimed deposits in banks, _____ county, Ohio," and which at all times shall be open to public inspection, all statements returned to him for the preceding year under the above provisions. Such judge shall designate in such book at the head of each statement recorded therein, the name of the bank, company, association or person by whom such statement was returned. The original statement returned to him shall be kept on file and preserved in his office. (R. S. Sec. 3821-91; March 6, 1888, 85 v. 65, § 3.)

Section 9867. (Fees for making such record.) There shall be allowed and paid to the probate judge of each county, the sum of eight cents per hundred words, for all statements recorded by him, as above provided. The cost of recording the names and amounts due to depositors, by whom such deposits were made, and who are "unknown," shall be paid to such judge by the bank, company, association, or person, as herein provided, at the time such annual statement is returned, and by such bank, company, association, or person shall be deducted from the amount due such unknown depositor. (R. S. Sec. 3821-92; March 6, 1888, 85 v. 65, § 4.)

Section 9868. (Unknown deposits to be paid into county treasury.) When a corporation, company, association, or person, in whose name a deposit is made with a bank, company, association, or person designated herein, becomes unknown within the definition and meaning hereof, the amount due to such depositor shall be paid by such bank, company, association or person, to the treasurer of the county, in which such bank, company or association is located, and by such treasurer be credited to the general fund of such county. But it shall not be paid until after the expiration of eight years from the date of the first statement, in which the name and amount due such unknown depositor was returned to the probate judge. The bank, corporation, association or person so making such payment shall thereby be released

from any claim, demand, or liability to pay it or any part thereof to the depositor, his administrators, executors or assigns. (R. S. Sec. 3821-93; March 6, 1888, 85 v. 65, § 5.)

Section 9869. (How such deposits reclaimed.) If at any time thereafter proof is made to the satisfaction of the probate court, or the county commissioners, of the right of any person or persons, by inheritance or otherwise, to such funds or any part thereof, or so paid to the treasurer, such court or commissioners shall so certify to the county auditor, who thereupon shall draw a warrant on the treasurer of the county in favor of such claimant or claimants, or the legal representative or duly authorized agent thereof, for the sum so paid into the treasury. If any such person or persons become aggrieved by the decision, finding or action of the probate court or the county commissioners, such person or persons may appeal to the court of common pleas, in the manner provided by law for appealing from the decisions of county commissioners, or from those of the probate judge. (R. S. Sec. 3821-94; March 6, 1888, 85 v. 65, § 6.)

Section 9870. (Penalty for refusal or neglect to comply.) Every bank, company, association, or person designated herein, who neglects or refuses to comply with these provisions, shall forfeit and pay five hundred dollars, for every such offense. (R. S. Sec. 3821-95; March 6, 1888, 85 v. 65, § 7.)

Section 9871. (Recovery and disposition of penalties.) The penalty so imposed shall be recovered by action in the name of the state, before any court of competent jurisdiction; and when collected, shall be paid to the treasurer of the county in which the judgment therefor is recovered. One-half thereof shall be by such treasurer credited to the general fund of such county, and one-half thereof be by him held for the use of the state. (R. S. Sec. 3821-96; March 6, 1888, 85 v. 65, § 8.)

Section 9872. (Who may sue; duty of prosecuting attorney.) The action provided by the preceding section may be instituted and prosecuted to judgment by any citizen of the state. The prosecuting attorney of such county hereby is required to institute and prosecute such action against every bank, company, association or person so designated, and located in such county, who fails to comply with the foregoing provisions. (R. S. Sec. 3821-97; March 6, 1888, 85 v. 65, § 9.)

PART XXII.

CORPORATIONS NOT FOR PROFIT.

- CHAPTER 1. Salvage.
- CHAPTER 2. Agricultural.
- CHAPTER 3. Educational.
- CHAPTER 4. Religious and Benevolent.
- CHAPTER 5. Humane Society.
- CHAPTER 6. Charitable Trust.
- CHAPTER 7. Cemetery.

CHAPTER 1.

SALVAGE.

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| § 9873. Powers. | § 9877. Quarterly statement to be filed by insurance companies. |
| § 9874. Subordinate to fire department. | § 9878. Written demand for statement. |
| § 9875. Regulations. | § 9879. Failure to file statement. |
| § 9876. Biennial meetings; assessments. | |

Section 9873. (Powers.) Corporations, not for profit, may be organized under the general corporation laws of this state, and as hereinafter provided for the purpose of discovering and preventing fires and of saving property and life from conflagration, with power to provide a patrol of men and a competent person to act as superintendent to discover and prevent fires, with suitable apparatus and equipment to save and preserve property and life at and after fires. To enable them so to act with promptness and efficiency, the superintendent and patrol may enter a building at any time for the purpose of inspection and any building on fire or which is exposed to or in danger of taking fire from other burning buildings, for the purpose of protecting and saving such building and the property therein, or of removing the property or a part thereof during the fire or from the ruins after the fire. (R. S. Sec. 3691-24h; April 29, 1902, 95 v. 324, § 1.)

Section 9874. (Subordinate to fire department.) Nothing in this chapter shall in any degree lessen, impair or interfere with the powers, privileges, duties or authority of a regular or volunteer fire department organized and maintained by public authority within the state. Such superin-

tendent and the members of the patrol, while on duty at a fire, shall be subordinate to and under the control of the public authority having charge of the extinguishment and prevention of fires. No act of the superintendent or the patrol of men shall justify an owner of a building or property in abandoning it. (R. S. Sec. 3691-24h; April 29, 1902, 95 v. 324, § 1.)

Section 9875. (Regulations.) The articles of incorporation of such a corporation shall set forth the municipality or other subdivision of the state within which it is to prosecute its business, and thereafter it shall be confined to such municipality or other subdivision. It may elect officers and make needful by-laws not contrary to the provisions of the constitution or laws of this state or of the United States. Except as in this chapter provided, such company shall be subject to the general corporation laws of this state. (R. S. Sec. 3691-24i; April 29, 1902, 95 v. 324, § 2.)

Section 9876. (Biennial meetings; assessments.) Before such corporation may begin business, and in the month of March of every second year thereafter, a meeting thereof shall be held, of which ten days' previous notice shall be given by inserting it in at least two newspapers published or of general circulation in the municipality or other subdivision in which the corporation is organized and established, if there be such newspapers, and if not, by posting notices thereof, at which meeting each insurance company, corporation, association, underwriter, person or persons doing a fire insurance business in such municipality or other subdivision, whether members of such corporation or not, may be represented and have one vote. A majority of the whole number so represented may decide upon the question of sustaining the fire patrol organized by the corporation, and shall fix the maximum amount of expenses which may be incurred therefor during the fiscal years next to ensue and until the next meeting, which in no case shall exceed two per cent of the aggregate premiums returned as received. Such amount, or so much thereof as is necessary, may be assessed upon all insurance companies, corporations, underwriters, agents, person or persons who assume risks and accept premiums for fire insurance in such municipality or other subdivision, whether members of the corporation or not, in proportion to the several amounts of premiums returned as received by each. Such assessments shall be collectible by and in the name of the corporation in any court in this state having jurisdiction thereof in such manner and

at such time or times as it determines. (R. S. Sec. 3691-24j; April 29, 1902, 95 v. 325, § 3.)

Section 9877. (Quarterly statement to be filed by insurance companies.) To insure the collection of such assessments, provide for the payment of persons employed by the corporation, maintain suitable rooms therefor and for the acquisitions of such real and personal property as is necessary, all which is to be determined at the regular meetings, the corporation may require a statement to be furnished quarterly by all insurance companies, corporations, associations, underwriters, agents, or persons of the aggregate amount of premiums received by each for insuring property in the municipality or subdivision where the corporation is organized and established, for and during the three months next preceding the thirty-first day of March, the thirtieth day of June, the thirtieth day of September and the thirty-first day of December of each year. Such statement shall be sworn to by the president and secretary of the corporation or association, or by the agent or person so acting or effecting such insurance in the municipality or subdivision, and shall be given to the secretary of the corporation created under the provisions of this chapter, within ten days after the first days of April, July, October and January of each year. (R. S. Sec. 3691-24k; April 29, 1902, 95 v. 325, § 4.)

Section 9878. (Written demand for statement.) The treasurer or other appointed officer of such a corporation, within the ten days aforesaid, by written or printed demand, signed by him shall require such statement from every insurance company, corporation, organization, underwriter, agent or person engaged in the business of fire insurance in the municipality or other subdivision where the corporation is organized and established. Such demand may be delivered personally at the office of the insurance company, corporation, association, underwriter, agent or person within the municipality or other subdivision, or at the residence of any officer of such corporation or association, underwriter, agent or person. (R. S. Sec. 3691-24l; April 29, 1902, 95 v. 326, § 5.)

Section 9879. (Failure to file statement.) An insurance company, corporation or association, or officer thereof, and an underwriter, agent or person within the municipality or other subdivision in which the corporation is organized and established, engaged in the business of fire insurance, or of assuming risks and accepting premiums therefor, who fails to furnish the statement hereinbefore required, shall forfeit

for the use of the corporation entitled thereto, the sum of twenty-five dollars for every day he neglects to furnish it, which amount the corporation may recover in any court in the state having jurisdiction thereof. (R. S. Sec. 3691-241; April 29, 1902, 95 v. 326, § 5.)

CHAPTER 2.

AGRICULTURAL.

Agricultural Societies.

- § 9880. Organization of societies.
- § 9880-1. Independent societies, organization of.
- § 9881. Premiums offered.
- § 9882. Duties of persons competing therefor.
- § 9883. Repealed.
- § 9884. Publication of treasurer's account and list of awards.
- § 9884-1. Who may be members; certificate; fee.
- § 9884-2. Board of directors; term of office; election; vacancy.
- § 9884-3. Annual meeting; organization of board; oath.
- § 9884-4. Permit shall not be issued to sell, etc., liquor; immoral shows; when aid of state withheld.
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- § 9911. Repealed.
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Farmers' Institutes.

- § 9916. Organization of farmers' institute societies.
- § 9917. Number of annual meetings in each county.
- § 9918. Certificates for county payments.
- § 9919. Detailed statement of expenses filed with certificate.
- § 9920. Lecturers shall be furnished by the state.
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- §§ 9921-1 to 9921-6, relating to employment of county agricultural agents, omitted.

AGRICULTURAL SOCIETIES.

Section 9880. (Organization of societies.) When thirty or more persons, residents of a county organize themselves into a county agricultural society, which adopts a constitution and by-laws, selects the usual and proper officers, and otherwise conducts its affairs in conformity to law, and the rules of the state board of agriculture, and when such society has held an annual exhibition in accordance with sections 9881, 9882 and 9884 of the General Code, and made proper report to the state board, then upon presentation to the county auditor, of a certificate from the president of the state board attested by the secretary thereof, that the laws of the state and the rules of the board have been complied with, the county auditor of each county wherein such agricultural societies are organized, annually shall draw an order on the treasurer of the county in favor of the president of the county agricultural society for the sum of eight hundred dollars, and the treasurer of the county shall pay it. The total amount of such order shall not exceed one hundred per cent (100%) of the amount paid in regular class premiums. (109 v. 240; 108 (Pt. 1) v. 381; R. S. Sec. 3697; May 6, 1902, 95 v. 403; April 16, 1900, 94 v. 395; April 21, 1896, 92 v. 205; April 13, 1893, 90 v. 173; April 16, 1886, 80 v. 142; R. S. 1880; February 28, 1846, 44 v. 70, § 1; S. & C. 61.)

A society organized under § 9880 et seq. is a private corporation. Opins. Atty. Gen. 1922, p. 40; 20 O. L. R. 58.

The state board of agriculture can not be compelled, by mandamus, to issue the certificate provided for by § 9880. State v. Stroop, 99 O. S. 522 (1919). See Opins. Atty. Gen. 1916, p. 1782.

A society, organized under this section, which has constructed seats on its fair grounds for the use of patrons, is liable, in its corporate capacity, to a person, attending its fair and rightfully occupying a seat, who is injured in consequence of negligence in their construction.

Dunn v. Agricultural Society, 46 O. S. 93 (1888).

This section is not in violation of Art. VIII, Sec. 4 of the constitution which prohibits the state from loaning its credit or becoming a joint owner or stockholder in any company or association.

State v. Kerns, 104 O. S. 550 (1922).

Commissioners v. Brown, 1 N. P. n. s. 357; 14 L. D. 241 (C. P. 1903).

A county society, entitled to aid under this section, is not entitled to the additional aid for independent societies under § 9880-1. Opins. Atty. Gen. 1921, p. 240.

This chapter provides for only one society in a county. Where two societies desire to participate in the public fund, the society which was first properly organized is alone entitled to aid. Rep. Atty. Gen. 1912, p. 1412; Opins. Atty. Gen. 1915, p. 2080; Opins. Atty. Gen. 1919, p. 416. Compare Rep. Atty. Gen. 1906-1907, p. 15.

Societies organized subsequently may receive aid only as independent societies under § 9880-1. Opins. Atty. Gen. 1919, p. 416.

Payment is not authorized, after the date specified in § 9884, unless the secretary of the state board has certified to the county auditor that the reports required by that section have been made. Opins. Atty. Gen. 1920, p. 61.

The county auditor may require verification of the amount paid out in premiums. Opins. Atty. Gen. 1921, p. 240.

An amendment to R. S. § 3697 which exempted Cuyahoga County from its provisions and made special provisions therefor was rejected and held not to render the remainder of the section unconstitutional.

Commissioners v. Brown, 1 N. P. n. s. 357; 14 L. D. 241 (C. P. 1903). Amount of state aid prior to last amendment, see

State v. Reed, 12 L. D. 415 (C. P. 1902).

Agricultural societies in the year 1911 were entitled to an amount based on the census of 1910.

Rep. Atty. Gen. 1910-1911, p. 597.

Real estate used for holding agricultural fairs conducted by the county, or by an agricultural society which has complied with § 9880 et seq., is exempt from taxation, whether the title is in the county or in the society. Opins. Atty. Gen. 1918, p. 828.

By the adoption of the General Code, section 3697, Revised Statutes, which authorized payment to two agricultural societies in Cuyahoga County, was repealed. Rep. Atty. Gen. 1913, p. 234.

Section 9880-1. (Independent societies, organization of. What sum may be drawn from the county. When board are residents of more than one county.) When thirty or more more persons of a county or of contiguous counties, not to exceed three shall have been organized into an independent agricultural society and has held an annual exhibit for three years previous to January 1, 1919, in a county wherein is located a county agricultural society, and when such independent society has held an annual exhibition, in accordance with the three following sections and made proper report to the state board, then, upon the presentation to the county auditor of a certificate from the president of the state board attested by the secretary thereof, that the laws of Ohio and the rules of the board have been complied with, the county auditor of the county, if the fair board be residents of one county, shall draw an order on the treasurer of the county in favor of the president of the independent association for a sum equal to one hundred per cent of the amount paid in regular class premiums, as calculated in section 9880 herein, but which shall not exceed the sum of eight hundred dollars, and the treasurer shall paid said order.

If the fair board be residents of more than one county the auditor of such counties shall draw orders on their respective treasurers for the proportionate share of the sum of eight hundred dollars to be divided according to population of the counties according to the last federal census, but shall not exceed more than one hundred per cent of the amount paid in regular class premiums, and

the treasurer or treasurers shall pay such order or orders from the county funds. (109 v. 240; 108 (Pt. 1) v. 382; 106 v. 273.)

This section is constitutional. State, ex rel., v. Kerns, 104 O. S. 550 (1922).

A corporation organized for profit may be entitled to aid. State, ex rel., v. Kerns, 104 O. S. 550 (1922).

A society organized under § 9911, which held three annual fairs prior to 1915 and an annual exhibition in 1915, is not an "independent" society under § 9880-1 entitled to an allowance from the county treasury under § 9880. Nor can it by reorganizing in December, 1915, come within §§ 9880, 9880-1. Opins. Atty. Gen. 1916, p. 1448.

A society is not entitled to public aid if it has failed to comply with § 9882. Opins. Atty. Gen. 1917, p. 2252.

Section 9881. (Premiums offered.) The several societies formed under the provisions of the preceding sections, annually shall offer and award premiums for the improvement of grains, fruit, vegetables, live stock, articles of domestic industry, public school displays, and such other articles, productions and improvements, as they deem proper, and may perform all acts that are best calculated to promote the agricultural and household manufacturing interests of the county or counties, and of the state. They shall regulate the amount of premiums, and their different grades, so that all may have an opportunity to compete therefor. (108 (Pt. 1) v. 382; R. S. Sec. 3698; April 9, 1880, 77 v. 143; R. S. 1880; February 28, 1846, 44 v. 70, § 2; S. & C. 63.)

Section 9882. (Duties of persons offering to compete therefor.) Persons offering to compete for premiums on improved methods of production of crops or other articles, before such premium is adjudged, shall deliver to the awarding committee if required, a full and correct statement of the process of the method of production, and the expense and value thereof, with a view of showing accurately the profits derived or expected to be derived therefrom. (108 (Pt. 1) v. 383; R. S. Sec. 3698; April 9, 1880, 77 v. 143; R. S. 1880; February 28, 1846, 44 v. 70, § 2; S. & C. 63.)

Section 9883. Repealed. (108 (Pt. 1) v. 385.)

Section 9884. (Publication of treasurer's account and list of awards.) County societies shall publish annually an abstract of the treasurer's account, in a newspaper of the county, and make a report of their proceedings during the year. Also make a synopsis of the awards for improvement

in agriculture and household manufactures which shall be made in accordance with the rules and regulations of the state board of agriculture, and be forwarded to the secretary of agriculture on or before the first Thursday after the second Monday in January of each year. No subsequent payment shall be made from the county treasury unless a certificate be presented to the county auditor, from the secretary of agriculture showing that such reports have been made. (108 (Pt. 1) v. 383; R. S. Sec. 3699; February 20, 1861, 58 v. 22, § 1; S. & S. 4; S. & C. 63.)

“Subsequent payment” means payments made after the date fixed by this section. Opins. Atty. Gen. 1920, p. 61.

Section 9884-1. (Who may be members; certificate; fee. List of members sent to state secretary and kept in local office.) Members of county agricultural societies must be residents of the county in which the county agricultural society is organized. The annual membership fee shall be fixed by each society or its board of directors and paid to the secretary or treasurer as its by-laws may direct. A printed certificate of membership shall be issued to each member who pays the required fee, and said certificates shall be issued from a book in which duplicate stubs of same shall be properly filled out and preserved. All certificates shall be numbered consecutively. No person shall pay or secure more than one membership, and that for himself or herself. The secretary of each society shall send the name and address of each member of the board of directors to the secretary of the state board of agriculture within ten days after the election. A list of the members shall be kept in the office of the secretary of each society and open to public inspection at all times so as to afford convenient information to any resident of the county. (108 (Pt. 1) v. 383.)

Section 9884-2. (Board of directors; term of office; election; vacancy.) The board of directors shall consist of at least eight members, and the county agent and county school superintendent may be members ex-officio. The terms of office shall be determined by the rules of the state board of agriculture. Any vacancy, caused by death, resignation, refusal to qualify, removal from county, or other cause, may be filled by the board until the next annual election when a director shall be elected for the unexpired term. The annual election of the directors shall be by ballot at time and place fixed by the board; provided, however, that this election shall not be held later than the first Saturday in

December. The secretary shall give notice of the director's election for three weeks prior to the holding thereof, in at least two newspapers of opposite politics and of general circulation in the county, or by letter mailed to each member. Only persons holding membership certificates at the close of the fair, or at least fifteen calendar days before the date of election, as may be fixed by the board of directors, shall be entitled to vote, unless such election is held during the time of the holding of the annual county fair. If the said election is held on the fairgrounds during the continuance of the county fair, then all persons holding membership certificates of the date and hour of the election shall be entitled to vote. When the election is to be held during the continuance of the annual county fair, notice of such election must be prominently mentioned in the premium list, in addition to the notice required in newspapers. The terms of office of the retiring directors shall expire, and that of the directors-elect shall begin not later than the first Saturday in January of each year. (108 (Pt. 1) v. 383.)

An election for directors may not be held after the date fixed by this section. If no valid election is held by that date, the incumbents hold over until their successors are elected and qualified. Opins. Atty. Gen. 1920, p. 61.

The directors of a county society are not personally liable for voting in favor of a waiver of the limitations of G. C. § 3819, if they act in good faith, and if the act is not prohibited by the by-laws. Opins. Atty. Gen. 1922, p. 40.

Section 9884-3. (Annual meeting; organization of board; oath.) The board of directors shall annually meet not later than the first Saturday of January, and elect a president, vice-president, treasurer, secretary, and such other officers as it may deem proper; the president, vice president and treasurer to serve one and the secretary not to exceed three years, as the board of directors may determine and until their successors are elected and qualified. The president and vice-president shall be directors. The secretary and treasurer may or may not be directors. Before election of officers the newly elected directors shall qualify by taking oath (or affirmation) before a competent authority; and the board of directors shall conform to the rules and regulations of the state board of agriculture. (108 (Pt. 1) v. 384.)

Section 9884-4. (Permit shall not be issued to sell, etc., liquors; immoral shows. When aid of state withheld.) County agricultural societies shall not sell or grant to any person or persons, or permit in any manner, the privilege of selling,

dealing, or bartering in spirituous, vinous or malt liquors, allow, or tolerate immoral shows, lottery devices, games of chance, or gambling of any kind, including pool selling and paddle wheels, in or about any building or anywhere on its fairgrounds, at any time. If it be shown from the report of any county agricultural society, from witnesses or otherwise, that the annual exhibition held by such society was not conducted along moral or agricultural lines or was not of sufficient educational value to justify the expenditure of the per capita tax as provided by section 9880 of the General Code, the certificate for such financial aid may be withheld by the state board of agriculture. (108 (Pt. 1) v. 384.)

Under this section the state board may withhold its certificate from a county society if its exhibitions are improperly or inefficiently conducted in the respects mentioned in § 9884-4. Opins. Atty. Gen. 1920, p. 61.

Section 9884-5. (Licenses for sides shows, etc.) It shall be unlawful for any person to conduct or operate any side show, amusement, game, device, or to offer for sale at auction, or solicitation, any novelty, at any county or independent agricultural society fair without first obtaining from the director of agriculture, a license so to do. (110 v. 454, § 1.)

Section 9884-6. (License must be obtained from director of agriculture.) No officer, agent, or employe of a county or independent agricultural society, shall grant a privilege or concession to any person, who does not hold a license issued by the director of agriculture under the provisions of this act, to conduct or operate any side show, amusement, game, device, or to offer for sale at auction, or solicitation, any novelty at a county or independent agricultural society fair. (110 v. 454, § 2.)

Section 9884-7. (Written application must be made; fee.) Licenses to conduct or operate any side show, amusement, game, device, or to offer for sale at auction, or solicitation, any novelty at county or independent agricultural society fair, shall be issued by the director of agriculture only upon a written application containing a detailed description of the concession. Blank applications shall be prepared and furnished by the director of agriculture. No license shall be issued until the applicant therefor shall have paid to the director of agriculture the sum of \$5.00.

All licenses issued under the provisions of this act shall contain a detailed description of the concession so licensed, shall expire on the December 31st following the date of

issue, and shall be kept by the licensee in a conspicuous place where his concession is in operation. Nothing herein contained however, shall be construed to require the officers of any county or independent agricultural society to grant any privilege or concessions to any licensee. (110 v. 454, § 3.)

Section 9884-8. (Penalty for violating provisions of license.) Any person holding a license issued to him under the provisions of this act, who permits or tolerates, at any place on the fair grounds where his concession is in operation, any immoral show, lottery device, game of chance or gambling of any kind, including pool selling and paddle wheels, or who violates in any way, the provisions and terms of the license issued to him, shall forfeit his license, and the director of agriculture shall not issue any other license to said person until after a period of two years. (110 v. 455, § 4.)

Section 9884-9. (Enforcement.) It shall be the duty of the director of agriculture to enforce all the provisions of this act [G. C. §§ 9884-5 to 9884-11] and to make all rules and regulations, not otherwise herein provided, necessary for the enforcement of the same, and shall, after giving notice to such licensee, if he find the provisions of this act have been violated, revoke said license. (110 v. 455, § 5.)

Section 9884-10. (License fees; where paid.) The license fees collected under the provisions of this act [G. C. §§ 9884-5 to 9884-11] shall be paid into the state treasury to the credit of the general revenue fund. (110 v. 455, § 6.)

Section 9884-11. (Penalty.) Whoever violates any of the provisions of this act [G. C. §§ 9884-5 to 9884-11] shall be guilty of a misdemeanor and upon conviction thereof, shall be fined not less than \$100.00 or more than \$500.00. (110 v. 455, § 7.)

Section 9885. (Powers when they become incorporated.) County societies which have been, or may hereafter be organized, are declared bodies corporate and politic, and as such, shall be capable of suing and being sued, and of holding in fee simple such real estate as they have heretofore purchased, or may hereafter purchase, as sites whereon to hold their fairs. They may mortgage the grounds of the society for the purpose of renewing or extending pre-existing debts, and for the purpose of furnishing money to purchase

additional land. But if the county commissioners have paid money out of the county treasury to aid in the purchase of the site of such grounds, no mortgage shall be given without the consent of such commissioners. (R. S. Sec. 3700; March 31, 1904, 97 v. 60; February 15, 1853, 51 v. 333, § 1; S. & C. 66.)

Under former statutes an agricultural society had no power to mortgage its fair grounds. Such a mortgage was held to be absolutely void.

Stewart v. Agricultural Society, 7 Am. L. Rec. 668 (Dist. Ct. 1879).

It is unnecessary for an agricultural society to incorporate under the general corporation law. State, ex rel., v. Kerns, 104 O. S. 550 (1922).

Section 9886. (Conveyances declared valid.) Deeds, conveyances and agreements in writing, made to and by such county societies, for the purchase of real estate as sites for their fairs, shall vest a title in fee simple to real estate therein described, without words of inheritance. (R. S. Sec. 3701; February 15, 1853, 51 v. 333, § 2; S. & C. 67.)

Section 9887. (Commissioners may assist societies.) When a county society has purchased, or leased real estate whereon to hold fairs for a term of not less than twenty years, or the title to the grounds is vested in fee in the county, but the society has the control and management of the lands and buildings; if they think it for the interests of the county, and society, the county commissioners may pay out of the county treasury the same amount of money for the purchase or lease and improvement of such site as is paid by such society or individuals for that purpose, and may levy a tax upon all the taxable property of the county sufficient to meet such payment. ((R. S. Sec. 3702; March 21, 1887, 84 v. 230; R. S. 1880; March 30, 1871, 68 v. 50, § 3; S. & S. 6.)

The public aid authorized by this section is additional to the payment provided for in § 9880.

3 Opins. Attys. Gen. 441 (1884).

A tax levy under this section does not preclude further aid authorized by § 9894. Opins. Atty. Gen. 1917, p. 369.

A county prosecuting attorney is not authorized to act as legal adviser of an agricultural society, and can not accept employment from the society. Opins. Atty. Gen. 1915, p. 1459.

A county commissioner should not be a member of a county agricultural society. Opins. Atty. Gen. 1918, p. 1497.

Money raised under this section must be used for the purchase and improvement of the original fairground site and can not be used for the purchase of a new site. Opins. Atty. Gen. 1917, p. 369.

Nor for the purpose of employing an attorney to advise the directors as to incumbering real estate owned by the society. Opins. Atty. Gen. 1915, p. 1459.

If authorized by a vote of the people, county commissioners may

pay indebtedness of a county society if it amounts to \$15,000 or more; and if it amounts to less than \$15,000, and has been incurred for improvements on fairgrounds, may contribute an amount equal to one-half of the purchase and improvement cost; or, if authorized by a vote of the people, more than one-half of the cost, if the tax rate therefor does not exceed half a mill. Rep. Atty. Gen. 1914, p. 952.

A society may transfer to the county the title to real estate acquired for a fair site, subject to a mortgage. The county commissioners under this section may pay a sum equal to that paid by the society, to be applied upon improvements and the incumbrance, but the commissioners may not make a binding contract to do so until a levy for the purpose has been placed on the tax duplicate for collection. Opins. Atty. Gen. 1921, p. 183.

This section does not authorize the payment, out of county funds, of special assessments for street improvements, levied against property of the society. Rep. Atty. Gen. 1912, p. 1406.

A society organized prior to the enactment of §§ 9880 and 9885 may receive aid under § 9887. Opins. Atty. Gen. 1922, p. 480.

An exhibit building is an "improvement" within the meaning of § 9887. Opins. Atty. Gen. 1922, p. 480.

Section 9887-1. (Tax levy to improve real estate of agricultural societies.) In counties wherein there is a county agricultural society which has purchased a site whereon to hold fairs, and the title to such grounds is vested in fee in the county, but the society has the control and management of the lands and buildings, if they think it for the interest of the county and society, the county commissioners may levy a tax upon all the taxable property of the county for the purpose of improving such grounds not to exceed one-twentieth of one mill in any one year and not for a period of more than five years; and in anticipation of the collection of this tax the commissioners may issue and sell the bonds of the county, bearing interest not to exceed six per cent. per annum payable annually. (106 v. 484.)

This section is probably constitutional. Opins. Atty. Gen. 1915, p. 742.

Money raised under this section may be turned over to the society in accordance with §§ 9897 and 9892 and controlled and expended by the society. Opins. Atty. Gen. 1921, p. 157.

Section 9888. (Submission of question of issuing bonds.) In counties wherein there is a county agricultural society which has purchased a site whereon to hold fairs, or if the title to such grounds is vested in fee in the county, and such society is indebted fifteen thousand dollars or more, upon the presentation of a petition signed by not less than five hundred resident electors of the county praying for the submission to the electors of the county of the question whether or not county bonds shall be issued and sold to liquidate

such indebtedness, such commissioners, within ten days thereafter by resolution shall fix a date which shall be within thirty days, upon which the question of issuing and selling such bonds, in amount and denomination such as are necessary for the purpose in view, shall be submitted to the electors of the county. They also shall cause a copy of such resolution to be certified to the deputy state supervisors of elections of the county, who, within ten days thereafter shall proceed to prepare the ballots and make all other necessary arrangements for the submission of such question to such electors at the time fixed by the resolution. (R. S. Sec. 3702-1; April 25, 1898, 93 v. 358, § 1.)

Section 9889. (Conduct of the election.) Such election shall be held at the regular places of voting in the county and conducted, canvassed and certified except as otherwise provided by law, as are elections for the election of county officers. The deputy state supervisors of election must give fifteen days' notice of the submission by publication in one or more newspapers published in the county once a week for two consecutive weeks, stating the amount of bonds to be issued, the purpose for which issued and the time and places of holding such election. Those who vote in favor of the proposition shall have written or printed on their ballots "for the issue of bonds" and those who vote against it, have written or printed on their ballots "against the issue of bonds." If a majority of the voters voting upon the question of issuing the bonds vote in favor thereof, then and not otherwise they shall be issued, and the tax hereinafter mentioned be levied. (R. S. Sec. 3702-1; April 25, 1898, 93 v. 358, § 1.)

Section 9890. (Bonds.) If a majority of the voters of such county voting upon the question of issuing the bonds vote in favor thereof, the board of county commissioners, for the purpose of liquidating such indebtedness, shall issue and sell the bonds of the county according to law, in the amount necessary and bearing not more than six per cent interest, payable semi-annually. (R. S. Sec. 3702-2; April 25, 1898, 93 v. 359, § 2.)

Section 9891. (Levy.) Such bonds shall be issued for a period of not less than ten nor more than twenty years. The county commissioners thereupon shall levy a tax upon all the taxable property on the duplicate of the county to pay such bonds as they mature and the interest thereon, at the rate and for such length of time as may be necessary

for the purpose. (R. S. Sec. 3702-2; April 25, 1898, 93 v. 359, § 2.)

Section 9892. (Liquidation of debts.) From the proceeds arising from the sale of such bonds, the county commissioners shall pay off and liquidate the indebtedness for which they were so sold. (R. S. Sec. 3702-3; April 25, 1898, 93 v. 359, § 3.)

Section 9893. (Money raised shall be applied to purpose.) When money has been raised by taxation in a county for the purpose of leasing lands for county fairs, or of erecting buildings for county fair purposes, or for making improvements on county fair grounds, or any purpose connected with the use of county fair grounds or the management thereof by a county agricultural society, it shall be used for such purpose only, notwithstanding the law under which the money was so raised has expired by limitation. Such moneys shall be used for the purposes intended by the act under which they were levied and collected by taxation. (R. S. Sec. 3702-4; April 25, 1898, 93 v. 316, § 1.)

Section 9894. (One-tenth mill levy for use of society.) When a county or a county agricultural society, owns or holds under a lease, real estate used as a site whereon to hold fairs, and the county agricultural society therein has the control and management of such lands and buildings, for the purpose of encouraging agricultural fairs, the county commissioners shall on the request of the agricultural society annually levy taxes of not exceeding a tenth of one mill upon all taxable property of the county, but in no event to exceed the sum of two thousand dollars, or be less than fifteen hundred dollars, which sum shall be paid by the treasurer of the county to the treasurer of the agricultural society, upon an order from the county auditor duly issued therefor. Such commissioners shall pay out of the treasury any sum from money in the general fund not otherwise appropriated, in anticipation of such levy. (108 (Pt. 1) v. 384; 102 v. 105; R. S. Sec. 3702b; April 30, 1908, 99 v. 249; April 10, 1902, 95 v. 122; April 25, 1898, 93 v. 292.)

Limitations on tax rate, see G. C. § 5649-2.

Where fair grounds are leased to a society for one week only, the commissioners are not authorized to levy a tax under this section for its assistance.

Rep. Atty. Gen. 1911-1912, p. 1236.

Upon the request from a proper society it is mandatory upon the commissioners to levy a tax, but the amount thereof is within the discretion of the commissioners.

Rep. Atty. Gen. 1911-1912, p. 1413.

Rep. Atty. Gen. 1912, p. 1095; Opins. Atty. Gen. 1915, p. 2080.

Where no request from the society is made for a levy, until after the time for making the levy has passed, the society is not entitled to public funds. Rep. Atty. Gen. 1912, p. 1419.

The money need not be used within any specified time. Money remaining in the general fund of the county may be used by an association when properly appropriated. Rep. Atty. Gen. 1912, p. 1406.

An agricultural society does not bar itself from public aid by leasing its fairgrounds to a city for park purposes, retaining, however, the right to use the grounds for fair purposes. Opins. Atty. Gen. 1915, p. 787.

Only a society organized under §§ 9880-9884 is authorized to request a tax levy. Opins. Atty. Gen. 1915, p. 2080.

A tax levy under § 9887 does not preclude further aid under this section. Opins. Atty. Gen. 1917, p. 369.

Section 9895. (Commissioners may purchase grounds.)

If a county society and the county commissioners decide that the interests of the society and county demand an appropriation from the county treasury for the purchase and improvement of county fair grounds greater than that authorized by the preceding section, or without action of or purchase by the society, the commissioners may levy a tax upon all the taxable property of the county, the amount of which they shall fix, but shall not exceed half a mill thereon, in addition to the amount authorized in the preceding section to be paid for such purpose. (R. S. Sec. 3703; March 30, 1871, 68 v. 50, § 30.)

This section does not authorize the payment, out of county funds, of special assessments levied against property of the society. Rep. Atty. Gen. 1912, p. 1406.

Section 9896. (Question of tax to be submitted.) No such tax shall be levied until the question as to the amount is submitted by the commissioners to the qualified electors of the county at some general election, a notice of which, specifying the amount to be levied, has been given at least thirty days previous to such election, in one or more newspapers published and of general circulation in the county. Those voting at the election in favor of the tax shall have written or printed on their ballots "Agricultural tax, Yes," and those voting against it, "Agricultural tax, No." If a majority of the votes cast be in favor of paying such tax, it may be levied and collected as other taxes. (R. S. Sec. 3704; March 30, 1871, 68 v. 50, § 3.)

A majority of all votes cast at the general election is not required by this section. A majority of the votes cast on the question submitted is sufficient.

4 Opins. Attys. Gen. 168 (1888).

This section refers only to § 9895 and not to § 9894. Rep. Atty. Gen. 1912, p. 1095.

Section 9897. (When tax paid to treasurer of society.)

When such tax is collected by the county treasurer, the auditor shall issue his order for the amount thereof to the treasurer of the county agricultural society, on his filing with the auditor a bond in double the amount collected with good and sufficient sureties, to be approved by the auditor, conditioned for the faithful paying over and accounting to such society for such funds. (R. S. Sec. 3704; March 30, 1871, 68 v. 50, § 3.)

Section 9898. (When real estate vests in county.) When a society is dissolved or ceases to exist, in a county where payments have been made for real estate, or improvements thereon, or for the liquidation of indebtedness, for the use of such society, all such real estate and improvements shall vest in fee simple in the county by which the payments were made. (R. S. Sec. 3705; April 25, 1898, 93 v. 360; February 15, 1853, 51 v. 333, § 4; S. & C. 67.)

Where payments have been made by the county for purchase or improvement of real estate of a society which has dissolved or ceased to exist, or for the payment of debts of such society, the real estate vests in the county and may be sold or held by the county. Opins. Atty. Gen. 1921, p. 183.

An agricultural society, by ceasing to give fairs on grounds purchased by the county for its use in that manner, and by granting a license to an exposition company for the use of the grounds for the giving of expositions of a prescribed character for a period of twenty years, does not thereby fall within the provisions of this section, that when a society is "dissolved or ceases to exist" its real estate and improvements thereupon vest in the county. The rights of the society in the property lapse when it ceases to exist as a corporation, and not when it ceases to give fairs.

Exposition Co. v. Kerr, 8 C. C. n. s. 369; 18 C. D. 547 (1906).

Where in such case the exposition company ceased to give expositions and the county commissioners brought an action for recovery of the real estate, claiming to be the owner thereof, and that the property was wrongfully held by the exposition company, to which was added a cause of action for rents and profits, and a prayer for a large amount claimed to be due, it was held:

(1) That the action was one for recovery of real property under G. C. § 11903 et seq., notwithstanding allegations which appear to call for equitable relief.

(2) The exposition company, being a tenant of the agricultural society, had a right to defend under the title of that society, and could not be ousted from the property unless it appeared that the agricultural society had lost its rights therein.

Exposition Co. v. Kerr, 8 C. C. n. s. 369; 18 C. D. 547 (1906).

A cross petition, filed in such case by the agricultural society, seeking possession of the grounds because of failure to comply with the terms of its license, was held properly dismissed, in so far as it was a cross petition or counter claim, for the reason that one action in ejectment

can not be engrafted upon another action; but that in so far as the cross petition was available for the purpose of combatting the claim of the commissioners, it should have been allowed to stand.

Exposition Co. v. Kerr, 8 C. C. n. s. 369; 18 C. D. 547 (1906).

Section 9899. (Insurance on buildings.) The county commissioners of a county shall insure the buildings on the grounds of the county agricultural society for the benefit of such society. (108 (Pt. 1) v. 385; R. S. Sec. 3705a; April 10, 1902, 95 v. 123; March 10, 1898, 93 v. 40.)

Section 9900. (May sell lease or purchase sites.) When a county society desires to sell its site in order to purchase another, or if for any reason such site is unfit or insufficient for the purposes for which it is used, and at a regular meeting, by a vote of at least a majority of all the members of its board of directors, upon a call of the yeas and nays, it adopts a resolution for the purpose of securing the benefits hereof and declaring a desire to sell such site in order to buy another, or that the site has become unfit or insufficient, and that it is for the best interests of the society and county, that such site be sold or leased, and a new one bought or leased, the society may sell or lease such old site and buy or lease a new one for holding county fairs as hereinafter provided. But in cases where the county paid all or any portion of the purchase money for the site to be sold or leased, the written consent of the county commissioners shall first be given to such sale or lease. Within thirty days after its passage, such board of directors shall give notice in writing to the commissioners of such county of the adoption of such resolution declaring the necessity of selling or leasing such site and of buying or leasing a new site, which notice shall contain or have annexed thereto a certified copy of the resolution, signed by the president and secretary of the board of directors. (R. S. Sec. 3706; April 23, 1904, 97 v. 297; May 10, 1902, 95 v. 503; March 28, 1859, 56 v. 76, § 1; S. & C. 69.)

Section 9900-1. (Authority to sell or exchange site.) When the premises in the possession or under the control of an agricultural society and used by it as a site on which to hold annual exhibitions, is greater in size than is necessary for the purposes and uses to which it is devoted, or is not suitable in its formation or character, such society, or if the title thereof is in the county, the county commissioners, may sell any part thereof, or exchange any part thereof for other lands, so as to reduce the size of such premises or site, or change the formation or character thereof. (107 v. 449.)

Section 9901. (When commissioners shall carry out contracts.) When such society has given notice to the commissioners as above provided, and has selected or secured options for the purchase or lease of a new site for holding county fairs in such county, its board of directors shall immediately give notice of all of such facts to the commissioners, which notice, if such old site is sold or leased before the purchase or lease of the new one, shall state the amount for which it was sold or leased, also the amount of money necessary to acquire such new site, and the terms and conditions of the purchase or lease thereof, together with a full description of the tracts or parcels of land and improvements thereon, included therein. After the filing of such notices, the commissioners may complete and carry into effect any contract or contracts which such society made for the purchase or lease of the new site. (R. S. Sec. 3706a; April 23, 1904, 97 v. 297; May 10, 1902, 95 v. 504.)

Section 9902. (Payment for purchase or lease of land.) Payment for the purchase or lease of the land included in such site, and the improvements thereon, may be made by the county commissioners from any unappropriated funds in the county treasury at the time it is to be made. If no such funds are then in the treasury, the commissioners may issue the bonds of the county for such amounts as are necessary for the purchase or lease of the land and the improvements thereon. But if such old site is sold or leased before the new site is purchased or leased, in making the payment such society first shall apply the moneys realized from the sale or lease to the purchase or lease of the new site. If the old site is sold or leased after the purchase or lease of the new site, the amounts realized from such sale or lease shall be placed to the credit of the sinking fund for the redemption of bonds issued as hereinafter provided. Such bonds shall bear not more than five per cent interest per annum, payable semi-annually, not be sold at less than their par value, and shall be payable at such place, times, and in such denominations as the commissioners determine. (R. S. Sec. 3706b; April 23, 1904, 97 v. 298; May 10, 1902, 95 v. 504.)

Section 9903. (Levy for payment of bonds.) To provide for the payment of such bonds, and interest thereon, the county commissioners may levy such annual taxes on all the taxable property of the county, as are necessary to create and provide a sinking fund for the redemption of the bonds at maturity and the interest accruing thereon. Such levy shall be collected and accounted for to the county

treasurer in the manner provided for the collection of other taxes. (R. S. Sec. 3706b; April 23, 1904, 97 v. 298; May 10, 1902, 95 v. 504.)

Section 9904. (Submission of question of issuing bonds.)

Before issuing such bonds, the commissioners by resolution shall submit to the qualified electors of the county at the next general election for county officers held not less than thirty days after receiving from such agricultural society the notice provided for in section ninety-nine hundred, the question of issuing and selling such bonds, in amount and denomination as necessary for the purpose in view, and shall certify a copy of such resolution to the deputy state supervisors of elections of the county. (R. S. Sec. 3706b; April 23, 1904, 97 v. 298; May 10, 1902, 95 v. 504.)

A compliance by the society with § 9901 is a condition precedent to the submission of the bond issue under this section. Opins. Atty. Gen. 1916, p. 1611.

Section 9905. (The election.)

Such deputy state supervisors shall place the question of issuing and selling such bonds upon the ballot and make all other necessary arrangements for the submission of such question to the qualified electors of such county, at the time fixed by such resolution. The votes cast upon the question must be counted, canvassed and certified in the same manner, except as otherwise provided by law, as votes cast for county officers. Fifteen days' notice of such submission shall be given by the deputy state supervisors, by publication once a week for two consecutive weeks in two or more newspapers published in the county, stating the amount of bonds to be issued, the purpose for which they are issued, and the time and places of holding the election. Such question must be stated on the ballot as follows: "For the issue of county fair bonds, yes;" "For the issue of county fair bonds, no." If the majority of the voters voting upon the question of issuing the bonds are in favor thereof, then, but not otherwise, they shall be issued, and the tax hereinbefore mentioned be levied. (R. S. Sec. 3706b; April 23, 1904, 97 v. 298; May 10, 1902, 95 v. 504.)

Section 9906. (Control of lands when title vested in commissioners.)

When the title to grounds and improvements occupied by agricultural societies is in the county commissioners, the control and management of such lands and improvements shall be vested in the board of directors of such society so long as they are occupied and used by it for holding agricultural fairs. Moneys realized by the so-

ciety in holding county fairs and derived from renting or leasing the grounds and buildings, or portions thereof, in the conduct of fairs or otherwise, over and above the necessary expenses thereof, shall be paid into the county treasury of the society, to be used as a fund for keeping such grounds and buildings in good order and repair, and in making other improvements from time to time deemed necessary by its directors. (R. S. Sec. 3706c; May 10, 1902, 95 v. 505.)

Where title to fair grounds is in the county, the county commissioners, although having the consent of the directors and of a majority of the members of the society, are not authorized to donate such grounds to the state for educational purposes.

Rep. Atty. Gen. 1910-1911, p. 1077.

Section 9907. (How conveyances executed.) Conveyances of grounds sold under section ninety-nine hundred, which are owned exclusively by any society, may be executed by the president as such. Grounds owned partly by the society and partly by the county may be conveyed by deed executed by the president of the society, as such, and by the county commissioners. (R. S. Sec. 3707; March 28, 1859, 56 v. 76, § 2; S. & C. 69.)

Section 9908. (When society may encumber grounds; limitation.) When the commissioners of a county have paid, or pay, money out of the county treasury for the purchase of real estate as a site for an agricultural society whereon to hold its fairs, the society shall not encumber such real estate with any debt, by mortgage or otherwise, without the consent of the commissioners duly entered upon their journal.

When such consent is obtained the society may encumber such real estate in order to pay the cost of necessary repairs and improvements to an amount not exceeding fifty per cent. of its value. In order to ascertain the value of such real estate the commissioners shall appoint three disinterested free-holder residents of the county to appraise such real estates. The appraisers so appointed shall, within ten days after their appointment, upon actual view of such premises, appraise such real estate and return such appraisal under oath to the board of county commissioners. And the appraisal so made shall be considered the value of such real estate for the purpose of mortgage or other encumbrance. (May 6, 1913, 103 v. 560; R. S. Sec. 3708; April 15, 1908, 99 v. 120; February 26, 1875, 72 v. 42, § 1.)

Money received from a tax levy can not be used in employing an attorney for services in incumbering real estate of the society. Legal

services must be paid for with money raised from other sources. Opins. Atty. Gen. 1915, p. 1459.

Section 9909. (Appropriation of land for fair purposes.)

When deemed necessary by the board of directors of a county agricultural society to enlarge the fair grounds under its control, and the owner or owners of the proposed addition to the grounds and the board are unable to agree upon the sale and purchase thereof, the board shall make an accurate plat and description of the land which it desires for such purpose and file them with the probate judge of the proper county. Thereupon the same proceedings of appropriation shall be had which are provided for the appropriation of private property by municipal corporations, such board to act for the society therein as the council would for the municipality. (R. S. Sec. 3713-10; March 2, 1892, 89 v. 52, § 1; April 8, 1880, 77 v. 128.)

Section 9910. (Directors to prosecute proceedings.) If the law makes it the duty of the county commissioners to purchase such additional grounds for the use of such society, its board of directors shall prosecute the proceedings for appropriation to their final conclusion, except as to payment of purchase money, before the commissioners can be called upon to act in the matter. Such commissioners shall make such payment or deposit, not above fifteen thousand dollars in amount, when required so to do by such board of directors or by the court, and delay on their part shall not prevent such purchase or appropriation. (R. S. Sec. 3713-11; April 8, 1880, 77 v. 128, § 2.)

TOWNSHIP SOCIETIES.

Section 9911. Repealed. (108 (Pt. 1) v. 385.)

Section 9912. (Justice of the peace may appoint special constables.) On the application of a state, county, township or independent agricultural society, or industrial association, or other association or meeting of citizens for the purpose of promoting social or literary intercourse, a justice of the peace may appoint a suitable number of special constables to assist in keeping the peace during the time when such society or assembly is holding its annual fair or meeting. He shall make an entry in his docket of the number and names of all such persons so appointed. (R. S. Sec. 3710;

April 9, 1908, 99 v. 86; April 11, 1856, 53 v. 141, § 1; S. & C. 67.)

Section 9913. (Powers of such constables.) Constables so appointed shall have all the power of constables to suppress riots, disturbances, and breaches of the peace. Upon view they may arrest any person guilty of a violation of any law of the state, and pursue and arrest any person fleeing from justice in any part of the state. They also may apprehend any person in the act of committing an offense, and, on reasonable information, supported by affidavit, procure process for the arrest of any person charged with a breach of the peace, forthwith bring him before a competent authority and enforce all the laws for the preservation of good order. (R. S. Sec. 3711; April 11, 1856, 53 v. 141, § 2; S. & C. 68.)

Section 9914. Repealed. (108 (Pt. 1) v. 385.)

See G. C. §§ 13206 and 13207.

Theis v. State, 54 O. S. 245 (1896).

State v. Long, 48 O. S. 509 (1891).

Heck v. State, 44 O. S. 536 (1886).

Section 9915. Repealed. (108 (Pt. 1) v. 385.)

FARMERS' INSTITUTES.

Section 9916. (Organization of farmers' institute societies.) When twenty or more persons, residents of a county, organize themselves into a farmers' institute society, for the purpose of teaching better methods of farming, stock raising, fruit culture, and business connected with agriculture, and adopt a constitution and by-laws conforming to rules and regulations furnished by the trustees of the Ohio state university, and when such society has elected proper officers and performed such other acts as are required by the rules of the trustees of the Ohio state university, it shall be a body corporate. (106 v. 356; 103 v. 338; R. S. Sec. 3713-1; April 27, 1896, 92 v. 330.)

Section 9917. (Number of annual meetings in each county.) Not to exceed five farmers' institute societies so organized shall hold annual meetings under the auspices of the trustees of the Ohio state university in any one county. The trustees of the Ohio state university may determine the number, and name the times and places for holding such institute

meetings. (106 v. 356; 103 v. 339; R. S. Sec. 3713-2; April 27, 1896, 92 v. 330, § 2.)

Section 9918. (Certificates for county payments.) When a society so organized has held annual farmers' institute meetings in accordance with the rules of the trustees of the Ohio state university, the dean of the college of agriculture shall issue certificates, one to the president of the farmers' institute society and one to the county auditor, setting forth such facts. On the presentation of such certificates to the county auditor, he, each year, shall draw orders on the treasurer of the county as follows: One in favor of the dean of the college of agriculture of Ohio state university for one hundred and seventy-five dollars and one in favor of the president of each farmers' institute society in the county holding meetings under the auspices and by the direction of the trustees of the Ohio state university for the amount of the actual expenses and not to exceed twenty-five dollars to pay necessary local expenses, and when such expenses have been itemized and certified to by the president of an institute and submitted to the dean of the college of agriculture of the Ohio state university, he shall authorize the auditor to issue a warrant, and the treasurer of the county shall pay them from the county fund. But in no county shall the total annual sum exceed three hundred dollars, nor shall the payment to the farmers' institute society exceed the expenses, as per detailed statement provided in the following section. (106 v. 356; 103 v. 339; June 6, 1911, 102 v. 292; R. S. Sec. 3713-3; April 2, 1906, 98 v. 307, § 3; April 27, 1896, 92 v. 330.)

Moneys received under this section are not to be paid into the state treasury, but should be retained as a trust fund for the purposes specified in § 9920. Opins. Atty. Gen. 1916, p. 568.

Section 9919. (Detailed statement of expenses filed with certificate.) With each certificate of the dean of the college of agriculture of the Ohio state university to the county auditor, which certificate shall show the number of societies organized in the county and holding meetings by direction of the trustees of the Ohio state university, and before he issues his order on the treasurer, there shall be filed with the auditor a detailed statement of the expenses of the institute for the current year, no part of which shall be for salaries of officers of the institute society. This provision does not apply to the order in favor of the dean of the college of agriculture of the Ohio state university. (106 v.

357; 103 v. 339; R. S. Sec. 3713-4; April 27, 1896, 92 v. 331, § 4.)

Section 9920. (Lecturers shall be furnished by the state.)

At the annual farmers' institute meetings held as herein provided, and under the auspices of the trustees of the Ohio state university, the department shall furnish lecturers or speakers whose compensation and expenses it shall pay. A majority of these lecturers and speakers shall be practical farmers. (106 v. 357; 103 v. 339; R. S. Sec. 3713-5; April 27, 1896, 92 v. 331, § 5.)

Section 9921. (Publication and distribution of lectures and papers.)

At the close of each season's institute work the trustees of the Ohio state university, in pamphlet or book form, may publish such lectures and papers delivered at the several institute meetings as may seem of general interest and importance to the farmers, stock breeders and horticulturists of the state, copies of which shall be furnished the secretary of each institute society, and the remainder for general distribution. The cost of preparing and distributing the pamphlet or book shall be paid from appropriations made for this purpose from the general revenue fund of the state upon the warrant of the auditor of state upon vouchers approved by the dean of the college of agriculture of the Ohio state university. (106 v. 357; 103 v. 339; R. S. Sec. 3713-6; April 27, 1896, 92 v. 331, § 6.)

Sections 9921-1 to 9921-5, inclusive (106 v. 356), and 9921-6 (108 (Pt. 1) v. 364) relating to the employment of county agricultural agents omitted.

CHAPTER 3.

EDUCATIONAL.

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| § 9922. When officers may be appointed and degrees conferred. | § 9931. May increase property. |
| § 9923. Certificate to be filed with secretary of state. | § 9932. Temporary loans secured by mortgage authorized. |
| § 9924. May hold donated property in trust. | § 9933. Statement to be filed. |
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Section 9922. (When officers may be appointed and degrees conferred.) When a college, university, or other institution of learning incorporated for the purpose of promoting education, religion, morality, or the fine arts, has acquired real or personal property, of twenty-five thousand dollars in value, has filed in the office of the secretary of state a schedule of the kind and value of such property, verified by the oaths of its trustees, such trustees may appoint a president, professors, tutors, and any other necessary agents and officers, fix the compensation of each, and enact such by-laws consistent with the laws of this state and the United States, for the government of the institution, and for conducting the affairs of the corporation, as they deem necessary. On the recommendation of the faculty, the

trustees also may confer all the degrees and honors conferred by colleges and universities of the United States, and such others having reference to the course of study, and the accomplishments of the student, as they deem proper. (R. S. Sec. 3726; May 1, 1908, 99 v. 262; April 9, 1852, 50 v. 128, § 1; March 11, 1853, 51 v. 403, §§ 2, 3; S. & C. 266; S. & C. 270.)

Degrees.

See also *Medical colleges* below.

A schedule of property must be filed, as required by this section, before an institution is authorized to confer degrees. Opins. Atty. Gen. 1915, p. 1614.

The essential characteristic of a college in the original sense of the word, and one recognized by this section, is the power to confer degrees.

Rep. Atty. Gen. 1910-1911, p. 1074.

Where the trustees of a college, incorporated under the laws of Ohio, sign diplomas in blank and leave them within the control of one of its officers who sells them, and thus confers degrees without merit, there is such a misuse of the power conferred as requires the dissolution of the corporation.

State v. College Co., 63 O. S. 341 (1900).

A student who has failed in examinations can not maintain an action against the corporation for breach of contract in refusing to confer a degree. Under § 9922 a degree can only be conferred "on recommendation of the faculty". Sutton v. University, 12 O. L. R. 535; 60 Bull. 33 (Municipal Court).

A corporation organized to conduct a training school for nurses, and to grant graduates certificates as trained nurses, is not an institution of learning as defined under this section.

Rep. Atty. Gen. 1908-1909, p. 64.

A young men's christian association, incorporated for the "spiritual, mental, moral, social and physical" improvement of young men, may prescribe courses of study and confer degrees.

5 Opins. Attys. Gen. 61 (1900).

Public or private corporation. An incorporated university, exempted by the legislature from taxation, but receiving no other benefit from the state, having an endowment fund contributed by private donors, and charging tuition fees to students, is a private and not a public corporation. The charity administered may be public, but the corporation is private.

Koblitz v. University, 21 C. C. 144; 11 C. D. 515 (1901).

Courts will not interfere with the government of a private university, which is not administering public funds, unless there has been unjust, unfair and oppressive treatment of its students, nor will the management of its affairs be interfered with except in case of breach of trust on the part of its officers.

Koblitz v. University, 21 C. C. 144; 11 C. D. 515 (1901).

The expulsion of a student by a private university will not be reviewed by the courts although he has paid tuition.

Koblitz v. University, 21 C. C. 144; 11 C. D. 515 (1901).

The fact that an institution of learning, founded by private donations, receives money derived from a tax levy made by the board of education of the municipality, in which it is located, does not take the institution out of the class known as private schools, nor is the levy of taxes in the support of such a school unconstitutional.

State v. Toledo, 3 C. C. n. s. 468; 13 C. D. 327 (1902); s. c., 5 C. C. n. s. 277; 16 C. D. 628 (1904).

University. An institution founded for the purpose of promoting a knowledge of the arts and trades is within the line of that purpose when its curriculum qualifies students desiring to become artisans or artificers for their intended work, and if this purpose is being accomplished, it is immaterial whether the institution be called a university or a polytechnic school.

State v. Toledo, 3 C. C. n. s. 468; 13 C. D. 327 (1902); s. c., 5 C. C. n. s. 277; 16 C. D. 628 (1904).

Medical colleges. An institution incorporated for the purpose of "the education of suitable persons in the art and science of curing diseases by the use of air, baths, electricity, heat, magnetism, massage and all other resources of nature" does not offend against the law of its creation by imparting instruction concerning the administering of drugs.

State v. Medical College, 60 O. S. 122 (1899).

Whether a diploma presented by one who desires a certificate authorizing him to practice medicine is from "a legally chartered medical institution . . . in good standing" (G. C. § 1270) is to be determined in the first instance, not by the court, but by the state medical board.

State v. Medical College, 60 O. S. 122 (1899).

A writ of mandamus will not lie, on the relation of a medical college, to compel the state medical board to recognize the college as an institution in good standing.

State v. Coleman, 64 O. S. 377 (1901).

Section 9923. (Certificate to be filed with secretary of state.) But no college or university shall confer any degree until the president or board of trustees thereof has filed with the secretary of state a certificate issued by the superintendent of public instruction that the course of study in such institution has been filed in his office, and that the equipment as to faculty and other facilities for carrying out such course are proportioned to its property and the number of students in actual attendance so as to warrant the issuing of degrees by the trustees thereof. (104 v. 236; R. S. Sec. 3726; May 1, 1908, 99 v. 262; April 9, 1852, 50 v. 128, § 1; March 11, 1853, 51 v. 403, §§ 2, 3; S. & C. 266; S. & C. 270.)

Section 9924. (May hold donated property in trust.) A university, college, or academy of the trustees thereof, may hold in trust any property devised, bequeathed or donated to such institution, upon any specific trust consistent with the objects of the corporation. (R. S. Sec. 3727; April 9, 1852, 50 v. 128, § 5; S. & C. 267.)

A municipality has authority to receive property in trust for institutions of learning, located therein, beneficial to its inhabitants.

State v. Toledo, 3 C. C. n. s. 468; 13 C. D. 327 (1902); s. c., 5 C. C. n. s. 277; 16 C. D. 628 (1904).

Perin v. Carey, 65 U. S. (24 How.) 465; 3 O. F. D. 634.

A corporation formed for the purpose of carrying out a trust, such

as the establishment of an institution of learning, is subordinate and subsidiary to the trust.

State v. Toledo, 3 C. C. n. s. 468; 13 C. D. 327 (1902).

Subscriptions. Subscriptions to an incorporated educational institution, for the accomplishment of its purposes, are valid and enforceable where expenditures are made or obligations are incurred in reliance thereon.

Irwin v. Lombard University, 56 O. S. 9 (1897); affirming, 7 C. C. 269; 4 C. D. 590.

Ohio Wesleyan College v. Higgins, 16 O. S. 20 (1865).

Sturges v. Colby, 3 W. L. B. 643 (1878).

Durrel v. Belding, 9 C. C. 74; 4 C. D. 263 (1894).

But where no obligation is incurred, or expenditures made, on the faith of a gratuitous subscription it can not be enforced.

Sutton v. Trustees, 7 C. C. 343; 4 C. D. 627 (1893); aff'd, no rep., 54 O. S. 665.

Subscriptions to a fund for the payment of an existing indebtedness are without consideration and unenforceable.

Johnson v. University, 41 O. S. 527 (1885).

Devise.

A testator having devised property to an educational institution, and in case the devise should fail for any cause, then to the children of his two brothers, and having in a codicil authorized and requested his daughter, his only lineal descendent, to ratify and confirm the devise to the institution, declaring that "in case she complies" with this request the devises and requests over to the children of the testator's brothers "are revoked," and the testator having died within a year from the making of the will, so that the devise to the institution become invalid under G. C. § 10504 and the daughter having executed the power by a deed to the institution the nephews of the testator take nothing by the will.

Thomas v. Trustees, 70 O. S. 92 (1904).

Trustees v. Folsom, 56 O. S. 701 (1897).

in such power conferred on the daughter and heir at law of the testator, a devise ^{see}, is a naked power to appoint to a designated object, and not § 10504. trust to or for the university, and is not invalid under G. C.

Thomas v. Trustees, 70 O. S. 92 (1904).

A deed of confirmation, expressly purporting to execute such power and conveying the devised property, is operative to invest the university with a full and perfect title.

Thomas v. Trustees, 70 O. S. 92 (1904).

Section 9925. (How to constitute faculty; powers.) The president and professors shall constitute the faculty of any incorporated literary college or university, may enforce the rules and regulations enacted by its trustees for the government and discipline of the students, and suspend and expel offenders, as they deem necessary. (R. S. Sec. 3728; April 9, 1852, 50 v. 128, § 6; S. & C. 267.)

Where a student of a college, not administering public funds, is expelled for a violation of its rules, such expulsion will not be reviewed by the courts.

Koblitz v. University, 21 C. C. 144; 11 C. D. 515 (1901).

Section 9926. (May acquire machinery and land.) Any incorporated university, college, or academy may connect therewith, to be used as a part of its course of education, mechanical shops and machinery, or lands for agricultural purposes not exceeding three hundred acres, to which may be attached all necessary buildings for carrying on the mechanical or agricultural operations of such institution. (R. S. Sec. 3729; April 9, 1852, 50 v. 128, § 8; S. & C. 267.)

Section 9927. (May change stock into scholarships.) Any company formed in pursuance of this title or which exists by virtue of a special act of incorporation, the property of which is held as stock, and not derived by donation, gift, devise, or gratuitous subscription, may change its capital stock into scholarships when it becomes necessary for the purpose of carrying out the object for which it was formed, in the mode provided in this title for increasing the capital stock of corporations. (R. S. Sec. 3730; April 9, 1852, 50 v. 128, §§ 9, 10; S. & C. 268.)

A college, organized as a private corporation, has power to receive a subscription to its endowment fund, for which the donor receives a scholarship entitling him to instruction for one pupil, perpetually, free of charge.

Farmers College v. Cary, 35 O. S. 648 (1880).

Endowment stock. A dental college organized under a special charter, not for profit and which had made no profits, had as capital certain real estate derived from the proceeds of certificates of stock, which certified that each holder was "entitled to one share of the real estate property of the college, drawing an interest of six percent." On the margin of the certificate was printed "shares \$100 each," at which sum each certificate was valued and sold. All shareholders were dentists and members of the corporation. The real estate had always constituted its entire property. During its existence of about forty years no interest had been paid on any share. At a time when it was a going concern, and the real estate was indispensable to its existence, and a stockholder brought an action to recover a money judgment on his share, it was held that the action was not maintainable.

Ohio College, etc., v. Rosenthal, 45 O. S. 183 (1887).

See Bryant v. Ohio College, etc., 1 C. S. C. R. 307 (1871).

Section 9928. (Location may be changed.) A college, university or other institution of learning, existing by virtue of an act of incorporation, or that hereafter becomes incorporated for any of the purposes specified in this chapter, if three-fourths of the trustees or directors thereof deem it proper, or if the institution is owned in shares, or by stock subscribed or taken, by a vote of the holders of three-fourths of the stock or shares, may change the location of such institution, convey its real estate, and transfer the

effects thereof, and invest them at the place to which such institution is removed. No such removal shall be ordered, and no vote taken thereon, until after publication in the manner provided by law in case of a sale and distribution of the property of such an institution, in which notice shall be fully set forth the place to which it is proposed to remove the institution. In case of removal, a copy of the proceedings of such meeting shall be filed with the secretary of state. (R. S. Sec. 3731; April 29, 1854, 52 v. 77, § 12; S. & C. 268.)

Section 9929. (How endowment fund diverted.) The trustees of a corporation incorporated to create, hold and manage a college endowment fund, the articles of incorporation of which provide that the fund may be applied to any object not inconsistent with the purposes of education different from that particularly specified therein, may apply to the common pleas court in the county where the corporation is located for permission to make such change, designating particularly the purposes to which it is proposed to apply the fund. On being satisfied that such change is not inconsistent with the object of the original creation and institution of the fund, the court shall authorize and sanction it. (R. S. Sec. 3732; March 12, 1853, 51 v. 393, § 2; S. & C. 269.)

Endowment fund corporations, see § 9948.

Under G. C. § 5353, an endowment fund of a college, which belongs exclusively to it, and which is devoted solely to deriving an income for its support, is exempt from taxation.

Little v. Seminary, 72 O. S. 417 (1905); affirming, 2 C. C. n. s. 540; 15 C. D. 609.

The property of a private eleemosynary corporation, although charged with the maintenance of a college or other "public charity" is private property, within the meaning and protection of section 19, article 1 of the constitution.

State v. Neff, 52 O. S. 375 (1895).

Section 9930. (Vacancies caused by amendment of charter.) When a vacancy occurs in whole or part, in the board of trustees of an incorporated college, seminary, or academy, by reason of an amendment of the charter thereof, or from other cause, and there is no provision of law for filling it, within three months after receiving information thereof, the governor shall appoint the required number of trustees, one-third thereof to serve for one year, one-third for two years, and one-third for three years. (R. S. Sec. 3733; March 1, 1878, 75 v. 25, § 2.)

Section 9931. (May increase property.) A college, university, academy, seminary, or other institution devoted to the promotion of education, existing by virtue of a special act of incorporation, or organized under the provisions of any law, whose property came and is held by donation, gift, purchase, devise, or gratuitous subscription, and the amount of which, or the income arising therefrom is limited by such special act, or the articles of association adopted by such institution, may receive, acquire, possess and hold any amount of property, real, personal or mixed, which its board of directors or trustees, for the institution accepts, and by its trustees, sell, dispose of and convey it. But such property shall not be diverted from the express will of the donor, deviser or subscriber. (R. S. Sec. 3734; March 8, 1893, 90 v. 71; April 9, 1856, 53 v. 170, § 1; S. & C. 368.)

See note to § 9924.

Section 9932. (Temporary loans secured by mortgage, authorized.) The board of trustees of such a college, university, academy, seminary, or other institution devoted to the promotion of education, in anticipation of donations to be received and collections to be made, for the purpose of constructing, enlarging or adding to college buildings or improvements, may borrow such sum of money, upon such terms and with such conditions and provisions as they determine to be necessary therefor, by temporary loans without mortgage or by the issue of bonds or notes and secure them by a mortgage upon the property on which such improvement is to be made, if the property is not held by them under some specific trust. (109 v. 21; R. S. Sec. 3734; March 8, 1893, 90 v. 71; April 9, 1856, 53 v. 170, § 1; S. & C. 368.)

Section 9933. (Statement to be filed.) Before such an institution shall be authorized to acquire and hold additional property, the trustees thereof, at a regular meeting of their board, or at a special meeting called for that purpose, from time to time shall make and sign a statement specifying the amount of additional property which they seek to acquire and hold, and set forth therein the purposes to which it is to be devoted, which statements shall be entered at large upon the record book of the trustees and be filed in the office of the secretary of state. (R. S. Sec. 3735; March 8, 1893, 90 v. 72; April 9, 1856, 53 v. 170, § 2; S. & C. 368.)

Section 9934. (How certain boards may be constituted and governed.) The board of trustees of any university or

college heretofore incorporated, or which may hereafter be incorporated, and operating under the patronage of one or more conferences or other religious bodies of any religious denomination, may accept the provisions of this and succeeding sections 9935, 9936, 9937, 9937-a, 9939, 9941, 9942 and 9943 by resolution adopted at any regular meeting of the board, and entered upon the record of its proceedings. After such acceptance the board in all respects shall be organized, constituted, regulated and perpetuated, pursuant to and under said provisions. No right acquired by any such board, university or college; under its charter or any law of this state, shall in any way be affected thereby. (104 v. 171; R. S. Sec. 3736; May 13, 1868, 65 v. 188, § 1; S. & C. 106.)

Section 9935. (Trustees to be divided into classes; president ex-officio member; limitations and designations.) The president of such university or college shall, ex-officio, be a trustee after the acceptance of the provision of this act by any such university or college. At any meeting of such board after the passage of this act, such board shall divide its number, not including such president, into classes, making one class for each conference or religious body at the time patronizing such university or college, and one class for the alumni of such university or college and one class of trustees at large. No class shall have more than ten members. Each conference or other religious body patronizing such university shall have the same number of trustees. The board of trustees of such university or college may designate the number of trustees to be assigned to the alumni association and to the class of trustees at large, but the combined number of trustees apportioned to said patronizing conferences of other religious bodies shall constitute majority of the entire board, not including the president. (107 v. 636; 104 v. 171; R. S. Sec. 3737; May 13, 1868, 65 v. 188, § 2; S. & C. 106.)

Section 9936. (Term of office of trustees; vacancies.) The regular term of office of such trustees shall be five years, but upon the original formation of classes of trustees one or more trustees may be elected for one, two, three and four-year terms until the regular order can be established. The term of office of an equal number of trustees in each class, as near as may be, shall expire each year. Vacancies which occur in any class of trustees in any manner whatsoever except by expiration of time shall be filled only for the remainder of the term, but the term of office of a trustee shall not

expire during any meeting of the board which does not continue for more than two weeks. (104 v. 171; R. S. Sec. 3738; May 13, 1868, 65 v. 188, § 3; April 24, 1873, 70 v. 157, § 1; S. & C. 107.)

See § 8656.

Section 9937. (Re-classification and re-apportionment of trustees.) If the number of conferences or other religious bodies patronizing such university or college shall at any time be increased or decreased, the board of trustees of such university or college may re-classify said trustees of said bodies by an equal reduction of the number in each such class when a new conference or other religious body becomes a patronizing body and by an equal increase of the number in each such class when a conference or other religious body ceases to be a patronizing body. Whenever, by reason of a change in the number of patronizing conferences or religious bodies, it becomes necessary to re-classify the trustees in said board, and whenever said board deems it proper, for any other reason, to increase or decrease its total membership, within the limits established by section 9935 the board (a lawful quorum being present) shall by appropriate resolution designate the number of trustees apportioned to each class and certify such apportionment to each patronizing conference or other religious body and to such alumni association, and all vacancies in such class thereafter shall be filled in accordance with such apportionment. (107 v. 636; 104 v. 171; R. S. Sec. 3739; March 17, 1892, 89 v. 119; May 13, 1868, 65 v. 188, § 4; S. & S. 107.)

Section 9937-a. (The alumni association may elect one-fifth of board,) The alumni composing the alumni association of such university or college may elect as members of the board of trustees of such university or college, as many members of such alumni association as there are members of the class of alumni trustees assigned or apportioned to said alumni association by the board of trustees of such university or college, this class to constitute not less than one-fifth of the entire board, not including the president. This election shall be held under such regulations as the alumni association may prescribe and the result shall be certified by the proper officials of the alumni association to the board of trustees, which result shall be entered upon the records of said board. Such board of trustees composed of alumni trustees and trustees elected by patronizing conferences or

other religious bodies, as provided in section 9935 to section 9937-a inclusive, may increase its own numbers by the election of a class of trustees at large, the number of which class shall be fixed by said board of trustees, under the limitations fixed by sections 9935 and 9937-a. (104 v. 171.)

Section 9938. Repealed. (104 v. 171; R. S. Sec. 3740; May 13, 1868, 65 v. 188, § 5; S. & S. 107.)

Section 9939. (How a conference may become a patron.) Any conference or other religious body not patronizing any particular university or college may become a patronizing body upon invitation of the board of trustees of such university or college by a majority vote of the whole board. The intention to become such patronizing body shall be evidenced by the adoption of an appropriate resolution and certification of the same to the board of trustees of such university or college, and such certified resolution shall be entered upon the minutes of the board of trustees of such university or college thereby completing the right of such conference or religious body to act as a patronizing body. (104 v. 171; R. S. Sec. 3741; 65 v. 188, § 6; S. & S. 107.)

Section 9940. Repealed. (104 v. 171; R. S. Sec. 3742; April 8, 1876, 73 v. 163, § 7; S. & S. 107.)

Section 9941. (When right of representation ceases.) If a conference or other religious body patronizing a university or college and having a representation in its board of trustees, ceases to exist, or ceases to patronize such university or college, the right of such conference or other religious body to such representation shall cease, and the board of trustees of such university or college shall apportion or distribute the number of trustees in such class to the remaining patronizing conferences or other religious bodies in order to maintain, as nearly as may be, the established number of trustees and equality of representation from each patronizing body. (104 v. 171; R. S. Sec. 3743; May 13, 1868, 65 v. 188, § 8; April 8, 1876, 73 v. 163; S. & S. 107.)

Section 9942. (Action must be taken by board.) Before a conference or other religious body represented in the board of trustees of such university or college shall cease to be represented in said board, the board of trustees shall declare and enter into the record of its proceedings that the conditions and contingencies terminating such representation have

taken place. (104 v. 173; R. S. Sec. 3744; May 13, 1868, 65 v. 188, § 9; S. & S. 107.)

Section 9943. (Quorum; how constituted.) Eleven trustees shall constitute a quorum of the board of any such university or college, whatever the number of trustees if more than twenty is or may become; but when the number is twenty or less, a majority thereof shall constitute a quorum. (R. S. Sec. 3745; May 13, 1868, 65 v. 188, § 10; S. & S. 108.)

Section 9944. Repealed. (104 v. 171; R. S. Sec. 3746; April 12, 1872, 69 v. 71, § 1.)

Section 9945. Repealed. (104 v. 171; R. S. Sec. 3747; March 17, 1892, 89 v. 120; 81 v. 174; R. S. 1880; April 12, 1872, 69 v. 71, § 2; May 13, 1879, 76 v. 87, § 1.)

Section 9946. Repealed. (104 v. 171; R. S. Sec. 3748; March 17, 1892, 89 v. 120; April 12, 1872, 69 v. 71, § 3.)

Section 9947. Repealed. (104 v. 171; R. S. Sec. 3749; April 12, 1872, 69 v. 71, § 3.)

Section 9948. (Endowment fund corporations.) The trustees of a corporation incorporated for the purpose of creating a fund, the income of which is to be applied to the promotion of education, may receive subscriptions for membership in the corporation, and they, or a majority of them, by giving ten days' notice, by publication in the county where the corporation is located, may call a meeting of members to adopt by-laws, and elect not more than nine directors. Each member shall have a vote for every amount by him subscribed equal to that in the articles of incorporation specified as necessary for membership, which may be cast in person or by proxy, but at no subsequent meeting can a member vote for or be eligible as a director who is in arrears to the corporation. The trustees shall control the funds and disburse the income of the corporation as provided by its by-laws. (R. S. Sec. 3750; April 27, 1872, 69 v. 173, §§ 1, 2, 3, 4, 5.)

Diversion of fund, see § 9929.

Section 9949. (How certain boards constituted and governed.) The board of trustees of a university, college or other institution of learning, incorporated, and acting under the patronage of one annual conference or other religious

body of a religious denomination, may accept the provisions of this and the succeeding section, by resolution adopted at a meeting of the board, and entered upon the record or journal of its proceedings. After such acceptance the board shall be organized, constituted, regulated, and perpetuated as therein provided. No right acquired by such board, university, or other institution of learning, under its charter, or any law of this state, shall be impaired or affected thereby. (R. S. Sec. 3751; April 27, 1872, 69 v. 180, § 1.)

Section 9950. (Increase in number of trustees in certain corporations.) The board of trustees of a university or college heretofore incorporated, and now under the patronage of one annual conference, synod or other religious body of a religious denomination, may increase the number of its trustees, not exceeding six. Such additional trustees shall be nominated by the collegiate alumni of the university or college from the collegiate alumni of three years' standing, for appointment or election by such patronizing conference or synod, under such regulations as are prescribed by such board, if it determines to increase the number of its trustees and makes such regulations for their nomination, by resolution adopted at a regular meeting of the board and duly entered on the record of its proceedings, and, such patronizing or governing conference or synod consents to the increase and the rules and regulations for their nomination. And after such board is so increased by not exceeding six additional trustees, in all respects it shall be organized, constituted, regulated and perpetuated pursuant to and under its charter, and such provisions. No rights acquired by such a board, university or college, under its charter or any law of this state, shall be affected or impaired thereby. (R. S. Sec. 3751a; April 19, 1894, 91 v. 155.)

Section 9951. (Colleges under ecclesiastical patronage.) A corporation may be formed for the promotion of academic, collegiate or university education, under religious influences, may set forth in its articles or certificate of incorporation, as a part thereof, the name of the religious sect, association or denomination with which it is to be connected, and grant any ecclesiastical body of such religious sect, association or denomination, whether it be a conference, association, presbytery, synod, general assembly, convocation or otherwise, the right to appoint its trustees or directors, or any number thereof. It also may set forth in its articles or certificate such other rights as to the administration of the purpose for which it is organized, consistent with the laws of this

state and of the United States, as the incorporation desires to confer upon the ecclesiastical body of such sect, association or denomination, and that body may exercise all rights and powers set forth therein. (R. S. Sec. 3751b; April 16, 1900, 94 v. 331.)

Section 9952. (How existing corporations may avail themselves of the provisions.) A corporation formed for the promotion of academic, collegiate or university education, under religious influences, incorporated under the laws of this state, by special act or otherwise, may avail itself of the provisions of the preceding section, as a part of its articles or certificate of incorporation, and may confer on an ecclesiastical body of such religious sect, association or denomination, it is or proposes to be connected with, whether it be a conference, association, presbytery, synod, general assembly, convocation or otherwise, any or all of the rights, powers or privileges by such section allowed to be conferred on corporations hereafter organized, and may accept the provisions by a vote of the majority of its trustees at any regular meeting. (R. S. Sec. 3751c; April 16, 1900, 94 v. 331.)

Section 9953. (Copy of acceptance to be filed with secretary of state.) When so accepted, a copy of the acceptance, certified by the secretary or clerk of its board of trustees or directors, shall be sent to the ecclesiastical body with which it is or proposes to be connected. If such body agrees to accept the powers proposed to be conferred upon it, it shall certify its approval upon the certified copy so sent, and it thereupon shall be filed in the office of the secretary of state. When thus filed it will be a part of the charter of such corporation, and such ecclesiastical body shall exercise all the rights and powers so set forth in the articles or certificate of corporation. (R. S. Sec. 3751c; April 16, 1900, 94 v. 331.)

Section 9954. (Number of trustees and classes.) After such acceptance the board shall certify it to the patronizing conference or other religious body having the right to elect or appoint trustees of such university or other institution of learning, at the next meeting of such conference or other religious body; and thereafter the board shall consist of twenty-one trustees elected or appointed, and the president of such university or other institution of learning, who shall be ex-officio a member thereof. Such elected or appointed trustees shall be divided into three classes of seven members

each. (R. S. Sec. 3752; March 30, 1888, 85 v. 140, 141; R. S. 1880; April 27, 1872, 69 v. 180, §§ 2, 3; 70 v. 157, § 1.)

Section 9955. (Election; term; vacancies; increase of board.) At the first election or appointment after such acceptance, one of such classes shall be elected or appointed for one year, one for two years and one for three years. In subsequent elections or appointments each of the classes of trustees shall be elected or appointed for three years. No term of office of such a trustee shall expire during a meeting of the board which does not continue more than two weeks. Ten members of the board shall constitute a quorum. Vacancies which occur in any class of trustees otherwise than by expiration of the term of office shall be filled only for the remainder of the term. Such a university or other institution of learning which heretofore accepted the provisions of sections ninety-nine hundred and forty-nine, ninety-nine hundred and fifty-four, and ninety-nine hundred and fifty-five, may increase its board of trustees by electing or appointing two additional members in each of the classes of trustees herein provided for. (R. S. Sec. 3752; March 30, 1888, 85 v. 140, 141; R. S. 1880; April 27, 1872, 69 v. 180, §§ 2, 3; 70 v. 157, § 1.)

Section 9955-1. (Interchangeable use of the words "academy," "college" and "university.") A corporation formed for the promotion of academic, collegiate or university education under religious influences, and connected with any religious sect, association, or denomination, and to which, whether it be a conference, association, presbytery, synod, general assembly, convocation, or otherwise, it has granted the right to appoint its trustees or directors, or any number thereof, and which has incorporated into its charter or certificate of incorporation as a part of its corporate name either one or more of the words "academy," "college," or "university," may use one or more of said words not so incorporated therein interchangeably with said word or words which may have been incorporated therein to the same extent and as fully as the words or words so incorporated therein has or have been heretofore used in the name of such corporation, when authorized so to do by a resolution adopted by a majority vote of its trustees, or directors at any regular meeting, or special meeting called for that purpose. Provided that a copy of such resolution certified by the clerk or secretary of such trustees or directors, and accompanied by a resolution of consent passed by such one of such ecclesiastical bodies as aforesaid, with which

such corporation is connected, and certified by its clerk or secretary, shall first be filed in the office of the Secretary of State, and a certified copy thereof shall have been issued to and received by said clerk or secretary of such trustees or directors. (104 v. 3.)

Section 9955-2. (Use of interchangeable words does not affect the right or title to any gift, grant, devise or bequest.) Nothing herein contained, or the interchangeable use of said word or words, as herein provided and authorized, shall be held or construed as abolishing the use of the original corporate name of such corporation, or as affecting the title, right or possession of such corporation to, or of, any gift, grant, devise, or bequest heretofore, or hereafter made to it, whether the same shall have been made or shall be made in the original corporate name, or in one or more of said interchangeable names, or in all of such names: And the use of such original incorporate name, or one or more of such interchangeable names shall be held and construed as vesting in such corporation all gifts, grants, devises, and bequests as fully and to the same extent as if the same had been made in the name of the original incorporated name. (104 v. 3.)

Section 9956. (Assessments.) The proportion that each stockholder of a college, academy, university, seminary, or other institution for the promotion of education, shall be required to pay to meet the debts and liabilities of the corporation, may be determined and collected in the manner provided by the three succeeding sections. (R. S. Sec. 3753: February 20, 1861, 58 v. 20, § 1; S. & S. 108.)

Section 9957. (Meeting of stockholders; notice.) The trustees of such a corporation desiring to avail themselves of such provisions shall call a meeting of the stockholders for the purpose of determining what amount of its indebtedness shall be paid by each stockholder, and give thirty days' notice to the stockholders in writing or by publication in some newspaper of general circulation in the county where the corporation is located, of the time, place, and purpose of the meeting, at which also, the trustees shall submit a detailed statement showing the assets and indebtedness of the corporation. (R. S. Sec. 3754; February 20, 1861, 58 v. 20, §§ 2, 3; S. & S. 108.)

Section 9958. (How amount of assessment fixed.) A majority in interest of the stockholders present at such meeting may determine what amount of the indebtedness of the

corporation is to be paid by each stockholder, and fix the time and mode for the payment of the money assessed against each stockholder. But these provisions shall not interfere with or abridge the right of a creditor of the corporation to institute any proceedings authorized by law to enforce the liability of stockholders. (R. S. Sec. 3755; February 20, 1861, 58 v. 20, § 4; S. & S. 108.)

Section 9959. (Limit of assessment and collection.) The assessment shall be pro rata upon the stock subscribed or otherwise acquired by each stockholder, and in no case shall exceed the amount for which each stockholder is or may be liable by law. A stockholder who fails to pay the amount so assessed against him, shall be liable in a civil action to be brought in the name of the corporation, for the recovery thereof, as in other cases of indebtedness. (R. S. Sec. 3756; February 20, 1861, 58 v. 20, §§ 5, 6; S. & S. 108, 109.)

Section 9960. (Board of military academies.) The academic board of an institution incorporated for military and polytechnical education shall consist of the superintendent thereof, the commandant of cadets, and the professors. It may make and enforce rules and regulations for the government of cadets, but they first shall be submitted to and approved by the governor of the state. (R. S. Sec. 3757; April 16, 1867, 64 v. 239, §§ 1, 2; S. & S. 109.)

Section 9961. (Board of visitors.) The board of visitors of such an institution shall consist of the governor, who shall be ex-officio a member and the president of the board, of two other persons to be named by him, and such other persons as the superintendent of the institution appoints. (R. S. Sec. 3758; April 16, 1867, 64 v. 239, § 3; S. & S. 110.)

Section 9962. (Duties of board of visitors.) The board of visitors shall meet at the institution, on the first day of the annual commencement exercises, and examine into the condition of the classes, quarters, and commons, the discipline, drill, records of standing in study, and conduct of the cadets, and report thereon to the legislature at its next session. The board of visitors, or any member thereof, may visit and inspect the institution at any time. (R. S. Sec. 3759; April 16, 1867, 64 v. 239, § 4; S. & S. 110.)

Section 9963. (How term of trustees fixed.) At a regular meeting for the election of directors or trustees of a college or other institution of learning, the authorized voters

may determine by vote, whether the election of directors or trustees shall be held annually, if the term of their election is for a longer period than one year, and also what proportion of the entire board shall be so elected. At the first election hereunder the voters shall designate upon their ballots who shall serve for one year, who for two years, and who for three years. Vacancies caused by expiration of term of office shall be filled by election annually thereafter. (R. S. Sec. 3760; April 11, 1873, 70 v. 125, § 1.)

Section 9964. (Certain corporations may change location.) The trustees of colleges and other institutions of learning not endowed by voluntary contributions, established under special acts of incorporation, and which, by the provisions thereof are located at particular places, may change their location to such other places as they deem proper, and erect and maintain academies and other schools auxiliary thereto. (R. S. Sec. 3761; April 11, 1873, 70 v. 248, § 1.)

Section 9965. (Sale and distribution of property of certain corporations.) The trustees of a university, college, or other institution of learning, incorporated by authority of this state under special charter, owned in shares or stock subscribed or taken, may dispose of its property at public sale, on such terms as to payment as the stockholders by a vote of three-fourths of the shares or stock of the institution, direct, after giving public notice thereof, by publication, for six consecutive weeks in some newspaper published in the county where the institution is located. Such notice shall contain a full statement of the terms, time and place of sale, and such action of the trustees. The trustees may close up the corporate existence of such institution, and make an equitable division and distribution of the proceeds of the sale among all the holders of shares or stock, after the payment of its just debts. (R. S. Sec. 3762; March 22, 1870, 67 v. 24, § 1.)

Section 9966. (Certain colleges may file charter and amend.) The trustees of any university, college or institution of learning, incorporated under authority of this state, owned in shares of stock subscribed and paid up in full, by a majority of the owners of such stock, for the sole purpose of promoting education, religion and morality, or the fine arts, exclusively among males or females, on the written petition of the owners of a majority of such stock filed before its trustees or on the vote of the owners of the majority of such shares of paid up stock at any general meeting of

the stockholders called for such purpose, after thirty days' notice published in some newspaper published and of general circulation in the county, by them, may change the name and enlarge the purposes and objects of such university, college or institution, by amendments to its charter, approved by the owners of the majority of such stock, so that all the educational rights and privileges thereof may be bestowed in the co-equal and co-ordinate education of both sexes. (R. S. Sec. 3762a; April 14, 1888, 85 v. 270.)

Section 9967. (Copy of amendment to be filed with secretary of state.) When such amendment is adopted and the original articles of incorporation of such corporation have not been filed and recorded in the office of the secretary of state, a copy of the amendment and of the original articles, with a certificate to each of them thereto affixed, signed by the president and secretary of the corporation, and sealed with the corporate seal, if any there be, stating the fact and date of the adoption of such amendment, and that such copy thereof and of the original articles of incorporation are true copies of the originals shall be recorded in such office. When so recorded, such amendment shall be in law the sole articles of incorporation of the corporation. The property, real and personal, corporate franchises, and endowment funds, gifts, bequests, legacies, or mortgage securities, promissory notes, and rights of every kind belonging to, vested in, claimed, or possessed by the original corporation, by such amendment shall pass to, and be enjoyed and exercised by the corporation named, created and organized by such amendment for the promotion of all the objects and purposes of its creation and organization. (R. S. Sec. 3762a; April 14, 1888, 85 v. 270.)

Section 9968. (Fee of secretary of state.) For recording such amendments and copies of original articles of incorporation, and furnishing a certified copy or copies thereof, the secretary of state shall receive a fee of twenty cents per hundred words, to be in no case less than five dollars. (R. S. Sec. 3762a; April 14, 1888, 85 v. 270.)

Section 9969. (Colleges may change name or purpose.) The board of trustees of a university, college, or institution of learning, incorporated under authority of this state, for the sole purpose of promoting education, religion and morality, or the fine arts, at a regular or special meeting of such board of trustees, called for that purpose, after thirty days' actual notice to each and all such trustees, may change the

name and enlarge the purposes and objects of such university, college or institution of learning, by amendment to its charter, approved by a majority of the board at such regular or special meeting, so called and so notified, for such change of its name, and the enlargement of its purposes and objects. (R. S. Sec. 3762b; February 10, 1890, 87 v. 8.)

Section 9970. (Procedure and effect.) When such amendment is so adopted by the board of trustees of such university, college or institution of learning, a copy thereof with a certificate thereto affixed, signed by the president and secretary of such board and sealed with the corporate seal, if any there be, stating the fact and date of such amendment, and that such copy is a true copy of the original amendment, shall be filed and recorded in the office of the secretary of state, and when so filed and recorded such amendment shall be in law an integral part of the articles of incorporation of such corporation. The property, real and personal, corporate powers and franchises, endowment funds, gifts, bequests, legacies, mortgage securities and promissory notes, belonging to, such original corporation, by such amendment shall pass to, and be enjoyed and exercised by the corporation created and organized by such amendment for the promotion of the objects of its creation and organization. Such new corporation shall be liable for and must perform all the lawful obligations and contracts of the original corporation. (R. S. Sec. 3762b; February 10, 1890, 87 v. 8.)

Section 9971. (Fees of secretary of state.) For recording such amendment and furnishing a certified copy or copies thereof, the secretary of state shall receive a fee of twenty cents per hundred words, to be in no case less than five dollars. (R. S. Sec. 3762b; February 10, 1890, 87 v. 8.)

Section 9972. (Organic rules may be prescribed in articles of certain corporations.) An association incorporated for the purpose of receiving gifts, devises or trust funds to erect, establish, or maintain an academy in any department of fine arts, a gallery for the exhibition of paintings, or sculpture or works of art, a museum of natural or other curiosities, or specimens of art or nature promotive of knowledge, or a law or other library, or courses of lectures upon science, art, philosophy, natural history, or law, and to open it to the public on reasonable terms; or an industrial training school, or a mechanics' institute for advancing the best interests of mechanics, manufacturers and artisans, by the more general

*diffusion of useful knowledge in those classes of the community, or homes for indigent and aged widows and unmarried women, whose directors or trustees may be of either sex, in its articles of incorporation may prescribe the tenure of office of the trustees or directors, the mode of appointing or electing successors, the administration and management of the property, trust and other funds of the corporation and such other organic rules as are deemed expedient or acceptable to donors, which shall be the permanent organic law of the corporation. (R. S. Sec. 3767; February 21, 1887, 84 v. 31; March 26, 1886, 83 v. 40; R. S. 1880; 75 v. 135, §§ 1, 3.)

Section 6 of Article VIII of the constitution does not prohibit the devotion of fines and penalties, collected in municipal court in state cases, to the aid of a law library association not for profit, whose library is open for use by all judicial officers of the county. *State v. Sayre*, 90 O. S. 215 (1914).

Effect of Cleveland Municipal Court Act on G. C. § 3056. See *State v. Henry*, 23 C. C. n. s. 541.

Section 9973. (May add to original objects.) By certificate duly acknowledged by the trustees or directors, and filed in the office of the secretary of state, such corporations may add to the original objects and purposes thereof, any of the several objects and purposes, mentioned in the preceding section, not provided for by the articles of incorporation. (R. S. Sec. 3768; March 26, 1886, 83 v. 41; May 7, 1878, 75 v. 135, § 3.)

Section 9974. (Acceptance of statutory provisions.) Such corporation heretofore incorporated under the laws of the state, by certificate reciting the organic rules adopted by the corporation as its permanent organic law, duly acknowledged by the trustees or directors, and filed in the office of the secretary of state, may accept the provisions of the second preceding section. (R. S. Sec. 3768; March 26, 1886, 83 v. 41; May 7, 1878, 75 v. 135, § 3.)

Section 9975. (Accounts of receipts and disbursements.) The officers of such a corporation charged or intrusted with the receipts and disbursements of its funds or property, shall make and keep accurate and detailed accounts of such funds, and the receipts and disbursements thereof such as are required to be kept by the fund commissioners of the state. On or before the third Monday in January of each year the trustees shall file with the clerk of the common pleas court of the county in which the corporation is located an ab-

abstract of their account which shall correspond in date, amount, person to whom paid, from whom received, and on what account, with the vouchers taken or given on account of such receipts and disbursements. At the same time they annually shall file in such clerk's office a report of the names of the donors, the kind, amount, or value of gifts of each, and a brief statement of the conditions and purposes of the gifts. The filing of such abstract and report, and the supplying of any omission in either, may be enforced by order and attachment of the common pleas court of the proper county, against the trustees, on motion of any respectable citizen. (R. S. Sec. 3769; May 7, 1878, 75 v. 135, § 4.)

Section 9976. (Trustees ineligible to other office.) No trustee of such corporation shall be eligible to any office or agency of the corporation to which a salary or emolument is attached, nor shall the trustees be allowed any salary, emoluments or perquisites, except the right of free ingress to the grounds, rooms, and buildings of the corporation. (R. S. Sec. 3770; May 7, 1878, 75 v. 135, § 5.)

A trustee of a law library association, who is elected librarian, can not thereafter continue to act as trustee.
Rep. Atty. Gen. 1910-1911, p. 1081.

Section 9977. (Attorney-general may enforce duties of officers.) On application to the attorney general by five citizens of the proper county, in writing, verified by the oath or affirmation of one of them, setting forth specific charges against any of the fiscal or other agents or trustees of such a corporation, involving a breach of trust or duty, he shall give notice thereof to the trustees or agents complained of, and inquire into the truth of such charges. For this purpose he may receive affidavits, or enforce, by process from the court of common pleas of Franklin county, the production of papers and the attendance of witnesses before him. If, on testimony or other evidence, he believes the charges or any of them to be true, he shall proceed, by action in that court, in the name of the state, against the delinquent trustee or trustees, fiscal agent or agents, and, on the hearing the court may direct the performance of any duty, or the removal of all or any of the agents or trustees, and decree such other and further relief as is equitable. (R. S. Sec. 3771; May 7, 1878, 75 v. 135, § 6.)

Section 9978. (May increase number of trustees of certain corporations.) The board of trustees of a university or college heretofore incorporated, but not under the patronage

of conferences or other ecclesiastical bodies of any religious denomination, may increase the number of such trustees to twenty-four, exclusive of the president, or a less number, and divide such trustees into six classes, each class to serve six years, and one class to be chosen each year, for such term. One trustee of each class may be chosen by the votes of the alumni of such university or college, if the board of trustees so provides by by-law, in which case the board also shall provide by such by-laws, a method of nominating and electing such appointee of the alumni. (R. S. Sec. 3771a; April 11, 1890, 87 v. 188; April 15, 1889, 86 v. 341.)

Section 9979. (Distribution of new members.) The president of such university or college shall ex-officio, be a trustee perpetually, and not be included in the classes going out in rotation. If in the first enlargement of the board of trustees, under the preceding section it be necessary to distribute new members to the several classes, whose terms will expire by rotation, the distribution may be made in such manner as the board directs so that no trustee shall be elected for a longer term than six years. (R. S. Sec. 3771a; April 11, 1890, 87 v. 188; April 15, 1889, 86 v. 341.)

Section 9980. (Stock corporations may retire stock.) The board of trustees of a university or college in this state organized as a stock corporation and not under ecclesiastical patronage, upon the surrender and cancellation of all outstanding shares of its capital stock, may cause a certificate of that fact, sealed with the corporate seal and signed by the president and secretary of such board, to be filed in the office of the secretary of state, which certificate the secretary of state shall record for public use in the records of his office, and a certified copy of which he shall return to such board of trustees upon receipt of a fee of twenty cents per one hundred words, to be in no case less than five dollars. Thereupon such university or college shall continue its corporate existence as a corporation not for profit and with the same powers, duties, privileges and immunities as it previously possessed, save such as relate to its capital stock. Such board by resolution may conform the number, tenure and mode of election of its own members to the provisions of the preceding section, except, that trustees not authorized to be elected by the alumni, shall be elected by the board; and that the ex-officio membership thereon of the president of such college or university shall be optional with the board. (R. S. Sec. 3771b; May 1, 1908, 99 v. 260.)

Section 9981. (Cancellation by decree of court.) When such a corporation seeking to avail itself of the provisions of the preceding section has procured the surrender for cancellation of not less than sixty per cent of the outstanding shares of its capital stock, any residue thereof standing upon its books in the names of persons, partnerships, societies or corporations that for seven years or more have been deceased, dissolved or of unknown address, and non-participants in the corporate elections, and of whose shares aforesaid no known owner exists, may be cancelled by decree of the court of common pleas of the county wherein such corporation is located, upon its petition, duly certified, being filed therein, making such persons, partnerships, societies and corporations or their legal representatives parties defendant, and on serving such defendants with public notice of the pendency of such petition in the manner provided for service by publication in civil actions, and upon averment and proof by the plaintiff and a finding by the court of the facts as hereinbefore required, and of the further fact that the plaintiff is an eleemosynary corporation. Thereupon the shares of such defendants shall be deemed to be cancelled and surrendered, and the decree shall not be vacated or set aside, on the application of any such defendant, otherwise than as in the case of judgments in civil actions. (R. S. Sec. 3771c; May 1, 1908, 99 v. 260.)

Section 9982. (Mechanics' institute may borrow money.) A mechanics' institute, incorporated under the laws of this state prior to the year eighteen hundred and fifty-one, may borrow money, issue bonds or notes therefor at no more than the legal rate of interest, and secure them by mortgage upon its real estate. (R. S. Sec. 3768-1; April 9, 1885, 82 v. 118, § 1.)

Section 9983. (Liability of directors and trustees.) The directors and trustees of such corporations shall not be personally liable for debts contracted by them, as in the preceding section provided. (R. S. Sec. 3768-2; April 9, 1885, 82 v. 118, § 2.)

Section 9984. (How medical colleges may receive bodies for dissection.) Superintendents of city hospitals, directors or superintendents of city or county infirmaries, directors or superintendents of work-houses, directors or superintendents of asylums for the insane, or other charitable institutions founded and supported in whole or in part at public expense, the directors or warden of the penitentiary, township trus-

tees, sheriffs, or coroners, in possession of bodies not claimed or identified, or which must be buried at the expense of the county or township, before burial, shall hold such bodies not less than thirty-six hours and notify the professor of anatomy in a college which by its charter is empowered to teach anatomy, or the president of a county medical society, of the fact that such bodies are being so held. Before or after burial such superintendent, director, or other officer, on the written application of the professor of anatomy, or the president of a county medical society shall deliver to such professor or president, for the purpose of medical or surgical study or dissection, the body of a person who died in either of such institutions, from any disease, not infectious, if it has not been requested for interment by any person at his own expense. (R. S. Sec. 3763; April 5, 1898, 93 v. 84; February 19, 1881, 78 v. 33; R. S. 1880; March 25, 1870, 67 v. 25, § 1.)

Post mortem examinations may only be performed as authorized by this and the following sections.

Rep. Atty. Gen. 1909-1910, p. 399.

See 3 Opins. Attys. Gen. 988 (1887).

Delivery of bodies under this section should be at the place of decease. The expense of transportation should be paid by the college, and not out of public funds.

2 Opins. Attys. Gen. 860 (1880).

Any county medical society, organized in good faith, whether auxiliary to a state association or not, is authorized to receive bodies.

3 Opins. Attys. Gen. 155 (1883).

Unclaimed bodies should be buried at the expense of the county or township.

3 Opins. Attys. Gen. 369 (Brief of James Lawrence, 1884).

3 Opins. Attys. Gen. 390.

Section 9985. (Body to be delivered to claimant.) If the body of a deceased person so delivered, be subsequently claimed, in writing, by a relative or other person for private interment, at his own expense, it shall be given up to such claimant. (R. S. Sec. 3763; April 5, 1898, 93 v. 84; February 19, 1881, 78 v. 33; R. S. 1880; March 25, 1870, 67 v. 25, § 1.)

The next of kin of a decedent have the right to the control, custody and burial of the body, and may select the place of burial.

Smiley v. Bartlett, 6 C. C. 234; 3 C. D. 432 (1892).

Section 9986. (Interment of body after dissection.) After such bodies have been subjected to medical or surgical examination or dissection, the remains thereof shall be interred in some suitable place at the expense of the party or parties in whose keeping the corpse was placed. (R. S. Sec. 3763;

April 5, 1898, 93 v. 84; February 19, 1881, 78 v. 33; R. S. 1880; March 25, 1870, 67 v. 25, § 1.)

Section 9987. (Notification of relatives.) In all cases the officer having such body under his control, must notify or cause to be notified, in writing, the relatives or friends of the deceased person. (R. S. Sec. 3763; April 5, 1898, 93 v. 84; February 19, 1881, 78 v. 33; R. S. 1880; March 25, 1870, 67 v. 25, § 1.)

Section 9988. (Body of strangers or travelers.) The bodies of strangers or travelers, who die in any of the institutions above named, shall not be delivered for the purpose of dissection unless the stranger or traveler belongs to that class commonly known as tramps. Bodies delivered as herein provided shall be used for medical, surgical and anatomical study only, and within this state. (R. S. Sec. 3763; April 5, 1898, 93 v. 84; February 19, 1881, 78 v. 33; R. S. 1880; March 25, 1870, 67 v. 25, § 1.)

Section 9989. (Liability for having unlawful possession of body.) A person, association, or company, having unlawful possession of the body of a deceased person shall be jointly and severally liable with any other persons, associations, and companies that had or have had unlawful possession of such corpse, in any sum not less than five hundred nor more than five thousand dollars, to be recovered at the suit of the personal representative of the deceased in any court of competent jurisdiction, for the benefit of the next of kin of deceased. (R. S. Sec. 3764; R. S. of 1880.)

This section is not directed against cemetery associations or their trustees; nor does it relate to the remains of persons long buried and decomposed.

Carter v. Zanesville, 59 O. S. 170 (1898).

CHAPTER 4.

RELIGIOUS AND BENEVOLENT.

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CHURCHES.

Section 9990. (When language of church service may be changed.) Any religious society incorporated under a general or special law of this state, and which act of incorporation prescribes that its public religious services shall be con-

ducted in any other than the English language, by a vote of a majority of its adult members, in good and regular standing, who speak such prescribed language, may decide whether its public religious services, at any time shall be conducted in any other language. (R. S. Sec. 3772; May 8, 1868, 65 v. 163, § 1; S. & S. 162.)

Section 9991. (May sell cemetery grounds.) When a religious or educational corporation or society holds lands within the limits of a city or village which were used as a cemetery, and interments in which have been prohibited by the ordinances of such municipality, the trustees, wardens, vestry, or other officers intrusted with the management of the property of such corporation or society, may file a petition in the court of common pleas of the county where such property is situated, setting forth therein a description of it, the existence of such ordinance, and the names of all persons holding burial privileges in such cemetery, so far as known to them. If such privileges are held by persons whose names are unknown to them, the facts as to these they also must state, and ask that the value, if any, of such burial privileges be determined by the court, for its direction as to the removal of the bodies interred in such cemetery to other cemeteries and for an order to sell such property free from burial privileges. (R. S. Sec. 3773; April 11, 1890, 87 v. 189; April 13, 1889, 86 v. 294; R. S. 1880; April 3, 1867, 64 v. 103, § 1; S. & S. 164.)

Section 9992. (Notice and answer.) Notice of the filing of such petition shall be given by publication in some newspaper, printed and of general circulation in the county where it is filed, for four consecutive weeks, setting forth the object and prayer thereof, and that any persons claiming an interest in its subject matter, or burial privileges in such cemetery, may appear and file an answer therein, within six weeks from the date of the first publication of such notice, and after which such case will stand for hearing. (R. S. Sec. 3773; April 11, 1890, 87 v. 189; April 13, 1889, 86 v. 294; R. S. 1880; April 3, 1867, 64 v. 103, § 1; S. & S. 164.)

Section 9993. (Judgment.) Upon final hearing of the case, if it be made to appear that such cemetery is as above described, with or without the aid of a jury, as the parties appearing elect, the court shall hear and determine the value, if any, of such burial privileges, and order the corporation or society to pay any amount so ascertained to the holder of such privilege. The court may also order the cemetery

property sold, free from such burial privileges, and direct a subdivision of it into lots for the purpose of sale, and shall direct the application of the money arising therefrom, to such uses by such corporation or society, for pious or educational purposes, as the trustees, wardens, vestry, or other officers thereof conceive to be most for its interest. Such sale shall not be made until the bodies interred therein are removed to other cemeteries, as directed by the court on the final hearing of the case. (R. S. Sec. 3773; April 11, 1890, 87 v. 189; April 13, 1889, 86 v. 294; R. S. 1880; April 3, 1867, 64 v. 103, § 1; S. & S. 164.)

Section 9994. (Limitations.) A holder of a burial privilege who did not appear in such proceeding, and who has not waived his right to receive compensation for it, may assert his right to receive from such society or corporation, compensation therefor, within five years after the final entry of such proceedings. (R. S. Sec. 3773; April 11, 1890, 87 v. 189; April 13, 1889, 86 v. 294; R. S. 1880; April 3, 1867, 64 v. 103, § 1; S. & S. 164.)

Section 9995. (May transfer cemetery land.) When a religious or benevolent society or association owning real estate used or occupied as a burial place, the title to which is vested in such society or association, or the trustees thereof, desires to transfer such real estate to a cemetery association incorporated under any law of this state, the trustees or other officers entrusted with the management of the affairs of such society or association in the common pleas court of the county in which such real estate is situated, may file a petition stating how and by whom the title thereto is held, that such society or association desires to make such transfer, and asking for an order therefor. (R. S. Sec. 3773a; February 22, 1906, 98 v. 10.)

Section 9996. (Notice and answer.) Notice of the filing of such petition shall be given by publication in some newspaper printed and of general circulation in the county where it is filed, for four consecutive weeks, setting forth the object and prayer thereof, and that persons claiming an interest in the subject matter may appear and file an answer therein within six weeks from the first publication of such notice. (R. S. Sec. 3773a; February 22, 1906, 98 v. 10.)

Section 9997. (Judgment.) At the expiration of such six weeks such case will stand for hearing, and if the court is satisfied that such transfer is desired by the members of

such society or association, it may authorize the trustees or other officers thereof to make a good and sufficient deed therefor to such cemetery association. Such association shall assume all legal debts against the real estate so transferred. (R. S. Sec. 3773a; February 22, 1906, 98 v. 10.)

Section 9998. (Conveyance of burying ground to township.) When a public burying-ground is located on or near a township line, and is used by the people of two or more townships for burial purposes, the title of which is vested in a religious or benevolent society, such society, or the trustees thereof, may convey it to the trustees of such townships so using it, and their successors in office, jointly; and such trustees shall accept, jointly take possession of, and keep it in repair, as required as to public burial grounds in and belonging to the respective townships. Each township shall bear an equal share of the expenses thereof, and the trustees of each township shall levy needful taxes in that behalf, not more in any one year than one-fourth of one per cent. (R. S. Sec. 3773-1; April 6, 1893, 90 v. 151, § 1.)

Section 9999. (May apply to court for order to sell property.) When the title to real estate is vested in trustees for the use of churches or congregations of churches, and, owing to its peculiar situation or the nature of the trust or conditions upon which it is held, for twenty years such realty has not been claimed by or appropriated to the use of churches or congregations, as originally contemplated, and such trustees are in doubt as to what disposition to make of it, and when any public church site and meeting house has been abandoned by the public as a place of worship, and the trustees invested with the title to such property have sold it, and are in doubt as to what disposition to make of the proceeds thereof, in either case such trustees may file a petition in the common pleas court of the county where the property is situated, setting forth all the facts in the case, and asking its direction as to the proper disposition of such unappropriated property or proceeds. (R. S. Sec. 3774; April 10, 1868, 65 v. 84, § 1; S. & S. 164.)

See note to § 10051.

Section 10000. (Notice.) Notice of the filing of such petition must be given by publication in some newspaper printed and of general circulation in the county where it is filed, for four consecutive weeks, setting forth the object and prayer thereof, and that a person, church, or congrega-

tion, claiming an interest in the subject matter of such petition, may appear and file an answer therein. (R. S. Sec. 3775; April 10, 1868, 65 v. 84, § 2; S. & S. 165.)

Section 10001. (Judgment.) On final hearing of the case the court shall make such order or decree as will best secure the rights of the churches or congregations, or persons having an interest therein, and best promote the interests of religion, having regard, as near as may be, to the nature and terms of the original trust or purpose with which such property or proceeds is charged, and tax the costs of the proceeding as justice requires. (R. S. Sec. 3775; April 10, 1868, 65 v. 84, § 2; S. & S. 165.)

Section 10002. (May convey church site to congregation; subject to judgment.) When real estate has been purchased by or conveyed to trustees for the use of churches or congregations, as sites for meeting houses, and such churches or congregations have erected houses of worship thereon, but no power is possessed by such trustees to convey such real estate to such congregations, or to the trustees thereof, such trustees may convey such improved sites to the trustees of such congregations. But when an incorporated religious congregation, society, association, sect, or denomination uses or occupies as and for a place of worship, real estate which is held in trust for it or the members thereof, as and for a place of worship, and a judgment is recovered against such corporation, the real estate together with such edifice and improvements thereon, by a civil action for that purpose, shall be subjected to the payment of such judgment and costs. (R. S. Sec. 3776; March 7, 1883, 80 v. 51; R. S. 1880; April 10, 1868, 65 v. 84, § 3; S. & S. 165.)

Section 10003. (How consent obtained.) An ecclesiastical society incorporated under the laws of this state connected with a church of Christ therein, by a three-fourths vote of its adult members present and voting at a meeting warned and held for that purpose, may assign, transfer and convey to the church with which it is connected, and which is incorporated under the laws of this state, all the property and estate, real and personal, and trust funds of such society to be held by such corporation under the trusts and for the uses upon which it had been held by such society. Pursuant to such vote, also, the society committee or trustees may make all conveyances necessary to complete such assignment and transfer. Before they shall be effectual, a certificate of the fact of such assignment and transfer shall be filed in

the office of the secretary of state, and in the office of the clerk of the county in which the property is located. (R. S. Sec. 3776-1; April 8, 1891, 88 v. 298; March 12, 1890, 87 v. 56.)

Section 10004. (Consolidation.) When two or more religious societies, churches, or associations, recognizing the same ecclesiastical jurisdiction, form of faith, government, order, and discipline, and incorporated by or under any law of this state, desire to be consolidated or united as a single corporation, the elders, trustees, deacons, directors, or other known and legal representatives of such societies, churches, or associations, may enter into an agreement for such union or consolidation, and prescribe the terms and conditions thereof, the corporate name of such united society, church, or association, the time and place for the first meeting of the new corporation, the number of members of each separate branch or organization to be chosen as directors, trustees, elders, or other officers for the new body, to succeed to the rights, trusts, duties and obligations of those officers who, in the separate organizations, held in trust the estate, real and personal, of such separate churches, societies, or associations, with such other estates as they deem necessary to complete the new corporation. No agreement so made shall be valid until it has been submitted to a separate meeting of the members of each organization, of which due and full notice has been given, according to the form and usage for calling church, congregation, or society meetings, and ratified by a two-thirds vote of all present at such meeting, in person or by proxy and entitled to vote according to the laws, regulations, or usages of such church, society, or corporation. (R. S. Sec. 3777; 67 v. 30, § 1.)

The consolidation of separate religious corporations can only be effected in this state by conforming to §§ 10004, 10005 and 10006.

Presbyterian Society v. Markley, 10 N. P. n. s. 529 (1910).

See *Prather v. Presbyterian Society*, 13 N. P. n. s. 169, 178 (1912).

Dissenting members of one religious society can not maintain an action in its name to enjoin a proposed consolidation on the ground that the consolidation deprived such society of its property, where no request is made on its trustees to act. *First Church v. Young*, 21 N. P. n. s. 569 (1919); on appeal, judgment for defendant; motion to certify record overruled, 17 O. L. R. 304.

Section 10005. (Agreement to consolidate.) When the agreement has been ratified by each church, society, or association which is a party to the proposed united organization, the clerk or secretary of each meeting shall certify the record of the proceedings thereof, and deliver it to the clerk

or secretary of the first meeting of the united churches, societies or organizations, as hereinbefore provided, and as specified in the terms of agreement. (R. S. Sec. 3778; April 2, 1870, 67 v. 30, § 2.)

Section 10006. (Articles of incorporation; filing.) If, at the first meeting of the united corporations, the proceedings and acts of the several churches, societies, and parties thereto are submitted to and approved by it, and a board of trustees, directors, or other officers are chosen in accordance with the terms of agreement, the clerk or secretary of the meeting shall certify such approved agreement or terms of union, and file it in the office of the secretary of state, whereupon the several churches, societies or associations, parties thereto, shall be one corporation, possessing within this state all the rights, privileges, and franchises, and subject to all the restrictions, disabilities, and duties, of such new corporation. (R. S. Sec. 3779; April 2, 1870, 67 v. 30, § 3.)

Section 10007. (Property passes to new corporation.) Such new corporation, with its officers and chosen representatives, shall succeed to, and be invested with, all the right, title and interest in and to every species of property, and all the rights, privileges and franchises of each of the churches, societies or associations parties to the agreement, without any other act, conveyance or transfer; and such new corporation shall hold and enjoy these with all the rights pertaining to such property, franchises, and trusts, and be subject to all the debts, liabilities, and obligations, in the manner and to the extent as any of the churches or societies parties thereto. (R. S. Sec. 3780; April 2, 1870, 67 v. 30, § 4.)

Section 10008. (Transfer of property after consolidation.) When two or more religious societies, denominations or ecclesiastical corporations in this state, unanimously form, or so have formed a union, and become united or consolidated under and by virtue of rules and regulations of such societies, denominations, or corporations, or laws of this state, the trustees, deacons, directors, or other proper officers of the new society, denomination, or corporation, at the request of a majority of the members of either of the societies, denominations, or corporations, may petition the common pleas court of the proper county, setting forth the fact of such union. Thereupon, in its discretion the court may order such officers, at the time of the union, to convey to the new organization the real estate owned and held by the parties to the union, as it directs, and that, if any of such officers

neglect to obey such order, the decree shall serve as such conveyance. In no case shall the order be inconsistent with the original terms upon which real estate became vested in or intrusted to the parties to the union; and in all cases the grantors of the real estate to such parties, or their heirs, shall be made parties to the petition. Such of them as make no defense will not be subject to costs. (R. S. Sec. 3781; April 11, 1876, 73 v. 225, § 1.)

Section 10009. (Notice of application.) Notice of the pendency of such petition shall be given by publication in a newspaper published in the county where the petition is filed, for four consecutive weeks, setting forth the object and prayer of the petition. (R. S. Sec. 3782; April 11, 1876, 73 v. 225, § 2.)

Section 10010. (Association for holding donations and bequests.) An association incorporated for the purpose of receiving and holding donations, bequests, and funds derived from other sources, and disbursing the interest and income arising therefrom as herein provided, shall hold all such principal sums as a permanent fund. The interest arising from such fund, and the annual income arising from all personal and real property held by the association, shall be applied and distributed annually as follows:

First. To the payment of the necessary expenses of the association.

Second. The balance shall be paid to the board of stewards, or any officer designated by the conference, synod, assembly or association within the bounds of which the principal office is located at the time of such organization, to be distributed by the board of stewards or such officer annually, to such persons as may be designated by the conference, synod, presbytery, assembly, or association. (R. S. Sec. 3783; April 20, 1874, 71 v. 110, §§ 1, 2, 3, 4.)

Where a trust is created for the benefit of an incorporated religious society, and there are two such bodies, each claiming to be such society, a court of equity may require the claimants to interplead and proceed to ascertain the true beneficiary, without compelling either party to establish its corporate rights at law.

Presbyterian Society v. Presbyterian Society, 25 O. S. 128 (1874).

Section 10011. (Endowment fund corporations.) When a presbytery, synod, conference, diocesan convention or other representative body of a religious denomination in this state, or when an assembly, synod, conference, convention or other general ecclesiastical body of a religious denomination held

in the United States desires to create a board of trustees for an endowment fund or other property of the denomination represented by such body, and, at a regular meeting of such presbytery, synod, conference, diocesan convention or other representative body of such denomination in this state, or of such assembly, synod, conference, convention or other general ecclesiastical body in the United States, elects not less than five members of such denomination, one of whom is a resident freeholder in this state, to serve as trustees, and makes and files in the office of the secretary of state a statement, giving the names of such trustees, the character of the endowment fund or other property to be intrusted to their care, and the uses to which it is to be applied, signed by the proper presiding officer and the secretary or clerk of such body, acknowledged before a clerk of a court of record, notary public or a judicial officer having a seal, and the signing of it is duly attested by such officer, and the statement thus authenticated is recorded in the secretary of state's office, the persons named in such statement as trustees thereupon, with their successors in office, shall become a body corporate and politic for the purpose in such statement specified. A copy of the record, duly certified by the secretary of state, shall be evidence of the existence of the corporation. (R. S. Sec. 3784; March 21, 1894, 91 v. 83; April 21, 1890, 87 v. 243; April 20, 1874, 71 v. 118, § 1.)

A foreign religious society may acquire property in Ohio by devise of bequest, in the absence of a prohibiting statute.

American Bible Society v. Marshall, 15 O. S. 537 (1864).

Liability for inheritance tax.

See Humphreys v. State, 70 O. S. 67 (1904).

A religious society, receiving a gift, may agree to pay an annuity to the giver during his life. Such an agreement is not an insurance contract. Rep. Atty. Gen. 1914, p. 1655.

Section 10012. (Power of trustees.) Such trustees, if chosen to take charge of an endowment fund, may invest, manage, and dispose of it in accordance with the purpose for which it was created, subject to such regulations as the body by which they were elected from time to time prescribe. (R. S. Sec. 3785; April 20, 1874, 71 v. 118, § 3.)

Section 10013. (Power of trustees of a religious society.) If the trustees are chosen to take charge of and manage other property owned or acquired by such religious denomination, they may hold, invest, control, and manage it, for the benefit of the denomination within the presbytery, synod, conference, diocese, or other ecclesiastical territorial limits represented by the trustees, subject to the direction of the proper

representative body of such denomination within such limits. If a parish or congregation, connected with the denomination represented by the trustees becomes extinct, by reason of the death or dispersion of its members, the trustees may take possession of the church property of the parish, congregation, or society, whether real or personal, and rent, lease, sell, invest or otherwise dispose of it for the benefit of the denomination represented by them, within the territorial limits represented by the body by which they were appointed, and subject to such regulations as such body prescribes. All property held by such trustees, and the proceeds thereof, shall be applied to the use and benefit of the proper denomination within this state. (R. S. Sec. 3786; February 23, 1882, 79 v. 14; R. S. 1880; April 24, 1877, 74 v. 110, § 1.)

Religious societies.

Incorporation, see §§ 8653, 8625, 8626.

Members.

See also §§ 8653, 8654.

A member of a church society has no severable right in its property but merely the enjoyment and use of it while he remains a member. On his withdrawal or expulsion he is not entitled to a proportionate share of the property.

Gasely v. Separatists Soc., 13 O. S. 144 (1862).

Wiswill v. First Cong. Church, 14 O. S. 31 (1863).

Members of an incorporated church society are not individually liable for its debts.

See Myers v. Jenkins, 63 O. S. 101 (1900).

§§ 8666, 10014.

Members of an unincorporated church are not liable for its debts unless they, in some way, authorized, or acquiesced in, the creation thereof.

Devoss v. Gray, 22 O. S. 159 (1871).

Males v. Murray, 3 C. C. n. s. 671; 13 C. D. 396 (1902); affirming, 7 N. P. 614; 10 L. D. 373.

Expulsion. Grounds, procedure, and remedies for wrongful expulsion, see note to § 8653.

Trustees.

Election and term of office, see §§ 8655 and 8656.

Removal, see notes to §§ 8647 and 8656.

General powers, see § 8660, 10013.

Liability, see §§ 8666, 10014.

Where an election is irregular or illegal the acts of the persons acting as trustees under such election may be binding on the society as the acts of de facto trustees. The title of trustees must be tested by quo warranto. It can not be indirectly attacked.

Presbyterian Society v. Smithers, 12 O. S. 248 (1861).

Messinger v. Wardens, 6 W. L. B. 397 (1881).

Hullman v. Honecamp, 5 O. S. 238, 242 (1856).

Trustees have no power to dispose of real estate without authority of court.

South Kenton, etc., Ass'n v. Espy, 17 C. C. 524; 9 C. D. 695 (1899).

See §§ 10051, 9999, 10015.

Where conveyances are made to individual trustees instead of the corporation, such individual grantees are trustees for the corporation, and on sale receive the proceeds to its use.

Methodist Church v. Wood, 5 Ohio 283 (1831).
Insolvent sole trustee.

See Mannix v. Purcell, 46 O. S. 102 (1888).

Miller v. Elder, 7 C. C. 97; 3 C. D. 681 (1893).

Where persons claiming to be trustees of a religious society take possession of a church building, exclude the persons theretofore in possession, file a petition to quiet their title, and obtain an injunction to prevent the persons excluded from retaking possession, and, on final hearing, it is decided that the persons excluded are legally the trustees, they may be restored to such possession, and an injunction may be granted in their favor restraining the plaintiffs from interfering with their possession and control of the property.

Bartholomew v. Lutheran Congregation, 35 O. S. 567 (1880).

Munsel v. Boyd, 10 C. C. n. s. 121; 20 C. D. 182 (1907).

Property.

In general, see § 10020.

Sale or incumbrance, §§ 10051, 9999, 10015.

Division of, see *Succession or separation* below.

Of Chautauqua Assemblies, see § 5888.

Succession. Rules, decisions and orders of society. Where a separation has taken place, in determining the legitimate succession of an unincorporated religious society, the civil courts will adopt its rules and enforce its policy in the spirit and to the effect for which it was designed.

Harrison v. Hoyle, 24 O. S. 254 (1873).

Rike v. Floyd, 6 C. C. 80 (1891); aff'd, no rep., 53 O. S. 653.

Brundage v. Deardorf, 92 Fed. 214 (C. C. A. 1899).

Griggs v. Middaugh, 22 W. L. B. 367 (C. P. 1889).

The decisions and orders of such a society, made in conformity to its policy, should have the same effect in civil courts, which the society intended should be awarded to them when pronounced by its own tribunals, when public policy, or the positive law of the land, is not contravened thereby.

Harrison v. Hoyle, 24 O. S. 254 (1873).

Rike v. Floyd, 6 C. C. 80 (1891); aff'd, no rep., 53 O. S. 653.

Griggs v. Middaugh, 22 W. L. B. 367 (C. P. 1889).

Where such society is composed of several bodies or branches, whether co-ordinate or subordinated, the rules of the society, for the management of its internal affairs, and for the adjustment of the relations between its branches, constitute the rule by which they should be governed.

Harrison v. Hoyle, 24 O. S. 254 (1873).

Where the confession of faith of a church society is amended, in accordance with its constitution, but not so as to involve a substantial departure from the established doctrines of the society, such change is not a perversion of the trusts upon which the property of the society is held.

Rike v. Floyd, 6 C. C. 80 (1891); aff'd, no rep., 53 O. S. 653.

Brundage v. Deardorf, 92 Fed. 214 (C. C. A. 1899).

Free baptists are the legal successors of the free will baptists.

Graham v. Ransahous, 11 C. C. n. s. 145 (1908).

Where property was dedicated for the use of a certain specified religious denomination, the majority of members may be enjoined from effecting a change in organization which would amount to a turning of the property over to another separate and distinct de-

nomination. *Bakos v. Takach*, 14 Ohio App. 370; 32 O. C. A. 569 (1921); motion to certify record overruled, 19 O. L. R. 466, 588.

Secession or separation.

See also *Succession* above.

Members who secede from a church organization forfeit all rights to its property, but the members may, by agreement, separate into two bodies and divide the property.

Wiswell v. First Cong. Church, 14 O. S. 31 (1863).

M. E. Church v. Wood, 5 Ohio 283.

Rike v. Floyd, 6 C. C. 80 (1891); aff'd, no rep., 53 O. S. 653.

Brundage v. Deardorf, 92 Fed. 214 (C. C. A. 1899).

Ex parte Shoup, 16 W. L. B. 71.

Members who dissent from changes in the confession of faith of a church, made in accordance with its constitution, and not involving a substantial departure from its established doctrines are "seceders."

Rike v. Floyd, 6 C. C. 80 (1891); aff'd, no rep., 53 O. S. 653.

Brundage v. Deardorf, 92 Fed. 214 (C. C. A. 1899).

Where one of two existing factions of a religious society, or the trustees or representatives of such faction, obtains a judgment of a court having jurisdiction of the parties and subject matter, determining the rights and interests of the parties in its property, such judgment is *res adjudicata* as to all matters so determined, in all subsequent suits between the two factions so long as they remain substantially the same, and this is so notwithstanding that the trustees, representatives and individual membership of the factions may change.

Graham v. Ransahous, 11 C. C. n. s. 145 (1908).

Right of congregation to withdraw from synod.

See *Bartholomew v. Luthern Congregation*, 35 O. S. 567 (1880).

Heckman v. Mees, 16 Ohio 584 (1847).

Section 10014. (Real estate liable for certain judgments.) Real estate held by or in trust for a religious society or congregation as a place of worship, or otherwise, shall be liable for and by civil action may be subjected to the payment of a judgment recovered against the trustees or a committee of such society or congregation, in their individual capacity, or otherwise, for labor performed, materials furnished, or damages sustained, under any contract with them for the erection of a church edifice or other building or improvement made thereon. (R. S. Sec. 3786; February 23, 1882, 79 v. 14; R. S. 1880; April 24, 1877, 74 v. 110, § 1.)

Liability of trustees for debts in general, see § 8666.

Members of an incorporated church are not liable for its debts.

See *Myers v. Jenkins*, 63 O. S. 101 (1900).

See § 8666.

Members of an unincorporated church are not liable for its debts unless they in some way authorized or acquiesced in the creation thereof.

Devoss v. Gray, 22 O. S. 159 (1871).

Males v. Murray, 3 C. C. n. s. 671; 13 C. D. 396 (1902); affirming,

7 N. P. 614; 10 L. D. 373.

A finding that a certain amount is due from an unincorporated church is not a judgment, but constitutes a debt of record. The real debtors are the members of the church who authorized or acquiesced in the creation of the debt. Funds subsequently accumulated by a congre-

gation composed of other members can not be subjected to the payment of such debt.

Males v. Murray, 3 C. C. n. s. 671; 13 C. D. 396 (1902); affirming, 7 N. P. 614; 10 L. D. 373.

Section 10015. (When and how property of extinct corporations sold.) When a parish, congregation, or society becomes extinct, as mentioned in the second preceding section, the common pleas court of the county in which real property of such extinct parish, congregation, or society is situated, upon the petition of the trustees of the denomination to which the extinct parish, congregation, or society belonged, may make an order for the sale of the property, whether built upon, or otherwise improved, or not, the proceeds of the sale to go to, and be for the benefit of, the denomination represented by such trustees, within the territorial limits represented by the body by which they were appointed. The purchaser thereof shall be vested with as full and complete a title to the property as the character of the original grant to such parish, congregation or society will allow. This section shall not limit, or in any degree restrict, the powers conferred by the three preceding sections upon such trustees. (R. S. Sec. 3787; April 24, 1877, 74 v. 110, § 2.)

Section 10016. (Duties of trustees as to money received from sales.) All money derived from the sale of property under the provisions of the preceding section, shall be placed in the custody of the trustees of the presbytery, synod, conference, diocese, or other ecclesiastical body having jurisdiction in the territorial limits in which the property was located, and they shall hold it in trust for ten years, or for such period as is prescribed by the law of the denomination. If within that time another parish, congregation or society of the same denomination is organized in the same locality, then the court authorizing the sale of the property, upon proper application and evidence may authorize the return of the money to the trustees of the new organization. Otherwise it shall become a part of the funds of the presbytery, synod, conference, diocese, or other ecclesiastical body having jurisdiction. (R. S. Sec. 3787a; March 22, 1889, 86 v. 132, 133.)

Section 10017. (Parties to procedure for sale.) When a petition is filed, as provided for in the second preceding section, all persons who have a vested, contingent or reversionary interest in the real estate shall be made parties thereto, and be notified of the filing and pendency thereof, in the

manner provided by law in cases of the partition of real estate. The court may make such order as to costs as it deems just. (R. S. Sec. 3788; April 24, 1877, 74 v. 110, § 3.)

Section 10018. (Incorporation of printing and publishing houses.) When a conference, presbytery, assembly, association, or other general ecclesiastical body held in the United States, in conformity with the rules and regulations prescribed by such body, elects any number of persons, not less than three, as trustees or directors of a printing and publishing house, to hold such office until their successors are elected by that body, and a certificate of the election of such persons setting forth the name by which the corporation is to be known, signed by the clerk, secretary, or other like officer of such body, together with the written acceptance of such office by the persons so elected thereto, is filed in the office of the secretary of state, such trustees shall be duly incorporated, by the name in such certificate set forth. (R. S. Sec. 3789; March 18, 1871, 68 v. 43, § 1.)

Section 10019. (Expired corporations.) A corporation established by special act of the legislature for the purpose named in the preceding section, and whose charter has expired, may be renewed by a compliance with the provisions of that section on the part of the religious sect, association or denomination to which such corporation belonged, or under the direction of which it was carried on; and the title to all property belonging to such former corporation at the expiration of its charter, real, personal or mixed, shall pass to and be vested in the corporation so established. (R. S. Sec. 3790; March 18, 1871, 68 v. 43, § 2.)

Section 10020. (Lands to descend in trust.) Lands and tenements not exceeding twenty acres that have been or may be conveyed by devise, purchase or otherwise to any person or persons as trustee or trustees in trust for the use of a religious society within this state, either for a meeting house, burying-ground or residence for their preacher, shall descend, with the improvement and appurtenances, in perpetual succession, in trust to such trustee or trustees as from time to time are elected or appointed by any such religious society, according to their respective rules, customs, usages and regulations. (R. S. Sec. 3779-1; March 20, 1894, 91 v. 79; 23 v. 9; Chase, p. 1460; Curwen, p. 2347.)

The restriction of this section, to twenty acres, applies only to the land used for purposes of worship in one place.

Morgan v. Leslie, Wright 144 (1832).

Property conveyed to an archbishop by deed, absolute on its face, but in fact, for trust purposes, does not pass to an assignee for his individual creditors.

Mannix v. Purcell, 46 O. S. 102 (1888).

Property of religious societies.

Sale or incumbrance, see §§ 10051, 9999, 10015.

Exemption from taxation, G. C. § 5349.

Of Chautauqua assemblies, § 5888.

Division of, see note to § 10013.

A conveyance to trustees, for a valuable consideration, "in trust for a place of burial, and for the use of the aforesaid church aforesaid, and for none other" is not based on any condition, and vests in the church a fee simple estate, with no right of reversion or forfeiture to the grantor.

M. E. Church v. Gamble, 4 C. C. n. s. 45; 16 C. D. 295 (1904); aff'd, no rep., 74 O. S. 433.

Hedges v. Taylor, 33 W. L. B. 5 (1894).

See Ashland v. Greiner, 58 O. S. 67 (1898).

The abandonment of the ground for burial purposes at a date long subsequent, and its conveyance to a college for college purposes, conveyed the entire title to the college, subject only to the rights of the owners of cemetery lots therein.

M. E. Church v. Gamble, 4 C. C. n. s. 45; 16 C. D. 295 (1904); aff'd, no rep., 74 O. S. 33.

See Hedges v. Taylor, 33 W. L. B. 5 (1894).

Ashland v. Greiner, 58 O. S. 67 (1898).

Property donated to a church for the support of a particular creed or dogma can not be perverted from such purposes so long as there are agencies within the dedication to carry it on. But there is no such trust for a specific form of worship, where property is purchased by the society for a valuable consideration. A change in the creed of such society is immaterial.

Brundage v. Deardorf, 92 Fed. 214 (C. C. A. 1899).

A majority of the members of a religious society have a right to control the use and occupation of land purchased by it. They do not lose such right by any supposed error of doctrine.

Keyser v. Stansifer, 6 Ohio 363 (1834).

Price v. M. E. Church, 4 Ohio 515.

A breach of trust, by the majority of members, may be enjoined by any member.

Wiswell v. First Cong. Church, 14 O. S. 31 (1863).

Equity will interfere to protect trustees in the possession of property, against persons wrongfully seceding.

Rike v. Floyd, 6 C. C. 80 (1891); aff'd, no rep., 53 O. S. 653.

A religious society has power to rent a part of its property for use for theatrical purposes.

Catholic Institute v. Gibbons, 3 W. L. B. 581 (Super. Ct. Cin. 1878).

Section 10021. (Trustees may sue and defend.) The trustee or trustees, for the time being, of any such religious society may defend and prosecute suits and do all other acts for the protection, improvement and preservation of the property that individuals can do in relation to their individual property. (23 v. 9, § 2; Chase, p. 1460; Curwen, p. 2347; R. S. Sec. 3779-2.)

This section and § 10020 give power to the trustees to protect church property.

Adams v. State, 11 N. P. n. s. 11 (1910):

The names of the trustees should be given in an action or appropriation proceeding brought against them.

Pansing v. Miamisburg, 11 C. C. n. s. 511 (1907); *aff'd*, no rep., 79 O. S. 430.

Section 10022. (Legal title to lands.) Property conveyed in trust for the use of a religious society, church or association, whether incorporated or not, shall be held by the trustee or trustees, so appointed, and their successors, appointed as provided in the instrument creating the trust, or in case no provision is made in such instrument, then by such successor or successors, as are appointed by a competent court. But no person shall be elected or appointed by such society, church or association, to act as trustees, to the exclusion of any trustee or trustees, appointed as aforesaid. (R. S. Sec. 3779-3; March 23, 1850, 48 v. 71; Curwen, p. 1554.)

Where conveyances are made to individual trustees instead of the corporation such individual grantees are trustees for the corporation, and on sale receive the proceeds to its use.

Methodist Church v. Wood, 5 Ohio 283 (1831).

GENERAL OR CENTRAL RELIGIOUS SOCIETIES.

Section 10022-1. (Incorporation of cathedrals or other religious societies.) When a diocesan convention or other representative body of any religious denomination in this state desires the incorporation of a cathedral or other central or general religious society or church of its denomination, having, in addition to local religious, educational or charitable functions, a general charge of such, and missionary functions in the diocese, or other ecclesiastical territory in this state represented by said body, and, at any regular meeting of such representative body, elects not less than five members of such denomination, one of whom shall be a resident freeholder in this state, to serve as members of the chapter thereof, or as trustees, until the election of their successors, and makes a statement, giving the names of such members or trustees, the character of the endowment fund or other property, donations or appropriations, to be intrusted to their care, and the uses to which they are to be applied and their general rights, powers and duties, and the corporate name by which they are to be known, and such statement, is signed, certified, attested, acknowledged, filed and recorded in the office of the secretary of state in ac-

cordance with the provisions of section 10011, the persons so named in such statement shall, thereupon, with their successors in office, under such corporate name, become a body corporate and politic, for the purposes in such statement specified; and a copy of such record, duly certified by the secretary of state, shall be evidence of the existence of such corporation. (May 17, 1911, 102 v. 133.)

Section 10022-2. (Constitution.) Any representative body, creating a corporation under the provisions of section 10022-1 may provide a constitution, not inconsistent with the statement provided for therein, or with the law of this state, for the government of such corporation, and amend the same from time to time; and determine the number, and limit the terms of the members of the chapter, or trustees, and may provide for and designate at any time, a certain number, or proportion of ex-officio members of the chapter thereof, or trustees, and may provide for a certain number, or proportion of members or trustees, to be elected or designated ex-officio by other congregations, or bodies, of the same religious denominations in the same diocese, or ecclesiastical territory, in addition to the aforesaid members, or trustees, to be elected by said representative body, said additional classes of members, or trustees, not constituting a majority of the whole chapter, or board, and having otherwise the same qualifications as those elected by such representative body; and may determine the ratio of clerical to lay membership upon such chapter or board; and may include the whole, or any part of such designations, and provisions, either in the original statement provided for in section 10022-1, or in such constitution. (May 17, 1911, 102 v. 134.)

Section 10022-3. (Endowment fund controlled by trustees.) Members of the chapter or trustees of corporations under section 10022-1 and section 10022-2, if chosen to take charge of any endowment fund, may invest, manage and dispose of the same in accordance with the purpose for which it was created, subject to such constitutional regulations as such representative body may from time to time prescribe. (May 17, 1911, 102 v. 134.)

Section 10022-4. (Surrender of corporate existence or franchise and consolidation.) When one or more parishes, or other religious societies, represented by the same diocesan convention, or other representative body of any religious denomination in this state, and incorporated by, or under, any law of this state, desires, or desire at the same, or dif-

ferent times, to surrender its or their corporate existence and franchises, and that representatives and their successors, to be elected by its or their congregations, be consolidated as a single corporation, with any corporation created by the same representative body, under the foregoing section 10022-1, under the name, and with the rights, powers and duties of the last aforesaid corporation, the rector, wardens and vestry, or other known legal trustees of such parishes, or other religious societies, and the members of the chapter, or trustees of such corporation under said section 10022-1, may enter into an agreement for such consolidation; and prescribe therein the terms and conditions thereof, the time and place for the first meeting of the members of the chapter, or the trustees constituting the consolidated corporation, the number, or proportion, and time and manner of election of the members of each of said congregations, who shall first, and as their successors, be chosen as members of the chapter of, or trustees of the consolidated corporation, additional to those provided, designated or elected by such representative body, to succeed, with the last aforesaid, to the rights, trusts, duties and obligations of those members, officers or trustees, who in the separate, or original organizations held in trust, or in corporate capacity, the estate of such separate, or original corporations, with such other estates as they may deem necessary to complete the consolidated corporation; but an agreement so made shall not be valid until it has been submitted to, and ratified by, separate meetings of the members of each of said parishes, or societies, in accordance with the provisions of section 10004, and has also been submitted to, and ratified by, such representative body at one of its regular meetings. (May 17, 1911, 102 v. 134.)

Section 10022-5. (Merger of corporations; what sections govern.) When a corporation is being, or has been merged with, or into, another, or new corporation, under the provisions of section 10022-4, said merger and the consolidated, or new corporation, resulting therefrom shall be, in substance, subject to, and governed by, the provisions of sections 10005, 10006 and 10007 of this chapter, so far as the same are, in their nature, or by analogy, applicable thereto. (May 17, 1911, 102 v. 134.)

Section 10022-6. (Ratification. Evidence.) If, before the creation of a corporation under section 10022-1, for the purposes therein provided, any parish, or religious society, described in section 10022-4, has been acting, by authority of its diocesan convention, or other representative body, as a

part of, or in connection with any unincorporated subordinate agency, or body, in whole or in part, chosen, designated, or provided by such representative body, for some, or any, of the same, or similiar purposes, an agreement for consolidation, such as is provided in section 10022-4, may be made, in anticipation of the creation of such corporation under said section 10022-1, by and between, the said several parties who, as aforesaid, have been acting together; but an agreement so made shall not be valid until submitted and ratified, on both parts, as in the foregoing section 10022-4 provided; and thereupon the statement pursuant to the creation of a corporation under section 10022-1 and therein provided for, shall include the terms of said agreement and, on being signed, certified, attested, acknowledged, filed and recorded as in section 10022-1 provided, shall have all the effect of the provisions of section 10022-1, section 10022-4, section 10005, section 10006 and section 10007 of this chapter; and a copy of such record, duly certified by the secretary of state, shall be evidence of such consolidation and of the existence of the new corporation. (May 17, 1911, 102 v. 134.)

WOMEN'S CHRISTIAN ASSOCIATIONS.

Section 10023. (Women's christian association may procure homes.) Every women's christian association incorporated under the laws of Ohio, having and maintaining a branch or department as a retreat for unfortunate or fallen women, shall have all the powers and authority conferred upon children's homes, incorporated under the laws of this state, in placing, indenturing, and procuring the adoption in private families of children who are born in such retreats of the inmates thereof, and who are abandoned or deserted by their parents, and the supervision over them after they have been so placed or adopted. (R. S. Sec. 3794-1; April 18, 1892, 89 v. 405.)

YOUNG MEN'S CHRISTIAN ASSOCIATIONS.

Section 10024. (State association, approval of.) A society of men conducting religious services, performing christian work and co-operating for the mutual benefit of the membership, shall be known as a young men's christian association not for profit. When such a society has received the approval of the state association, and files its application and certificate of approval with the secretary of state and

paid a fee of ten dollars he shall cause to be issued to it these articles of incorporation. (May 9, 1908, 99 v. 396, § 1.)

The work of the Y. M. C. A. and the Y. W. C. A. is of a charitable nature. These institutions may operate employment agencies without a license under G. C. § 893. Rep. Atty. Gen. 1914, p. 325.

Section 10025. (Management, control, etc.) The management and control of the association shall be vested in five or more trustees. They may be elected for a term of not less than one nor more than five years, but the term of office of an equal number must expire each year. (May 9, 1908, 99 v. 396, § 2.)

Section 10026. (Powers of trustees.) The association may adopt regulations for its government. Its trustees may provide rules for the business of the association and for the conduct of the members, departments, branches, committees, officers, employes and guests. (May 9, 1908, 99 v. 396, § 3.)

An association incorporated for the "spiritual, mental, moral, social and physical" improvement of young men, may prescribe courses of study and confer degrees on graduates.

5 Opins. Atty. Gen. 61 (1900).

Section 10027. (Branches, organization of.) The association may conduct such work and organize such departments as are deemed by its trustees necessary to attain the purposes of the organization; and organize through its trustees under such rules as they adopt, branches which may become co-ordinate parts of the association. It also may receive dues, fees, fines, assessments and contributions from the members and apply them to their designated use; and accept legacies, devises, bequests, savings, donations and other grants and administer them. (May 9, 1908, 99 v. 397, § 4.)

This section does not authorize the association to conduct a savings bank department for the benefit of its members or others.

Rep. Atty. Gen. 1909-1910, p. 90.

Section 10028. (Power to hold property.) The association may acquire, hold, convey, lease, encumber by mortgage, improve and otherwise handle any real or personal property, necessary or convenient to enable it to carry out its aims and objects, but its property shall not be liable for any debt or obligation contracted without the approval of the board of trustees. In all respects it may deal with minors the same as it deals with adults. (May 9, 1908, 99 v. 397, § 5.)

The association can not mortgage its property without complying with § 10051 et seq.

Rep. Atty. Gen. 1909-1910, p. 90.

Section 10029. (Dissolution, where filed.) Subject to the contract rights of its members, by a majority vote of the membership and by filing with the secretary of state a copy of the certificate of their action, an association may dissolve. (May 9, 1908, 99 v. 397, § 5.)

Section 10030. (State organization.) The young men's christian associations in Ohio may unite and constitute the state association for the supervision and conduct of their work in the state. The associations affiliated with the state association, through their representatives, may make such regulations as they deem necessary; choose such officers as they determine upon and delegate such duties as they desire for the conduct of the work in the state to a state committee to be chosen as the state association decides. (May 9, 1908, 99 v. 397, § 6.)

Regulations properly adopted are binding upon local associations, which are members of the state association, and may be enforced against such local associations.

Rep. Atty. Gen. 1909-1910, p. 90.

Section 10031. (Power of state association.) The state association may incorporate and exercise the privileges of this chapter. When so incorporated and organized it may receive young men's christian associations into affiliation, and may pass upon all applications for the incorporation of such associations, causing to be affixed thereto, a certificate of its approval. (May 9, 1908, 99 v. 397, § 6.)

The state association may, in its discretion, refuse the application of an association.

Rep. Atty. Gen. 1909-1910, p. 90.

Section 10032. (Financial statement.) Every affiliated association must file with the state association a copy of its constitution, rules and regulations; and annually thereafter any changes therein, together with a schedule of its property; a financial statement, and such report of its activity as the state association determines. Once a year to the auditor of state the state association must make a statistical report and summary of the associations reporting to it. Nothing herein shall limit or restrict any power or authority now or hereafter conferred upon any corporation not for profit. (May 9, 1908, 99 v. 397, § 7.)

BENEVOLENT.

Section 10033. (Fiscal trustees of women's benevolent associations.) A benevolent or charitable association incorporated by or under the laws of this state, and of which women are or may be trustees, managers, or directors, may vest the custody, control, and management of all its endowment or capital, funds, and property in three male trustees, to be styled fiscal trustees, to be appointed from time to time, as follows: One by the common pleas court of the county where such association is located, one by the probate court of such county, and one by the vote of a majority of the members of such association present at a regular meeting duly convoked. Such trustees shall hold their offices for three years, except the first appointed, who shall hold office respectively for one, two and three years. They must meet in the presence of the probate judge, and, by agreement, or by lot if they can not agree, allot themselves accordingly, and the judge shall give to each a certificate of his term. Upon the death, resignation, incapacity, or removal from the county of either of such trustees, the vacancy must be filled for the unexpired term by the same appointing power. (R. S. Sec. 3791; May 13, 1878, 75 v. 524, § 1; S. & S. 51.)

Section 10034. (When appointed.) Trustees shall not be appointed except upon the written request of the association, filed in the probate court, in accordance with a resolution by it adopted, at a regular meeting thereof, duly convoked. Until such appointment the association at a regular meeting may elect any number of such trustees, not less than three, with such power and subject to such duties, to hold their office for such time not more than three years, as the association by its by-laws determines. (R. S. Sec. 3791; May 13, 1878, 75 v. 524, § 1; S. & S. 51.)

Section 10035. (Powers of fiscal trustees.) Such trustees shall have the exclusive right and authority, in the name and behalf of such association, to demand, take, and possess all the endowment or capital, funds, or property which the association has or may be entitled to, and these securely to manage, invest, change, and dispose of at their will, for the use and benefit of the association, so as to yield a regular income. Every three months, or oftener if necessary and convenient, they must give account of all such funds, property and income to the proper board of trustees, managers or directors of the association, and collect at such times, and

pay over to them or their order, all the net income of such investments, after deducting the actual necessary expenses of the trust. No charge or allowance for their service shall be made or permitted. (R. S. Sec. 3792; March 30, 1864, 61 v. 87, § 2; S. & S. 52.)

Section 10036. (Limitation of powers.) For such purposes, in the name of the association, the trustees may contract and be contracted with, prosecute and defend suits, and receive, hold, and dispose of, all money and property which the association may have, acquire or be entitled to, by gift, purchase or otherwise, for its endowment, and when necessary for such purposes, use the common seal of the corporation. But they shall not have or exercise any power, or control over the institution or affairs of the corporation, other than its fiscal affairs as hereinbefore limited, nor be liable for its debts, or for anything but their own acts or negligence. (R. S. Sec. 3792; March 30, 1864, 61 v. 87, § 2; S. & S. 52.)

Section 10037. (Other associations may accept provisions.) A benevolent or charitable association hereafter formed, coming within the purview of the third and fourth preceding sections may make the provisions of the four preceding sections part of its articles of incorporation. Such an association now incorporated under general or special law, also may accept such provisions, by a vote of the majority of the members present at a regular meeting. When so accepted, and a certified copy of such acceptance is filed in the office of the secretary of state, the provisions of the four preceding sections shall be a part of its charter. (R. S. Sec. 3793; March 30, 1864, 61 v. 87, § 3; S. & S. 52.)

Section 10038. (Consolidation of charitable or benevolent institutions.) When two or more charitable or benevolent associations, societies or organizations formed or incorporated by or under any law of this state for charitable or benevolent purposes, desire to be consolidated or united as a single corporation, or when two or more charitable or benevolent associations, societies or organizations, one or more of which is, or may be, incorporated under Ohio law for charitable or benevolent purposes, desire to be consolidated or united as a single corporation, the trustees, directors or other known legal representatives, governing body or bodies, of such associations, societies or organizations may enter into an agreement for such union or consolidation and prescribe its terms and conditions; also, a corporate name

for such united association, society or organization, which may be that of either one of them, or a new name, the time and place for the first meeting of the new corporations, the number of members of one or more or of each separate branch or organization to be chosen as directors, trustees, or other officers of the new corporation to succeed to the rights, trusts, duties and obligations of those officers who in either of the separate organizations held in trust the estate, real and personal, of the separate association, society or organization, with such other estates as they may deem necessary to complete the new corporation. (R. S. Sec. 3793a; April 19, 1898, 93 v. 136.)

Benevolent or charitable institutions are authorized to consolidate in Ohio, however diverse may be their methods of work.

An organization whose main purpose is to promote the temporal, moral or intellectual uplift of others, without pecuniary reward to itself or its promoters, is a benevolent organization within the meaning of the statute authorizing benevolent and charitable institutions to consolidate.

That donations have been made to a benevolent institution with certain conditions of reverter, which would be violated by the consolidation of the said institution with another, is not ground for equitable interference with such a proposed consolidation.

The statute providing for the consolidation of benevolent institutions is neither retroactive nor in impairment of contracts and is constitutional, notwithstanding the charters of the two organizations which are proposing to consolidate under it were granted prior to this enactment.

The proceeding provided by statute for the consolidation of benevolent or charitable corporations is not violative of the "due process of law" clause of the Federal constitution.

Dunham v. Kauffman, 10 N. P. n. s. 49; 20 L. D. 274 (C. P. 1910).

Societies organized to further the cause of temperance generally or among a certain defined class of persons are "charitable or benevolent" organizations within the meaning of this section and may consolidate.

Rep. Atty. Gen. 1911-1912, p. 69.

Section 10039. (Agreement to be submitted to each organization.) No agreement so made shall be valid until it has been submitted to a separate meeting of the members of each of the associations, societies or organizations, of which due and full notice has been given according to the form and usage for calling meetings of each of such associations, societies or organizations, and ratified by a two-thirds vote of all the members present at the meeting, in person or by proxy, entitled to vote according to the laws, regulations or usages of such associations, societies, organizations or corporations, respectively. (R. S. Sec. 3793a; April 19, 1898, 93 v. 136.)

Section 10040. (Record of ratification of agreement.) When such agreement has been ratified by each association, society, organization or corporation which is a party to the

proposed united organization, the clerk or secretary of each meeting shall certify the record of the proceedings thereof, and deliver it to the clerk or secretary of the first meeting of the united association, society, organization or corporation, as herein provided and as specified in the terms of agreement. (R. S. Sec. 3793b; April 19, 1898, 93 v. 137.)

Section 10041. (Who entitled to vote; agreement to be filed.) At the first meeting of the united association, society, organization or corporation, each member of each of such associations, societies, organizations or corporations will be entitled to vote. If at the meeting the proceedings and acts of the several associations, societies, organizations or corporations, parties thereto, are submitted to and approved by it, and a board of trustees, directors or other officers are chosen, in accordance with the terms of the agreement, the clerk or secretary of the meeting shall certify the approved agreement or terms of union and file it in the office of the secretary of state, whereupon the several associations, societies, organizations or corporations, parties thereto, shall be one corporation under the name by it adopted, possessing within this state all the rights, privileges and franchises, and subject to all the restrictions, disabilities and duties of the new corporation. (R. S. Sec. 3793c; April 19, 1898, 93 v. 137.)

Section 10042. (Acts may be perfected subsequently.) Any of the acts provided for by the preceding section, which are not done or perfected at such first meeting may be done and perfected at a subsequent or adjourned meeting of the united corporation. (R. S. Sec. 3793d; April 19, 1898, 93 v. 137.)

Section 10043. (Recording of certificate.) The certificate to the secretary of state provided for by the second preceding section shall be by him recorded, and a copy duly certified by him recorded in the office of the recorder of deeds of the county where such corporation exists. It may be recorded in the office of the recorder of deeds of any county where real estate lies belonging to any of such associations, societies, organizations or corporations entering into the union. (R. S. Sec. 3793e; April 19, 1898, 93 v. 137.)

Section 10044. (Evidence of corporate existence.) A certified copy of the certificate by the recorder of either county in whose office it is recorded, or a copy certified by the secretary of state of the record in his office, shall be prima facie

evidence of the existence of such corporation. (R. S. Sec. 3793e; April 19, 1898, 93 v. 137.)

Section 10045. (Constitution and by-laws.) The united corporation may adopt a constitution, by-laws and rules, consistent with the laws of this state, and amend them under such provisions for amendment as it at any time adopts. (R. S. Sec. 3793f; April 19, 1898, 93 v. 137.)

Section 10046. (Rights and powers of new corporations.) The various associations, societies, organizations or corporations entering into such union shall be merged in such united body and the new corporation with its officers and chosen directors, trustees or other representatives shall succeed to, and be vested with, all the right, title and interest in and to every species of property, and all the rights, privileges and franchises held by or vested in each of such associations, societies, organizations or corporations, parties to the agreement, without any other act, conveyance or transfer. The new corporation shall hold and enjoy these, with all the rights pertaining to such property, franchises and trusts, and be subject to all the debts, liabilities and obligations in the manner and to the extent as was any of the associations, societies, organizations or corporations, parties to the new corporation. (R. S. Sec. 3793g; April 19, 1898, 93 v. 137.)

Section 10047. (How property held in trust governed.) Real estate or other property vested in or held by either of such associations, societies or organizations or corporations under any trusts or terms governing the grant, shall continue to be subject to such trust and controlled by the original terms under which the real estate or property became vested in or entrusted to the parties to the union. (R. S. Sec. 3793h; April 19, 1898, 93 v. 138.)

Section 10048. (Petition for conveyance, judgment and effect.) The united corporation at the request of a majority of its members, or by act of its trustees, directors or other governing bodies, in its corporate name may petition the common pleas court of the proper county, setting forth the fact of such union, which court in its discretion may make an order requiring such officers to convey to the new corporation the real estate owned and held by the parties to the union, as it directs. If any of the officers refuse or neglect to obey such order, the decree therefor shall serve as such conveyance. The order in no case shall be inconsistent with the original terms under which the real estate became vested

in, or entrusted to, the parties to the union. In all cases the grantors of the real estate to such parties, or their heirs, or such other parties as the petitioners deem advisable, may be made defendants to the petition. Defendants who make no defense shall not be subject to costs. (R. S. Sec. 3793i; April 19, 1898, 93 v. 138.)

Section 10049. (Notice of petition.) Notice of the pendency of the petition must be given by publication in a newspaper published in the county where the petition is filed, for four consecutive weeks, setting forth the object and prayer thereof. (R. S. Sec. 3793j; April 19, 1898, 93 v. 138.)

Section 10050. (Subsequent consolidations of union associations.) After the creation of a united corporation under the provisions of the preceding sections relating thereto, any one or more associations, societies, organizations or corporations of like character, at any time may unite with and become a part of such corporation in accordance with such provisions. (R. S. Sec. 3793k; April 19, 1898, 93 v. 138.)

Section 10051. (May sell or incumber real estate, how.) When a charitable or religious society or association desires to sell, lease, exchange or incumber by mortgage or otherwise any real estate owned by it, or held in trust by it for a specified religious or charitable purpose, or held for its use or benefit by trustees either chosen by it or otherwise constituted, for any such purpose, except grounds used or occupied as burial places for the dead, the trustees, wardens and vestry, or other officers intrusted with the management of the affairs of such society or association or holding the title to such property, or such society or association itself, if it be incorporated under any law of this state, in the common pleas court of the county in which the real estate is situated may file a petition stating how and by whom the title thereto is held, that such society or association desires to make the sale, lease, exchange or incumbrance and setting forth the object thereof. If upon the hearing of the case it appears that such sale, exchange, lease or incumbrance is desired by the members of the society or association and that it is right and proper that authority be given to accomplish it, the court may authorize the trustees or other officers of the society or association, or if incorporated the society or association itself, to sell, lease, exchange or incumber such real estate in accordance with the prayer of the petition and upon such terms as the court deems reasonable. (107 v. 173;

R. S. Sec. 3794; 92 v. 397; 79 v. 108; R. S. 1880; April 3, 1866, 63 v. 87, §§ 1, 2; S. & S. 163; S. & C. 371, 372.)

For sale of real estate see also §§ 9999 and 10015.

Trustees have no power to convey real estate without the consent of the members of the society and without an order of court.

South Kenton, etc., Ass'n v. Espy, 17 C. C. 524; 9 C. D. 695 (1899).

A proceeding under this section is not an "action" within the meaning of G. C. §1571. Wilansky v. Congregation, 12 Ohio App. 301, 31 O. C. A. 526 (1920).

A stranger may not take advantage of the want of a court order under this section. A sale without such an order is voidable and subject only to direct attack by persons having a right to object at the time and upon grounds sufficient to have defeated the order. Sullivan v. Agricultural Soc., 23 N. P. n. s. 49 (1918).

Former statute empowering trustees to sell held invalid.

See South Kenton, etc., Ass'n v. Espy, 17 C. C. 524; 9 C. D. 695 (1899).

The Young Men's Christian Association must comply with this section in order to mortgage its property.

Rep. Atty. Gen. 1909-1910, p. 90.

A conveyance for a valuable consideration, to a religious society "for the use of such society," conveys an unconditional fee simple title. The property may be sold and a good title given to the purchaser.

Hedges v. Taylor, 33 W. L. B. 5 (Supreme Court, without report, 1899).

M. E. Church v. Gamble, 4 C. C. n. s. 45; 16 C. D. 295 (1904); aff'd, no rep., 74 O. S. 433.

See Ashland v. Greiner, 58 O. S. 67 (1898).

Section 10052. (Notice of pendency and prayer of petition.) The petitioners shall cause notice of the pendency and prayer of the petition to be published in some newspaper of general circulation in the county where the real estate proposed to be sold, leased, exchanged or incumbered is situated for four consecutive weeks, before the application is heard. (107 v. 173; R. S. Sec. 3795; April 17, 1882, 79 v. 108, 109; April 8, 1880, 77 v. 122; R. S. 1880; March 24, 1860, 57 v. 85, § 3; S. & C. 372a.)

Section 10053. (Procedure when property held in trust and trustees refuse to file petition.) In case the title to the property is held for the use or benefit of such society or association by trustees, all or a majority of whom are not chosen thereby but otherwise constituted, and who refuse upon request of such society or association, or its duly elected trustees, wardens and vestry or other officers, to file such petition, upon the petition of the society or association or its duly elected trustees or other officers, the court may require the trustees holding the title to lease, convey or incumber the real estate in accordance with the prayer of the petition and upon terms it deems reasonable. But all trustees hold-

ing title and refusing to file or join in the petition must be made defendants therein and be served with summons as in civil action. (107 v. 173; R. S. Sec. 3794; April 27, 1896, 92 v. 397; April 17, 1882, 79 v. 108; R. S. 1880; April 3, 1866, 63 v. 87, §§ 1, 2; S. & S. 163; S. & C. 371, 372.)

Section 10054. (Interconveyance of property.) The trustees of a church organization, religious or charitable society or association, or such organization, religious, or charitable society or association itself, if incorporated, and all persons holding title to property in trust therefor, may upon a two-thirds vote of the members of the organization connected therewith if there be such present and voting at a meeting duly called and held for that purpose, lease, transfer, convey or incumber it to other trustees of the same denomination, or to the trustees of such organization, society or association itself of the same denomination if incorporated under the law of this state. But the lease, transfer, conveyance or incumbrance shall be made only when the property so transferred, leased or incumbered, or the proceeds thereof, or the revenue arising from the use thereof, is still to be used for the religious, missionary or church purposes of said denominations, or, if a charitable organization, for the specified charitable purpose. (107 v. 174; R. S. Sec. 3794a; April 27, 1896, 92 v. 397; April 27, 1893, 90 v. 321.)

Section 10055. (Title guaranteed.) When the trustees or other officers mentioned in the preceding sections heretofore have sold and conveyed by deed in fee simple or mortgaged any real estate therein mentioned, without proceeding as required by such sections, and the grantees thereof, and their successors in line of title, for five years since the date of such conveyance, held continued, exclusive, notorious and adverse possession of the real estate so conveyed, such sales, conveyances and mortgages shall have the same validity and effect as if they had been made by proceedings instituted under such sections and duly confirmed by the court of common pleas. (R. S. Sec. 3794b; April 12, 1898, 93 v. 101.)

Section 10056. (Sale or incumbrance to be confirmed by the court.) The trustees or other officers of such religious society, authorized to make a such sale, lease, exchange or incumbrance, shall make return thereof to the court ordering it, at such time as it orders. Thereupon, if satisfied that the sale, lease, exchange or incumbrance was made according to its order, the court shall approve it, and order

that the proceeds be invested in other real estate for the use of the society, used in payments of its debts, or otherwise invested or disposed of according to the prayer of the petition. (107 v. 173; R. S. Sec. 3796; April 17, 1882, 79 v. 108, 109; April 8, 1880, 77 v. 122; R. S. 1880; April 3, 1866, 63 v. 87, § 2; S. & C. 372a.)

Section 10057. (Secret benevolent association may invest reserve funds.) A secret benevolent association, or society incorporated under or by the laws of the state, which has reserve or accumulated funds, or moneys, held by them for the purpose of endowment of the widows, orphans, families, blood relatives or heirs of the members of the society or association, or for purely charitable purposes, may invest such funds or moneys upon interest, but must take securities for the investment upon real or personal property, or otherwise, as the society or association deems fit. (R. S. Sec. 3796a; April 16, 1900, 94 v. 355; April 9, 1880, 77 v. 146.)

Section 10058. (May elect trustees to manage funds.) Such an association or society may elect a board of trustees, consisting of not less than three members, and entrust to them the right to manage, control, take charge of, invest, collect, demand, receive and deposit all reserves, surplus or accumulated funds or moneys, which the association or society holds from time to time for the purpose of such endowments as are named in the preceding section. (R. C. Sec. 3796b; April 9, 1880, 77 v. 146.)

The funds of a society, organized to assist its sick and needy members, can not, without a change in its constitution, be applied to religious purposes.

Podesta v. Societa, 10 C. C. 19; 6 C. D. 210 (1895).

Section 10059. (Society to fix terms, define duties, etc.) Such an association or society by by-law may define and limit the term of office of each of such trustees; define their duties and powers, and also those of the board of trustees; remove either one for good cause, and fill all vacancies occurring in the board. It also shall demand from each of the trustees security for the faithful performance of their several duties, as it deems fit; cause investments to be made by them in the name or names of either or all, in which name or names also suit may be brought; and may empower the trustees to discharge, acquit, and release all claims or demands of the association or society upon payment thereof. The trustees may sue for a claim or demand, for a loan or

investment made by the association or society; and upon foreclosure of a mortgage held by the association or society for an investment or loan, may purchase and hold any lands, tenement or interest in land, in fee or otherwise and lease, rent, sell and convey it by deed. (R. S. Sec. 3796c; April 9, 1880, 77 v. 146.)

Section 10060. (Powers conferred by law.) Such an association or society may sue or be sued, answer or be answered unto, plead or be impleaded in any court in this state. (R. S. Sec. 3796d; April 9, 1880, 77 v. 146.)

Section 10061. (Powers of society.) Such an association or society may accept and receive any donation or voluntary contribution, collect its assessments, which shall not exceed one-fifth of one per cent of the amount payable at the death of a member; and pay endowments in the mode and to the persons named and provided by its laws but in no case exceeding in the aggregate five thousand dollars on the death of any one member. (R. S. Sec. 3786e; April 9, 1880, 77 v. 146.)

Section 10061-1. (Lodge may hold real estate. Conveyance. Notice to lodge members. Attestation.) That any unincorporated lodge or other subordinate body of any society or order which is duly chartered by its grand lodge or body, may take and hold real estate for its own use and benefit, by lease, purchase, grant, devise, gift or otherwise, and loan its funds and secure the same or any unpaid purchase money by mortgage on otherwise unincumbered real estate, may borrow money and execute and deliver notes or bonds and mortgages on real property of the lodge to secure the same in and by the name and number of said lodge or other subordinate body according to the register of the respective grand lodge or body. The presiding officer of such lodge or other subordinate body, together with the secretary or officer keeping the records thereof, may make conveyance, leases or mortgages of any real estate belonging to such lodge or other subordinate body when authorized by a vote of the members present at a regular meeting held by said lodge or other subordinate body, after at least ten days' notice has been given to all members of said lodge or other subordinate body, by mailing a written notice of said proposed action to the last known postoffice address of all such members, under the rules and regulations of the lodge or other subordinate body, and not in conflict with the regulations provided by the respective grand lodge or body. All such

conveyances, leases or mortgages shall be in the name of the lodge, attested by the presiding officer and secretary, or other officer in charge of the records, shall have affixed the seal of such lodge or other subordinate body, and any mortgage taken by lodge or other subordinate body in its name and number may, when paid and satisfied, be released by the presiding officer and secretary or officer keeping the records thereof, attested by the seal of the lodge or other subordinate body. (110 v. 88; 101 v. 207.)

CHAPTER 5.

HUMANE SOCIETY.

§ 10062.	Ohio humane society.	§ 10075.	Member may require police to act.
§ 10063.	Objects and power to acquire property.	§ 10076.	Fees.
§ 10064.	Officers and rules.	§ 10077.	Person guilty liable to damages.
§ 10065.	Powers of agents.	§ 10078.	Conviction of agent no bar.
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§ 10070.	May appoint agents.	§ 10083.	Probate judge may make general agent guardian.
§ 10071.	Approval of appointments.	§ 10084.	Guardian to provide home for child.
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Section 10062. (Ohio humane society.) The Ohio state society for the prevention of cruelty to animals, shall remain a body corporate, under the name of "the Ohio humane society," with the powers, privileges, immunities, and duties heretofore possessed by such society, hereinafter specified as to county societies, and may appoint any person, in a county where there is no such active society, to represent the state society, and to receive and account for all funds coming to that society, from fines or otherwise. (R. C. Sec. 3714; March 21, 1887, 84 v. 207; R. S. 1880; March 29, 1875, 72 v. 129, § 21.)

A contract between a humane society and a city whereby the society agrees to enforce an ordinance relating to dogs running at large is *ultra vires*. Opins. Atty. Gen. 1918, p. 243.

This section and other statutes making certain acts of cruelty to animals an offense, and affixing a penalty, are constitutional.

Beamer v. State, 21 C. C. 440; 12 C. D. 4 (1901).

As to matters not covered by the federal twenty-eight hour live stock shipment law, such statutes are valid and enforceable as applied to interstate shipments of live stock.

Meeks, etc., Co. v. Humane Co., 12 N. P. n. s. 625; 22 L. D. 517 (1912).

Section 10063. (Objects and power to acquire property.)

The objects of such society, and all societies organized under sections ten thousand and sixty-seven and ten thousand and sixty-eight, shall be the inculcation of humane principles, the enforcement of laws for the prevention of cruelty, especially to children and animals, to promote which objects such societies may respectively acquire property, real or personal, by purchase or gift. All property acquired by gift, devise, or bequest, for special purposes, shall be vested in a board of trustees consisting of three members elected by the society, which board must manage such property, and apply it in accordance with the terms of the gift, devise, or bequest, with power to sell it and re-invest the proceeds. (R. S. Sec. 3714; March 21, 1887, 84 v. 207; R. S. 1880; March 29, 1875, 72 v. 129, § 21.)

Certificate from board of state charities required before filing articles of incorporation of association for care of dependent, neglected or delinquent children. Opins. Atty. Gen. 1915, p. 2436; G. C. § 1352-2.

Section 10064. (Officers and rules.) Such society may elect such officers, and make such rules, regulations and by laws as are deemed expedient by its members for their own government and the proper management of its affairs. The society may appoint agents in any county of this state where no active society exists, under such sections ten thousand and sixty-seven and ten thousand and sixty-eight, to represent it and receive and account for all funds coming to the society from fines or otherwise, and may also appoint agents at large to prosecute the work of the society throughout the state. (R. S. Sec. 3714; March 21, 1887; 84 v. 207; R. S. 1880; March 29, 1875, 72 v. 129, § 21.)

Term of office of agents, see note to § 10071.

Section 10065. (Powers of agents.) The agents of such society and of all societies organized under such sections, whose appointment has been approved as hereinafter provided, may arrest a person found violating any law for the protection of persons or animals, or the prevention of cruelty thereto. Upon making such arrest the agent forthwith shall convey the person arrested before some court or magistrate having jurisdiction of the offense, and there make complaint against him. But agents shall not make such arrests within a municipal corporation unless their appointment has been approved by the mayor thereof, nor within a county beyond the limits of a municipal corporation, unless their appointment has been approved by the

probate judge of the county. The mayor or probate judge must keep a record of such appointments. (R. S. Sec. 3714; March 21, 1887, 84 v. 207; R. S. 1880; March 29, 1875, 72 v. 129, § 21.)

Section 10066. (Branches.) Branches of such society consisting of not less than ten members may be organized in any part of the state to prosecute the work of the societies in their several localities, under rules and regulations prescribed by this society. Societies organized in any county under the next following section may become branches of such society by resolution adopted at a meeting thereof called for that purpose, a copy of which resolution shall be forwarded to the secretary of state. (R. S. Sec. 3714; March 21, 1887, 84 v. 207; R. S. 1880; March 29, 1875, 72 v. 129, § 21.)

Award of fund arising under G. C. § 5653, see Opins. Atty. Gen. 1917, pp. 1668, 2353; State v. Commissioners, 15 N. P. n. s. 233.

Section 10067. (Other societies authorized.) Societies for the prevention of acts of cruelty to animals may be organized in any county, by the association of not less than seven persons. The members thereof, at a meeting called for the purpose, shall elect not less than three of their members directors, who shall continue in office until their successors are duly chosen. (R. S. Sec. 3715; March 29, 1875, 72 v. 129, § 12.)

A society can not be formed under this section for the protection of animals alone. Articles of incorporation must state that the corporation is formed for the protection of children as well as animals. Opins. Atty. Gen. 1917, p. 2067; § 10063.

And the articles must be approved by the board of state charities. Opins. Atty. Gen. 1917, pp. 2351, 2353; G. C. § 1352-2.

Section 10068. (Incorporation.) The secretary or clerk of the meeting must make a true record of the proceedings thereat, and certify and forward it to the secretary of the state, who shall record it. This record shall contain the name by which such association is to be known, and from and after its filing, the directors and associates, and their successors, will be invested with the powers, privileges, and immunities incident to incorporated companies. A copy of such record, duly certified by the secretary of state, shall be taken in all courts and places in this state, as evidence that such society is a duly organized and incorporated body. (R. S. Sec. 3716; March 29, 1875, 72 v. 129, § 13.)

Section 10069. (Officers and by-laws.) Such societies may elect such officers, and make such rules, regulations, and by-laws, as are deemed expedient by their members for their own government, and the proper management of their affairs. (R. S. Sec. 3717; March 29, 1875, 72 v. 129, § 15.)

Section 10070. (May appoint agents.) Such societies may appoint agents who are residents of the county or municipality for which the appointment is made, for the purpose of prosecuting any person guilty of an act of cruelty to persons or animals, who may arrest any person found violating any provision of this chapter, or any other law for protecting persons or animals or preventing acts or cruelty thereto. Upon making such arrest, such agent shall convey the person so arrested before some court or magistrate having jurisdiction of the offense, and there forthwith make complaint on oath or affirmation of the offense. (R. S. Sec. 3718; March 14, 1906, 98 v. 44; April 14, 1884, 81 v. 181; R. S. 1880; March 29, 1875, 72 v. 129, § 6 [§ 16].)

A sheriff is ineligible for appointment as humane officer. Opins. Atty. Gen. 1915, p. 758.

G. C. § 3024, prohibiting police officers from receiving witness fees, applies to agents of humane societies. Rep. Atty. Gen. 1912, p. 262.

A humane agent may be appointed probation officer of a juvenile court. Rep. Atty. Gen. 1914, p. 345.

Section 10071. (Approval of appointments.) All appointments by such societies under the next preceding section shall have the approval of the mayor of the city or village for which they are made. If the society exists outside of a city or village, appointments shall be approved by the probate judge of the county for which they are made. The mayor or probate judge shall keep a record of such appointments. (R. S. Sec. 3718; March 14, 1906, 98 v. 44; April 14, 1884, 81 v. 181; R. S. 1880; March 29, 1875, 72 v. 129, § 6 [§ 16].)

The probate judge has discretion to determine not only whether the appointee is a proper person, but also whether there is such necessity for the appointment as would justify the expense to the public. State v. Ashman, 90 O. S. 200 (1914).

A probate judge has no power to appoint. His authority is limited to approval. Rep. Atty. Gen. 1913, p. 61.

A mayor has no power to revoke his approval of an appointment. Rep. Atty. Gen. 1912, p. 1825.

But an agent may be removed by the society with the approval of the mayor or probate judge. Rep. Atty. Gen. 1913, p. 1126.

A humane agent is not under civil service. Rep. Atty. Gen. 1914, p. 503.

The term of office of agents is not provided for. Unless his term is fixed at the time of appointment, an agent holds his position at the pleasure of the society appointing him, and of the mayor or probate judge.

Rep. Atty. Gen. 1910-1911, p. 891.

Section 10072. (Salary of agents.) Upon the approval of the appointment of such an agent by the mayor of the city or village, the council thereof shall pay monthly to such agent or agents from the general revenue fund of the city or village, such salary as the council deems just and reasonable. Upon the approval of the appointment of such an agent by the probate judge of the county, the county commissioners shall pay monthly to such agent or agents, from the general revenue fund of the county, such salary as they deem just and reasonable. The commissioners, and the council of such city or village may agree upon the amount each is to pay such agent or agents monthly. The amount of salary to be paid monthly by the council of the village to such agent shall not be less than five dollars, by the council of the city not less than twenty dollars, and by the commissioners of the county not less than twenty-five dollars. But not more than one agent in each county shall receive remuneration from the county commissioners under this section. (R. S. Sec. 3718; March 14, 1906, 98 v. 44; April 14, 1884, 81 v. 181; R. S. 1880; March 29, 1875, 72 v. 129; § 6 [§ 16].)

The expenses of an agent can not be paid by the county, in addition to his salary. Rep. Atty. Gen. 1912, p. 395.

An agent is not entitled to fees or costs for making arrests, serving subpoenas or other services. His compensation is fixed by this section. State v. Kleinhoffer, 92 O. S. 163 (1915); Rep. Atty. Gen. 1914, p. 1730; Rep. Atty. Gen. 1912, p. 395.

An agent appointed for one year does not hold office after the expiration of the year until his successor is appointed and qualified. His right to salary ceases at the end of the year. Opins. Atty. Gen. 1916, p. 946.

Section 10073. (Police powers of officers and agents.) An officer, agent, or member of such a society may interfere to prevent the perpetration of any act of cruelty to animals in his presence, use such force as is necessary to prevent it, and to that end may summon to his aid any bystanders. (R. S. Sec. 3720; March 29, 1875, 72 v. 129, § 18.)

The discretion of officers and agents of a humane society, in determining that the reloading of crippled live stock in transit, which has been unloaded for rest, food and water, into cars containing the carcasses of dead animals constitute cruelty, will not be interfered with by a court of equity, in the absence of abuse of such discretion.

Meeks, etc., Co. v. Humane Soc., 12 N. P. n. s. 625 (C. P. 1912).

An agent is not authorized to make arrests until after his ap-

pointment has been approved under § 10071. Rep. Atty. Gen. 1912, p. 1730.

The authority of an agent to arrest is only a power and not a duty. He can not be compelled to make arrests and can not be reimbursed for expenses. Rep. Atty. Gen. 1914, p. 1730.

Section 10074. (Interpretation of words.) In this chapter, and in every law relating to or affecting animals, the word "animal" includes every living dumb creature; the words "torture," "torment," and "cruelty" include every act, omission, or neglect whereby unnecessary or unjustifiable pain or suffering is caused, permitted, or allowed to continue, when there is a reasonable remedy or relief. The words "owner" and "person" includes corporations; and the knowledge and acts of their agents and employes in regard to animals transported, owned, employed by, or in the custody thereof, is the act of the corporation. (R. S. 3721; March 29, 1875, 72 v. 129, § 19.)

Cited, Meeks, etc., Co. v. Humane Soc., 12 N. P. n. s. 625, 627 (1912). See note to § 10073.

Where the owner provides sufficient help to properly care for his animals, and exercises reasonable care and prudence in so doing, and provides wholesome food and water in sufficient quantities, it is a defense to a charge of cruelty against such owner, that he did not know that they were not being properly fed and cared for.

Muhlhauser v. State, 1 C. C. n. s. 273; 15 C. D. 81 (1900).

Section 10075. (Member may require police to act.) A member of such society may require the sheriff of any county, the constable of any township, the marshal or policeman of any city or village, or the agent of such society, to arrest any person found violating the laws in relation to cruelty to persons or animals, and to take possession of an animal cruelly treated, in their respective counties, cities, or villages, and deliver it to the proper officers of the society. (R. S. Sec. 3722; April 14, 1884, 81 v. 181, 183; R. S. 1880; March 29, 1875, 72 v. 129, § 20.)

Section 10076. (Fees.) For this service and for all services rendered in carrying out the provisions of this chapter, such officers, and the officers and agents of the association, shall be allowed and paid such fees as they are allowed for like services in other cases, which must be charged as costs, and reimbursed to the society by the person convicted. (R. S. Sec. 3722; April 14, 1884, 81 v. 181, 183; R. S. 1880; March 29, 1875, 72 v. 129, § 20.)

No fee may be taxed for the service of a subpoena by a humane agent. Rep. Atty. Gen. 1912, p. 395; G. C. § 11504.

An agent is not entitled to fees or costs for making arrests or other services. His compensation is provided for by § 10072. *State v. Kleinhoffer*, 92 O. S. 163 (1915).

Section 10077. (Person guilty liable to damages.) A person guilty of cruelty to an animal, the property of another, shall be liable to the owner thereof in damages, in addition to the penalties prescribed by law. (R. S. Sec. 3723; March 29, 1875, 72 v. 129, § 11.)

Section 10078. (Conviction of agent no bar.) The conviction of an agent or employe shall not bar an action for cruelty to animals against an employer for allowing a state of facts to exist which will induce cruelty to animals on the part of such agent or employer. (R. S. Sec. 3724; March 29, 1875, 72 v. 129, § 9.)

Section 10079. (Any person may protect animal from neglect.) When, in order to protect any animal from neglect it is necessary, any person may take possession of it. When an animal is impounded, yarded or confined, and continues without necessary food, water or proper attention for more than fifteen successive hours, as often as is necessary, any person may enter into and upon any place in which the animal is impounded, yarded or confined, and supply it with necessary food, water and attention, so long as it there remains, or, if necessary or convenient, may remove such animal, and not be liable to an action for such entry. In all cases the owner or custodian of such animal, if known, immediately shall be notified of such action, by the person taking possession of the animal. If the owner or custodian be unknown, and can not with reasonable effort be ascertained, such animal shall be held to be an estray, and be dealt with as such. (R. S. Sec. 3725; April 14, 1884, 81 v. 181, 183; R. S. 1880; March 29, 1875, 72 v. 129, § 3.)

Section 10080. (Cost and expenses.) The necessary expenses for food and attention given to an animal under the preceding section, may be collected from the owner thereof, and the animal shall not be exempt from levy and sale upon execution issued upon a judgment therefor. (R. S. Sec. 3725; April 14, 1884, 81 v. 181, 183; R. S. 1880; March 29, 1875, 72 v. 129, § 3.)

Section 10081. (May remove child from parents.) When an officer or agent of a society organized under this chapter, deems it for the best interest of a child, because of cruelty

inflicted upon it, or of its surroundings, that it be removed from the possession and control of the parents, or persons having charge thereof, such officer or agent may take possession of the child summarily. (R. S. Sec. 3725-1; April 25, 1898, 93 v. 296, § 1.)

An application under § 10081 et seq. is a civil and not a criminal proceeding, and witnesses may demand their fees in advance. Rep. Atty. Gen. 1914, p. 1679; 12 O. L. R. 496.

Taking temporary possession of a mistreated child does not subject the society to supervision by the board of state charities under G. C. § 1352-2. Opnis. Atty. Gen. 1918, p. 389.

Section 10082. (Notice to persons having control of child and parents.) Such officer or agent shall cause a notice to be personally served upon the person having control or possession of such child, and upon its parent or parents, if within the state, that the society will apply to the probate court of the county in which it is situated, at a time and place named in the notice, for an order as hereinafter set forth. If such person or parents reside or have gone out of the state or if his or her place of residence is unknown so that such notice can not be served, such officer or agent shall file with the probate court an affidavit stating such fact. Thereupon the clerk of said court shall cause such notice to be published once in a newspaper of general circulation throughout the county, and published in the county, if there be one so published. The notice shall state the nature of the complaint, and the time and place of the hearing, which shall be held at least two weeks later than the date of the publication; and a copy of such notice shall be sent by mail to the last known address of such parent, guardian or other person having custody of such child, unless said affidavit shows that a reasonable effort has been made without success to ascertain such address. The certificate of the clerk that such publication has been made or such notice mailed shall be sufficient evidence thereof. Until the time for the hearing arrives, the court shall make such temporary disposition of such child as it may deem best. When said period of two weeks from the time of publication shall have elapsed, said court shall have full jurisdiction to deal with such child as provided by this chapter. (May 9, 1913, 103 v. 905; R. S. Sec. 3725-1; April 25, 1898, 93 v. 296, § 1.)

Section 10083. (Probate judge may make general agent guardian.) At the time stated in such notice, if it appears to the satisfaction of the probate judge, that it is for the best interest of such child that possession and control of it be

taken from the parent or other person having it, he shall make an order conferring upon the general agent of the society the powers of a guardian as to the child. (R. S. Sec. 3725-2; April 25, 1898, 93 v. 296, § 2.)

Section 10084. (Guardian to provide home for child.)

As such guardian, such general agent, with the approval of the probate judge, may provide a suitable home for the child until it reaches the age of majority, or the probate judge is satisfied that its parent or parents are in a position properly to provide and care for it. (R. S. Sec. 3725-2; April 25, 1898, 93 v. 296, § 2.)

CHAPTER 6.

CHARITABLE TRUST.

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| § 10085. Administration of charitable trusts in certain cases. | § 10092-1. Duties of trustee of a charitable trust. Provision for incorporation. |
| § 10086. Articles of incorporation. | § 10092-2. Regulations for the administration of trust. |
| § 10087. Who members and directors. | § 10092-3. Officers of corporation. |
| § 10088. Succession. | § 10092-4. Subsequent grant or devise. |
| § 10089. Attorney-general may enforce, devise or bequest. | § 10092-5. Prosecuting attorney shall examine accounts and records. Annual report. |
| § 10090. Officers. | |
| § 10091. Constitution and by-laws. | |
| § 10092. Where directors to meet. | |

Section 10085. (Administration of charitable trusts in certain cases.) When, by the last will and testament of a person, duly admitted to probate in this state or elsewhere, a decedent devised or bequeathed, or may devise or bequeath, his or her property, or a portion thereof, for charitable uses within this state, or for the establishment and maintenance of an industrial or educational school or institution to be located within the state; and when in such will it was or may be, provided that the executor or executors thereof shall organize a corporation under our laws, to receive the property so devised or bequeathed, and carry out the charitable purposes therein expressed, or establish and maintain the institution or school it provides for, and such will further provides for the management of such corporation by a board of trustees or directors, consisting, in part, of officials of this state, of the county in which such charities are to be administered or institution or school located, of any municipality in such county, and the member of congress for the district of which it forms a part, or any of such officials, and names others to be associated with them or any of them, and also provides for

the appointment of a successor or successors to the person or persons so appointed to act with such officials in a way specified in the will, such executor or executors, or his or their successors in office, and the persons hereinafter named, may constitute themselves a body corporate, with the general powers of benevolent incorporations. (R. S. Sec. 3796-1; March 19, 1902, 95 v. 61, § 1.)

This chapter is constitutional.

Smithsonian Institute v. St. John, 214 U. S. 19 (1909).

Section 10086. (Articles of incorporation.) Such executor or executors, or his or their successors, shall associate with himself or themselves not more than two citizens and residents, other than the persons named in such will, of the county in which such charities are to be administered, or such institution or school located, and he or they and such associates shall execute, acknowledge and file with the secretary of state articles of incorporation. In case of a will hereafter so probated, if within six months of such probate he or they do not file such articles, than a minority of the officials for the time being named in such will or testament may execute, acknowledge and file them, and therein must set forth:

1. A copy of the will or testament to carry out whose provisions the incorporation is organized.

2. The name of the corporation, including the name of the testator unless the will otherwise provides.

3. The location of such corporation.

(R. S. Sec. 3796-2; March 19, 1902, 95 v. 61, § 2.)

Section 10087. (Who members and directors.) The officers or officials named in such will or testament, together with the persons therein named, and in case the articles are filed by the executor or executors, the citizens of such county, not exceeding two in number, who execute and acknowledge them with such executor or executors, shall thereupon become the members and directors of such corporation. As the term of any official expires, his successor thereupon, by virtue of his office, shall become one of the members and directors of such corporation, so that the officials named in such will, for the time being and from time to time, shall be directors of the corporation. (R. S. Sec. 3796-3; March 19, 1902, 95 v. 62, § 3.)

Section 10088. (Succession.) Upon the death or resignation of the person or persons named in such will as directors associated with such officials, his or their successor or suc-

cessors shall be appointed in the manner provided in such will or testament, if it makes provision therefor, otherwise by the board of directors, and he or they shall thereupon become members and directors of the corporation. Upon the death or resignation of the two citizens of the county, or either of them, who have become directors by reason of joining in such articles of incorporation, his or their successor or successors shall be chosen by the board of directors, and he or they thereupon shall become members and directors of the corporation. (R. S. Sec. 3796-3; March 19, 1902, 95 v. 62, § 3.)

Section 10089. (Attorney-general may enforce devise or bequest.) The attorney-general in his official capacity may bring proceedings in any court of record to enforce such a devise or bequest, if he deems such action necessary to protect and carry out the purposes named in such last will and testament, without waiting for the organization of such corporation. (R. S. Sec. 3796-4; March 19, 1902, 95 v. 64, § 4.)

Section 10090. (Officers.) The officers of such corporation shall consist of a president, secretary and treasurer, and such others as the board of directors deems necessary. The president shall be a member of such board. (R. S. Sec. 3796-5; March 19, 1902, 95 v. 62, § 5.)

Section 10091. (Constitution and by-laws.) The board of directors may adopt, and also change, such organic rules, regulations and by-laws as they deem expedient, consistent with the constitution and laws of this state. (R. S. Sec. 3796-6; March 19, 1902, 95 v. 62, § 6.)

Section 10092. (Where directors to meet.) Until the estate is finally settled, the board of directors may meet in the state of the domicile of the testator. (R. S. Sec. 3796-7; March 19, 1902, 95 v. 62, § 7.)

Section 10092-1. (Duties of trustees of a charitable trust. Provision for incorporation.) When any person by deed or will shall grant or devise property and money, or either, to trustees in perpetuity, in trust, the principal and income of which, or such part thereof as may be provided by such deed or will, to be used and applied by said trustees and their successors in office for educational, charitable or benevolent purposes, to be conducted in this state, and such deed or will provides that the trustees shall become a body cor-

porate to hold and invest said property and money, and to administer said trust, said trustees upon accepting said trust shall file with the secretary of state articles of incorporation as now provided by law in cases of corporations not for profit, together with a certified copy of such deed or will, and thereupon said trustees and their successors in office shall become a corporation not for profit to administer said trust, and said trustees shall forthwith become the board of trustees thereof for such term as may be prescribed by such deed or will or by the regulations hereinafter provided for. The members of the board of trustees and their successors forever during their respective terms of office shall be the members of the corporation. (May 6, 1913, 103 v. 535.)

Section 10092-2. (Regulations for the administration of trust.) Such corporation shall adopt and maintain regulations for its government and the administration of said trust, in conformity to the provisions of such deed or will. Such regulations shall provide for the election or appointment of the trustees of said corporation and their successors, to fill vacancies or otherwise, and for their term of office, so as to conform to any provision in respect thereto contained in such deed or will, and said trustees and their successors shall be so elected or appointed and for the term so provided. If such deed or will shall contain no provision as to the manner of electing or appointing the trustees or as to their term of office, they shall be elected or appointed in the manner and for the term provided by the General Code relating to corporations not for profit, or by regulations adopted pursuant thereto. (May 6, 1913, 103 v. 535.)

Section 10092-3. (Officers of corporation.) The officers of such corporation, in addition to the board of trustees, shall be a president, vice-president, treasurer and secretary, the first three of whom shall be members of the board of trustees. The board of trustees may create such other offices as may be deemed necessary or that may be designated by such deed or will. (May 6, 1913, 103 v. 535.)

Section 10092-4. (Subsequent grant or devise.) The trustees of such corporation may accept any subsequent grant or devise of money or property, made to them or to such corporation in perpetuity, in trust, the principal or income of which or any part thereof as may be provided by

such grant or devise, to be used and applied to and for the purposes for which said original trust was established, and in such case said property and money shall be invested and administered in accordance with the regulations of such corporation. A certified copy of the deed or will making such grant or devise shall be filed with the secretary of state to be placed with the articles of incorporation and other papers relating thereto on file in his office. (May 6, 1913, 103 v. 536.)

Section 10092-5. (Prosecuting attorney shall examine accounts and records. Annual report.) The prosecuting attorney of the county in which said corporation has its general office whenever he may deem it necessary is authorized to examine the accounts and records of such corporation, and may proceed by action in the proper courts, to enforce the administration of the trust and the investment and application of the funds and property thereof in accordance with the provisions of the deed or will creating the same. A copy of the annual financial report of the corporation showing the condition of said trust shall be filed with the probate judge of said county each year. (May 6, 1913, 103 v. 536.)

CHAPTER 7.

CEMETERY ASSOCIATIONS.

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| § 10093. May acquire land and property. | § 10108. Officers may appoint policemen. |
| § 10094. Repealed. | § 10109. How receipts and income applied. |
| § 10095. Appropriation of land. | § 10110. May accept and execute certain trusts. |
| § 10096. Location of cemeteries as to dwellings; exceptions. | § 10111. May hold land in a village. |
| § 10097. (What companies prohibited from appropriation.) | § 10112. Powers of certain corporations. |
| § 10098. How income applied. | § 10113. Rights of lot owners assured. |
| § 10099. How land for entrance secured. | § 10114. Rights and powers of crematory associations. |
| § 10100. Appeal. | § 10115. Sale of certain associations; proceeds. |
| § 10101. Sale of lots. | § 10116. Notice of application; order of sale. |
| § 10102. May sell land to be used as site for public monuments. | § 10117. May create sinking fund. |
| § 10103. Plat of ground; powers. | § 10118. How such funds invested. |
| § 10104. County commissioners may purchase road to cemetery. | § 10119. How expended. |
| § 10105. Exemptions. | § 10119-1. Providing for transfer of lands and improvements from one association to another. |
| § 10106. Land shall not be mortgaged or sold on execution. | |
| § 10107. May act as soldiers' monumental association. | |

See also § 3461 et seq.

Section 10093. (May acquire and hold land and property; exempt from tax and execution. Sale of unsuitable lands; application of proceeds.) A company or association incorporated for cemetery purposes may appropriate or otherwise acquire and may hold, not exceeding six hundred and forty acres of land; also, take any gift or devise in trust for cemetery purposes, or the income from such gift or devise according to the provisions of such gift or devise, in trust, all of which shall be exempt from execution and from being appropriated for any other public purpose, and shall be exempt from taxation, if held exclusively for burial purposes, and in no wise with a view to profit. And the trustees of such company or association, whenever in their opinion any portion of such lands is unsuitable for burial purposes, may sell and convey by deed in fee simple, in such manner, and upon such terms as may be provided by resolution of such trustees, any such portion or portions of said lands, and apply the proceeds thereof to the general purposes of the company or association; but on such sale or sales being made, the lands so sold shall be returned by the trustees to the auditor of the proper county, to be by him placed upon the grand duplicate for taxation. (109 v. 172; R. S. Sec. 3571; April 26, 1904, 97 v. 442; March 29, 1875, 72 v. 113, § 5.)

The exemption from taxation does not include exemption from assessment for local improvements.

Lima v. Cemetery Ass'n, 42 O. S. 128 (1884).

While the lands, so far as exempted, can not be sold, an assessment may be enforced by such remedies as the statutes and courts of equity afford.

Lima v. Cemetery Ass'n, 42 O. S. 128 (1884).

Gilmour v. Pelton, 2 W. L. B. 158 (1877).

Under a former special statute (R. S. § 3581), providing for exemption for taxation, it was held that the mere purchase of additional ground, on which some work had been done in preparing it for burial purposes, but which had not been platted, and in which no interments had been made, did not exempt it from tax.

German Cemetery v. Brooks, 8 C. C. 439; 4 C. D. 478 (1894).

A private corporation can not conduct a cemetery for profit. *Frey v. Nowlin*, 19 N. P. n. s. 484 (1917).

Only the property specified in the statute is exempt from execution. Execution may be levied on other property of an association. *Canton Assn. v. Slayman*, 99 O. S. 28 (1918).

A cemetery association organized under § 10093 et seq. may be liable for malicious prosecution. *Canton Assn. v. Slayman*, 99 O. S. 28 (1918).

A cemetery association may be liable for negligence. *Wulftange v. Cemetery*, 15 N. P. n. s. 49 (1913).

Land acquired by a cemetery association, not used for profit, but not laid out and allotted or prepared for use as a burial ground is not exempt from taxation. Rep. Atty. Gen. 1914, p. 1435.

A building used as a residence by the cemetery superintendent,

erected by the superintendent on land set apart and used for burial purposes, is exempt from taxation. Rep. Atty. Gen. 1914, p. 1435.

Section 10094. Repealed. (109 v. 173.)

Section 10095. (Appropriation of land.) If it be necessary to acquire lands by appropriation, such proceedings shall be taken therefor as are provided for the appropriation of property to the use of corporations. No lands shall be appropriated until the probate court is satisfied that suitable premises can not be obtained by contract upon reasonable terms, and no lands shall be appropriated upon which there is a dwelling-house, barn, stable or other farm-buildings, or an orchard, nursery, or valuable mineral or other medicinal spring, or a well actually yielding oil, or salt water, unless it adjoins a cemetery already located and used, on the same or opposite side of a public highway. (R. S. Sec. 3573; April 25, 1904, 97 v. 391; March 22, 1893, 90 v. 103; April 2, 1886, 83 v. 63; May 1, 1885, 82 v. 217; March 6, 1880, 77 v. 41; Rev. Stat. 1880; March 29, 1875, 72 v. 113, § 5; 76 v. 137, § 5.)

Section 10096. (Location of cemeteries as to dwellings. Exceptions.) Land shall not be appropriated or a cemetery located by an association incorporated for cemetery purposes or by benevolent or religious societies, within two hundred yards of a dwelling house, unless the owner thereof gives his consent, or unless the entire tract be so appropriated as a necessary addition to or enlargement of a cemetery already located and used. The limit shall not be less than one hundred yards when it is sought to appropriate for cemetery purposes property adjoining a cemetery already located and used, when such dwelling house was erected subsequent to the laying out and establishing of the cemetery. Where the cemetery lies within or adjoins a municipal corporation the association or corporation owning such cemetery, without such consent, may appropriate property within one hundred feet, or the width of a street, or alley of any dwelling house. The addition of any land across a street or public road, as now located or which shall be hereafter established, shall not be considered an enlargement of an existing cemetery under the provisions of this section. (June 12, 1911, 102 v. 423; R. S. Sec. 3573; April 25, 1904, 97 v. 391; March 22, 1893, 90 v. 103; April 2, 1886, 83 v. 63; May 1, 1885, 82 v. 217; March 6, 1880, 77 v. 41; R. S. 1880; March 29, 1875, 72 v. 113, § 5; 76 v. 137, § 5.)

The change in G. C. § 10096, whereby the distance from a dwelling at which a cemetery may be located was made not less than one hundred yards instead of not less than two hundred yards, can not be construed as an infringement on the vested rights of a property owner who purchased and made his improvements prior to such change, especially where the land which it is proposed to devote to such use adjoins an established cemetery in a rapidly growing town.

A restriction as to the location of cemeteries, which was considered reasonable when it was adopted, may be removed or modified when the legislature determines that necessity or circumstances so demand; and it is not unreasonable to require that such modification be anticipated as to land adjoining cemeteries established, and in use, and so situated that adjoining land would naturally be selected when more burial space becomes necessary.

One who purchases land adjoining the cemetery of a religious society, and builds a house one hundred and sixty feet from the nearest lot therein and makes other improvements, is not entitled to an injunction restraining the society from using for cemetery purposes land purchased by them bordering on the established cemetery grounds, where the part to be so used is more than one hundred yards from the plaintiff's dwelling, although the nearest boundary line is less than one hundred yards from his dwelling.

Morlock v. Horstman, 10 C. C. n. s. 599; 12 C. D. 778 (1908); *aff'd*, no rep., 60 O. S. 629.

An entrance, park and driveway, in front of a cemetery is used for "cemetery purposes" within the meaning of this section. *Frey v. Nowlin*, 19 N. P. n. s. 484 (1917).

Section 10097. (What companies prohibited from appropriation.) The provisions of the two preceding sections shall not be applicable to a corporation or cemetery association, owning a cemetery of less dimensions than four acres and situated within one mile of the corporate limits of a municipality. (June 12, 1911, 102 v. 423; R. S. Sec. 3573; April 25, 1904, 97 v. 391; March 22, 1893, 90 v. 103; April 2, 1886, 83 v. 63; May 1, 1885, 82 v. 217; March 6, 1880, 77 v. 41; Rev. Stat. 1880; March 29, 1875, 72 v. 113, § 5; 76 v. 137, § 5.)

Section 10098. (How income applied.) After paying for such land future receipts and incomes of such company or association, whether from sale of lots, donations, or otherwise, shall be exclusively applied to laying out, preserving, protecting, and embellishing the cemetery, and avenues leading thereto, the erection of buildings necessary for the cemetery purposes, and to paying the necessary expenses of the cemetery company or association. No debts shall be incurred except for original purchasing, laying out, inclosing and embellishing the ground and avenues, for which debts may be contracted not exceeding ten thousand dollars in the whole, to be paid out of future receipts. Such company or association may adopt rules and regulations as it deems expedient for disposing of and conveying burial lots; but a person not

already the owner of a lot in the cemetery shall have the right to purchase any unsold lot, and to have it conveyed to him by the company or association, upon tender of the usual price asked therefor by it. (R. S. Sec. 3574; March 29, 1875, 72 v. 113, § 5.)

A cemetery association may be liable for negligence. *Wulftange v. Cemetery*, 15 N. P. n. s. 49 (1913).

And for malicious prosecution. *Canton Assn. v. Slayman*, 99 O. S. 28 (1918).

Land acquired by a cemetery association, not used for profit, but not laid out and allotted or prepared for use as a burial ground is not exempt from taxation. *Rep. Atty. Gen.* 1914, p. 1435.

A building used as a residence for the cemetery superintendent, erected by the superintendent on land set apart and used for burial purposes, is exempt from taxation. *Rep. Atty. Gen.* 1914, p. 1435.

Section 10099. (How land for entrance secured.) When in the judgment of the officers of a cemetery association, it is necessary to secure additional land for the purpose of making an entrance to its ground, or to improve an entrance already made, the officers may apply to the county commissioners of the county in which the cemetery is located for the appointment of appraisers. Upon such application being made to them, they shall appoint three disinterested freeholders of the county as appraisers, whose duty it shall be to view the land sought to be obtained, appraise its value, and make due return of their appraisal to such commissioners. When the cemetery association pays the amount of such appraisal, together with its cost, the title to the land shall vest in it. (R. S. Sec. 3574-1; April 6, 1893, 90 v. 153, § 1.)

Before the change in § 10100 made by the codifying commission, this section and § 10100 were held unconstitutional for the reason that, through an error in the reference to other statutes, no provision was made for a jury on appeal.

King v. Cemetery Ass'n, 67 O. S. 240 (1902).

Section 10100. (Appeal.) An appeal may be taken from the appraisal so made to the probate court of the county in which such cemetery or entrance is located in the manner provided by law for appeals in road cases. (R. S. Sec. 3574-1; April 6, 1893, 90 v. 153, § 1.)

Section 10101. (Sale of lots.) Burial-lots sold by such company or association shall be for the sole purpose of interments, be subject to the rules prescribed by the company, or association, and be exempt from taxation, execution, attachment, or any other claim, lien, or process whatever, if used

exclusively for burial purposes, and in no wise with a view to profit. (R. S. Sec. 3575; February 24, 1848, 46 v. 97, § 6; S. & C. 227.)

A lot in a municipal cemetery may be sold by its owner, and the conveyance need not be executed with the formalities of a deed. But the purchaser acquires no right to remove bodies already buried in the lot. *Fraser v. Lee*, 8 Ohio App. 235 (1917).

Section 10102. (May sell land to be used as site for public monument.) Any cemetery association organized under the laws of this state may sell and convey by deed in fee simple to a corporation organized not for profit under the laws of this state for the purpose of erecting and maintaining a public monument or memorial to any distinguished deceased person, such portion of the real estate of the association as is selected and agreed upon between it and such corporation, which is not used by the association, and has not been disposed of by it for burial purposes; the sale to be at a price, payable in the manner, and on terms agreed upon between the association and such corporation. The land so sold and conveyed shall thereafter be exclusively owned, held and controlled by the corporation purchasing it for the interment of such a deceased person, and for the erection and maintenance thereon of such monument or memorial, and for no other purpose. (R. S. Sec. 3575a; April 1, 1904, 97 v. 66.)

Section 10103. (Plat of grounds; powers.) Every such company or association shall cause a plat of its grounds and of the lots by it laid out, to be made and recorded, or filed in the recorder's office of the county in which situated; the lots to be numbered by regular consecutive numbers. It may inclose, improve and adorn the grounds and avenues, erect buildings for its use, prescribe rules for inclosing and adorning lots, and for erecting monuments in the cemetery, and prohibit any use, division, improvement, or adornment of a lot which it deems improper. An annual exhibit shall be made of the affairs of the company or association. (R. S. Sec. 3576; March 8, 1888, 85 v. 76; R. S. 1880; February 24, 1848, 46 v. 97, § 7; S. & C. 227.)

Section 10103 does not authorize the trustees of a cemetery association to prohibit the placing of markers on the graves of deceased soldiers as expressly authorized by G. C. § 2958. *Rep. Atty. Gen.* 1913, p. 1428.

Section 10104. (County commissioners may purchase road to cemetery.) On petition for that purpose by a turnpike road company, the commissioners of the several counties may

purchase so much of a turnpike road as lies between any city or village and cemetery or public burying ground, and make it a free road to such cemetery or burying-ground, the cost thereof to be paid out of the county bridge fund. So much of the road as is so purchased shall be kept in repair by the commissioners, and the cost of such repairs be paid for from the county general fund. (R. S. Sec. 3577; March 17, 1877, 74 v. 40, § 1.)

Section 10105. (Exemptions.) Lands appropriated and set apart as burial grounds, either for public or private use, and so recorded or filed in the recorder's office of the county where they are situated, or any burial ground that has been used as such for fifteen years, shall not be subject to sale on execution on a judgment, to taxation, to dower, nor to compulsory partition. But land so appropriated and set apart as a private burial ground shall not be so exempt if it exceeds in value the sum of fifty dollars. (R. S. Sec. 3578; March 8, 1888, 85 v. 76; R. S. 1880; 33 v. 11, § 11, (§ 1); S. & C. 227.)

Only the property specified in the statute is exempt from execution. Execution may be levied on other property on an association. *Canton Assn. v. Slayman*, 99 O. S. 28 (1918).

Land acquired by a cemetery association, not used for profit, but not laid out and allotted or prepared for use as a burial ground is not exempt from taxation. *Rep. Atty. Gen.* 1914, p. 1435.

A building used as a residence for the cemetery superintendent, erected by the superintendent on land set apart and used for burial purposes, is exempt from taxation. *Rep. Atty. Gen.* 1914, p. 1435.

The exemption from taxation does not include exemption from assessment for local improvements.

Lima v. Cemetery Ass'n, 42 O. S. 128 (1884).

While the lands, so far as exempted, can not be sold, an assessment may be enforced by such remedies as the statutes and courts of equity afford.

Lima v. Cemetery Ass'n, 42 O. S. 128 (1884).

Gilmour v. Felton, 2 W. L. B. 158 (1877).

Under a former special statute (R. S. § 3581), providing for exemption for taxation, it was held that the mere purchase of additional ground on which some work had been done in preparing it for burial purposes, but which had not been platted, and in which no interments had been made, did not exempt it from tax.

German Cemetery v. Brooks, 8 C. C. 439; 4 C. D. 478 (1894).

Section 10106. (Land shall not be mortgaged or sold on execution.) Lands sold and conveyed under the provisions of section ten thousand one hundred and two, so long as they are held and used for the purposes designated therein, shall not be mortgaged, nor be subject to sale for debt on execution or otherwise. (R. S. Sec. 3578a; April 1, 1904, 97 v. 67, § 2.)

Section 10107. (May act as soldiers' monumental association.) Such a company or association may act either as a soldiers' monumental or as a cemetery association, and, as it elects take charge of the management of cemetery grounds, or monuments especially erected in honor of soldiers or seamen who have died in the service of the state, or of the United States, or both. Monuments, and the surroundings thereof, erected in honor of deceased soldiers or seamen, shall be protected by and under the penalties prescribed in the statutes for the protection of cemeteries and burial-grounds. (R. S. Sec. 3579; March 16, 1865, 62 v. 44, § 1; S. & C. 68.)

Section 10108. (Officers may appoint policemen.) The trustees, directors, or other officers of a cemetery company or association, whether incorporated or unincorporated, and township trustees having charge of township cemeteries, may appoint as many day and night watchmen of their grounds as they deem expedient. Such watchmen, and all superintendents, gardeners and agents of such company or association or of the township trustees, stationed on the grounds, may take and subscribe, before any mayor or justice of the peace in the township where the grounds are situated, an oath of office similar to the oath required by law of constables. Upon taking such oath, such watchmen, superintendents, gardeners, or agents shall have and may exercise all the powers of police officers within and adjacent to the cemetery grounds. (R. S. Sec. 3580; April 12, 1889, 86 v. 254; Rev. Stat. 1880; April 6, 1869, 66 v. 48, § 2; S. & S. 69.)

Section 10109. (How receipts and income applied.) The receipts and income of such a company or association, whether derived from the sale of lots, from donations, or otherwise, shall be applied to the payment for such lands, to the laying out, preservation, protection and establishment of the cemetery, the avenues within it, to the erection of necessary buildings, and to the general purposes of such company or association. No debts shall be contracted in anticipation of future receipts, except for the original purchase of the land, and laying out, inclosing, and embellishing the grounds, and avenues therein. No part of the proceeds of land sold, or of the funds of such a company or association, shall ever be divided among its stockholders or lot-owners. All its funds must be used exclusively for the purposes of the company or association, as above herein specified, or invested in a fund the income of which shall be so used and appropriated. (R. S. Sec. 3582; April 6, 1870, 67 v. 35, § 2.)

Section 10110. (May accept and execute certain trusts.)

Every cemetery company or association may take, hold, possess, use, enjoy, and occupy such property of any kind as legally is given, granted, or devised to it, for the purpose of building or repairing fences, graves, vaults, monuments, walks, cemetery lots, drives, or avenues in its cemetery, or for the purpose of building or repairing therein any particular fence, cemetery lot, grave, vault, monument, walk, drive, or avenue, and appropriate such property, or the proceeds thereof, to any of the foregoing purposes according to the terms of the trust for which it was given, granted, or devised. (R. S. Sec. 3583; April 11, 1876, 73 v. 210, § 1.)

Section 10111. (May hold land in a village.)

Any association of persons who have been and are acting as a cemetery association, and have purchased and improved land for cemetery purposes, paid for by subscriptions of lot-holders and the sale of lots, and who are acting through a board of trustees chosen by members of the association, when the lands thus occupied have been brought or held within the corporate limits of a village subsequently to the time of their purchase and improvement, may become incorporated for cemetery purposes, as though the lands held by the association were outside of such corporate limits. (R. S. Sec. 3584; May 7, 1878, 75 v. 132, § 1.)

Section 10112. (Powers of certain corporations.)

Any association organized under the preceding section, as the successor of the original association, through and by its concurrence, may take possession of, hold, and use for cemetery purposes, all the property belonging to and held by the original association for such purposes. (R. S. Sec. 3585; May 7, 1878, 75 v. 132, § 2.)

Section 10113. (Rights of lot-owners assured.)

All rights of lot-owners in the cemetery grounds of the original association are reserved and assured to them, and made valid, without reference to the form of conveyance issued to them by the trustees of original association. (R. S. Sec. 3586; May 7, 1878, 75 v. 132, § 3.)

Section 10114. (Rights and powers of crematory associations.)

Any company or association incorporated for the erection and maintenance of a crematory or other place or building for cremating the dead, may exercise all the rights and powers conferred by this chapter, subject to its condi-

tions. But no building shall be erected for such a purpose within two hundred yards of a dwelling-house, unless its owner gives his consent. It also shall be unlawful for any person, persons, company, association or firm to establish a morgue on a street or part thereof upon which are dwelling-houses, unless the owner or occupants thereof within two hundred yards of the proposed morgue give their written consent thereto. These provisions shall not apply to a crematory already built, or morgue already established. (R. S. Sec. 3586a; April 3, 1900, 94 v. 95; April 11, 1893, 90 v. 161.)

In the interpretation of G. C. § 10114, the word morgue, being without definition in the statute itself, must be given its usual and commonly accepted meaning which is, a place or dead-house, where the bodies of persons found dead are exposed for identification so that they may be claimed by their friends. And the Legislature in the enactment of the section must be held to have used and employed the word in that sense, and as descriptive of such a place.

This section does not prohibit the location of an undertaking establishment on a residence street, nor make it unlawful to receive, care for and keep temporarily in an undertaking establishment thus located, in a private room thereof and unexposed to public view, the bodies of known and identified dead which are from time to time taken to such undertaking establishment at the instance and request of relatives or friends of the deceased that funeral services over the bodies may be held and conducted at that place.

Koebler v. Pennewell, 75 O. S. 278 (1906).

Section 10115. (Sale of certain associations; proceeds.)

The trustees of a cemetery association, whose cemetery is within the limits of a city or village, interments in which have been prohibited by ordinance thereof, or whose cemetery is abandoned as a place for the burial of the dead, or which association is involved in debt it is unable to pay, may apply by petition to the common pleas court of the county wherein such cemetery is located, for the sale of the whole or a portion of its grounds, and the court may order the whole or a portion thereof to be sold. The money derived from such sale, under direction of the court, shall be applied to the costs and expenses of the removal and reinterment of the remains of the dead therein, and to the payment of any debts of such association. Any surplus must be invested upon interest, and the income therefrom applied to keeping in repair the unsold portion thereof, or if the entire premises be sold, the surplus shall be divided pro rata among the lot-owners. The court shall grant such time for the removal of the dead, after the confirmation of such sale, as it deems necessary. (R. S. § 3586-1; February 1, 1888, 85 v. 7, § 1; April 29, 1885, 82 v. 164.)

Section 10116. (Notice of application; order of sale.)

Notice of the filing of such application shall be given by publication in some newspaper of general circulation in the county where it is filed, for four consecutive weeks, setting forth the object and prayer thereof, and that any person claiming an interest in the subject matter of such petition may appear and file an answer therein. On final hearing of the case, the court shall make such order or decree as will best secure the rights of the persons having an interest in such cemetery. (R. S. Sec. 3586-2; April 29, 1885, 82 v. 164, § 2).

Section 10117. (May create sinking fund.) A cemetery association which has been organized under a general or special law may create a sinking fund, out of surplus money on hand, or which has been given to it by will, deed or otherwise. (R. S. Sec. 3586-3; April 3, 1883, 80 v. 91.)

Section 10118. (How such funds invested.) A cemetery association so organized may invest money appropriated to such sinking fund in bonds of the United States, state of Ohio, or of a city therein, or loan it upon first mortgage of real estate in this state worth double the loan, or upon collateral of any of the above securities of equal face value with the loan. But it shall not be lawful to loan such money to a member of the cemetery board. (R. S. Sec. 3586-4; April 3, 1883, 80 v. 91, § 2.)

Section 10119. (How expended.) All moneys thus appropriated to a sinking fund, and interest derived thereon shall be held exclusively for the enlargement of cemetery grounds, their improvements, repair or adornment, or for constructing or keeping in repair buildings, monuments or other structures deemed necessary or appropriate for cemetery grounds, and not be appropriated or used for any other purpose. (R. S. Sec. 3586-5; April 3, 1883, 80 v. 91, § 3.)

Section 10119-1. (Providing for transfer of lands and improvements from one association to another.) When in the judgment of the trustees of any association of persons who have been and are acting as a cemetery association and have purchased and improved land for cemetery purposes, the welfare of all concerned in the lands so purchased and improved would be subserved by transferring such lands and improvements and other assets of such association to another association incorporated under the laws of Ohio for cemetery purposes, said trustees shall call a meeting of the members of the association of which they are the trustees by giving notice of

such meeting for two consecutive weeks in a newspaper of general circulation in the county in which said cemetery is located, specifying the place, time and object of such meeting; and a majority of the members of such association shall constitute a quorum for the transaction of business, and if by a majority vote of the members of such association the trustees be authorized to convey and transfer the lands and improvements and other assets aforesaid to another corporation duly organized as aforesaid for cemetery purposes and lawfully electing to accept such transfer said trustees may and are hereby empowered to execute a deed of conveyance and transfer of said lands, improvements and other assets to said other corporation.

It shall thereupon be incumbent upon the corporation to which said conveyance and transfer is made to carry out the objects and purposes for which said original association was formed and to apply any moneys received by it from said original association in laying out, preserving, protecting and embellishing said cemetery.

All rights of lot owners in the cemetery ground of the original association are reserved and assured to them and made valid without reference to the form of conveyance issued by the original association. (May 9, 1913, 103 v. 847, § 1.)

PART XXIII.

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HYDRAULIC.

Section 10120. (May enter upon land for survey.) A company incorporated under the laws of this state for hydraulic or manufacturing purposes, to which the board of public works, for a stipulated revenue, leases and grants the right to use the surplus water of a public canal to propel its machinery, may enter upon land or across which it desires to build, excavate, or construct its hydraulic canal, race-ways, or water-channel, for conveying and discharging such surplus water to and from the point at which such company desires to employ it, and survey the route thereof. (R. S. Sec. 3562; April 5, 1866, 63 v. 147, § 1; S. & S. 172.)

Section 10121. (May appropriate land.) Such company may appropriate so much land as it deems necessary for its canal, race-way, or water-channel, with the necessary culverts, waste-weirs, aqueducts, water-gates, abutments, and fixtures, and a right of way over adjacent lands sufficient to enable it to construct and repair these, if the probate court, in the proceedings instituted for that purpose, finds that the erection and operation of its proposed works will be subservient to the public welfare. (R. S. Sec. 3563; April 5, 1866, 63 v. 147, § 2, 3, 4; S. & S. 172, 173.)

Section 10122. (May borrow money and secure loan.) For the purpose of repairing, completing, or extending its work, a hydraulic company may borrow money to an amount not exceeding one-half of its capital stock actually paid in, and secure the payment thereof by the issue of bonds or notes, bearing interest not to exceed a legal rate, and secured by mortgage on its real estate, or part thereof. Such bonds or notes shall not be issued without the assent in writing of the holders of a majority of the stock in the company. (R. S. Sec. 3565; April 25, 1873, 70 v. 160, § 1.)

Section 10123. (Consolidation.) A hydraulic company organized under the laws of this state, may consolidate with

any other hydraulic company in this or an adjoining state, when the works of such companies are connected or proposed to be connected, which consolidation shall be by an agreement of the corporations, duly ratified by a vote of the holders of two-thirds of the stock of each company. When so consolidated the companies shall constitute one company, and take such name as the agreement designates. If both are organized under the laws of this state, the consolidated company shall possess all the rights, privileges, and franchises of each of the corporations parties in the agreement. If one is organized under the laws of another state, the consolidated company shall possess all the rights, privileges, and franchises of the company organized under the laws of this state, and in either case possess and hold all the property and rights of action, subject to all liens upon the respective property of each company. All debts, liabilities, and duties of either of the companies thenceforth will attach to the new company, and may be enforced against it. (R. S. Sec. 3566; April 27, 1872, 69 v. 177, § 1.)

Section 10124. (Notice of meeting for such purpose.)

The notice of a meeting to take into consideration the agreement to consolidate, must be given to the stockholders of such companies, by their respective secretaries, by publication in a newspaper printed and published in the county where such corporation is located, thirty days previous to such meeting, stating the object of the meeting. A printed copy of the notice shall be sent by the secretary of each company, by mail, to any stockholder whose residence is out of the county. The publication and sending of the notice must be certified by the secretaries on their respective record books. (R. S. Sec. 3567; April 27, 1872, 69 v. 177, § 2.)

Section 10125. (Proceedings at meeting.) At the meeting so called the stockholders shall take into consideration the agreement to consolidate, and after its adoption appoint the time and place for the election of directors and other officers of the new corporation, a certified copy of which, and of the proceedings and vote on the consolidation, must be certified by the officers of such meeting, under their seals, be acknowledged by them before an officer authorized to take acknowledgements of deeds, and forthwith be filed in the office of the secretary of state. A copy of the agreement and act of consolidation so filed and duly certified by the secretary of state, shall be evidence of the existence of such consolidated company. (R. S. Sec. 3568; April 27, 1872, 69 v. 177, § 3.)

Section 10126. (When water may be drawn from canals.)

All canal companies and persons having oversight of a canal are prohibited from drawing off the water from such canal for the purpose of cleaning it out, or making the general annual repairs thereof, and from allowing the water to remain out of it between the thirtieth day of June and the thirtieth day of September in any year. If such a company or person violates this section, it or he shall forfeit and pay to the state not less than five hundred nor more than three thousand dollars, to be recovered in a civil action, before any court having jurisdiction thereof. (R. S. Sec. 3569; January 31, 1845, 43 v. 17, § 1; S. & C. 225.)

Section 10127. (What provisions applicable.) The provisions of law for the foreclosure of a mortgage of a turn-pike or plankroad, and the sale thereof upon such mortgage, or execution, shall apply to the foreclosure of a mortgage of the canal of any company, and to the sale thereof on such proceedings or on execution. (R. S. Sec. 3570; April 16, 1857, 54 v. 179, § § 1, 2; S. & C. 339.)

Section 10128. (Construction of dams, pipe lines, etc.) Any company or companies organized for the purpose of erecting or building dams across rivers or streams in this state to raise and maintain a head of water, or for constructing and maintaining canals, locks, and race-ways to regulate and carry such head of water to any plant or power house where electricity is to be generated, or for erecting and maintaining a line or lines of poles whereon to attach or string wires or cables to carry and transmit electricity, or for transporting natural gas, petroleum, water or electricity, through tubing, pipes or conduits, or by means of wires, cables or conduits, or for storing, transporting or transmitting water, natural gas or petroleum, or for generating and transmitting electricity, may enter upon any private land for the purpose of examining or surveying a line or lines for its tubing, pipes, conduits, poles and wires, or for a reservoir, dams, canals, race-ways, plant or power house, and for ascertaining the number of acres overflowed by reason of the construction of such dam or dams, and may appropriate so much thereof as is deemed necessary for the laying down or building of such tubing, conduits, pipes, dams, poles, wires, reservoir, plant and power house, as well as the land overflowed, and for the erection of tanks and reservoirs for the storage of water for transportation and the erection of stations along such line or lines, and the erection of such building as may be necessary for the purpose aforesaid. (R. S. Sec. 3878;

April 23, 1904, 97 v. 300; April 16, 1900, 94 v. 382; March 24, 1888, 85 v. 114, 115; R. S. 1880; March 30, 1875, 72 v. 151, § § 1, 2; April 29, 1872, 69 v. 194, § 4.)

An oil and gas company is not authorized to operate a pipe line except for the transportation of its own product.

Rep. Atty. Gen. 1908-1909, pp. 79, 69.

Rep. Atty. Gen. 1909-1910, p. 148.

Sections 10128 et seq. were originally enacted for pipe line companies organized for transportation purposes only. But they may apply also to public utility companies transporting gas to their patrons. *Columbus v. Gas Co.*, 13 N. P. n. s. 394, 396, 397 (1910); s. c., 88 O. S. 547.

By its incorporation, making and adopting plans and surveys, passing certain resolutions, determining to proceed with the construction of dams and reservoirs, adopting descriptions and development programs, and commencing judicial proceedings to acquire rights in a stream, a hydro-electric power company does not acquire such priority in the stream as will prevent a municipality from thereafter appropriating the water thereof for a water supply under G. C. § 3677. *Sears v. Akron*, 246 U. S. 242 (1918); 16 O. L. R. 96.

Incorporation of a hydro-electric company under §§ 10128 and 10134, and a resolution by its directors for the appropriation of certain lands, does not give the corporation rights in the streams described in such resolution to the exclusion of all others. *Cuyahoga River Power Co. v. Traction Co.*, 252 U. S. 389 (1920).

Jurisdiction of federal courts in suit to enjoin a municipality from taking property of a hydro-electric power company, without compensation, for a municipal water supply, see *Power Co. v. Akron*, 240 U. S. 461 (1916); reversing, 210 Fed. 524.

Section 10129. (How right acquired.) Such appropriation shall be made in accordance with the law providing for compensation to the owners of private property appropriated to the use of corporations. So far as the rights of the public therein are concerned, the county commissioners as to county and state roads, the township trustees as to township roads, and the councils of municipal corporations as to streets and alleys in their respective jurisdictions, subject to such regulation and restrictions as they prescribe, may grant to such companies, the right to lay such tubing, pipes, conduits, poles and wires therein. But the right to appropriate for any of the purposes above specified, shall not include or extend to the erection of any tank, station, reservoir, or building, or lands therefor, or to more than one continuous pipe, conduit or tubing or land therefor, in or through a municipal corporation, unless the council first consents thereto. (R. S. Sec. 3878; April 23, 1904, 97 v. 300; April 16, 1900, 94 v. 382; March 24, 1888; 85 v. 114, 115; R. S. 1880; March 30, 1875, 72 v. 151, § § 1, 2; April 29, 1872, 69 v. 194, § 4.)

Prior to the constitutional amendments of 1912 sections 3714 and

10129 authorized a municipality to make a contract with a gas company or other public utility to use its streets in consideration of the payment of a lump sum or a percentage of its gross receipts. *Gas Co. v. Columbus*, 96 O. S. 530 (1917).

This section does not extend the right of eminent domain to more than one line. *Columbus v. Gas Co.*, 13 N. P. n. s. 394, 397 (1910); s. c., 88 O. S. 547.

Section 10130. (Right to appropriate public way, how acquired.) Nothing in the two preceding sections shall be construed to confer power to appropriate any portion of any street, alley, highway or other public way or land, or to confer any right in any street, alley, highway or other public way or land situated within any municipality, without its consent. (R. S. Sec. 3878; April 23, 1904, 97 v. 300; April 16, 1900, 94 v. 382; March 24, 1888, 85 v. 114, 115; R. S. 1880; March 30, 1875, 72 v. 151, §§ 1, 2; April 29, 1872, 69 v. 194, § 4.)

Section 10131. (Reservoirs in certain places prohibited.) No reservoirs for the storage or transportation of water shall be constructed within the corporate limits of any municipal corporation or any public park, and all excavations, except reservoirs for storage and transportation of water, shall be well filled by such company, and so kept by it. (R. S. Sec. 3878; April 23, 1904, 97 v. 300; April 16, 1900, 94 v. 382; March 24, 1888, 85 v. 114, 115; R. S. 1880; March 30, 1875, 72 v. 151, §§ 1, 2; April 29, 1872, 69 v. 194, § 4.)

Section 10132. (Common carrier. Authority to grant by lease to companies certain rights and privileges.) Such company or companies, for the purpose of transporting natural gas, oils, water and electricity shall be common carriers and shall be subject to all the duties and liabilities of such carriers under the laws of this state; and the superintendent of public works is hereby authorized upon the approval of the governor and attorney general indorsed thereon in writing, to enter into leases or agreements with such company or companies for a period of twenty-five years and upon such terms as he may deem for the best interests of the state, granting to such companies the right to flow, transport and convey water from the dams or reservoirs, built by such company or companies under the authority granted in section 10128 of the General Code, through, over and upon any of the lands of the state or channels or beds of any of its reservoirs, lakes, canals, races, aqueducts or water courses; but no rights or privileges granted by any such leases or agreements shall in any wise interfere with the navigation

of the canals of the state, nor the control and maintenance of the state reservoirs as public parks or pleasure resorts, nor the sale of water by the state nor shall the state be held to incur any liability on its part under such leases or agreements to continue to maintain such canals, races, channels or water courses, or to continue the use thereof, and all such leases shall contain a clause giving the superintendent of public works such control over all waste-gates and wickets, controlling the flow of water into state reservoirs or canals, as may be necessary to maintain the proper level of the state's reservoirs and canals, and to prevent the flowing into such reservoirs and canals of such quantities of water as might damage or impair any property of the state or of its lessees. (107 v. 428; R. S. Sec. 3878; April 23, 1904, 97 v. 300; April 16, 1900, 94 v. 382; March 24, 1888, 85 v. 114, 115; R. S. 1880; March 30, 72 v. 151, §§ 1, 2; April 29, 1872, 69 v. 194, § 4.)

The provision of the federal interstate commerce act, making pipe lines common carriers was held constitutional. Pipe Line Cases, 234 U. S. 548 (1914).

A pipe line is a private enterprise, although the public has an interest. A right of way over private property for a pipe line is not a public easement, such as a highway. Kunkle v. Beck, 1 Ohio App. 70; 18 C. C. n. s. 565 (1913).

Section 10133. (May hold certain property.) Such a company may take, by purchase or otherwise, and hold, such real and personal estate, and erect or purchase the necessary buildings and machinery for carrying on the business, including all the necessary equipments and appendages of the business, such as tubing, pumps, tanks, telegraph apparatus, and engines, as may be necessary to transport oils and water through tubes and pipes. (R. S. Sec. 3879; April 25, 1868, 65 v. 109, § 2.)

Section 10134. (Further powers of such companies.) Such a company may transport, store, insure and ship natural gas, petroleum or water, and transport and store water, for the purpose of furnishing it to engineers employed in developing for, or in the production and transportation of petroleum, and for that purpose it may lay down, construct and maintain the necessary pipes, tubing, tanks, machinery and arrangements. (R. S. Sec. 3880; March 24, 1880, 85 v. 114, 115; R. S. 1880; March 30, 1875, 72 v. 151, § 2; April 16, 1900, 94 v. 382.)

MINING AND MANUFACTURING.

Section 10135. (Manufacturing companies shall keep certain accounts.) At some place within one of the counties in which its business is carried on, every manufacturing company shall establish and keep a principal office, at which shall be kept accurate accounts exhibiting its financial condition, its capital stock or shares, all its property of every description, and credits, subject to taxation. Such accounts shall at all times be subject to the inspection of any assessor lawfully authorized to assess such property and credits. Notice of the place where such office is established, and of any change thereof, shall be published in some newspaper of general circulation in such county. The principal accounting officer of the company shall be a resident of this state. (R. S. Sec. 3855; March 30, 1857, 54 v. 72, § 82.)

The "principal office" required by this section and "the principal place of conducting the business of the corporation" under § 11938 are the same. The legislative intent was to fix the situs of all such manufacturing companies, and the place where their personal property was returnable for taxation, and where they might be sued.

Mercantile Trust Co. v. Etna Iron Works, 4 C. C. 579, 588; 2 C. D. 718 (1890).

This section does not require a certificate of change of principal office to be filed with the secretary of state.

3 Opins. Atty. Gen. 280 (1884).

Section 10136. (May extend their operations.) A company incorporated for manufacturing purposes, upon a vote of the holders of a majority of its stock, may extend its manufacturing operations to articles in the same line of business, not authorized by the terms of the original articles of incorporation. After making a certificate of the vote, specifying therein how far the manufacturing operations are to be extended, verified by the oath of its president, and filing it in the office of the secretary of state, the company may manufacture and sell such articles as are named or otherwise provided for in the certificate. (R. S. Sec. 3856; April 19, 1861, 58 v. 58, § 1.)

A manufacturing company which, as an incident to its business, furnishes electric current to consumers for light, heat or power purposes is a public utility. Rep. Atty. Gen. 1913, p. 545.

Section 10137. (Powers of mining and manufacturing corporations.) Any company incorporated under the laws of this state, for the purpose of mining or boring for petroleum or rock oil, or coal oil, salt or other vegetable, medicinal or

mineral fluid, in the earth, or for refining or purifying them, quarrying stone, marble, or slate, mining coal, iron, copper, lead or other minerals, or manufacturing them, or engaged in the manufacturing of articles composed in the whole of iron or part of iron and wood, or for manufacturing cotton or woolen fabrics in whole or in part, or both, and carrying on business connected with the main objects of such corporation may, in its corporate name, carry on its business, or so much thereof as is convenient, in any county in this state, or beyond the limits of this state, and there hold any real or personal estate necessary or convenient for conducting it. (R. S. Sec. 3862; March 26, 1883, 80 v. 76; R. S. 1880; April 13, 1874, 71 v. 69, § 1; April 13, 1865, 62 v. 143, § 1.)

Except as authorized by this and the following sections the "single purpose" rule controls. (See note to § 8623.)

Rep. Atty. Gen. 1910-1911, p. 229.

Rep. Atty. Gen. 1911-1912, p. 64.

It is said that this section does not authorize refining companies to engage in manufacturing articles composed in part of wood and in part of some metal other than iron.

Rep. Atty. Gen. 1910-1911, p. 229.

The power to acquire and deal in timber lands can not be included in articles of incorporation as incidental to the main purpose of mining oil, gas and coal.

Rep. Atty. Gen. 1909-1910, p. 147.

This section does not authorize the joinder, in articles of incorporation, of the purposes of mining with the purposes of manufacturing and dealing in artificial ice, or of dealing in hay, grain, flour and feed.

Rep. Atty. Gen. 1909-1910, p. 103.

The several corporate purposes authorized by this section and § 10139 can not be joined with power to deal in the articles manufactured as "agent, factor and broker."

Rep. Atty. Gen. 1909-1910, p. 121.

A corporation may sell products mined and manufactured by itself, and may supply its customers with such products, regardless of whether they are of its own production and manufacture, but such business must be limited to that necessarily and properly incidental to the principal business of the corporation.

Rep. Atty. Gen. 1908-1909, p. 121.

A manufacturing company may, as an incident to its business, purchase and sell patent rights. But a corporation formed for the purpose of developing certain inventions may not include in its articles the purpose of manufacturing and selling the articles to which the patent processes are applicable. Rep. Atty. Gen. 1911-1912, p. 72.

The dealing in refineries or gas works, apart from those used by the corporation in its business, is unauthorized. Rep. Atty. Gen. 1909-1910, p. 147.

The power to own and operate pipe lines can not be joined with power to mine and manufacture oil, gas and coal. An oil and gas company can only operate a pipe line for the transportation of its own product. Rep. Atty. Gen. 1909-1910, p. 148; Rep. Atty. Gen. 1908-1909, p. 79.

A mining company can not be authorized to deal generally in real estate. Rep. Atty. Gen. 1908-1909, p. 77.

After the incorporators have stated the corporate purpose in the articles of incorporation, the powers of the company are fixed by general laws. *Humboldt Min. Co. v. American, etc., Co.*, 62 Fed. 356; 9 O. F. D. 153 (C. C. A. 1894).

Section 10138. (May subscribe for stock in transportation companies.) The directors of such company may authorize its president, or other proper officer, to purchase or subscribe for, in the name of the company, such an amount of the stocks of any railroad, or other transportation company, as they deem necessary, in order to procure proper facilities for transportation for the manufactories, mines, or other works of the company. But the written consent of the holders of two-thirds of the capital stock of the company to such subscription or purchase first must be had. (R. S. Sec. 3863; April 13, 1874, 71 v. 69, § 2.)

Power to acquire stock in other corporations, generally, see § 8683.

A railroad company is not authorized to acquire stock in a coal mining company. *State v. Railway Co.*, 12 C. C. n. s. 49, 59; 21 C. D. 175 (1909); *Railway Co. v. Burke*, 19 W. L. B. 27 (C. P. 1887).

This section does not authorize a coal company to construct or operate a railroad: *Barlotti v. Commission*, 103 O. S. 647 (1921).

Under the provisions of § 10137 and this section the directors, having first obtained the requisite consent of the purchasing company's stockholders, may, in the exercise of a sound discretion, determine what amount of stock it is necessary to subscribe for or purchase, whether a controlling interest or less. *Mannington v. Railway*, 8 O. L. R. 451, 473; 183 Fed. 133, 150; 16 O. F. D. 552 (U. S. C. C. 1910).

A mining and manufacturing corporation may mortgage its real estate to guarantee the bonds of a railroad company, to enable it to furnish transportation facilities.

Central Trust Co. v. Railway Co., 87 Fed. 815; 10 O. F. D. 328 (C. C. 1898).

But a railway company is not authorized to guarantee the bonds of a coal mining company.

State v. Railway, 12 C. C. n. s. 49; 21 C. D. 175 (1909).

Section 10139. (Such companies may consolidate.) Any two or more such corporations may be consolidated in the manner and to the effect provided by law for the consolidation of railroad companies. (R. S. Sec. 3864; April 3, 1868, 65 v. 50, § 1.)

One corporation may be organized to conduct several classes of business which one corporation, formed by the consolidation of several corporations, is authorized to conduct.

Rep. Atty. Gen. 1908-1909, pp. 62, 55, 89.

Rep. Atty. Gen. 1904-1905, p. 78.

See note to § 8623 *Single purpose rule*.

Section 10140. (Certain conveyances must be made.)

When such agreement for consolidation has been duly ratified in the manner specified in the preceding section, the president and secretary of the company, which by the agreement, surrenders its name, properties, rights, and franchises, shall execute and deliver to the consolidated corporation proper deeds, assignments, and transfers, conveying to the consolidated corporation all of the rights, property, and effects of the corporation so surrendering its name and property. From and after the execution of such transfers it shall cease to be a corporation, or to exercise corporate rights. (R. S. Sec. 3865; April 3, 1868, 65 v. 50, § 4.)

Section 10141. (May build a railroad.) Companies organized for the purpose of mining, quarrying, or manufacturing, when such purpose is stated in the articles of incorporation, may construct a railroad, with single or double track, with such side-tracks, turnouts, offices, and depots as they deem necessary to carry out the objects of the incorporation, from any mine, quarry, or manufactory, to any other railroad, or any canal, slack-water navigation, or other navigable water or place within or upon the borders of this state. In respect to such railroad they shall be subject to and governed by the provisions of chapter two of this title. (R. S. Sec. 3866; April 8, 1856, 53 v. 103, § 3.)

Branch railroads to mines, see § 8757.

A mining company having built a railroad under this section may change the office of its railroad under § 8744, but not its principal office, which can only be changed under § 8719.

State v. Coal Co., 4 N. P. 115; 6 L. D. 178.

Snow Fork, etc., Co. v. Railroad Co., 7 N. P. 191; 6 L. D. 178.

The railroad authorized by this section is a private road for the benefit of the coal company and in no sense a public road. The road is to begin at a mine, etc., and end at a railroad or other outlet.

Barlotti v. Commission, 103 O. S. 647 (1921).

State v. Railway Co., 12 C. C. n. s. 49, 60; 21 C. D. 175 (1909).

An incidental purpose in the charter of a coal mining company to construct a railway from its mines to a railway or other outlet, does not constitute the mining company a railway or kindred company so as to make applicable §§ 8806 or 8683 authorizing a railway company to subscribe for and hold stock in another railroad or kindred company.

State v. Railway Co., 12 C. C. n. s. 49, 60; 21 C. D. 175 (1909).

This section does not authorize mining companies to appropriate land.

Miami Coal Co. v. Wigton, 19 O. S. 560 (1869).

A railroad company is not authorized to transact a coal mining business.

State v. Railway Co., 12 C. C. n. s. 49, 60; 21 C. D. 175 (1909).

Railway Co. v. Burke, 19 W. L. B. 27 (C. P. 1887).

A coal mining company, which has purchased a public railroad at judicial sale, can not operate it as a private road to the exclusion of the public. State v. Black Diamond Co., 97 O. S. 24 (1917).

A railroad company organized as such with power of eminent domain is impressed with a public interest and must furnish shipping

facilities without discrimination. *Barlotti v. Commission*, 103 O. S. 647 (1921).

A manufacturing company, maintaining a switch engine and several tracks for use in shifting cars in its yards, is not a "railroad corporation" within the meaning of G. C. § 9009, which requires railroad corporations to block angles in switches, etc. *Taggart v. Republic, etc., Co.*, 141 Fed. 910 (C. C. A. 1905).

Side tracks placed by a railroad company on the leasehold estate of a coal mining company, for the purpose of removing the coal, may be removed by the railroad company, over the objection of the lessor, on the abandonment of the premises by the coal company, where the lease permitted the removal of mining appliances by the mining company, on abandonment.

Ambler v. Railroad Co., 9 C. C. n. s. 81; 19 C. D. 89 (1906).

Section 10142. (Mining companies may acquire additional powers.) A company organized for the purpose of mining coal, or iron ores and coal, or a part of whose business is the mining of iron ores and coal, upon a vote of the holders of two-thirds of its capital stock, may engage in the business of manufacturing iron from ores, or in any other branch of iron manufacture. But before it shall engage in such manufacture, by its president, it must execute a certificate, under corporate seal, setting forth the particular branch or branches of iron manufacture in which it purposes to engage, and the place or places where the business, or any part thereof, is to be located, to be verified by the oath of the president, and acknowledged, certified, and forwarded to the secretary of state. Thereupon the company may carry on the business named in such certificate, in addition to that named in the original articles of incorporation. (R. S. Sec. 3867; January 24, 1877, 74 v. 21, § 1.)

Section 10143. (Company to manufacture iron may make steel.) Any company incorporated for manufacturing iron, upon a vote of the holders of a majority of its stock may engage in and carry on the business of manufacturing steel in its branches. (R. S. Sec. 3857; April 2, 1866, 63 v. 67, § 1.)

COMMERCIAL.

Section 10144. (Officers of commercial organizations.) The officers of an incorporated board of trade, chamber of commerce or merchants' exchange or other kindred association, shall consist of a president, two vice-presidents, treasurer, secretary, and not less than ten directors, all of whom shall be members of the association, and be engaged in business at, or residents of the city or town where it is

established. They shall be elected by ballot at the annual meeting of the association, and hold their office for one year, unless, by its by-laws, the association provides a longer term for all or any of such officers, and until their successors are elected and qualified. The officers thus elected, together with the directors, shall constitute the board of directors of the association. But the association may provide for the election of not less than ten directors, as aforesaid, and by its by-laws authorize them to elect a president, two vice-presidents, a treasurer and a secretary, and such additional directors as are necessary to complete the maximum membership of the board, all of whom must be members of the association. The officers thus elected, together with the directors, shall constitute the board of directors of such association. All other officers, agents or committees deemed necessary for the interests of the association, shall be elected or appointed in such manner and with such powers as may be provided by the by-laws. In like manner the association may provide for the trial, suspension, fine or expulsion of any of its members by the board of directors constituted as hereinbefore provided. Such association may make provision for the relief and support of the families and dependents of deceased members. (R. S. Sec. 3827; January 24, 1876, 73 v. 3, § 4; R. S. 1880; March 5, 1883, 80 v. 40; April 4, 1894, 91 v. 108.)

Expulsion of members; grounds; procedure and remedies for wrongful expulsion.

See note to § 8653.

The declaration in the articles of incorporation of a chamber of commerce that it "is formed not for profit" is not inconsistent with a provision for capital stock, nor with a declaration that it is intended to promote the prosperity of the city in which it is located; and its trustees or directors are personally liable for all debts contracted by them.

Snyder v. Chamber of Commerce, 53 O. S. 1 (1895).

This section and § 10147 et seq. were held to authorize an association of tobacco dealers to appoint an inspector of leaf tobacco and the performance of his duties, at the instance of the members, was not a usurpation of the duties of inspectors appointed under G. C. § 6041.

State v. Casey, 38 O. S. 555 (1883).

Section 10145. (May appoint committees of arbitration.)

Such corporation may constitute and appoint committees of reference and arbitration, and committees of appeals, who shall be governed by such rules and regulations as may be prescribed in rules or by-laws for the settlement of such matters of reference as voluntarily are submitted for arbitration by members of the association, or by other persons not members thereof. (R. S. Sec. 3828; April 3, 1866, 63 v. 89, § 5.)

Section 10146. (May require bonds from officers.) Such corporations may receive and require from their officers, whether elected or appointed, good and sufficient bonds for the faithful discharge of their duties and trusts, conditioned and made payable as prescribed by the by-laws of the corporations, and may be sued on, and the money collected and held for the use of the party injured, or such other use as is determined upon by the corporation. The president, a vice-president, or the secretary of the corporation, may administer such oaths of office as are prescribed in its by-laws. (R. S. Sec. 3829; April 3, 1866, 63 v. 89, § 6.)

Section 10147. (May appoint inspectors.) Every inspector, gauger, weigher, or measurer appointed by such an association shall be recognized as a legally appointed officer, for the duties pertaining to his position, in the city and county wherein the association is located, and shall be subject to all the provisions and penalties of the laws relating thereto. The certificate of such appointee as to his official acts shall be evidence, and binding upon the persons interested. (R. S. Sec. 3830; April 3, 1866, 63 v. 89, § 9.)

See note to § 10144.

Section 10148. (Inspectors, may appoint deputies.) Every inspector, gauger, weigher or measurer appointed by any board of trade or chamber of commerce organized in this state may appoint one or more deputies to be approved by the board of directors or board of officers of such board of trade or chamber of commerce. Such inspector, gauger, weigher or measurer may take from his deputy a bond, with sureties, conditioned for the faithful performance of the duties of the appointment, but in all cases the inspector, gauger, weigher, or measurer shall be responsible for his deputy's neglect of duty or misconduct in office. (R. S. Sec. 3830a; April 6, 1883, 80 v. 98.)

Section 10149. (Other like associations may have benefit of these provisions.) Any board of trade or chamber of commerce organized in this state may avail itself of the privileges and powers, in whole or in part, conferred by the five preceding sections, by making a certificate of its adoption thereof, under its seal, and attested by the signatures of its president and secretary, which shall be filed in the office of the secretary of state, and when so filed shall confer all privileges and powers so defined. (R. S. Sec. 3831; April 3, 1866, 63 v. 89, § 11.)

Section 10150. (Purchase or lease of grounds and erection of buildings; authority to sell and convey.) Such an incorporated association may purchase or lease suitable grounds and erect thereon such buildings as the board of directors may deem proper, for its interest. It may lease any portion of such building, that is not occupied by or needed for its immediate use. Such association, by a two-thirds favorable vote of its board of directors, may sell and convey its real estate and may borrow money and execute and sell or otherwise dispose of its bonds or obligations secured by a mortgage of its property or otherwise. The president and secretary of such association, when so authorized, shall sign all obligations and conveyances. (108 (Pt. 1) v. 607; 74 v. 145, § 1; R. S. 1880; 84 v. 33.)

MARKET-HOUSE.

Section 10151. (Market-house companies.) A company incorporated to construct and maintain a market-house may erect, establish, and maintain, at the place named in its articles of incorporation, a suitable building or buildings to be appropriated and used exclusively as a public market-house, for the sale and vending of meats, vegetables, and all other kinds of provisions, and of fruits, plants, and flowers, and all other articles commonly sold and vended in public market-houses or spaces, on market days, in market hours. (R. S. Sec. 3858; April 19, 1861, 58 v. 92, §§ 1, 2.)

Section 10152. (Powers of such companies.) Such companies may rent, lease, sell, or dispose of stalls, cellar vaults, or other divisions or spaces in their buildings, in the manner, and upon such terms and conditions, as the directors determine. A uniform rule in renting or leasing such stalls, cellar vaults, or other divisions or spaces must be established, printed, and hung in conspicuous places in the buildings. But it may be changed, from time to time, by the directors. (R. S. Sec. 3859; April 19, 1861, 58 v. 92, § 5.)

Section 10153. (Discrimination prohibited.) No preference shall be made, by any variation or difference in rates or prices, in favor of citizens of the city or village wherein the buildings are erected, and against farmers, butchers, or producers not residing in such city or village, and no rule, regulation, order, or condition shall be made or exacted by any company to prevent farmers, butchers, or other persons from disposing of their produce, meats, vegetables, or other

articles, in such quantities and upon such terms as they deem proper. (R. S. Sec. 3859; April 19, 1861, 58 v. 92, § 5.)

Section 10154. (What company shall prohibit.) Such companies shall prohibit and prevent in their buildings the use of false weights or measures, the exposure or sale of any diseased or decaying meats or vegetables, and any offensive or injurious articles. (R. S. Sec. 3859; April 19, 1861, 58 v. 92, § 5.)

Section 10155. (May keep streets unobstructed.) Such companies may keep the streets, alleys, or avenues in front of their buildings free, open, and clear of any obstruction from stoppage of wagons, carriages, or vehicles of any kind, or of horses, mules, or cattle, on market days, in market hours. (R. S. Sec. 3860; April 19, 1861, 58 v. 92, § 6.)

Section 10156. (May construct sewers.) When such a company erects its buildings in a city or village having a sewer with which the company may connect sewers of its own construction sufficient to drain its buildings, it shall construct such sewers, and so connect them. In cities and villages not having sewers, such companies may construct sewers for the drainage of their buildings, and charge and receive a compensation for the tapping and use of them, or portions thereof. (R. S. Sec. 3861; March 13, 1861, 58 v. 92, § 7.)

SEWERAGE.

Section 10157. (Sewerage companies.) A company organized for the purpose of draining the streets, alleys, lots, commons, wharves, landings, or buildings of a city or village in this state, may construct and maintain sewers and drains, and lay conductors or pipe for conveying water and other liquid matter from the lots, houses, and streets, through and under the streets, sidewalks, public highways, alleys, commons, wharves, or landings of any such city or village. Upon application by such company the council of any city, or village, may grant to it the privilege of exercising its corporate powers within the limits thereof, for such term of years, and upon such conditions and limitations, as may be deemed expedient. The city council, or the council of the village, may require from the company such reasonable security as it deems necessary for the faithful performance of the duties imposed upon such company by law. (R. S. Sec. 3871; April 8, 1856, 53 v. 137, § 5.)

Section 10158. (Grants and privileges prohibited.) No grant shall be made to such a company, and no power or privilege be conferred upon or exercised by it, which will interfere with the rights of any other corporation, or any person, nor shall any person be taxed without his consent for drainage or sewerage constructed by such company. Such companies shall be liable for all damages occasioned by their acts, neglects, or defaults to the rights of persons and other corporations. (R. S. Sec. 3871; April 8, 1856, 53 v. 137, § 5.)

Section 10159. (When municipality must purchase property of company.) When a city or village which has granted to such a company, for any term, the rights and privileges herein mentioned, and, at the expiration of the term, upon petition of the company, fails or refuses to renew the grant, the city or village shall purchase of the company its property, consisting of sewers, drains, and pipes actually laid and constructed, with the appurtenances, and the materials and fixtures appertaining thereto, on hand at the time of the expiration of such term, at a price not exceeding the actual cost thereof, for the use and benefit of the city or village. (R. S. 3872; April 8, 1856, 53 v. 137, § 5.)

Section 10160. (Municipality may contract with company.) The council of any city, or village, in which such company is organized, may contract with it for the construction and use of such sewers or drains, for draining the streets, alleys, lots, commons, wharves, or grounds within the limits of the municipal corporation. The city or village shall not use the sewers or drains in any manner except by and with the consent of the company, and in the manner, and upon the terms and conditions, which are mutually agreed upon by the company and the city or village. (R. S. Sec. 3873; April 8, 1856, 53 v. 137, § 6.)

Section 10160-1. (Owners outside municipalities permitted to use sewers.) The council of any city or village may permit the owners or association of owners of lots and lands abutting on roads or other highways entering such city or village to connect with and use the sewers of such city or village for carrying off sewage and drainage from such outside lots or lands upon such terms as may be agreed upon between such council and the owners or association of owners of such outside lots or lands. (May 29, 1911, 102 v. 191.)

Section 10161. (Company may prescribe rates.) Such

companies may prescribe the terms upon which owners and occupants of houses or lots may obtain the use of their sewers and drains for private purposes, and the rate of charge annually for such use, and also the terms upon which the city or village may use the sewers and drains for public purposes. (R. S. Sec. 3874; April 8, 1856, 53 v. 137, § 7.)

Section 10162. (Powers of municipalities not limited.)

Nothing in the five preceding sections shall prevent any city or village from constructing sewers, or establishing and maintaining a system of sewerage, under the direction and by the authority of the municipal authorities thereof, not interfering, however, with the work of such company. (R. S. Sec. 3875; April 8, 1856, 53 v. 137, § 8.)

PUBLIC AVENUE.

Section 10163. (Avenue companies.)

A corporation created for the purpose of constructing and maintaining a free public avenue shall construct and maintain its avenue at not less than fifty nor more than one hundred feet in width, of such materials as it deems proper. It shall not charge toll of any kind for the use thereof by the public, but may make and enforce all necessary and reasonable regulations for its use and preservation. If in laying out such avenue, it be necessary to enter upon and appropriate any lands or premises, the proceedings therefor shall be instituted and carried on as is provided by law for the appropriation of private property by municipal corporations. (R. S. Sec. 3823; April 16, 1879, 76 v. 62, §§ 1, 2.)

See Turnpike and Plankroad companies, §§ 9229 to 9304.

Section 10164. (When company may take tolls.)

When such a company puts under contract five consecutive miles of such an avenue, and completes not less than two consecutive miles thereof to the acceptance of the county commissioners, or when the whole of an avenue is completed to such acceptance, the company may erect a toll-gate thereon for the collection of such tolls as turnpike and plankroad companies are allowed by law to collect. When a company completes to such acceptance five consecutive miles of an avenue, it may erect thereon two toll-gates, at such places as in the opinion of the directors will best subserve its interests, for the collection of tolls. (R. S. Sec. 3824; April 3, 1856, 53 v. 46, 3.)

Section 10165. (When consent of authorities necessary.) When in laying out such an avenue it becomes necessary to run through or along the line of any village, the board of directors of the avenue company shall obtain the consent of the council of the village to laying out the avenue through or along the territory over which they have supervision or control. (R. S. Sec. 3825; April 3, 1856, 53 v. 46, § 4.)

Section 10166. (Authorities may surrender roads to company.) If, on application being made to the council of a village, they are of opinion that the public good demands the laying out of such avenue, they may give their written consent to the laying out and construction thereof, which shall have the force and effect of a full and complete release of all authority over the avenue within their corporate jurisdiction. The directors may lay out and construct the avenue through the territory of such village, and control it as though the village did not exist. (R. S. Sec. 3826; April 3, 1856, 53 v. 46, § 5.)

NAVIGATION.

Section 10167. (Companies for improvement of navigable streams.) The directors of a company incorporated for the purpose of improving any stream of water, or part thereof, declared navigable by any law of this state, may prescribe the rates of toll the company shall receive for the passage of any boat or other watercraft through any lock upon such improvement, or for the running of any boat or other watercraft between the locks thereon. (R. S. Sec. 3854; April 6, 1859, 56 v. 239, § 7.)

Section 10168. (Transportation companies.) A company organized for the purpose of transporting freight, or for towing purposes, on any of the navigable rivers of this state, or the lakes and navigable rivers bordering thereon, may build, purchase, and hold such number of steamboats, barges, or other vessels, and other personal property, and such real estate, in this and other states, as it deems necessary for its business, and sell it or any part thereof, in such manner and for such purpose as is prescribed by the rules and regulations of the company, not inconsistent with the laws of this state. The company may carry any articles of freight or produce, tow any barge or other vessel upon any of the navigable streams in this state, and on any of the lakes or navigable rivers bordering thereon. It shall be governed by the same laws, not inconsistent with

this section, which govern individuals in such employments. (R. S. Sec. 3877; 66 v. 39, § 4; S. & C. 350.)

Wharfboat as "watercraft."

See *Gaff v. Flesher*, 33 O. S. 453, 107.

State v. Transportation Co., 23 O. S. 166.

Section 10169. (Wrecking companies.) Any company or association organized for the purpose of wrecking boats and vessels, and saving them, and the property thereon, or property lost by damage or injury to boats or vessels, may build, purchase, and hold such number of boats, vessels, diving-bells, and other appliances and property as it deems necessary for commencing and conducting its business, and may sell and dispose of them, or any part thereof; contract for salvage or compensation for saving boats, vessels, and other property, and demand, recover, and receive salvage, or such compensation, when entitled thereto, by contract or otherwise. They shall be governed by the same laws not inconsistent with this section which govern individuals in such business or employment. (R. S. Sec. 3882; March 11, 1867, 64 v. 44, §§ 2, 4.)

COMMON CARRIER.

Section 10170. (Common carrier companies.) A corporation organized as and for a common carrier company shall have the power:

1. To make all contracts lawful for natural persons to make for the carriage of persons, the storage, forwarding, carriage and delivery of property, but subject to their liabilities.

2. To lease, hold and operate, any line of railway and its appendages, before or after its completion, owned by a municipal corporation of this state, and any railway connecting therewith, lying without this state, and such portion of any railway within this state as may be necessary for the convenient dispatch of its business.

3. To construct, or complete and equip, any railway and its appendages which it is authorized to lease.

4. To borrow money, not exceeding its authorized capital stock, at a rate of interest not exceeding seven and three-tenths per cent per annum, and execute bonds or promissory notes therefor, payable in gold or lawful money, in sums of not less than one hundred dollars, and secure payment thereof by mortgage or pledge of its property then or thereafter acquired, and its income or franchises, including the

franchise to be a corporation. But no mortgage bond shall be sold at less than par in lawful money, without the consent of a majority in interest of the stockholders, given at a meeting of the stockholders, or in writing. It may exercise all other powers of a railroad company under the laws of this state, including the right of appropriation, but the powers contained in this paragraph shall be exercised only by common carrier companies organized under this section, and operating a steam railroad. (R. S. Sec. 3838; April 22, 1904, 97 v. 161; April 12, 1877, 74 v. 84, § 4.)

Section 10171. (Any company may subscribe to its stock.) Any company incorporated—or organized under the laws of this state may subscribe for or become the owner of stock in such corporation. But before the subscriptions shall be made, the directors of the company subscribing must be authorized to make it by a vote of the majority in interest of its stockholders, or obtain their consent there-to in writing. (R. S. Sec. 3839; April 12, 1877, 74 v. 84, § 9.)

This section and § 10170 impose no limitation on the amount of stock that a corporation may acquire in a company of the character named, and no restriction as to the kind of corporation that may acquire stock in such a company.

Mannington v. Railway, 8 O. L. R. 451, 473; 183 Fed. 133; 16 O. F. D. 552 (C. C. 1910).

ELEVATOR.

Section 10172. (Elevator companies.) A company or association organized as an elevator company may purchase and hold real and personal estate, erect or purchase, and own, the necessary buildings, offices, and machinery for the purpose of carrying on the business of receiving, storing, delivering and forwarding grain of all kinds, and may add to and connect with this the business of general storage, warehousemen, and forwarders of all kinds of produce and merchandise. On its own account, or for others, it shall not deal as buyer or seller. In the prosecution of its business it shall be governed by the same laws, not inconsistent with this section, as govern individuals in such employment. (R. S. Sec. 3841; March 29, 1867, 64 v. 85, § 3.)

Section 10173. (Railroad company may take stock in such company.) When such company erects or owns an elevator building, and uses it for the purpose of receiving

or delivering grain from or to any railroad company, as freight carried or to be carried over its roads, or any part thereof, the railroad company may subscribe to or purchase shares in its capital stock, to an amount not exceeding one-third of the entire capital stock of the elevator company, in the name of its president or other officer, and hold it as trustee. The railroad company shall be liable upon such stock, in its corporate capacity, to the same extent and in the manner a natural person, buying it would be. (R. S. Sec. 3842; March 29, 1867, 64 v. 85, § 4.)

This section fixes the limit of stockholding of the purchasing company at less than a controlling interest.

Mannington v. Railway Co., 8 O. L. R. 451, 472; 183 Fed. 133; 16 O. F. D. 552 (C. C. A. 1910).

The limitation on the amount of stock, authorized to be acquired by the railroad company, indicates a legislative intent to give the railroad company power to aid but not control.

State v. Railway Co., 12 C. C. n. s. 49, 57; 21 C. D. 175 (1909).

FISHERY.

Section 10174. (Fishery companies.) When a company organized for the purpose of propagating fish and establishing fisheries in this state acquires the right to use any stream, canal, or reservoir, from the owner of the land adjoining thereto, for the establishment of a fishery to be owned, maintained, and used for the purpose of propagating fish, no person shall fish therefrom without first obtaining authority from such company. A person who violates the provisions of this section shall be liable to such company in trespass, or to the fines authorized by law against persons trespassing upon lands. (R. S. Sec. 3853; January 15, 1873, 70 v. 9 §§ 2, 6.)

Section 10175. (Exceptions to preceding section.) The navigable streams and public canals in this state shall not be subject to the provisions of the preceding section, and nothing therein shall cut off the privilege of any person to use or fish from any lake, river, stream, or reservoir which by custom or usage, has been used for the purpose of fishing therefrom as regulated by law. (R. S. Sec. 3853; January 15, 1873, 70 v. 9, §§ 2, 6.)

FIREMEN'S RELIEF.

Section 10176. (Firemen's relief associations.) An association of members of any regular fire, hose, or hook and ladder company, incorporated for the purpose of affording relief to firemen disabled while on duty, and making donations to indigent, sick firemen, and to the widows and orphans of deceased firemen, may provide for the election of its directors or trustees at separate elections, to be held by the members in good and regular standing of each fire, hose, or hook and ladder company who are members of the corporation, and fix the number to be elected by each company. (R. S. Sec. 3850; March 13, 1861, 58 v. 37; §§ 1, 5, 6.)

The articles of incorporation of a firemen's relief association should comply with this section. The relief should be confined to members disabled while on duty, and benefits should be made payable to the "widows and orphans" of deceased firemen, instead of their "heirs". Rep. Atty. Gen. 1913, p. 120.

Section 10177. (Certain powers of such associations.) Such corporations may decide what officers they will have, prescribe the manner of their election, their duties, make regulations for the relief of firemen disabled while on duty, and provide for such entrance fee for members, and such weekly, monthly, or yearly assessment upon members, as it deems best. (R. S. Sec. 3851; March 13, 1861, 58 v. 37, § 6.)

Section 10178. (Power to acquire and dispose of property.) Such corporation may acquire, hold, enjoy, dispose of, and convey all property, real or personal, which it acquires by purchase, contribution, donation, assessment upon its members, or otherwise, for the purpose of carrying out the objects of the corporation, but it shall not acquire or hold property for any other purpose. In order to increase its funds it may loan its money upon bond and mortgage, under such rules and regulations as may be prescribed, and at an annual interest not exceeding six per cent per annum. (R. S. Sec. 3852; March 13, 1861, 58 v. 37, § 5.)

FARM LABORERS.

Section 10179. (Farm laborers' associations.) No association incorporated for the purpose of promoting the interests of agriculture, and for the relief of distressed farm laborers, or their widows and orphans, whether such widows and orphans are members of the association or not, and for

any other charitable purpose, shall take or hold real estate, except such as may be actually occupied in the exercise of its legitimate business, or as it acquires in security for or satisfaction of debts justly due it. Real estate so occupied shall not in any case exceed in value the sum of fifty thousand dollars. (R. S. Sec. 3843; May 7, 1877, 74 v. 204, § 5.)

Section 10180. (What investment it may make.) After paying their expenses, such associations shall invest their funds exclusively for the purposes mentioned in their articles of incorporation, and may invest them in mortgages upon real estate, or in county, state, or United States securities. In their articles of incorporation, they may designate the kinds of securities in which their funds shall be invested, in which case no part thereof shall be invested in securities other than those named therein. They shall not make any loan to any of their trustees or officers. They may take by gift, subscription, purchase, devise, or loan. But no loan shall be taken for a less term than three years nor for a greater term than twenty years, nor to an amount exceeding one hundred thousand dollars, nor at a rate of interest greater than four per cent, payable semi-annually. (R. S. Sec. 3844; May 7, 1877, 74 v. 204, § 6.)

Section 10181. (Must report to attorney-general.) Every such association annually shall make, and transmit to the attorney-general, under the signatures of a majority of the trustees, attested by the clerk, a full and true statement of its condition and affairs. For any wilful neglect to make such report within one month after its annual meeting, the attorney-general may proceed against the association for the forfeiture of its charter. (R. S. Sec. 3845; May 7, 1877, 74 v. 204, § 7.)

Section 10182. (Consolidation of two associations.) Any unincorporated association or society organized for any purpose named in the third preceding section may be consolidated with an association incorporated for a purpose named therein, by a resolution of each, adopted by not less than two-thirds of its members, at a meeting called for that purpose. Such resolutions, and votes thereon must be recorded by the clerk of the corporate association, and the consolidated association thereupon shall assume the name or title of the corporate association, and be entitled to all its privileges. But the members of the consolidated association shall not be liable for the debts or obligations of the un-

incorporated association or society. (R. S. Sec. 3846; May 7, 1877, 74 v. 204, § 8.)

See note to § 10038.

Dunham v. Kauffman, 10 N. P. n. s. 49; 20 L. D. 274 (1910).

Section 10183. (Attorney-general to report annually.)

The attorney-general, annually, shall report to the general assembly, in a condensed form, the number and condition of such associations, as derived from the annual reports of their trustees. (R. S. Sec. 3847; May 1, 1877, 74 v. 204, § 9.)

Section 10184. (May maintain libraries, etc.) All such incorporated associations may keep and maintain libraries, and a museum of art consisting of models of such improved instruments and machinery as are best calculated to promote the interests of agriculture, for the benefit of such associations, under such rules and regulations as its members from time to time adopt, and may make all needful by-laws for their good government and regulation. (R. S. Sec. 3848; May 1, 1877, 74 v. 204, § 11.)

COOPERATIVE TRADE.

Section 10185. (Co-operative trade associations.) An association incorporated for the purpose of purchasing, in quantity, grain, goods, groceries, fruits, vegetables, provisions, or any other articles of merchandise, and distributing them to consumers at the actual cost and expense of purchasing, holding, and distribution, may employ its capital and means in the purchase of such articles of merchandise as it deems best for itself, and in the purchase or lease of such real and personal estate, subject always to the control of the stock-holders, as are necessary or convenient for purposes connected with and pertaining to its business. (R. S. Sec. 3837; April 13, 1867, 64 v. 145, §§ 2, 5.)

A corporation for profit is not authorized by this section. The articles of incorporation should limit the authorized purchases to those authorized by this section. Opins. Atty. Gen. 1919, p. 213.

Section 10186. (Distribution of purchases.) Such association may adopt such plan of distribution of its purchases among the stockholders and others as is most convenient, and best adapted to secure the ends proposed by the organization. Profits arising from the business may be divided

among the stockholders from time to time, as it deems expedient, in proportion to the several amounts of their respective purchases. (R. S. Sec. 3837; April 13, 1867, 64 v. 145, §§ 2, 5.)

COOPERATIVE AGRICULTURAL ASSOCIATIONS.

Section 10186-1. (Definition of terms.) As used in this act (a) the term "agricultural products" shall include horticultural, viticultural, forestry, dairy, live stock, poultry, bee and any farm products; (b) the term "member" shall include actual members of associations without capital stock and holders of common stock in associations organized with capital stock; (c) the term "association" means any corporation organized under this act; and (d) the term "person" shall include individuals, firms, partnerships, corporations and associations. Associations organized hereunder shall be deemed "non-profit," inasmuch as they are not organized to make profit for themselves, as such, or for their members, as such, but only for their members as producers. (110 v. 91, § 1; 108 (Pt. 2) v. 1246.)

Section 10186-2. (Number required for incorporation.) Five (5) or more persons, a majority of whom are residents of this state, engaged in the production of agricultural products, may form a non-profit cooperative association, with or without capital stock, under the provisions of this act. (110 v. 91, § 2; 108 (Pt. 2) v. 1246.)

Section 10186-3. (Business in which association may engage.) An association may be organized to engage in any activity in connection with the marketing or selling of the agricultural products of its members, or with the harvesting, preserving, drying, processing, canning, packing, grading, storing, handling, shipping or utilization thereof, or the manufacturing or marketing of the by-products thereof; or in connection with the manufacturing, selling or supplying to its members of machinery, equipment or supplies of any kind or character; or in the financing of the above enumerated activities; or in any one or more of the activities specified herein. (110 v. 91, § 3; 108 (Pt. 2) v. 1246.)

Section 10186-4. (Powers of such associations.) Each association incorporated under this act shall have the following powers:

(a) To engage in any activity in connection with the marketing, selling, preserving, harvesting, drying processing, manufacturing, canning, packing, grading, storing, handling, or utilization of any agricultural products produced or delivered to it by its members or others, or the manufacturing or marketing of the by-products thereof; or any activities in connection with the purchase, sale, hiring or use by its members or others, of supplies, machinery or equipment of any kind or character; or in the financing of such activities; or in any one or more of the activities specified in this section.

Any such association may limit its activities to the handling or the marketing products of its own members, except for storage. If it handles the products of non-members, such non-members' products handled in any fiscal year must not exceed the total of similar products handled by the association for its own members during the same period.

(b) To borrow money without limitation as to amount of corporate indebtedness or liability except in the case of associations organized with capital stock; and to make advance payments and other advances to members or others.

(c) To act as the agent or representative of any member or members in any of the above mentioned activities.

(d) To purchase or otherwise acquire; and to hold, own and exercise all rights of ownership in; and to sell, transfer or pledge, or guarantee the payment of dividends or interest on, or the retirement or redemption of, shares of capital stock or bonds of any corporation or association engaged in any directly related activity or in the warehousing or handling or marketing of any of the products handled by the association.

(e) To establish reserves and to invest the funds thereof in bonds or in such other property as may be provided in the by-laws.

(f) To buy, hold and exercise all privileges of ownership, over such real or personal property as may be necessary or convenient for the conduct and operation of any of the business of the association, or incidental thereto.

(g) To establish, secure, own and develop patents, trade-marks and copyrights.

(h) To do each any everything necessary, suitable or proper for the accomplishment of any one of the purposes or the attainment of any one or more of the subjects herein enumerated; or conducive to or expedient for the interest or benefit of the association; and to contract accordingly; and in addition to exercise and possess all powers, rights

and privileges necessary or incidental to the purposes for which the association is organized or to the activities in which it is engaged; and in addition, any other rights, powers and privileges granted by the laws of this state to ordinary corporations, except such as are inconsistent with the express provisions of this act; and to do any such thing anywhere. (110 v. 91, § 4; 108 (Pt. 2) v. 1247.)

Section 10186-5. (Membership limited.) (a) Under the terms and conditions prescribed in the by-laws adopted by it, an association may admit as members (or issue common stock to), only cooperative marketing associations or persons engaged in the production of the agricultural products to be handled by or through the association, including the lessees and tenants of land used for the production of such products and any lessors and landlords who receive as rent all or any part of the crop raised on the leased premises.

(b) If a member of a non-stock association be other than natural person, such members may be represented by any individual, associate, officer or manager or member thereof, duly authorized in writing.

(c) Any association organized hereunder may become a member or stockholder of any other association or associations organized hereunder. (110 v. 92, § 5; 108 (Pt. 2) v. 1247, § 9.)

Section 10186-6. (What articles of association shall state.) Each association formed under this act must prepare and file articles of incorporation, setting forth:

(a) The name of the association.

(b) The purposes for which it is formed.

(c) The place where its principal business will be transacted.

(d) The number of directors thereof, which must be not less than five (5) and may be any number in excess thereof; the term of office of such directors; and the names and addresses of those who are to serve as directors for the first term, and or until the election and qualification of their successors.

(e) If organized without capital stock, whether the property rights and interest of each member shall be equal or unequal; and if unequal, the general rule or rules applicable to all members by which the property rights and interests, respectively, of each member may and shall be determined and fixed; and provisions for the admission of new members who shall be entitled to share in the property

of the association with the old members, in accordance with such general rule or rules. This provision or paragraph of the articles of incorporation shall not be altered, amended, or repealed except by the written consent or vote of two-thirds of the members.

(f) If organized with capital stock, the amount of such stock and the number of shares into which it is divided and the par value thereof.

The capital stock may be divided into preferred and common stock. If so divided, the articles of incorporation must contain a statement of the number of shares of stock to which preference is granted and the number of shares of stock to which no preference is granted and the nature and definite extent of the preference and privileges granted to each.

The articles must be subscribed by the incorporators and acknowledged by them before an officer authorized by the law of this state to take and certify acknowledgements of deeds and conveyances; and shall be filed in accordance with the provisions of the general corporation law of this state; and when so filed the said articles of incorporation, or certified copies thereof, shall be received in all the courts of this state and other places as prima facie evidence of the facts contained therein and of the due incorporation of such association. (110 v. 93, § 6; 108 (Pt. 2) v. 1246, § 4.)

Section 10186-7. (Amendments to articles.) The articles of incorporation may be altered or amended at any regular meeting or any special meeting called for that purpose. An amendment must first be approved by two-thirds of the directors and then adopted by a vote representing a majority of all the members of the association. Amendments to the articles of incorporation, when so adopted, shall be filed in accordance with the provisions of the general corporation law of this state. (110 v. 94, § 7; 108 (Pt. 2) v. 1246, § 6.)

Section 10186-8. (Adoption of by-laws. What by-laws may contain.) Each association incorporated under this act must, within thirty (30) days after its incorporation, adopt for its government and management, a code of by-laws, not inconsistent with the powers granted by this act. A majority vote of the members, or their written assent, is necessary to adopt such by-laws. By-laws shall also provide that the by-laws may be amended; and shall provide the voting power by which amendments may be made. Each

association, under its by-laws, may provide for any or all of the following matters:

(a) The time, place and manner of calling and conducting its meetings.

(b) The number of members constituting a quorum.

(c) The right of members to vote by proxy or by mail, or both; and the conditions, manner, form, and effect of such votes.

(d) The number of directors constituting a quorum.

(e) The qualifications, compensation and duties and term of office of directors and officers; time of their election and the mode and manner of giving notice thereof.

(f) Penalties for violation of the by-laws.

(g) The amount of entrance, organization and membership fees, if any; the manner and method of collection of the same; and the purposes for which they may be used.

(h) The amount which each member shall be required to pay annually or from time to time, if at all, to carry on the business of the association; the charge, if any, to be paid by each member for services rendered by the association to him and the time of payment and the manner of collection; and the marketing contract between the association and its members which every member may be required to sign.

(i) The number and qualification of members of the association and the conditions precedent to membership or ownership of common stocks; the methods, time and manner of permitting members to withdraw or the holders of common stock to transfer their stock; the manner of assignment and transfer of the interest of members and of the shares of common stock; the conditions upon which and time when membership of any member shall cease; the suspension of the rights of a member when he ceases to be eligible to membership in the association; and the mode, manner and effect of the expulsion of a member; the manner of determining the value of a member's interest and provision for its purchase by the association upon the death or withdrawal of a member or upon the expulsion of a member or forfeiture of his membership, or, at the option of the association, the purchase at a price fixed by appraisal by the board of directors. In case of the withdrawal or expulsion of a member, the board of directors shall equitably appraise his property interests in the association and shall fix the amount thereof in money, which shall be paid to him within one year after such expulsion or withdrawal.

Every association incorporated hereunder may adopt any

other by-laws consistent with law, providing for any matter or thing relative to the control, regulation, operation, management, or government of the association. (110 v. 94, § 8; 108 (Pt. 2) v. 1248, § 14.)

Section 10186-9. (Annual and special meetings; notice.)

In its by-laws, each association shall provide for one or more regular meetings annually. The board of directors shall have the right to call a special meeting at any time; and ten percent of the members or stockholders may file a petition stating the specific business to be brought before the association and demand a special meeting at any time. Such meeting must thereupon be called by the directors. Notice of all meetings, together with a statement of the purpose thereof, shall be mailed to each member at least ten days prior to the meeting; provided, however, that the by-laws may require instead that such notice may be given by publication in a newspaper of general circulation, published at the principal place of business of the association. (110 v. 95, § 9.)

Section 10186-10. (Board of directors. Salaries. Vacancy.) The affairs of the association shall be managed by a board of not less than five directors, elected by the members from their own number. The by-laws may provide that the territory in which the association has members shall be divided into districts and that the directors shall be elected according to such districts, either directly or by district delegates elected by the members in that district. In such a case the by-laws shall specify the number of directors to be elected by each district, the manner and method of reapportioning the directors and of redistricting the territory covered by the association. The by-laws may provide that primary elections shall be held in each district to elect the directors apportioned to such districts and that the result of all such primary elections may be ratified by the next regular meeting of the association or may be considered final as to the association. The by-laws may provide that one or more directors may be appointed by any public official or commission or by other directors selected by the members or their delegates. Such directors shall represent primarily the interest of the general public in such associations. The directors so appointed need not be members of the association; but shall have the same powers and rights as other directors. Such directors shall not number more than one-fifth of the entire number of directors.

An association may provide a fair remuneration for the

time actually spent by its officers and directors in its service and for the service of its members of its executive committee. No director, during the term of his office, shall be a party to a contract for profit with the association differing in any way from the business relations accorded regular members or holders of common stock of the association or others, or differing from terms generally current in that district.

The by-laws may provide that no director shall occupy any position in the association, except the president and secretary, on regular salary or substantially full time pay.

The by-laws may provide for an executive committee and may allot to such committee all the functions and powers of the board of directors, subject to the general direction and control of the board.

When a vacancy on the board of directors occurs other than by expiration of term, the remaining members of the board, by a majority vote, shall fill the vacancy, unless the by-laws provide for an election of directors by district. In such a case the board of directors shall immediately call a special meeting of the members of stockholders in that district to fill the vacancy. (110 v. 95, § 10; 108 (Pt. 2) v. 1248, § 14.)

Section 10186-11. (Officers.) The directors shall elect from their number a president and one or more vice-presidents. They shall also elect a secretary and a treasurer, who need not be directors or members of the association; and they may combine the two latter offices and designate the combined office as secretary-treasurer; or unite both functions and titles in one person. The treasurer may be a bank or any depository, and as such, shall not be considered as an officer, but as a function, of the board of directors. In such case, the secretary shall perform the usual accounting duties of the treasurer, excepting that the funds shall be deposited only as and where authorized by the board of directors. (110 v. 96, § 11; 108 (Pt. 2) v. 1248, § 14.)

Section 10186-12. (Official bonds.) Every officer, employe and agent handling funds or negotiable instruments or property of or for any association created hereunder shall be required to execute and deliver adequate bonds for the faithful performance of his duties and obligations. (110 v. 96, § 12.)

Section 10186-13. (Certificate of membership. Stock. Debts. Amount of stock each member may hold. Dividends.

Vote. Preferred stock may be sold. Purchase its own stock.)
When a member of an association established without capital stock has paid his membership fee in full, he shall receive a certificate of membership.

No association shall issue stock to a member until it has been fully paid for. The promissory notes of the members may be accepted by the association as full or partial payment. The association shall hold the stock as security for the payment of the note; but such retention as security shall not affect the member's right to vote.

No member shall be liable for the debts of the association to an amount exceeding the sum remaining unpaid on his membership fee or his subscription to the capital stock, including any unpaid balance on any promissory notes given in payment thereof.

No stockholder of a cooperative association shall own more than one-twentieth ($1/20$) of the common stock of the association; and an association, in its by-laws may limit the amount of common stock which one member may own to any amount less than one-twentieth ($1/20$) of the common stock. The association shall limit its dividends on stock of any amount not greater than eight (8) per cent per annum; and all other net income, less specified reserves which shall be provided for in by-laws, shall be distributed back to its members only on the basis of patronage. Any receipts or dividends from subsidiary corporations or from stock or other securities owned by the association, shall be included in the ordinary receipts of the association, and shall be distributed accordingly.

No member in any association without capital stock shall be entitled to more than one vote.

Any association organized with stock under this act may issue preferred stock, without the right to vote. Such stock may be sold to any person, member or non-member, and may be redeemable or retireable by the association on such terms and conditions as may be provided for by the articles of incorporation and printed on the face of the certificate. The by-laws shall prohibit the transfer of the common stock of the association to persons not engaged in the production of the agricultural products handled by the association; and such restrictions must be printed upon every certificate of stock subject thereto.

The association may, at any time, as specified in the by-laws, except when the debts of the association exceed fifty (50) per cent of the assets thereof, buy in or purchase its common stock at the book value thereof, as determined

by the board of directors, and pay for it in cash within one (1) year thereafter. (110 v. 96, § 13.)

Section 10186-14. (Removal of officers, etc. Petition; notice; etc. Election of directors by districts.) Any member may bring charges against an officer or director by filing them in writing with the secretary of the association, together with a petition signed by five per cent of the members, requesting the removal of the officer or director in question. The removal shall be voted upon at the next regular or special meeting of the association and, by a vote of a majority of the members, the association may remove the officer or director and fill the vacancy. The director or officer, against whom such charges have been brought shall be informed in writing of the charges previous to the meeting and shall have an opportunity at the meeting to be heard in person or by counsel and to present witnesses; and the person or persons bringing the charges against him shall have the same opportunity.

In case the by-laws provide for election of directors by districts with primary elections in each district, then the petition for removal of a director must be signed by twenty per cent of the members residing in the district from which he was elected. The board of directors must call a special meeting of the members residing in that district to consider the removal of the director; and by a vote of the majority of the members of that district, the director in question shall be removed from office. (110 v. 97, § 14.)

Section 10186-15. (Appeals from directors.) Upon demand of one-third of the entire board of directors, made immediately and so recorded at the same meeting at which the original motion was passed, any matter of policy that has been approved or passed by the board must be referred to the entire membership for decision at the next special or regular meeting; and a special meeting may be called for the purpose. (110 v. 98, § 15.)

Section 10186-16. (Contracts.) The association and its members may make and execute marketing contracts, requiring the members to sell, for any period of time, not over ten years, all or any specified part of their agricultural products or specified commodities exclusively to or through the association, or any facilities to be created by the association. The contract may provide, among other things, that the association may sell or resell the products delivered by its

members, with or without taking title thereto; and pay over to its members the resale price, after deducting all necessary selling, overhead and other costs and expenses, including interest or dividends on stock, not exceeding eight (8) per cent per annum, and reserves for retiring the stock, if any; and other proper reserves; and or any other deductions. (110 v. 98, § 16; 108 (Pt. 2) v. 1247, § 8.)

Section 10186-17. (Damages.) (a) The by-laws or the marketing contract may fix, as liquidated damages, specific reasonable sums to be paid by the members to the association upon the breach by them of any provision of the marketing contract regarding the sale or delivery or withholding of products; and may further provide that the member will pay all costs, premiums for bonds, expenses and fees, in case any action is brought upon the contract by the association; and any such provisions shall be valid and enforceable in the courts of this state; and such clauses providing for liquidated damages shall be enforceable as such and shall not be regarded as penalties. (110 v. 98, § 17.)

Section 10186-18. (May exchange preferred stock as purchase price.) Whenever an association, organized hereunder with preferred capital stock, shall purchase the stock or any property, or any interest in any property of any person, firm or corporation or association, it may discharge the obligations so incurred, wholly or in part, by exchanging for the acquired interest, shares of its preferred capital stock to an amount which at par value would equal the fair market value of the stock or interest so purchased, as determined by the board of directors. In that case the transfer to the association of the stock or interest purchased shall be equivalent to payment in cash for the shares of stock issued. (110 v. 98, § 18.)

Section 10186-19. (Annual reports.) Each association formed under this act shall prepare and file an annual report with the director of agriculture on forms to be furnished by him containing the name of the association; its principal place of business; and a general statement of its business operations during the fiscal year, showing the amount of capital stock paid up and the number of stockholders of a stock association or the number of members and amount of membership fees received, if a non-stock association; the total expenses of operations; the amount of its indebtedness or liabilities, and its balance sheets. (110 v. 99, § 19.)

Section 10186-20. (Exemptions.) Any provisions of law which are in conflict with this act [G. C. §§ 10186-1 to 10186-30] shall be construed as not applying to the associations herein provided for.

Any exemptions whatsoever under any and all existing laws applying to agricultural products in the possession or under the control of the individual producer, shall apply similarly and completely to such products delivered by its farmer members, in the possession or under the control of the association. (110 v. 99, § 20.)

Section 10186-21. (Who may use word "cooperative.") No person, firm, corporation or association, hereafter organized or hereafter applying to do business in this state as a farmers' marketing association for the sale of farm products, shall be entitled to use the word "cooperative" as a part of its corporate or other business name or title, unless it has complied with the provisions of this act. (110 v. 99, § 21.)

Section 10186-22. (May own other corporations.) An association may organize, form, operate, own, control, have an interest in, own stock of, or be a member of any other corporation or corporations, with or without capital stock, and engaged in preserving, drying, processing, canning, packing, storing, handling, shipping, utilizing, manufacturing, marketing or selling of the agricultural products handled by the association, or the by-products thereof.

If such corporations are warehousing corporations, they may issue legal warehouse receipts to the association against the commodities delivered by it, or to any other person and such legal warehouse receipts shall be considered as adequate collateral to the extent of the usual and current value of the commodity represented thereby. (110 v. 99, § 22.)

Section 10186-23. (Cooperation contracts.) Any association may, upon resolution adopted by its board of directors, enter into all necessary and proper contracts and agreements and make all necessary and proper stipulations, agreements and contracts and arrangements with any other cooperative corporation, association or associations, formed in this or any other state, for the cooperative and more economical carrying on of its business or any part or parts thereof. Any two or more associations may, by agreement between them, unite in employing and using or may separately employ and use the same personnel, methods, means and agencies for carrying on and conducting their respective business. (110 v. 99, § 23.)

Section 10186-24. (Corporations organized under laws of other states.) Any corporation or association heretofore or hereafter organized under generally similar laws of another state shall be allowed to carry on any proper activities, operations and functions in this state upon compliance with the general regulations applicable to foreign corporations desiring to do business in this state and all contracts which could be made by any association incorporated hereunder, made by or with such associations shall be legal and valid and enforceable in this state with all of the remedies set forth in this act. (110 v. 100, § 24.)

Section 10186-25. (Association organized under prior laws. Contracts validated.) Any association, organized under previously existing statutes, may, by a majority vote of its members, be brought under the provisions of this act by limiting its membership and adopting the other restrictions as provided herein. It shall make out in duplicate a statement signed and sworn to by its directors to the effect that the association has, by a majority vote of the members, decided to accept the benefits and be bound by the provisions of this act and has authorized all changes accordingly. Articles of incorporation shall be filed as required in section 8, except that they shall be signed by the members of the then board of directors. The filing fee shall be the same as for filing an amendment to articles of incorporation.

(a) Where any association may be incorporated under this act, all contracts heretofore made by or on behalf of same by the promoters thereof in anticipation of such association becoming incorporated under the laws of this state, whether such contracts be made by or in the name of some corporation organized elsewhere, and when same would have been valid if entered into subsequent to the passage of this act, are hereby validated as if made after the passage of this act. (110 v. 100, § 25.)

Section 10186-26. (Not in "restraint of trade.") No association organized hereunder and complying with the terms hereof shall be deemed a conspiracy or a combination in restraint of trade or an illegal monopoly; or an attempt to lessen competition or to fix prices arbitrarily nor shall the marketing contracts and agreements between the association and its members or any agreements authorized in this act be considered illegal as such or in unlawful restraint of trade or as part of a conspiracy or combination to accomplish an improper or illegal purpose. (110 v. 100, § 26.)

Section 10186-27. (Separate sections.) If any section of this act [G. C. §§ 10186-1 to 10186-30] shall be declared unconstitutional for any reason, the remainder of this act shall not be effected thereby. (110 v. 100, § 27; 108 (Pt. 2) v. 1250, § 20.)

Section 10186-28. (General corporation laws apply hereto.) The provisions of the general corporation laws of this state and all powers and rights thereunder, shall apply to the association organized hereunder, except where such provisions are in conflict with or inconsistent with the express provisions of this act. (110 v. 101, § 28.)

Section 10186-29. (Annual fees.) Each association organized hereunder shall pay into the state treasury an annual fee of ten (\$10) dollars only, in lieu of all franchise or license or corporation or taxes or charges upon reserves held by it for members. (110 v. 101, § 29; 109 v. 52, § 8.)

Section 10186-30. (Incorporation and amendment fees.) For filing articles of incorporation, an association organized hereunder shall pay to the secretary of state ten dollars; and for filing an amendment to the articles, five dollars. (110 v. 101, § 30; 108 (Pt. 2) v. 1250, § 19.)

PARK AND MEMORIAL.

Section 10187. (Associations may purchase battlefield or memorial sites.) Any incorporated association, having for its purpose the preservation of public parks and memorial sites, may acquire and hold in perpetuity for memorial purposes for the free use and benefit of the public, any real estate in this state, which has been, or may be, the site or scene of any battle, or other engagement, in behalf of, or in defense of, the government of the United States or of this state, or which has been used or set apart for the burial of American soldiers. (April 19, 1904, 97 v. 97, § 1; R. S. § 3870-1.)

Section 10188. (When may condemn property.) Such association may improve such real estate so held by it, and prescribe reasonable regulations for the use thereof by the public. In the event that such association and any owner or owners of the real estate, sought to be acquired by it, are unable to agree upon the price to be paid therefor, the association may acquire it by proceedings in a proper court, in

the manner provided by law for the appropriation of private property by a municipal corporation of this state. (R. S. Sec. 3870-1; April 19, 1904, 97 v. 97, § 1.)

CHARITY.

Section 10189. (Homes for aged and indigent women.) Corporations designated as the widows' home, and asylum for aged and indigent women, in addition to the estates, real, personal, or mixed, which they are otherwise allowed by law to hold, may take by purchase, gift, or devise, and hold, use, dispose of, and convey, in all lawful ways, any estate, real, personal, or mixed, convenient or necessary for the use of the corporation, or for the investment of its funds. No part of such estate, nor of the income thereof, shall be used for any purpose or business other than in providing a suitable asylum, the support and maintenance thereof, and the support and maintenance of such aged and indigent women as are admitted into it under the by-laws thereof. (R. S. Sec. 3881; February 27, 1878, 75 v. 14, § 1.)

See also §§ 9972 to 9977.

Section 10190. (Contract for care and maintenance of indigent, aged or infirm deaf and dumb.) Any incorporated association organized for the purpose of providing a home for deaf and dumb persons may enter into a contract with the board of county infirmary directors of any county, or with the proper officers of any corporation infirmary, for the care and maintenance at such home of any deaf and dumb person who may be an inmate of such county or corporation infirmary, or who, under the laws of the state, may be entitled to admission thereto. In every such case the county or corporation infirmary, during the period the person remains in such home, shall pay to the association, annually, a sum equal to the per capita cost of maintaining inmates in the county or corporation infirmary. (R. S. Sec. 3881-1; April 16, 1900, 94 v. 369, § 1; April 22, 1898, 93 v. 212; April 27, 1896, 92 v. 419.)

Section 10191. (State board of charities may order removal of such persons to home.) When any deaf and dumb person is maintained in a county or corporation infirmary in this state, who, in the judgment of the board of state charities, should be removed to a home organized under the preceding section, such board may order the removal of the person from the infirmary to the home. When

such person is removed on the order of the board from an infirmary to the home, then the transportation of the person to the home and his or her maintenance shall be paid by the infirmary directors of the county infirmary or the proper officers of the corporation infirmary as provided in the preceding section. (R. S. Sec. 3881-1; April 16, 1900, 94 v. 369, § 1; April 22, 1898, 93 v. 212; April 27, 1896, 92 v. 419.)

Section 10192. (Companies for protecting and preserving dead bodies.) Any association organized for the purpose of preserving and protecting bodies of deceased persons before burial may purchase, or take by devise or gift, hold, and convey real estate, not exceeding one acre of land, and erect thereon suitable buildings, construct and maintain vaults, and such other appliances as are necessary to carry out its objects. Such property shall be exempt from execution, from taxation, and from being appropriated to any other public purpose, if used exclusively for the purpose herein described. (R. S. Sec. 3884; R. S. of 1880.)

ENTERTAINMENT.

Section 10193. (Powers of museum, park and rink companies.) When a corporation organized for the purpose of constructing and conducting a museum for the exhibition and preservation of works of nature and art, and for instruction in connection therewith, or a public hall of any kind, or a park, pond or rink for skating or other lawful sports, or for holding fairs, festivals, public meetings, concerts or lawful entertainments of any kind, provides in its articles of incorporation that its buildings or a designated part thereof, shall be devoted to the use of the public for all purposes set forth therein, free from cost, charge or expense except such as are necessary to provide the means to keep the buildings, or part thereof and its grounds in proper condition and repair, and to pay the cost of insurance, care, management and attendance, so that the public may have the benefit thereof for the uses set forth in its articles at as little expense as possible, that no stockholder, subscriber, trustee, director or member shall receive any compensation, gain or profit from the corporation for such public use of its buildings or part thereof, the authorities of any city, village or county in which the corporation is located, may appropriate to such use and grant the right to such corporation to erect and perpetually maintain its

buildings on any of the parks, lands, lots or grounds which, or the use of which belong to or are subject to the control of such city, village, county, or the authorities thereof, and to control them on terms and conditions which may be agreed upon between the public authorities and the corporation. In every such case the public authorities and corporation may agree that additional trustees of the corporation may be appointed by such public authorities, and upon the number thereof and the method of their appointment. They also may agree that any officer or officers of such city, village or county to be designated by them ex-officio may act as trustees. (R. S. Sec. 3868; April 12, 1881, 78 v. 127; R. S. 1880; February 12, 1876, 73 v. 8, § 1; March 8, 1872, 69 v. 20, § 1.)

A corporation organized for "musical, artistic and gymnastic purposes" which owns a building where societies meet for such purposes, but no part of which is rented, is not a real estate corporation. *Becker v. Germania Hall*, 22 C. C. n. s. 395 (1908).

Power to own stock in other corporations, § 10196.

Section 10194. (May provide for reversion of stock, etc.)

Such corporation may provide in its organization a limit as to the number of shares which each stockholder can own, the conditions on which the shares may be held or transferred, and for the reversion thereof to the corporation in case of the death or disqualification of a stockholder. (R. S. Sec. 3869; February 12, 1876, 73 v. 8, § 2.)

Section 10195. (Penalties for trespasses upon property.)

Whoever breaks, throws down, or injures any gate, fence, inclosure, embankment, or erection of any kind, upon the ground of any such corporation, or forcibly or fraudulently passes such gate, or over such fence, or into such inclosure or building, without having paid the charge demanded for entry therein, for each offense, shall forfeit to the party injured the sum of twenty-five dollars, in addition to the damages resulting from such wrongful act. (R. S. Sec. 3870; April 5, 1867, 64 v. 182, § 7.)

Section 10196. (Certain companies may purchase or own stock in other companies.) When an incorporated company organized under the laws of this state, and having a capital stock including museum, park, pond or rink companies, is organized for the purpose of erecting and maintaining a building, any part of which is intended for or to be occupied by two or more incorporated companies not having a capital stock, including religious, scientific, and bene-

ficial associations heretofore incorporated, as a lodge-room, chapel, or regular place of meeting for their members, such incorporated companies, societies or benevolent associations may each subscribe for, purchase or become the owner or owners, by donation or otherwise, of the whole or part of the capital stock of such incorporated company organized for the purpose of erecting and maintaining such building. (R. S. Sec. 3631-8; April 18, 1883, 80 v. 177, § 1.)

Section 10197. (Liable in corporate capacity same as individuals.) Each of such incorporated companies, societies and associations shall be liable in its corporate capacity for and on their respective shares of the capital stock so subscribed, purchased, and owned by it the same as if the stock were held and owned by an individual. (R. S. Sec. 3631-9; April 18, 1883, 80 v. 177, § 2.)

Section 10198. (When and how directors elected.) When two or more or such incorporated companies, societies, or benevolent associations subscribe for, purchase or own all the capital stock of such incorporated company organized for the purpose of erecting and maintaining such building, each of the incorporated companies, societies or benevolent associations, shall elect three members of its company, society or association to act as directors of the company as soon as all the stock is subscribed and ten per cent is paid, and thereafter at its first stated meeting in January of each year, elect three such directors. The directors so elected and their successors in office shall comprise the board of directors of the company, and have all the powers conferred by law on the directors of incorporated companies having a capital stock. The directors need not be the owners or holders of capital stock in such corporation. (R. S. Sec. 3631-10; April 18, 1883, 80 v. 177, § 3.)

Section 10198-1. (Acquisition of prehistoric monuments and sites.) Any incorporated association or society maintained by and operating for and on behalf of the state of Ohio, having for its purpose the preservation of prehistoric monuments or the exploration or examination of such prehistoric monuments with the view of collecting and preserving all relics or artifacts found in such monuments, for educational and scientific purposes and for the use and benefits of the public by being permanently placed in a state museum, may acquire and hold any real estate in the state of Ohio which is the site of an prehistoric mound, earth or stone works, or prehistoric village site. In the

event that such incorporated association or society seeking to acquire such real estate and any owner of such real estate sought to be acquired are unable to agree upon the price to be paid for acquiring or holding of the real estate desired, such association or society may acquire such real estate by proceedings in a proper court in the manner provided by law for the appropriation of private property by a municipal corporation of this state. (May 2, 1913, 103 v. 262.)

CRIMES.

Section 10199. (Township society for detection and arrest of horse-thieves and criminals.) When natural persons of a township form a society for the detection and arrest of horse thieves and other criminals, and for mutual protection of the property of its members, such society may become a body corporate in the manner prescribed in section ninety-nine hundred and eleven, with the right to levy and collect, by suit, if necessary, assessments not exceeding three dollars annually from each member as may be required to carry out the objects of the society, and to make for it needful rules and regulations not in conflict with law. (R. S. Sec. 3709a; February 10, 1885, 82 v. 63.)

Whether the word "police" or "special police", in the name of a corporation organized under this section or § 10200, would be likely to mislead the public, is a question for decision by the secretary of state under § 8628. Rep. Atty. Gen. 1912, p. 55.

Section 10200. (Corporations for the apprehension and conviction of criminals.) Any number of persons, not less than fifteen, a majority of whom must be residents of this state, may become incorporated for the purpose of apprehending and convicting any person or persons accused of either a felony or misdemeanor. (R. S. Sec. 3705-11; April 29, 1902, 95 v. 299, § 1; March 21, 1887, 84 v. 169.)

Sections 10200 et seq. do not authorized the organization of a corporation for the purpose of enabling its members to exercise police powers and collect rewards for the apprehension of criminals. Opins. Atty. Gen. 1915, p. 2505.

A corporation organized under the general corporation law can not, by amendment, acquire the powers of a corporation authorized by this section.

Rep. Atty. Gen. 1908-1909, p. 71.

Section 10201. (Election of officers; by-laws.) An association so incorporated may make and use a common seal with the name of the corporation thereon. A majority of

its members may adopt a constitution and by-laws for their government, and elect or appoint such officers as they deem proper, who shall hold their offices during the term provided, by the constitution and by-laws, and perform the duties thereby, and also by law required of them. The presiding officer of such an association may administer the proper oaths of office to any of its officers or members, and certify the appointment or election thereof under its seal. (R. S. Sec. 3705-12; April 29, 1902, 95 v. 299; April 28, 1890, 87 v. 339; March 21, 1887, 84 v. 169.)

Section 10202. (Deputies.) Such presiding officer may appoint deputies, not exceeding one in each township, in a county or counties where the corporation is located, who may administer an oath of office or membership, and certify the appointment or election thereof, which shall be valid when approved by the presiding officer under the seal of the corporation. (R. S. Sec. 3705-12; April 29, 1902, 95 v. 299; April 28, 1890, 87 v. 339; March 21, 1887, 84 v. 169.)

Section 10203. (May arrest without a warrant.) The officers and members of the association upon the proper certificate of the presiding officer thereof, when so elected or appointed, if a felony has been committed, may pursue and without warrant arrest any person whom they believe or have reasonable cause to believe guilty of the offense, and arrest and detain the alleged criminal in any county of the state to which he fled, and return him to any officer of the county wherein the offense was committed, and there detain him until a legal warrant can be obtained for his arrest. (R. S. Sec. 3705-12; April 29, 1902, 95 v. 299; April 28, 1890, 87 v. 339; March 21, 1887, 84 v. 169.)

Section 10204. (May obtain a warrant.) An officer or member of such an association, under such certificate of authority may apply for and obtain a warrant for the arrest of a person accused of felony or misdemeanor, which shall be issued to him by any justice of the peace or police magistrate of a city or village under the same conditions as warrants are issued to constables. Under such warrant he shall have the same power to arrest and detain offenders as is vested in constables. (R. S. Sec. 3705-12; April 29, 1902, 95 v. 299; April 28, 1890, 87 v. 339; March 21, 1887, 84 v. 169.)

Section 10205. (Assessments.) Such an association may make and collect from its members, assessments authorized

by its constitution or by-laws, and if so provided in its constitution, also may indemnify its members for losses caused by horse thieves or other felons, and expend such moneys as are deemed necessary in the pursuit, arrest, and to procure the conviction of felons. (R. S. Sec. 3705-13; April 29, 1902, 95 v. 299; April 28, 1890, 87 v. 340; March 21, 1887, 84 v. 169.)

Section 10206. (Reimbursement of expenses by county.)

Upon the apprehension and conviction of a person charged with felony by such an association, the commissioners of the county in which the crime was committed, may reimburse it in any sum not above one hundred dollars, for necessary expenses, not otherwise provided for by law, incurred in the apprehension and conviction of such criminal. Upon the apprehension and conviction by the association of a person accused of misdemeanor, the commissioners of the county in which the crime was committed may reimburse it in any sum not above seventy-five dollars for necessary expenses incurred, not otherwise provided for by law, in the apprehension and conviction of such criminal. (R. S. Sec. 3705-14, April 29, 1902, 95 v. 300; April 28, 1890, 87 v. 340; March 21, 1887, 84 v. 169.)

OTHER COMPANIES.

Section 10207. (Dock companies.) A company organized for the purpose of constructing and establishing docks in and adjacent to any of the navigable waters in or bordering upon this state, may construct or purchase any dock or docks, and erect thereon any structure suitable for receiving, storing, and delivering produce, and goods of whatever description, repair and protect such dock or docks and structures, and sell them in the manner prescribed by the by-laws of the company. (R. S. Sec. 3840; March 16, 1865, 62 v. 48, § 4.)

Section 10208. (Ferry companies.) A corporation organized for the purpose of carrying on the ferry business on any of the water-courses in this state, or bordering thereon, may build, purchase, and hold steam ferry-boats, and other vessels and floats, real estate, landings, wharves, docks, and other property, in this state or elsewhere, proper to carry on its business, buy or lease, and use, let, or otherwise dispose of them, or any part thereof, in such manner as it deems advisable, carry on the ferry business at

the place named in its articles of incorporation, transport persons and property, and receive such compensation therefor as may be lawful. It shall be governed by the laws that govern natural persons in such employments. (R. S. Sec. 3849; April 11, 1865, 62 v. 114; § 4.)

The state has no power to fix ferry rates over a navigable stream from a point in another state. *Bellaire v. Ferry Co.*, 105 O. S. 247 (1922).

Section 10209. (Fruit companies.) Any company organized for the purpose of cultivating, canning, shipping, and dealing in fruit, may purchase, hold, and convey real and personal property for the purpose of conducting and carrying out the objects of the company, and hold it without the state. (R. S. Sec. 3883; R. S. of 1880.)

Section 10210. (Certain corporations may purchase or lease real estate.) A corporation organized for the purpose of constructing and maintaining buildings to be used for hotels, store-rooms, offices, warehouses, and factories, may acquire by purchase or lease, and hold, use, mortgage and lease all such real estate or personal property as is necessary, for such purpose. But no such corporation shall acquire or mortgage any real or leasehold estate, or lease it for a period exceeding, with all privileges of renewal, the term of five years, without the consent of the holders of two-thirds of the stock, obtained at a meeting called for that purpose, written notice of which was given to each stockholder, either personally, or deposited in the post-office, properly addressed and duly stamped, not less than ten days before the day fixed for such meeting. Nothing herein shall authorize corporations to buy and sell, or to deal in real estate for profit. (R. S. Sec. 3884a; April 15, 1889, 86 v. 375, 376.)

Real estate companies, see §§ 8648, 8650.

A corporation organized under this section can not amend its articles of incorporation so as to acquire power of dealing generally in real estate. Rep. Atty. Gen. 1906-1907, p. 66.

Nor can a real estate company, by amendment, acquire the powers conferred by this section. Rep. Atty. Gen. 1908-1909, p. 79; Rep. Atty. Gen. 1911-1912, p. 68.

A manufacturing corporation can not, by amendment, acquire the powers conferred by this section. Rep. Atty. Gen. 1908-1909, p. 70.

A construction company can not acquire the power to own hotel buildings. Such power is not given by this section. Rep. Atty. Gen. 1910-1911, p. 232.

This section does not authorize a building company to engage in a general rental business. Rep. Atty. Gen. 1911-1912, p. 62.

A building company which, as an incident to its business, furnishes electric current to tenants for light and power purposes, making a separate charge therefor, is a public utility. Rep. Atty. Gen. 1913, pp. 575, 545.

A corporation can not be formed to (a) acquire and maintain buildings; (b) manage and rent buildings and (c) do a general contracting business.

Rep. Atty. Gen. 1911-1912, p. 62.

Section 10211. (Stock-yard companies.) A company incorporated for the purpose of purchasing or leasing real estate, and erecting thereon pens and buildings for the safe-keeping of live stock intrusted to it on sale, may lease or purchase, and operate the portion of any railroad leading to or connected with its stock-yards as is necessary for the convenient dispatch of its business. The number of miles so leased or purchased shall not exceed thirty, and the lease or purchase shall not be made without the consent of the holders of a majority of the stock in such company, and in the company leasing or selling the railroad. (R. S. Sec. 3876; April 3, 1876, 73 v. 162, § 3.)

Section 10212. (Consolidation of public service companies.) Any two or more electric lighting companies, natural or artificial gas companies, gas light or coke companies, companies for supplying water for public or private consumption; or any electric light and power company and any water company; or any heating company and any incline, movable or rolling road company; doing business in the same municipal corporation or which are incorporated and organized for the purpose of doing business in the same municipal corporation may consolidate into a single corporation in the manner and with the same effect as is provided for the consolidation of railroad companies. (R. S. Sec. 2485a; April 23, 1904, 97 v. 281; April 16, 1900, 94 v. 315.)

This section does not authorize a corporation, formed to furnish gas, electricity, heat, power, light and water, to add to its corporate purposes that of manufacturing and dealing in ice and the doing of a refrigerating and storage business. Rep. Atty. Gen. 1914, p. 1107.

PART XXIV.

JUSTICE OF THE PEACE CODE PROVISIONS.

§ 10238. Service on corporations.	§ 10242. Summons issued to sheriff
§ 10239. Suits against railroad company.	§ 10243. Insurance company.
§ 10240. Process.	§ 10244. Foreign corporation.
§ 10241. Service of process.	§ 10253. Affidavit for attachment.
	§ 10266. Service.

Section 10238. (Service on corporations.) Except as hereinafter specially provided, a summons against a corporation may be served upon the president, mayor, chairman of the board of directors or trustees, or other chief officer; or, if its chief officer is not found in the county, upon its cashier, treasurer, secretary, clerk, or managing agent; or, if none of such officers can be found, by a copy left at the office, or usual place of business of such corporation, with the person having charge thereof. But if the defendant be an incorporated river transportation company, whether organized under the laws of this or another state, the service of a summons may be upon the master or other chief officer of any of its steamboats or other craft, or upon any of its authorized ticket or freight agents, at any port where it transacts business. (R. S. Sec. 6477; March 14, 1853, 51 v. 179, § 15; S. & C. 774.)

Service on corporation in other courts, see § 11288.

Where service is made on a secretary or managing agent it should affirmatively appear in the return that no chief officer could be found.

Rosenham v. Cohen & Mack, 13 C. C. n. s. 102 (1910).

See also note to § 11288.

This section was held not to apply to an attachment suit against a foreign railroad company.

Mo. Pac. Ry. Co. v. Baum, 7 N. P. n. s. 265 (C. P. 1908); affirmed, 12 C. C. n. s. 271; 22 C. D. 505; 81 O. S. 386.

Section 10239. (Suits against railroad company.) Suit may be brought before a justice of the peace against a railroad company, in the township in which the president of the company resides, or in a township into or through which the road owned or leased by such company is located, whether such company be foreign or created under the laws of this state, and whether the charter thereof prescribed the place where suit must be brought against it, or the manner or place of service of process thereon, or not. (R.

S. Sec. 6478; March 21, 1850, 48 v. 52, § 1; March 31, 1866, 63 v. 63, §§ 2, 3; April 30, 1868, 65 v. 116, § 66; R. S. 1880.)

Service on railroad companies in other courts, see § 11288.

Service on a railroad company in an action before a justice of the peace should be made under this section. The mode provided in this section is exclusive.

North v. Railroad, 10 O. S. 548 (1860).

Sections 10239 to 10242 do not apply to proceedings in attachment before a justice of the peace, and a justice may acquire jurisdiction in attachment against a foreign railroad corporation by levy, and publication of notice as provided in G. C. § 10263.

Railway Co. v. Baum, 81 O. S. 386 (1910); affirming, 12 C. C. n. s. 271; 22 C. D. 505; 7 N. P. n. s. 265; overruling, Squire v. Railway, 1 C. C. n. s. 354; 15 C. D. 30.

Sections 10239 to 10242 do not apply to street railway companies.

Greene v. Street Railroad Co., 62 O. S. 67 (1900).

Section 10240. (Process.) If the principal business office of such company is not kept in the township in which suit is brought, the justice of the peace shall issue a summons against it, directed to any constable in the township in which the suit is brought. (R. S. Sec. 6478; March 21, 1850, 48 v. 52, § 1; March 31, 1866, 63 v. 63, §§ 2, 3; April, 1868, 65 v. 116, § 66; R. S. 1880.)

Section 10241. (Service of process.) On receipt of such summons the constable forthwith shall serve it personally upon the president of such company, if he be a resident of the county in which suit is brought, or by leaving a certified copy at his place of business, if it is within the county. If the president of the company is not a resident of, or has no place of business within the county in which the suit is brought, the constable having such summons may serve it personally upon the person having charge of a ticket office or a freight depot, owned by or under the control of the company, and situated within the county where suit is brought. When the summons is served on either of the last described persons, it shall be done at least eight days prior to trial. When served upon the president, it may be served in accordance with the law for serving summons issued by justices of the peace. (R. S. Sec. 6478; March 21, 1850, 48 v. 52, § 1; March 31, 1866, 63 v. 63, §§ 2, 3; April 30, 1868, 65 v. 116, § 66; R. S. 1880.)

See § 11288 and notes.

To show good service of summons on a ticket agent under this section, it must appear affirmatively that the president of the company is not a resident of the county in which suit is brought, and has no place of business therein, and also that such agent is a person having charge of a ticket office or of a freight depot owned by or under the control of such

company, and that such ticket office or freight depot is situated within the county where such suit is brought.

Jones v. Railway Co., 20 C. C. 63; 10 C. D. 789 (1900).

Section 10242. (Summons issued to sheriff.) When the president of such company does not reside, and there is no such officer or depot in the county, then the justice of the peace shall issue a summons directed to the sheriff of the county where the principal business office of the company is located, with an indorsement on the back of the writ, of the name of the postoffice to which it shall be returned. Upon the receipt of the writ, the sheriff shall forthwith serve it personally upon the president, if found, or by leaving a copy at the business office of such company with the person having charge thereof, and immediately return the writ to the justice issuing it, by mail, directed to the postoffice named on its back. (R. S. Sec. 6478; March 21, 1850, 48 v. 52, § 1; March 31, 1866, 63 v. 63, §§ 2, 3; April 30, 1868, 65 v. 116, § 66; R. S. 1880.)

Section 10243. (Insurance company.) When the defendant is an incorporated insurance company, and the action is brought in a county wherein it has an agency, the service may be upon the chief officer of such agency. (R. S. Sec. 6479; March 14, 1853, 51 v. 179, § 16; S. & C. 744.)

See § 11289.

Section 10244. (Foreign corporation.) When the defendant is a foreign corporation, having a managing agent in this state, the service may be upon such agent. (R. S. Sec. 6480; March 14, 1853, 51 v. 179, § 17; S. & C. 774.)

See also § 11290 and note.

The return of service on a managing agent should show that the person served is such agent in this state.

Rosenham v. Cohen & Mack, 13 C. C. n. s. 102 (1910).

ATTACHMENT.

Section 10253. (Affidavit for attachment.) Except as hereinafter provided, the plaintiff shall have an order of attachment against property of the defendant in a civil action before a justice of the peace for the recovery of money, before or after its commencement, when there is filed in his office an affidavit of the plaintiff, his agent or attorney, showing the nature of the claim, that it is just, the amount the affiant believes the plaintiff ought to recover, and that the

property sought to be attached is not exempt from execution. If attachment of the personal earnings of the defendant be sought, the affidavit also must state that he is not the head or support of a family nor in good faith the support of a widowed mother wholly dependent upon him for support; or that such earnings are not for services rendered within three months before the action was begun, or that, if earned within that time, they amount to more than one hundred and fifty dollars, and only the excess over that sum is sought to be attached; or that the claim sued on is for work, labor or necessities, and, except in cases for such claims, the existence of one or more of the following particulars:

1. That the defendant, or one of several defendants, is a corporation, having no officer upon whom a summons can be served, or place of doing business in the county, or is a non-resident of the county. No proceedings in attachment shall be had to garnishee the salary or wages of an employe of a railroad company, by reason of his non-residence, except before a justice or on account of his being a non-resident of the county in which his liability was incurred;

2. Has absconded with intent to defraud his creditors;

3. Has left the county of his residence to avoid the service of a summons;

4. So conceals himself that a summons can not be served upon him;

5. Is about to remove his property, or a part thereof, out of the county, with the intent to defraud his creditors;

6. Is about to convert his property, or a part thereof, into money, for the purpose of placing it beyond the reach of his creditors;

7. Has property or rights of action which he conceals;

8. Has assigned, removed, or disposed of, or is about to assign, remove or dispose of his property, or a part thereof, with intent to defraud his creditors; or

9. Fraudulently or criminally contracted the debt, or incurred the obligation, for which suit is about to be or has been brought. When the defendant is a corporation, having no officer in the county upon whom a summons can be served, or a place of doing business in the county, or is a non-resident of the county, the attachment shall not be granted unless the claim is for a debt or demand arising upon contract, judgment or decree. No attachment shall issue by virtue of this chapter against the personal earnings of any defendant for services rendered by such defendant within three months before the commencement of the action

or the issuing of the attachment, unless the defendant is not the head or support of a family, or unless the amount of such earnings exceeds one hundred and fifty dollars, and then only as to the excess over that amount, or unless the claim is one for necessities, and then for only ten per cent of such personal earnings. (R. S. Sec. 6489; February 28, 1862, 59 v. 17, § 28; June 9, 1879, 76 v. 165, § 17; R. S. 1880; April 3, 1891, 88 v. 277; April 26, 1898, 93 v. 319; S. & C. 776; S. & S. 420.)

Attachment in common pleas court, see § 11819.

Exemption of licensed foreign corporations from attachment.

See § 186.

A domestic corporation may be proceeded against under this section on the ground that it is a non-resident of the county.

Machine Co. v. Huston, 24 O. S. 503 (1874).

A domestic corporation may be proceeded against in attachment either as a corporation or as a non-resident of the county, but in either case the affidavit must show that the corporation has no officer in the county upon whom summons may be served, or no place of business within the county.

Cartmel v. Wurlitzer, 5 N. P. n. s. 604; 18 L. D. 380 (C. P. 1907).

A foreign corporation may be proceeded against in attachment before a justice of the peace the same as a domestic corporation, but the affidavit must show that the corporation has no officer in the county on whom summons may be served, or no place of doing business within the county.

Cartmel v. Wurlitzer, 5 N. P. n. s. 604; 18 L. D. 380 (C. P. 1907).

A foreign railroad company is not exempted from attachment under this section by the provisions of § 10239.

Railway Co. v. Baum, 81 O. S. 386 (1910); affirming, 12 C. C. n. s. 276; 22 C. D. 505; 7 N. P. n. s. 265.

An affidavit which alleges that the defendant corporation is a non-resident of the county is not defective because it does not aver non-compliance with foreign corporation laws.

Rosenham Co. v. Cohen & Mack, 13 C. C. n. s. 102 (1910).

In common pleas court, however, non-compliance must be set forth in the affidavit. See notes to §§ 11819 and 186.

An attachment will lie against a foreign corporation for money lost in gambling. Harlan v. Investment Co., 11 N. P. n. s. 492 (1911).

Attachment without bond against non-resident for damages from purchase of stock induced by fraudulent representations. See Hart v. Andrews, 103 O. S. 218 (1921).

Under an earlier form of this section it was held that the words "foreign corporation" did not include a domestic corporation.

Boley v. Trust Co., 12 O. S. 139 (1861).

Section 10266. (Service.) If the garnishee is a person, the copy of the order and notice shall be served upon him personally, or left at his usual place of residence. If a partnership is garnisheed by its company name, they shall be left at its usual place of doing business, or be served personally on one of its members; and if a corporation, they shall be left with the president or other principal officer, or its secretary, cashier, or managing agent. If such cor-

poration is a railroad company, they may be left with any regular ticket or freight agent thereof in the county. (R. S. Sec. 6499; May 4, 1885, 82 v. 261; R. S. 1880; March 14, 1853, 51 v. 179, § 38; S. & S. 778.)

See § 11833.

A return of service upon the "agent" of the corporation has been held valid, although the better practice is to strictly follow the statute. *Parkinson v. Crawford*, 13 N. P. n. s. 73 (1912).

PART XXV.

APPROPRIATION OF PROPERTY.

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| § 11038. | Appropriation of private property. | § 11065. | Corporation may pay judgment and enter on property. |
| § 11039. | When appropriations made. | § 11066. | Proceedings in the common pleas on error. |
| § 11040. | Appropriation of property of minor, idiot, imbecile or insane person. | § 11067. | How school land appropriated. |
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| § 11042. | Petition for appropriation. | § 11069. | Procedure in common pleas court. |
| § 11043. | The county petition to be filed in. | § 11070. | When corporations entitled to possession. |
| § 11044. | Summons. | § 11071. | When court to appoint attorney. |
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| § 11047. | Jurors. | § 11074. | Custody of the funds. |
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| § 11049. | Amendments. | § 11076. | Condemnation of unfinished road-bed. |
| § 11050. | Time of trial, adjournments, and discharge of juries. | § 11077. | Construction of terms. |
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| § 11057. | When a structure is partly on land to be appropriated. | § 11084. | Proceedings when land is held without agreement. |
| § 11058. | Verdict. | § 11085. | Demand of written statement describing the land occupied without appropriation. |
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| § 11063. | Bills of exceptions. | § 11090. | When costs apportioned. |
| § 11064. | Petition in error. | § 11091. | When this chapter does not apply. |

Section 11038. (Appropriation of private property.) Appropriation of private property by corporations must be made according to the provisions of this chapter. (R. S. Sec. 6414; April 23, 1872, 69 v. 88, § 1.)

Power of various companies to appropriate property.

Railroad companies, §§ 8759, 8760, 8763 to 8768.

Street and interurban railways, §§ 9108 to 9111, 9118-2, 9119.

Foreign corporations, § 9090.

Application of chapter to appropriations by municipal and other public corporations.

See § 11091.

Railway Co. v. Greenville, 69 O. S. 492 (1903).

Cincinnati v. Lohman, 10 C. C. n. s. 119; 20 C. D. 92.

Purposes for which property may be appropriated. See note to § 8759.

An appropriation proceeding is not a civil action but a special proceeding.

Railroad v. Tod, 72 O. S. 166 (1905).

Constitutionality. This act is valid under article 4; § 8 of the constitution.

Giesy v. Cincinnati, etc., R. Co., 4 O. S. 308 (1854).

See Railroad Co. v. O'Harra, 48 O. S. 343 (1891).

A corporation which has instituted appropriation proceedings under this chapter is estopped from denying the constitutionality of any section thereof.

Wiler v. Logan, etc., Co., 6 C. C. n. s. 206; 17 C. D. 257 (1904);
(aff'd, 72 O. S. 628 for failure to file petition in error in time).

Eminent domain defined. The right of eminent domain is the right to take private property for public use.

Railroad v. Railroad, 72 O. S. 380 (1905).

Power of eminent domain vested in general assembly. Power of courts. The constitution does not confer the power of eminent domain but prescribes modes for and limitations upon its exercise. The power is lodged with the general assembly, and may be exercised directly or indirectly, without the intervention of courts, except for determining the amount of compensation. Courts possess power to determine its proper limits and to prevent abuses in its exercise.

Giesy v. Cincinnati, etc., R. Co., 4 O. S. 308 (1854).

Whether or not the use is public is a judicial question. The use being public the right is absolute in the general assembly, unless restricted by the constitution, and it is entirely in its discretion whether it is necessary to take property for such use, that is, whether the public welfare requires or will be promoted by such use.

Railroad v. Railroad, 72 O. S. 380 (1905).

Statutes strictly construed. Statutes conferring the power of eminent domain are strictly construed.

Platt v. Penna. Co., 43 O. S. 228, 244 (1885).

Railway Co. v. South, 78 O. S. 10 (1908).

See note to § 8759.

Section 11039. (When appropriations made.) Appropriations can be made only when the corporation is unable to agree with the owner, or his guardian or trustee, as to the compensation to be paid for the property, or easement or interest therein, sought to be appropriated, or when the owner is incapable of contracting in person or by agent, and has no guardian or trustee, or is unknown, or his residence is beyond the state, or unknown. (R. S. Sec. 6415; May 4, 1891, 88 v. 555; R. S. 1880; April 23, 1872, 69 v. 88, § 2.)

Proof of inability to agree. § 11046 and note.

Where property is jointly owned by several persons an effort should be made to agree with each owner, unless his residence is beyond the state or unknown.

Cincinnati, etc., R. v. Murray, 1 N. P. n. s. 301; 48 Bull. 877. (Ins. Ct. 1903).

A guardian of minors can not grant a right of way by deed without authority from the probate court.

State v. Commissioners, 39 O. S. 58 (1883).

See §§ 11040, 11041.

It is proper, but not necessary, to aver in the petition in an appropriation proceeding that the parties are unable to agree.

Railroad v. Tod, 72 O. S. 166 (1905).

The rights of other lot owners, under restrictive agreements in the deeds of land through which the right of way passes is not an "easement or interest" therein, under this section. Vanetten v. Railway, 18 C. C. n. s. 547 (1911); aff'd, no rep., 86 O. S. 323.

Section 11040. (Appropriation of property of minor, idiot, imbecile or insane person.) Under this chapter, when the property of a minor, idiot, imbecile, or insane person, or any easement or interest therein, is sought to be appropriated by a corporation and there is a legally appointed guardian of the person and estate or of the estates, or a trustee of such minor, idiot, imbecile, or insane person, and the guardian has agreed with the corporation upon the amount of compensation to be paid for such property, easement, or interest therein, he may file with the probate court of the county wherein the property is situated, a written application for authority to convey the property or interest to such corporation. The application must fully describe the property, right, easement or interest therein, sought to be conveyed, and set out the price agreed to be paid for it. (R. S. Sec. 6415a; May 4, 1891, 88 v. 554.)

Section 11041. (Notice to ward.) The probate judge shall order the guardian to give such notice as he deems reasonable, to the ward, of the filing of the application, and of the time set for its hearing. At the time for the hearing, if the judge finds that notice was given as ordered of the time set therefor, that the price to be paid is just, and that such conveyance will be to the best interest of his ward, he shall order the guardian to make and execute a deed to the corporation for the property or interests upon the payment of the price agreed upon by them. (R. S. Sec. 6415a; May 4, 1891, 88 v. 554.)

Section 11042. (Petition for appropriation.) In such a case the corporation may file a petition with the probate judge, verified as in a civil action, containing a specific description of each parcel of property, interest, or right, within the county, sought to be appropriated, the work, if any, intended to be constructed thereon, the use to which

the property is to be applied, the necessity for the appropriation, the name of the owner of each parcel, if known, or if not known, a statement of that fact, the names of all persons having or claiming an interest, legal or equitable, in the property, so far as they can be ascertained, and a prayer for its appropriation. (R. S. Sec. 6416; April 23, 1872, 69 v. 88, §§ 2, 19.)

Parties and pleading. A dummy corporation which does not intend to have any real or beneficial interest or use in the property can not maintain an appropriation proceeding. *Cemetery Assn. v. Tracton Co.*, 93 O. S. 161 (1915).

One having an inchoate right of dower is neither a proper or necessary party. *Long v. Long*, 99 O. S. 330 (1919).

A railway company seeking to appropriate property is the real party in interest although its officers are also officers of another railway company and its stock is largely owned by another company.

Devou v. Cincinnati, etc., Co., 4 O. L. R. 313; 19 C. D. 113 (1906).

Mortgagees are necessary parties.

Harrison v. Sabina, 14 W. L. B. 27 (1885).

The purpose and necessity of the appropriation must be clearly alleged.

Valley Ry. Co. v. Bohm, 34 O. S. 114 (1877).

The land must be described with certainty.

Cleveland, etc., R. Co. v. Prentice, 13 O. S. 373 (1862).

See *Pittsburg, etc., R. Co. v. Perkins*, 22 C. C. 630 (1888).

It is proper but not necessary to aver that the corporation and owner are unable to agree.

Railroad v. Tod, 72 O. S. 166 (1905).

The petition need not set out the termini of the railroad, and need not allege that the property sought to be appropriated is the only property in the country which it is desired to appropriate. *Realty Co. v. Railway*, 18 C. C. n. s. 86 (1910); *aff'd*, no rep. 86 O. S. 364.

Only the allegations required by the statute need be made. *Realty Co. v. Railway*, 18 C. C. n. s. 86 (1910); *aff'd*, no rep. 86 O. S. 364.

Where the petition specifically describes the property sought to be appropriated, no further written or record evidence of the line of the road is essential to the right of the company to have compensation fixed.

Powers v. Hazelton, etc., Ry. Co., 33 O. S. 429 (1878).

Whether the rules of code pleading are applicable to a petition to appropriate private property for public uses, filed under the statute, in the probate court, *quaere*. In case of doubt, the judgment rendered in such proceeding will not be reversed for failure to strictly observe such rules.

Toledo, etc., Ry. Co. v. Toledo, etc., Ry. Co., 6 C. C. 362; 3 C. D. 493; *aff'd*, 50 O. S. 603.

Pleadings after petition are not required.

Cincinnati, etc., Ry. Co. v. Pfitzer, 1 Goebel 248 (1889).

Railroad v. Tod, 72 O. S. 166 (1905).

Necessity. The necessity for the appropriation must be pleaded and proved.

Valley Ry. Co. v. Bohm, 34 O. S. 114 (1877).

S. E. Ohio, etc., Co. v. Diamond, etc., Co., 51 W. L. B. 421 (Prob. Ct.).

The power of eminent domain is based upon public necessity, and can only be exercised where such necessity exists, but this necessity relates rather to the nature of the property and the uses to which it is applied than to the exigencies of the particular case; and it is no objection to the exercise of the power that lands, equally feasible, could be obtained by purchase.

Giesy v. Cincinnati, etc., R. Co., 4 O. S. 308 (1854).
 Toledo, etc., Ry. Co. v. Toledo, etc., Ry. Co., 6 C. C. 362, 389; 3 C. D. 493; aff'd, 50 O. S. 603.
 Powers v. Hazelton, etc., Ry. Co., 33 O. S. 429 (1878).
 Bridge Co. v. Magruder, 63 O. S. 455, 476 (1900).
 See note to § 11046.

Quantity of land. Only that quantity of land which is necessary may be appropriated.

Platt v. Penna. Co., 48 O. S. 228 (1885).
 Giesy v. Cincinnati, etc., R. Co., 4 O. S. 308 (1854).
 See Pittsburg, etc., R. Co. v. Perkins, 22 C. C. 630 (1888).
 The railroad company has primary discretion in determining what land is necessary; but the probate court has power under § 11046 to prevent abuse of such discretion.

Railroad v. Railroad, 72 O. S. 368 (1905).
 Ohio, etc., R. Co. v. Hinkle, 1 N. P. 63; 1 L. D. 682 (1894).
 A railroad company can not, on motion, be required to appropriate more land than that described in the petition.
 Schaible v. L. S., etc., R. Co., 10 C. C. 334 (1895).

Property subject to appropriation.

— **Property already appropriated to public use.** Property already appropriated can not be taken for another public use which will wholly defeat or supersede the former use, unless power to make such second appropriation is granted expressly or by necessary implication.

Railroad Co. v. Belle Center, 48 O. S. 273 (1891).
 Little Miami, etc., R. Co. v. Dayton, 23 O. S. 510 (1872).
 See 15 O. L. R. 193 (article by A. H. Ronda).
 Land already appropriated by a municipality and used as a public park may be appropriated by a railroad company.
 Colby v. Toledo, 22 C. C. 732; 12 C. D. 347 (1901); aff'd, 68 O. S. 698.
 Newton v. Mfrs. Ry. Co., 115 Fed. 781 (C. C. A. 1902).
 Land held by a corporation, but not used or needed for the proper exercise of its franchises, may be appropriated.

Railroad Co. v. Belle Center, 48 O. S. 273 (1891).
 Where additional burdens are imposed on the land, under the new use, the owner is entitled to compensation therefor.

Hatch v. Railway Co., 18 O. S. 92 (1868).
 Vought v. Railroad Co., 58 O. S. 123 (1898); aff'd, 176 U. S. 469.
 Newton v. Railway Co., 115 Fed. 781; 14 O. F. D. 156 (C. C. A. 1902).
 Hawkins v. Buckeye, etc., Co., 6 N. P. n. s. 553, 556; 16 L. D. 333 (C. P. 1905).

Appropriation of easement for elevated railroad track over public landing.

See G. C. § 8767 and note.

Appropriation of use of streets, etc., for tracks.

See G. C. § 8764 et seq.
 Property in which a Catholic school, open to all children, is conducted may be appropriated by a railroad company.
 Cincinnati, etc., R. Co. v. Murray, 1 N. P. n. s. 301; 48 W. L. B. 877 (Ins. Ct. 1903).

In the opinion of the attorney general, an interurban railway is not empowered to appropriate land, the title to which is in the board of education of a school district in trust for public school purposes.
 Opins. Atty. Gen. 1915, p. 775.

— **Property of other railroad companies.** Property of one rail-

road company may be appropriated by another railroad company to furnish a crossing over such road.

Railway v. Railway, 30 O. S. 604.

See §§ 8834, 8836.

But a company seeking to appropriate land of another company, longitudinally, must establish urgent necessity for the land. Where such necessity is shown, and the other company does not require it for immediate use, and can arrange its tracks so as to avoid using it for a long period, the right to appropriate exists.

Railway Co. v. Railway Co., 2 N. P. n. s. 45; 49 O. L. B. 240 (Prob. Ct. 1903).

——. Property and rights of abutting owners in streets and highways.

See note to § 8765.

——. Rights of lot owners under covenants restricting use of property.

A railroad company may acquire lots in an allotment, and build a railroad thereon, although all of the lots are restricted by agreement to residence purposes only. Other lot owners can not enjoin the appropriation. Vanetten v. Railway, 18 C. C. n. s. 547 (1911); aff'd, no rep. 86 O. S. 323.

Nor can other lot owners recover damages. Doan v. Railway, 92 O. S. 461 (1915); Ward v. Railway, 92 O. S. 471 (1915).

Jurisdiction of probate court must be exercised in mode prescribed in this chapter. The probate court under this act has a special and limited jurisdiction, to be exercised in the cases and in the mode prescribed in the act; and that court can not, under an order of the court of common pleas, and to carry into effect that order, take jurisdiction of a case or proceed in a mode not authorized by the act.

Dayton, etc., R. Co. v. Marshall, 11 O. S. 497 (1860).

Practice. Revivor. Dismissal.

On the death of a defendant, revivor of the proceedings must be had in the name of the heirs or devisees, and not of the administrator of the deceased.

Valley Ry. Co. v. Bohm, 29 O. S. 633 (1876).

Right of corporation to abandon proceeding.

See § 11060 and note.

Section 11043. (The county petition to be filed in.) The petition may include one or more of the parcels of property, rights, or interests in the county in which it is filed. When any such parcel, right or interest, is situated in two or more counties, the petition may be filed in either of the counties in which an owner is resident, and if no owner resides therein, it may be filed in either. (R. S. Sec. 6417; March 23, 1875, 72 v. 71.)

Section 11044. (Summons.) Upon the filing of a precept therefor, the probate judge shall issue summons for the owners, and persons named in the petition as residents of the state, having an interest, which may be directed to the sheriff of any county, and shall command him to notify the persons it names of the filing of the petition, and to

appear thereto at a time to be fixed by the judge, and therein stated, not less than five nor more than fifteen days from the date thereof. It must be served and returned as in a civil action. When returned "not summoned," other writs may issue until the parties are duly summoned. (R. S. Sec. 6418; March 23, 1875, 72 v. 71, § 1.)

Section 11045. (Service by publication.) When a person having an interest is unknown, or his residence is beyond the state or unknown, the corporation may make service against him by publishing in a newspaper of general circulation in the county where the petition is filed, for four consecutive weeks, a notice containing a summary statement of the object and prayer of the petition, so far as it relates to the property of the person thus to be notified, the court in which it is filed, and the time when such person is to appear thereto, not less than ten nor more than twenty days after the last publication. The fact of publication may be proved by the affidavit of any person having knowledge thereof. (R. S. Sec. 6419; March 23, 1875, 72 v. 71, § 3.)

Section 11046. (Jurisdictional questions.) On the day named in a summons first served, or publication first completed, the probate judge shall hear and determine the questions of the existence of the corporation, its right to make the appropriation, its inability to agree with the owner, and the necessity for the appropriation. Upon all these questions the burden of proof shall be upon the corporation, and any interested person shall be heard. (R. S. Sec. 6420; March 23, 1875, 72 v. 71, § 4.)

Determination under this section a condition precedent to appropriation. A determination of the preliminary questions under this section in favor of the expropriator is a condition precedent to the right of eminent domain, and is jurisdictional.

Cemetery Assn. v. Traction Co., 93 O. S. 161 (1915).

Railroad v. Tod, 72 O. S. 166 (1905).

Telephone Co. v. Cincinnati, 73 O. S. 77 (1905).

Kramer v. Railroad, 53 O. S. 436, 444 (1895).

The preliminary questions are governed by state and not federal law. Cuyahoga River Power Co. v. Realty Co., 244 U. S. 300 (1917).

Existence of corporation. It is essential to the exercise of the right of eminent domain that the corporation prove its incorporation according to law, including the due and legal election of directors.

Powers v. Railway Co., 33 O. S. 429 (1878).

Telephone Co. v. Cincinnati, 73 O. S. 64, 77 (1905).

Atlantic, etc., R. Co. v. Sullivant, 5 O. S. 276 (1855).

Atkinson v. R. R. Co., 15 O. S. 21 (1864).

Society Perun v. Cleveland, 43 O. S. 498 (1885).

A foreign corporation must prove its *de jure* existence according to the laws of its home state. *Railway Co. v. Barger*, 10 Ohio App. 443; 30 O. C. A. 65 (1919); s. c., 28 O. C. A. 92; 21 N. P. n. s. 97.

But as § 8759 expressly confers the power of eminent domain upon foreign railroad corporations, it is not necessary to prove that it possesses such powers by the laws of its home state. *Railway Co. v. Barger*, 10 Ohio App. 443; 30 O. C. A. 65 (1919).

Corporate existence may be proved by a certified copy of the articles of incorporation and the corporate records showing subscriptions to the requisite amount of capital stock, payment of the first installment thereon, notice or waiver of notice of the meeting for the election of directors, and the election of directors.

Toledo Ry. Co. v. Toledo, etc., Ry. Co., 6 C. C. 362, 391; 3 C. D. 493; aff'd, 50 O. S. 603 (1892).

Toledo, etc., Ry. Co. v. Toledo, etc., Ry. Co., 12 C. C. 367, 384 (1893).

See *Telephone Co. v. Cincinnati*, 73 O. S. 77 (1905).

Railroad v. Railroad, 72 O. S. 378, 379 (1905).

Realty Co. v. Railway, 18 C. C. n. s. 86 (1910); aff'd, no rep. 86 O. S. 364.

Right to make appropriation.

See *Railroad v. Railroad*, 72 O. S. 378, 379 (1905).

Inability to agree with the owner. The purpose of requiring a showing of inability to agree (§§ 11046 and 11039) is to avoid, where possible, an appropriation proceeding.

Where on the preliminary hearing no proof was made of inability to agree, but such proof is made during the trial and before judgment, the judgment will not be reversed.

Powers v. Railway Co., 33 O. S. 429, 432, 433 (1878).

Toledo, etc., Ry. Co. v. Toledo, etc., Ry. Co., 6 C. C. 362, 388; 3 C. D. 493; aff'd, 50 O. S. 603.

Where a petition was dismissed for failure to show inability to agree, the property owner is not entitled to recover his costs and expenses under § 11060.

Devou v. Cincinnati, etc., R. Co., 4 O. L. R. 319; 17 L. D. 134 (C. P. 1906).

To establish a failure to agree it must appear that an explicit offer was made of a definite amount of money for a definite amount of land.

Railway Co. v. Railway Co., 2 N. P. n. s. 45; 49 O. L. B. 240 (Prob. Ct. 1903).

Where offers of the same amount, to several owners of properties of different values, were mailed the evening before the proceeding was commenced, without opportunity on the part of the owners to consider the offers, inability to agree is not shown. *Power Co. v. Turner Co.*, 17 C. C. n. s. 34 (1909).

Where it appears that the property sought to be appropriated is held by a municipal corporation which has no power to contract and convey the same, inability to agree is shown.

L. & N. Ry. v. Cincinnati, 15 C. C. n. s. 62; 23 C. D. 464 (1912); reversed on other grounds, 88 O. S. 283; s. c., 12 N. P. n. s. 65; 22 L. D. 363; 10 N. P. n. s. 749; 56 Bull. 317.

An executory agreement for a settlement, not reduced to writing, nor acted upon by the parties, nor performed, was held not to constitute a defense against an appropriation. *Railway Co. v. Devine*, 15 N. P. n. s. 56; 58 Bull. 437 (1913).

Necessity for the appropriation. While a corporation has primary discretion in determining what land is necessary, the probate judge, un-

der this section, has power to prevent abuse in its exercise, and may dismiss the petition if he determines that the appropriation will be an abuse of corporate power or destructive of the public use to which the land is already devoted.

Railroad v. Railroad, 72 O. S. 368 (1905).

Directors have primary discretion to determine the necessity for an appropriation under G. C. § 8767, but under § 11046 the court in which the proceeding is brought has the final authority to determine such necessity.

Cincinnati v. Railroad Co., 88 O. S. 283 (1913); affirming, 12 N. P. n. s. 65; 22 L. D. 363; 10 N. P. n. s. 749; 56 Bull. 317; reversing, 15 C. C. n. s. 62; 23 C. D. 464.

The court will not interfere unless there is an abuse of discretion by the corporation. Railway Co. v. Devine, 15 N. P. n. s. 56; 58 Bull. 437 (1913).

The "necessity" required is a reasonable and not an absolute necessity. Reusch v. Traction Co., 19 C. C. n. s. 1 (1912); aff'd, no rep. 89 O. S. 456.

It is not necessary to prove that the directors have acted by resolution. Railway Co. v. Barger, 10 Ohio App. 443; 30 O. C. A. 65 (1919).

Burden of proof. The burden of proof of the jurisdictional questions is on the appropriating corporation. Railway Co. v. Telegraph Co., 68 O. S. 306.

Findings.

Form. Railway Co. v. Cable Co., 68 O. S. 319, 320.

Sufficiency. Toledo, etc., Ry. Co. v. Toledo, etc., Ry. Co., 6 C. C. 362, 394; 3 C. D. 493; aff'd, 50 O. S. 603.

A party is not, as a matter of right, entitled to a separate finding of law and facts, on a preliminary hearing.

L. & N. R. Co. v. Cincinnati, 10 N. P. n. s. 595; 9 O. L. R. 105 (Ins. Ct. 1911).

Motion for new trial. Review on error. Procedure. The determination of preliminary questions under this section may be reviewed on error. A motion for a new trial is not necessary. The time for filing a bill of exceptions is computed from the day on which the determination is made, unless a motion for a new trial is filed, in which event the time is computed from the overruling of such motion. Where the judgment of the probate court is reversed for error in the determination of preliminary questions, the court of common pleas should retain the case and determine such questions de novo.

Railroad v. Tod, 72 O. S. 156 (1905).

Railroad v. Traction Co., 72 O. S. 429 (1905).

Toledo, etc., Ry. Co. v. Toledo, etc., Ry. Co., 6 C. C. 362 (1892).

Time for filing petition in error, see § 11064.

If errors occurring upon the hearing of preliminary questions come within any of the statutory causes for a new trial, they may be included in a motion for a new trial filed under § 11058 within ten days after the verdict is rendered.

Railroad v. Traction Co., 72 O. S. 429 (1905).

Injunction against appropriation. The prosecution of an appropriation proceeding will not be enjoined on the ground that there is no necessity therefor. Sec. 11046 furnishes an adequate remedy at law.

Railroad v. Railroad, 72 O. S. 369 (1905).

"Any interested person." This section does not authorize a competing telephone company to become a party to a proceeding under § 11255 or § 9178.

Sidney Telephone Co. v. Farmers Tel. Co., 11 N. P. n. s. 424; 21 L. D. 241 (1911).

Defenses against appropriation.

— **Incorporation for private ends.** It is incompetent for a landowner to show in an appropriation proceeding that the corporators procured the incorporation of the company, not for public use, but for private ends merely, and were exercising the corporate privileges in abuse of the law.

Powers v. Hazelton, etc., R. Co., 33 O. S. 429 (1878).

— **No public necessity for railroad.**

An appropriation proceeding can not be defeated by showing that there is no public necessity for the road.

Powers v. Hazelton, etc., R. Co., 33 O. S. 429 (1878).

— **Railroad constructed before appropriation proceeding brought.** A company has power to condemn land notwithstanding it has built its road on the land sought to be appropriated.

Ohio Southern R. R. v. Hinkle, 1 N. P. 63 (1894); 1 L. D. 682.

— **That other land could be obtained by purchase.** It is no defense to an appropriation proceeding that other land, equally feasible, could be obtained by purchase.

Giesy v. Cincinnati, etc., R. Co., 4 O. S. 308 (1854).

— **That another route should have been chosen.** Where the route chosen is not unreasonable the court can not order it changed.

Cincinnati, etc., R. Co. v. Murray, 1 N. P. n. s. 301; 48 Bull. 877 (Ins. Ct. 1903).

Section 11047. (Jurors.) If, as to any or all of the property, and persons interested therein, the judge determines such questions for the corporation, he shall issue an order to the clerk and sheriff to draw sixteen names from the jury wheel, as in other cases, and within two days after the receipt of it they must execute the order, and the clerk forthwith return it to the probate judge, with a list of the names drawn indorsed thereon, who shall issue to the sheriff a venire for the jurors so drawn to attend at his office at a time to be fixed by him, and named in the writ, not exceeding ten days from the date thereof. It shall be served and returned as in other cases. (R. S. Sec. 6421; March 23, 1875, 72 v. 71.)

Cited, Railroad v. Tod, 72 O. S. 161 (1905).

Hasbrook v. Traction Co., 5 C. C. n. s. 209; 17 C. D. 42 (1904); aff'd, 75 O. S. 584.

Section 11048. (Who entitled to a separate trial, and conduct of trial.) The owners of each separate parcel, right or interest, are entitled to a separate trial by jury, verdict, and judgment. They shall hold the affirmative on

the trial, which must be conducted, evidence admitted, and bills of exception allowed as provided in civil actions. (R. S. Sec. 6422; March 23, 1875, 72 v. 71, §§ 1, 3; April 23, 1872, 69 v. 88, §§ 8, 12, 23.)

Cited, *Railroad v. Tod*, 72 O. S. 161.

Separate trials. A property owner who made no objection to a joint trial can not complain in the reviewing court that he was not given a separate trial.

Cincinnati, etc., Co. v. Trustees, 9 C. C. n. s. 103; 19 C. D. 719 (1906).

Proceedings under the act of April 30, 1852, might be instituted jointly, against all owners of property lying in the county and sought to be appropriated; but after the return of the jury from the view each owner of distinct property is entitled to a separate trial.

Giesy v. Cincinnati, etc., R. R. Co., 4 O. S. 308 (1854).

Cincinnati v. Neff, 19 W. L. B. 404 (1888).

Jury. The three-fourths jury law applies to appropriation proceedings. *Miami District v. Mitman*, 100 O. S. 315 (1919); *Band v. Detrick*, 20 N. P. n. s. 209; *aff'd*, 8 Ohio App. 198, 28 O. C. A. 257; motion to certify record overruled, 15 O. L. R. 439.

For former law see *Lamb v. Lane*, 4 O. S. 167 (1854); *Shaver v. Starrett*, 4 O. S. 494 (1855); *Smith v. Atlantic, etc., R. Co.*, 25 O. S. 91 (1874); *Wagner v. Railway Co.*, 38 O. S. 32, 35 (1882).

Burden of proof. The burden of proof of value is on the owner. *Cincinnati v. Neff*, 20 W. L. B. 8; *Railroad v. Snyder*, 5 N. P. 461.

Section 11049. (Amendments.) The court may amend any defect or informality in the proceedings authorized or required by this chapter or cause new parties to be added, and direct such further notice to be given to a party in interest as it deems proper. (R. S. Sec. 6423; April 23, 1872, 69 v. 88, § 17.)

Section 11050. (Time of trial, adjournments, and discharge of jurors.) The court may direct the order and fix the time of the several trials, and adjourn or continue a trial for the purpose of obtaining proper service upon a property owner; or, when deemed necessary for the proper and convenient trial of the several cases, it may discharge a jury, and cause other juries to be impaneled, as provided in this chapter. (R. S. Sec. 6424; March 23, 1875, 72 v. 72, § 5.)

Section 11051. (How panel filled.) If, by reason of non-attendance, sickness, or other cause, any of the sixteen persons are not present and in condition to serve as jurors, the judge shall order the sheriff to fill the vacancies with talesmen. When the list of sixteen is full, the judge shall

call upon each separately, beginning with the first named on the list, to take his place in the jury box, and personally inquire of each, as called, whether he is interested in any way in any of the property, rights, or interests sought to be appropriated, or in the corporation which filed the petition, either as owner, stockholder, agent, attorney, or otherwise. If such person answers in the affirmative, or if it be shown to the judge, by satisfactory evidence, that he is so interested, he shall be excused from serving on the jury, and the next person on the list be called, and interrogated in like manner. If the list of sixteen be exhausted before a proper jury of twelve men is taken and accepted therefrom, the judge shall order the sheriff to fill the remaining vacancies in the jury box required to make up the number of twelve with talesmen, who shall be interrogated as above provided. (R. S. Sec. 6425; March 23, 1875, 72 v. 73, § 6.)

Jurors drawn from the box are talesmen within the meaning of this section and the fees of a jury so made up should be taxed as a part of the costs.

Hasbrook v. Traction Co., 5 C. C. n. s. 209; 17 C. D. 43 (1905); aff'd, 75 O. S. 584.

See Conservancy District v. Shade, 12 Ohio App. 169, 31 O. C. A. 61; motion to certify record overruled, 18 O. L. R. 15.

Section 11052. (Peremptory challenges.) When a jury box is filled with twelve disinterested jurors, the owners of the property which is the subject of the trial, jointly, and the petitioner, shall each have the right to four peremptory challenges, and to challenge for cause. Vacancies arising in the jury from challenge, or otherwise, shall be filled with talesmen having the qualifications prescribed in the next preceding section, to be ascertained as therein provided. (R. S. Sec. 6426; April 8, 1908, 99 v. 79; March 23, 1875, 72 v. 73, § 6.)

Where proceedings are commenced against the owners of several tracts of land, all the defendants are entitled to but four peremptory challenges; each defendant is not entitled to four.

Ohio, etc., R. Co. v. Kloeb, 5 N. P. 4 (1898).

Cincinnati v. Neff, 19 W. L. B. 404 (1888).

Section 11053. (The oath of jury.) When a jury is filled, the probate judge shall administer to them the following oath: "You, and each of you, do solemnly swear that, according to your best judgment, you will justly and impartially assess the amount of compensation due to the proper owners in the cases which will be brought before you in this proceeding, by reason of the appropriation of their property described in the petition, to the use of (here

name the corporation) in the proceeding now pending, irrespective of any benefit from any improvement proposed by such corporation; and you do further swear that in assessing any damages that may occur to such property owners, by reason of the appropriation, other than the compensation, you will further ascertain how much less valuable the remaining portion of such property will be in consequence of such appropriation; this you swear as you shall answer to God. (R. S. Sec. 6427; March 23, 1875, 72 v. 73, § 5.)

Compensation.

See § 8760 and note.

Must be in money.

Railroad Co. v. Holler, 7 O. S. 220 (1857).

"Compensation" and "damages" have different and distinct meanings. "Compensation" means the sum of money which will compensate the owner for land actually taken, irrespective of any benefits to remaining lands. "Damages" is the allowance made for any injury that may result to the remaining lands from the construction of the proposed improvement, after making due allowance for special benefits resulting. Ohio Southern R. Co. v. Rawlins, 29 W. L. B. 260 (1892).

Benefits excluded. The provisions of art. 1, § 19, and art. 13, § 5, of the constitution, the one requiring compensation to be made without deduction for benefits, when property is appropriated to a public use, and the other providing for compensation irrespective of benefits, where it is taken by a corporation for a right of way, are, in legal effect, identical. When property is taken under either section, its fair market value in cash, at the time it is taken, must be paid to the owner; and the jury in assessing the amount, have no right to consider or make any use of the fact that it has been increased in value by the proposal or construction of the improvement.

Giesy v. Cincinnati, etc., R. R. Co., 4 O. S. 308 (1854).

Testimony tending to introduce the element of probable benefit, or as to the price for which a farm may have been offered for sale, is incompetent.

Traction Co. v. Dempsey, 9 N. P. n. s. 65 (C. P. 1909).

Where benefits and injuries are blended. In case an appropriation of a strip causes incidental and local injury to the residue of the tract, although general resulting benefits from the railroad to the value of such residue of the land can not be taken into account in estimating the compensation to be paid to the owner, yet where a local incidental benefit to the residue of the land is blended or connected, either in locality or subject-matter, with a local incidental injury to such residue of the land, the benefit may be considered in fixing the compensation to be paid the owner, not by way of deduction from the compensation, but of showing the extent of the injury done the value of the residue of the land. But whether a local incidental benefit can be considered when not connected or blended either in locality or subject-matter, *quaere*.

Cleveland, etc., R. R. Co. v. Ball, 5 O. S. 568 (1856).

See Toledo Bending Co. v. Manufacturers' Ry. Co., 2 N. P. 317 (1895).

Little Miami, etc., R. R. Co. v. Collett, 6 O. S. 182 (1856).

Ohio Southern R. Co. v. Rawlins, 29 W. L. B. 260 (1892).

Lotze v. Cincinnati, 4 N. P. 311 (1897).

Schaible v. Lake Shore, etc., Ry. Co., 10 C. C. 334 (1895).

Benefits under former constitution. Under the constitution of 1832 benefits could be estimated and set off against the value of lands and damages.

Platt v. Pennsylvania Co., 43 O. S. 228, 244 (1885).

Kramer v. Cleveland, etc., R. Co., 5 O. S. 140 (1855).

Columbus, etc., R. Co. v. Simpson, 5 O. S. 251 (1855).

Value of property. The proper test of the value of land appropriated is not the price paid at a particular sale, but the general selling price in the neighborhood.

Railroad Co. v. Gorsch, 8 C. C. n. s. 297; 18 C. D. 418; aff'd, 76 O. S. 609.

The rule of valuation is, what the interest in the property is worth, not for any particular use, but generally for any and all uses for which it may be suitable.

Goodin v. Cincinnati, etc., Canal Co., 18 O. S. 169 (1868).

The owner is entitled to the fair market value at the time the land was taken.

Traction Co. v. Dempsey, 9 N. P. n. s. 65 (C. P. 1909).

See Cincinnati, etc., Ry. v. Pfitzer, 1 Goebel 248 (1889).

Fair market value is the amount at which the owner may expect to sell it at present at private voluntary sale and not at forced sale. Railway v. Knauss, 47 W. L. B. 807.

In ascertaining compensation, the jury should consider the real value of the land taken, and the diminished value of the residue, and may, for that purpose, take into account, not only the purposes to which the land has been or is applied, but any other beneficial purpose to which it may be applied, which would affect the amount of compensation or damages. Railroad v. Longworth, 30 O. S. 108 (1876); Foote v. Railway, 21 C. C. 319, 11 C. D. 685 (1901); aff'd, no rep. 67 O. S. 543.

The elements of compensation may be: (1) the abstract value of the land taken; (2) the value arising from the relative situation of the land taken in connection with the residue from which it is severed, and (3) the effect on the value of the residue, arising from the uses to which the part taken is appropriated. Lorain, etc., Co. v. Sinning, 17 C. C. 649, 6 C. D. 753 (1895).

The value of existing or future crops or other property that may be thereafter placed on the land should not be considered. Hayes v. Terminal Co., 6 C. C. n. s. 281 (1903); aff'd, no rep. 70 O. S. 425.

Speculative remuneration. Where land is appropriated for a public use, a compensatory, not speculative remuneration is guaranteed by the law for land taken, and for the damage occasioned thereby to the remainder of the premises. The difference in the value of the owners' property, with the appropriation, and that without it, is the rule of compensation. This difference must be ascertained with reference to the value of the property in view of its present character, situation and surroundings. It can not be enhanced by proving facts of a contingent and prospective character, such as the probable rents that may be derived from the property, or its special value as a prospective monopoly of a roadway to the adjoining lands of other persons.

Powers v. Hazelton, etc., Ry. Co., 33 O. S. 429 (1878).

Schaible v. Lake Shore, etc., R. R. Co., 10 C. C. 334 (1895).

Morrison v. Cleveland, 17 C. C. n. s. 427.

Additional burdens imposed after appropriation. Where property appropriated for one public use is subsequently appropriated for, or devoted to, another public use, and the second use imposes additional burdens on the land, the owner is entitled to compensation therefor.

- Vought v. Railroad Co., 58 O. S. 123 (1898); aff'd, 176 U. S. 469.
 Hatch v. Railway, 18 O. S. 92 (1868).
 Hawkins v. Buckeye, etc., Co., 6 N. P. n. s. 553, 556; 16 L. D. 333 (C. P. 1905).
 Newton v. Railway Co., 115 Fed. 781; 14 O. F. D. 156 (C. C. A. 1902).

Railroad intersecting land. Where a piece or strip of land is, by appropriation, severed from its connection with the other land of the owner, in estimating the compensation to be made to the owner, not only is the abstract value of the strip taken to be considered, but also its relative value, and the effect arising from its severance from the residue of the owner's land as well as the uses to which it is to be appropriated.

- Cleveland, etc., R. R. Co. v. Ball, 5 O. S. 568 (1856).
 Schaible v. Lake Shore, etc., Ry. Co., 10 C. C. 334 (1895).
 Hatch v. Cincinnati, etc., R. Co., 18 O. S. 92 (1868).
 Platt v. Penna. Co., 43 O. S. 244 (1885).
 Lorain, etc., Ry. Co. v. Sinning, 17 C. C. 649; 6 C. D. 753 (1895).

Time when value of land and damages are to be assessed.

- Railroad Co. v. Perkins, 49 O. S. 326 (1892); s. e., 22 C. D. 631.
 See Railway Co. v. Cordray, 10 C. C. n. s. 87; 20 C. D. 830 (1907).
 Schaible v. Lake Shore, etc., Ry. Co., 10 C. C. 334 (1895).
 Traction Co. v. Dempsey, 9 N. P. n. s. 65 (C. P. 1909).

Danger from fire to buildings, fences, timber or crops upon the remainder, in so far as it depreciates the value of the property is a proper element of compensation.

- Hayes v. Toledo, etc., Co., 6 C. C. n. s. 281; 16 C. D. 395 (1903); aff'd, 70 O. S. 425.

Providing the proximity of the buildings to the railroad is such as to render the danger imminent and appreciable.

- Hatch v. Cincinnati, etc., R. Co., 18 O. S. 92 (1868).

Damage by smoke, noises, and sparks. It is competent to take into consideration evidence of substantial injury and loss to the property (not common to the community at large) caused by smoke, noises and sparks of fire, occasioned by running of locomotives and cars along the track in front of the property.

- Railway Co. v. Gardner, 45 O. S. 309 (1887).
 Nypano Ry. v. Wadsworth Salt Co., 9 C. C. n. s. 114; 19 C. D. 110 (1906).
 See Railroad Co. v. Burski, 4 C. C. n. s. 98; 16 C. D. 486 (1904).

Rights of owners of lots in restricted allotment. Restrictive agreements as to the use of lots do not apply to the state, or any of its agencies, and a lot owner can not recover damages from a railroad company for violation of restrictions to residence purposes only by using the lots for railroad purposes. Doan v. Railway Co., 92 O. S. 461 (1915); Ward v. Railway, 92 O. S. 471 (1915).

Damage to lands adjacent when canal is converted into railroad. Where a canal company transfers its lands to a railroad company, the owner of the fee is entitled to damages for the additional burdens imposed on his land.

See *Hatch v. Cincinnati, etc., R. R. Co.*, 18 O. S. 92 (1868).
Cincinnati, etc., R. R. Co. v. Zinn, 18 O. S. 417 (1868).
Vought v. Columbus, etc., R. R. Co., 58 O. S. 123 (1898).

Damage to highway. A landowner must recover damages suffered by a change in a highway in a separate action, not in appropriation proceedings.

Schaible v. Lake Shore, etc., Ry. Co., 10 C. C. 334 (1898).

Injury to access to river. Where compensation is claimed for injury to access to river, thereby damaging the shipping facilities, it is competent to show that river transportation had ceased to be valuable.
Cleveland, etc., R. R. Co. v. Ball, 5 O. S. 568 (1856).

Interest. A property owner is entitled to interest from and after the time his property was taken, and even though the money may have been paid into court on one verdict, interest will be allowed in a second verdict from the time the land was taken.

Atlantic, etc., Ry. Co. v. Koblenz, 21 O. S. 334 (1871).

Cincinnati v. Williams, 9 W. L. B. 243 (1883).

See *City v. English*, 5 W. L. B. 789 (1880).

Cincinnati v. Whetstone, 47 O. S. 196 (1890).

Longworth v. Cincinnati, 48 O. S. 637, 647 (1891).

Railroad crossing. In a proceeding to appropriate a right of way across the track of an existing railroad, to be used in common, as a railroad crossing, the owner of such track is entitled to compensation for the property or interest therein actually appropriated, and for such consequential damages as are the direct and proximate consequence of such appropriation, but it can not recover as consequential damages the additional expense rendered necessary in operating its road in complying with the crossing law, nor can the jury take into account the detention of trains or loss of future business.

Lake Shore, etc., Ry. Co. v. Cincinnati, etc., Ry. Co., 30 O. S. 604 (1876).

Section 11054. (The form of writ to sheriff.) Upon motion of either party, the probate judge may issue the following writ to the sheriff, to-wit: "To the sheriff of county: You are hereby commanded to conduct the twelve jurors named in the panel to this writ annexed, to view the property or premises sought to be appropriated by (here state the name of the corporation), and owned by (here state the name of each owner), on, the day of, then and there to view the premises or property aforesaid, in the presence of A. B. on the part of the corporation aforesaid and C. D. on the part of the owner, appointed by this court and you shall make return of the manner you have executed this writ to this court, on the day of, A. D." The writ shall be signed by the probate judge, and certified under his seal of office. (R. S. Sec. 6428; April 23, 1872, 69 v. 88, § 9.)

See *Railroad Co. v. Bolen*, 76 O. S. 376 (1907).

Section 11055. (Judge must deliver certain copies to sheriff.) The judge also shall deliver to the sheriff a copy of that part of the petition containing a separate description of each parcel of property, and rights or interests sought to be appropriated within the county, which the jury is required to view. He may appoint, to be present at the view, the two persons named in the writ. The sheriff who is to execute the writ, by a special return upon it, shall certify under his hand that the view has been made according to the command thereof. The expenses of the view must be taxed in the bill of costs. No evidence shall be given on either side at its taking. (R. S. Sec. 6429; April 23, 1872, 69 v. 88, § 9.)

See *Railroad Co. v. Bolen*, 76 O. S. 376 (1907).

Nypano Ry. v. Wadsworth Salt Co., 9 C. C. n. s. 114; 19 C. D. 110 (1906).

Section 11056. (Witness examined before jury.) Witnesses may be examined before the jury after its return to the court. If more than three witnesses be examined by either party, on the same point in the same case, the judge may tax the costs of such additional witnesses to the party calling them. (R. S. Sec. 6430; April 23, 1872, 69 v. 88, § 9.)

View of premises by jury. Bill of exceptions. The impressions made on the minds of the jurors by a view of the premises are not of themselves evidence. Hence, a bill of exceptions which contains all the evidence given in court at the trial is, with a record otherwise complete, sufficient to present to a reviewing court the question of the weight of evidence.

Railroad Co. v. Bolen, 76 O. S. 376 (1907).

Traction Co. v. Dempsey, 9 N. P. n. s. 65 (1909).

But the parties may, by agreement, make the view evidence.

Traction Co. v. Hutchinson, 23 C. C. n. s. 58 (1907).

Where attorneys and representatives of both parties call the attention of the jury, while viewing premises, to certain facts pertinent to case, a verdict based on such facts will be set aside. The misconduct of the parties vitiates the verdict, although both are guilty.

Nypano Ry. v. Wadsworth Salt Co., 9 C. C. n. s. 114; 19 C. D. 110; 16 C. C. n. s. 410 (1906).

Value, how proved. The proper test of the value of land is not the price paid at a particular sale, but the general selling price in the neighborhood.

Neither the price paid for the property, nor evidence as to its value fourteen months prior to the appropriation, prove its present value, but both are admissible as tending to show present value.

A property owner may show the value of the land separate from the building, and the value of the building separate from the land. In the absence of other evidence the aggregate of the two valuations should be taken as the value.

Railroad v. Gorsuch, 8 C. C. n. s. 297; 18 C. D. 468 (1905); aff'd, 76 O. S. 609.

See Lorain, etc., Co. v. Sinning, 17 C. C. 649; 6 C. D. 753 (1895).

It is improper to ask a witness how much less valuable a piece of land would be in consequence of the appropriation, or what the difference in value would be with the appropriation and without it. The proof should be confined to the value with the appropriation and value without it. The jury is to ascertain the difference or damage.

Powers v. Hazelton, etc., Ry. Co., 33 O. S. 429 (1878).

Railway Co. v. Gardner, 45 O. S. 309, 322 (1887).

Where no special ground is laid therefor, account books of persons not parties to the proceedings are not of themselves admissible in evidence to prove the value of the property affected by the appropriation, and quantity of products transported over it from the lands of other parties.

Powers v. Hazelton, etc., Ry. Co., 33 O. S. 429 (1878).

Where a witness, on cross examination, testified as to a low sale of land in the neighborhood, it is competent on re-examination to inquire as to an exceptionally high sale of neighboring land.

Lorain, etc., Co. v. Sinning, 17 C. C. 649; 6 C. D. 753 (1895).

Opinions as to value or damages. Where in a proceeding it is claimed that the land will be injured by severing it, thus injuring the shipping facilities, it is proper to ask the opinion of a witness on cross-examination as to the extent of such injury.

Cleveland, etc., R. R. Co. v. Ball, 5 O. S. 568 (1856).

The opinion of a witness as to the amount of damages which a land-owner will sustain by the appropriation of a part of his land is not admissible, but opinions may be given as to the value of the land.

Cleveland, etc., R. R. Co. v. Ball, 5 O. S. 568 (1856).

Atlantic, etc., R. R. Co. v. Campbell, 4 O. S. 583 (1855).

Railway Co. v. Gardner, 45 O. S. 309, 322 (1887).

Traction Co. v. Hutchinson, 23 C. C. n. s. 58.

Witness as to value must first qualify as to knowledge thereof. Devou v. Cincinnati, 162 Fed. 633; 16 O. F. D. 172 (1908); certiorari denied, 212 U. S. 577; Foote v. Lorain, etc., Co., 21 C. C. 319, 11 C. D. 685 (1901); aff'd, no rep. 67 O. S. 543.

Diminished rents. Damages or value can not be shown by the rents received from the property.

See Railway Co. v. Gardner, 45 O. S. 309, 324 (1887).

Lake Shore, etc., Ry. Co. v. Cincinnati, etc., Ry. Co., 30 O. S. 604, 623 (1876).

Powers v. Hazelton, etc., Ry. Co., 33 O. S. 429, 425 (1878).

Evidence. Held admissible. Plans of a building and of machinery.

Cincinnati, etc., Co. v. Trustees, 9 C. C. n. s. 103; 19 C. D. 719 (1906).

An unrecorded map of land showing location of railroad and availability of land for division into lots. Railroad v. Perkins, 22 C. C. 630, 12 C. D. 676 (1888); aff'd, 49 O. S. 326; Railroad v. Longworth, 30 O. S. 108 (1876); Neff v. Cincinnati, 32 O. S. 215 (1877).

If there is no market value of improvements and no value established under any rule, the cost thereof may be shown as an element of value. Foote v. Railway, 21 C. C. 319, 11 C. D. 685 (1901); aff'd, no rep. 67 O. S. 543.

A tax return of the owner giving the value of his property.

Toledo, etc., Co. v. Toledo etc., Co., 12 C. C. 367; 6 C. D. 753 (1893).

Testimony that a freight house adjoining the premises is operated by one of the largest systems in the country.

Railroad Co. v. Gorsuch, 8 C. C. n. s. 297; 18 C. D. 468 (1905);
aff'd, 76 O. S. 609.

Testimony as to interference with drainage pipes and destruction
of underground drainage system.

Traction Co. v. Dempsey, 9 N. P. n. s. 65 (C. P. 1909).

— **Held not admissible.** The amount of monthly sales and of
freight transported over a switch track, where offered to prove loss of
future business. Also the cost of transporting merchandise by trucks,
when offered to fix value of switch track on the property condemned.

Cincinnati, etc., Co. v. Trustees, 9 C. C. n. s. 103; 19 C. D. 719 (1906).

That another railroad company is interested in the proceeding and
will be benefitted by the appropriation. Realty Co. v. Railway, 18 C.
C. n. s. 86 (1910).

Special adaptibility of the land to the purposes of the corpora-
tion. Gibson v. Norwalk, 13 C. C. 428 (1896).

Charge to the jury.

Lorain, etc., Co. v. Sinning, 17 C. C. 649; 6 C. D. 753 (1895).

Ohio, etc., R. Co. v. Snyder, 5 N. P. 461 (1898).

**Section 11057. (When a structure is partly on land to
be appropriated.)** When a building or other structure
is situated partly upon land sought to be appropriated,
and partly upon adjoining land, and such structure can not
be divided upon the line between such two tracts without
manifest injury, in assessing the compensation to any owner
of the lands, the jury shall assess its value exclusive of
the structure, and make a separate estimate of the value of
the structure. The owner of the structure may elect to
retain its ownership, and to remove it, or accept the value
estimated by the jury. If he fails to make such election
within ten days from the date of the jury's report, or with-
in ten days from the termination of the cause in a higher
court to which it is taken, he shall be deemed to have
elected to retain and remove the structure. If he elects
to accept the value of the structure, the title thereto shall
vest in the corporation making the appropriation, with the
right to enter upon the land for the purpose of removing it
therefrom. (R. S. Sec. 6431; April 11, 1876, 73 v. 210, § 1.)

An election may be made either ten days after the date of the ver-
dict, or ten days after the overruling of a motion for a new trial, or ten
days after the termination of the proceeding in error.

Covington Bridge Co. v. Devoto, 5 N. P. 330; 8 L. D. 268 (1898).

Section 11058. (Verdict.) The jury shall render its ver-
dict in writing, signed by the foreman, to the judge, who
shall cause it to be entered of record. Unless for good
cause shown, upon motion to be filed within ten days after
the verdict is rendered, a new trial be granted, the judge

shall enter a judgment confirming such verdict. (R. S. Sec. 6432; March 23, 1875, 72 v. 71.)

The three-fourths jury law applies to appropriation proceedings. *Miami District v. Mitman*, 100 O. S. 315 (1919).

The verdict must be in money. A verdict assessing damages at \$150.00 with a wagon way and stop for cattle is not authorized.

Central, etc., R. Co. v. Holler, 7 O. S. 220 (1857).

The verdict should show, separately, compensation for the land taken and damages to the residue. *Railway v. Knauss*, 47 W. L. B. 807.

The judgment confirming the verdict is a final judgment provided for in § 11065.

Railroad v. Tod, 72 O. S. 166 (1905).

Railroad Co. v. Barcalow, 4 C. O. 49; 2 C. D. 413.

Railway Co. v. Railway Co., 6 C. C. 521; 3 C. D. 566.

Errors occurring upon the hearing of preliminary questions may, if they come within the causes for a new trial defined in G. C. § 11576, be included in the motion filed under this section.

Railroad Co. v. Traction Co., 72 O. S. 429 (1905).

Section 11059. (When and how corporation may have possession.) Upon payment to the party entitled thereto, or deposit with the probate judge of the amount of the verdict and such costs as lawfully accrued in the case up to the time against the corporation, it will be entitled to take possession of, and hold, the property, rights or interests so appropriated, for the uses and purposes for which the appropriation was sought, as set forth in the petition. The judge shall enter of record an order to that effect, and if necessary, proper process shall be issued to place the corporation in possession thereof. (R. S. Sec. 6433; March 23, 1875, 72 v. 71.)

Where the corporation prosecutes error, without taking possession of the premises, and gives an undertaking, it can not be required to pay or deposit the amount of the verdict.

State v. Waite, 70 O. S. 149 (1904); affirming 2 C. C. n. s. 49.

See § 11065 and note.

Appropriation proceedings are effectual, although the owner may have refused to submit to such proceedings, or to receive the amount awarded to him, and deposited for his use.

Hueston v. Eaton, etc., R. Co., 4 O. S. 685 (1855).

Before a corporation can have possession it must make a deposit of the amount of the verdict, and a final judgment or order must be made in the proceedings.

Wagner v. Railway Co., 38 O. S. 32 (1882).

Trustees v. Banning, 17 W. L. B. 319.

Section 11060. (When and how corporation may abandon proceeding.) The corporation may abandon any case or proceeding after paying into court the amount of the defendants' costs, expenses, and attorney fees, as found by

the court. If the corporation fails in any case to make payment or deposit, as provided in the next preceding section, within thirty days after confirmation of the verdict, on motion of the party entitled to such payment, to be filed within ten days after the expiration of such thirty days, the judge shall enter an order directing the corporation to make such payment or deposit within thirty days after the date of the order. Unless such corporation, within such time makes such payment or deposit, it shall be held thereby to have abandoned the property, rights, or interests so appropriated, and all claims thereon under its proceeding, and the judge shall issue an order to that effect. He also shall enter a judgment against the corporation, and in favor of the party entitled to such payment, for such amount of expenses, including time spent and attorney fees incurred by him in the proceeding, as, upon the evidence offered in that behalf, the court deems just, for which execution may be issued against the corporation. The directors of the corporation, shall be individually liable upon such judgment, and may be made parties thereto by action. (R. S. Sec. 6434; March 23, 1875, 72 v. 71, § 10.)

This section is constitutional.

Wiler v. Logan, etc., Co., 6 C. C. n. s. 206; 17 C. D. 257 (1904); (aff'd, 72 O. S. 628, for failure to file petition in error in time).

This section furnishes the only remedy to the owner of property where the appropriation proceeding was brought in good faith and afterwards abandoned. The owner can not recover damages for deterioration of a partially erected building, the completion of which was halted by the appropriation proceeding. Jack v. Railroad Co., 19 C. C. n. s. 249 (1911).

Evidence as to the character and value of services of attorneys for the landowner may be introduced.

Wiler v. Logan, etc., Co., 6 C. C. n. s. 206; 17 C. D. 257 (1904); (aff'd, 72 O. S. 628, for failure to file petition in error in time).

This section refers to a voluntary abandonment. English v. Railway, 21 N. P. n. s. 518 (1918); affirmed by court of appeals. *Contra*, L. & N. Ry. v. Farmers, etc., Co., 50 O. L. R. 530; 53 Bull. 13 (Ins. Ct. 1907).

Dismissal by court for delay in prosecution may be an abandonment. Railway v. Campbell, 11 Ohio App. 151; 30 O. C. A. 500 (1919).

Where a petition to appropriate property is dismissed for failure to show inability of the parties to agree under § 11046, the corporation is not liable for costs and expenses under this section.

Devou v. Cincinnati, etc., Co., 4 O. L. R. 319; 17 L. D. 134 (C. P. 1906).

Right of corporation to dismiss and abandon proceeding.

See Dayton, etc., R. Co. v. Marshall, 11 O. S. 497 (1860).

State, ex rel, v. Cincinnati, etc., R. Co., 17 O. S. 103 (1866).

In re Condemnation Proceedings, 7 N. P. 605.

Failure of a municipal corporation to pay the amount assessed within six months was held not to bar a new proceeding after six months to appropriate the same property. Trustees v. Haas, 42 O. S. 239 (1884); compare, Trustees v. O'Meara, 2 W. L. B. 142.

Section 11061. (Action for costs and expenses.) If such judgment is not satisfied within thirty days after its rendition, or if the party entitled thereto is not satisfied with its amount he shall have a right of action against the petitioner for such expenses, including time spent and attorney fees, and also for his expenses, including reasonable attorney fees, incurred in prosecuting such action. But it must be brought within six months after the rendition of the judgment in the probate court. (R. S. Sec. 6435; March 23, 1875, 72 v. 71, § 10.)

This section is constitutional.

Wiler v. Logan, etc., Co., 6 C. C. n. s. 206; 17 C. D. 257 (1904); (aff'd, 72 O. S. 628, for failure to file petition in error in time).

Section 11062. (New trial, proceedings thereon.) A new trial shall be granted for cause only, shall take place in the court where the first trial was had, and be conducted in accordance with the provisions of this chapter so far as they are applicable. Upon granting the motion for a new trial, if the amount of the first verdict has been paid into court the judge shall retain it until the final termination of the second trial. On the new trial, if the verdict of the jury exceeds the amount of the first verdict, the corporation must pay the amount of the first verdict, together with the excess, to the owner of the property. When the verdict upon the second trial is less than that of the first, the judge shall repay to the corporation the difference. If a new trial be granted at the instance of the owner of the property, and the verdict of the jury be the same or less in amount than that first rendered, he must pay all the costs of the second trial. If it be more than that first rendered, the costs of the second trial must be paid by the corporation. (R. S. Sec. 6436, April 23, 1872, 69 v. 88, § 11.)

Time for filing motion for new trial, § 11058.

Grounds for new trial. Errors occurring upon the trial of preliminary questions may, if they come within the causes for a new trial defined in G. C. § 11576, be included in the motion for a new trial.

Railroad Co. v. Traction Co., 72 O. S. 429 (1905).

Misconduct of counsel in stating to the jury that a certain price was paid by the owner for the property is not a ground for a new trial where the jury was instructed to disregard the statement.

Devou v. Cincinnati, etc., Co., 4 O. L. R. 313; 19 C. D. 113 (1906).

When owner entitled to payment. The money paid in on the first verdict, which is afterward set aside, remains the property of the corporation until the final determination of the second trial; and if the second verdict is less than the deposit, the excess is returned to its owner, but if greater, the corporation must increase the deposit to equal the

second verdict, to entitle it to take the property.* This section gives no right to appropriate the property pending the second trial.

Wagner v. Railway Co., 38 O. S. 32, 39 (1882).

Trustees v. Banning, 21 W. L. B. 9 (1888).

Injunction against appropriation. The remedy of a landowner dissatisfied with an appropriation, and claiming the company has varied from the route specified in its charter, lies in the appropriation proceedings, not in equity.

Walker v. Mad River, etc., R. Co., 8 Ohio 38 (1837).

Section 11063. (Bills of exceptions.) Bills of exceptions may be taken and shall be allowed, as provided by law in civil actions. (R. S. Sec. 6437; March 21, 1904, 97 v. 44; April 23, 1872, 69 v. 88, § 12.)

The time within which a bill of exceptions on the hearing of preliminary questions under § 11046 should be taken is computed from the day on which such questions are determined, unless a motion for a new trial is filed, in which event it is computed from the day the motion is overruled.

Railroad v. Tod, 72 O. S. 156 (1905).

Railroad v. Traction Co., 72 O. S. 429 (1905).

The impressions made on the minds of the jury by a view of the premises are not of themselves evidence. A bill of exceptions which contains all of the evidence given in court at the trial is, with a record otherwise complete, sufficient to present to a reviewing court the question of the weight of evidence.

Railroad Co. v. Bolen, 76 O. S. 376 (1907).

Traction Co. v. Dempsey, 9 N. P. n. s. 65 (1909).

But the omission of an exhibit showing the proposed railroad line renders the bill of exceptions insufficient to present the question of the weight of evidence. Realty Co. v. Railway, 18 C. C. n. s. 86 (1910); aff'd, no rep. 86 O. S. 364.

Section 11064. (Petition in error.) Either party may file a petition in error in the court of common pleas of the proper county within thirty days after the time allowed for such signing of bills of exceptions, and the proceedings in error shall be conducted as in civil cases. (R. S. Sec 6437; March 21, 1904, 97 v. 44; April 23, 1872, 69 v. 88, § 12.)

Where the verdict fixing the amount of compensation has been confirmed the landowner may prosecute error before the compensation has been paid, or an order made under § 11059.

Cincinnati v. Barcalow, 4 C. C. 49; 2 C. D. 413.

Toledo, etc., Ry. Co. v. Toledo, etc., Ry. Co., 6 C. C. 521; 3 C. D. 566.

Toledo, etc., Ry. Co. v. Toledo, etc., Ry. Co., 6 C. C. 362; 3 C. D. 493 (1892); aff'd, 50 O. S. 603.

See Railroad v. Tod, 72 O. S. 166, 167 (1905).

The reviewing court acquires no jurisdiction where the petition in error is not filed within thirty days. The limitation of this section is not affected by § 12270.

Wiler v. Logan, etc., Co., 6 C. C. n. s. 206; 17 C. D. 257 (1904); aff'd, 72 O. S. 628.

Buckingham v. Steubenville, etc., R. Co., 10 O. S. 25 (1859).

The limitation applies to error proceedings by the landowner as well as by the corporation.

Cleveland, etc., Ry. Co. v. Wick, 35 O. S. 247 (1879).

Little Miami, etc., R. Co. v. Hopkins, 19 O. S. 279 (1869).

Time for filing petition in error prior to amendment of this section (97 v. 44).

See Railroad v. Tod, 72 O. S. 156 (1905).

The determination of preliminary questions under § 11046 may be reviewed on error.

Railroad v. Tod, 72 O. S. 156 (1905).

Railroad v. Traction Co., 72 O. S. 429 (1905).

Section 11065. (Corporation may pay judgment and enter on property.) On the rendition of final judgment in the probate court, the corporation may pay into the court the amount of the judgment for compensation, and costs therein rendered, and proceed to enter upon and appropriate property notwithstanding the pendency of the proceedings in error. (R. S. Sec. 6437; March 21, 1904, 97 v. 44; April 23, 1872, 69 v. 88, § 12.)

Where a corporation prosecuting error has not taken possession of the premises, it may stay execution on the judgment until the case on error is determined, by giving an undertaking. While such error proceeding is pending, mandamus will not lie requiring the probate judge to order the amount of the verdict deposited or paid to the landowner.

State v. Waite, 70 O. S. 149 (1904); affirming 2 C. C. n. s. 49.

But the corporation can not take possession, and avoid payment by giving a bond. Such possession may be enjoined under § 11088.

In re George, 5 C. C. 207 (1891).

Where the corporation has paid into court the amount of the judgment, the landowner may require the probate judge to pay it over, notwithstanding the pendency of the proceeding in error and the objection of the corporation. The bond of the probate judge is liable on failure to pay.

Meily v. Zurmely, 23 O. S. 627 (1873).

State v. Waite, 70 O. S. 149, 155 (1904).

See Wagner v. Railroad Co., 38 O. S. 32, 39 (1883).

Trustees v. Banning, 21 W. L. B. 9 (1888).

A corporation which has paid the compensation into court, under a stipulation permitting the landowner to withdraw it, without prejudice to any other rights, may be required by the court to go into a second trial as to the value of the land without a refunder of the first award.

Bridge Co. v. Magruder, 8 C. C. n. s. 303; 18 C. D. 607; aff'd, 76 O. S. 616.

Section 11066. (Proceedings in the common pleas on error.) Upon the hearing of the cause, if the common pleas court affirms the judgment of the probate court, all the costs in the common pleas court shall be paid by the plaintiff in error. If it reverses such judgment, it shall retain the cause for trial and final judgment, as in other cases. The trial shall be had at the term of reversal, unless for good

cause shown by either party a continuance is granted. On the trial of the cause in the common pleas court the same inquiry shall be made as to the interest of the jurors, and the same oath administered to the jury as hereinbefore provided. (R. S. Sec. 6438; April 23, 1872, 69 v. 88, § 13.)

Section cited, *Railroad v. Tod*, 72 O. S. 161.

The word "trial" in this section means a rehearing of the case from the beginning.

Railroad v. Traction Co., 72 O. S. 435 (1905).

State v. Judges, 69 O. S. 372 (1903).

See *Bridge Co. v. Magruder*, 63 O. S. 455 (1900).

Where the judgment of the probate court is reversed by the court of common pleas it is the duty of that court to proceed to hearing and trial as if it had original jurisdiction. The judgment of reversal finally disposes of the judgment of the probate court, but it is not a judgment which may be reversed on error. Although the judgment of reversal is erroneous, mandamus will not lie to compel the judges of the court of common pleas to again hear and pass upon the petition in error.

State v. Judges, 69 O. S. 372 (1903).

Bridge Co. v. Magruder, 63 O. S. 455 (1900).

Railway Co. v. Bailey, 39 O. S. 170 (1883).

Cincinnati, etc., R. Co. v. Barcalow, 4 C. C. 49, 50; 2 C. D. 413 (1889).

Bridge Co. v. Magruder, 8 C. C. n. s. 303; 18 C. D. 607; aff'd, 76 O. S. 616.

The court of common pleas should not remand the case for a new trial but should retain it.

City v. Lohman, 10 C. C. n. s. 119; 20 C. D. 92 (1907).

On affirming a judgment of the probate court the court of common pleas is not authorized to render a personal judgment against the corporation for the amount adjudged in the probate court.

Cleveland, etc., Ry. Co. v. Wick, 35 O. S. 247 (1879).

Retention of case for purpose of fixing attorneys fees, on abandonment. See *Ry. v. Campbell*, 11 Ohio App. 151; 30 O. C. A. 500 (1919).

Interest. Where the corporation has paid in the amount assessed, and the judgment is reversed, on the new trial the jury may include in the verdict interest from the time the property was appropriated, and while the money was retained by the court.

Atlantic, etc., Ry. v. Koblenz, 21 O. S. 334 (1871).

Section 11067. (How school land appropriated.) When a railroad company, incorporated in this state, has located its railroad through a part of reserved section twenty-nine or sixteen, or through a part of sections granted by congress instead of section sixteen for school purposes, and such lands remain unsold, or through a town lot or parcels of ground used for or devoted to school purposes, it may appropriate so much of such land or lots as is necessary for its purposes. Service of the summons made on such trustees or school officers, as have possession or control of the lands, shall have the same force and effect as service in other cases on owners of land sought to be appropriated. The

money arising from such appropriation must be disposed of by such trustees or school officers in accordance with law. (R. S. Sec. 6439; April 23, 1872, 69 v. 88, § 14.)

Purpose of section.

State v. Railway, 37 O. S. 157, 171 (1881).

Section 11068. (When proceedings to appropriate be commenced in common pleas.) When the probate judge is interested, either as stockholder, director or otherwise, in a corporation seeking to appropriate private property to its use, or if before filing the petition, it is made to appear to the satisfaction of a judge of the common pleas court of the county wherein the action is to be brought, that such probate judge is interested either as owner or otherwise in the property sought to be appropriated, or by reason of sickness, absence or other incapacity is and will be unable to preside at the trial, the proceedings authorized by this chapter may be commenced in the common pleas court of the county. (R. S. Sec. 6440; April 6, 1891, 88 v. 281; April 19, 1883, 80 v. 218; R. S. 1880; April 23, 1872, 69 v. 88, § 15.)

Section 11069. (Procedure in common pleas court.) In such case, so far as applicable, the proceedings shall conform to the provisions of this chapter, and the powers conferred and duties imposed thereby upon the probate court devolve upon the common pleas, which court may make such orders and direct such proceedings to be had as are necessary to do justice between the parties according to the spirit and intent of this chapter. (R. S. Sec. 6440; April 6, 1891, 88 v. 281; April 19, 1883, 80 v. 218; R. S. 1880; April 23, 1872, 69 v. 88, § 15.)

Section 11070. (When corporation entitled to possession.) After final judgment, on depositing the amount of the judgment and costs assessed in such court with the clerk thereof, the corporation may be entitled to enter into possession of the property sought to be appropriated. In case such court is not in session when the proceedings are begun therein, nor on the day fixed for the inquiry and assessment of compensation, a special term thereof must be held as provided by law. (R. S. Sec. 6440; 88 v. 281; 80 v. 218; R. S. 1880; 69 v. 88, § 15.)

Section 11071. (When court to appoint attorney.) When a party in interest is unknown, or his residence is unknown, and service has been made by publication, and the party

has not appeared in the proceedings by agent or attorney, or when such party in interest is under any legal disability and has no legal guardian, or trustee, within the county where the action is brought, the court shall appoint some competent attorney to attend upon the proceedings, and protect the rights and interests of such party, and also fix the fees of the attorney for such service, which shall be payable out of any money paid on the judgment rendered in such case for property appropriated. (R. S. Sec. 6441; April 23, 1872, 69 v. 88, § 16.)

Section 11072. (Conflicting claims.) When there are diverse or conflicting claims, legal or equitable, to the real estate, or any interest therein, sought to be appropriated under the provisions of this chapter, the jury or court shall not pass upon them in the proceedings for appropriation. Such claims shall be reserved for adjudication as hereinafter provided. (R. S. Sec. 6442; April 23, 1872, 69 v. 88, § 18.)

Section 11073. (To be adjudicated in the common pleas.) Upon the payment of the money into court by the corporation, a party claiming a legal or equitable interest in the property, or the money arising therefrom by such appropriation, may file his petition in the common pleas court of the proper county, making the other claimants to the property or money parties thereto, setting forth the facts on which the claim is founded, the fact of the appropriation of the property, the amount of money so paid in and such other facts as are required to enable the court to hear and determine the matter between the claimants. (R. S. Sec. 6443; April 23, 1872, 69 v. 88, § 19.)

Section 11074. (Custody of the funds.) The court forthwith shall appoint some master, or other suitable person selected by the parties, to hold such fund, or invest it in the manner the court directs, after hearing the parties. Such fund thenceforth will represent the land, and the interests therein, and be subject to the control of the court having jurisdiction of the case, by orders entered in this action, according to the rights of the parties to the land or fund, as from time to time it determines. (R. S. Sec. 6443; April 23, 1872, 69 v. 88, § 19.)

Section 11075. (Such proceeding a civil action.) Such proceeding in the court of common pleas, shall be a civil action; and the conflicting claims of parties to such fund

shall be determined by the court, or by a jury trial, according as the claim is equitable or legal, as if the land had not been converted into money. (R. S. Sec. 6444; April 23, 1872, 69 v. 88, § 20.)

The court is authorized to determine conflicting claims of the lessor and lessee of the property appropriated.

Good v. Droste, 8 C. C. n. s. 452; 19 C. D. 581 (1906).

These sections do not grant any right to trial by jury. They only preserve existing rights.

Skerrett v. Presbyterian Society, 41 O. S. 606 (1885).

Who entitled to compensation.

Held entitled to. Owner of the fee. Cincinnati v. Babb, 29 W. L. B. 284; 4 L. D. 64; aff'd, no rep. 55 O. S. 637.

Grantor as against subsequent grantee, in the absence of special agreement. Hatry v. Railway, 1 C. C. 426, 1 C. D. 238 (1886). *Contra*, Railroad Co. v. Davis, 19 C. C. 589 (1900). See Railroad Co. v. Campbell, 51 O. S. 328 (1894); Railroad Co. v. Lersch, 58 O. S. 652 (1898).

Trustee holding the property in trust. Trust Co. v. B. & O. S. W. R., 7 N. P. n. s. 497, 53 W. L. B. 450 (1908).

Tenant for years. Cleveland v. Agricultural Society, 41 O. S. 600 (1885); Foote v. Cincinnati, 11 Ohio 408 (1842).

Mortgagee. Harrison v. Sabina, 1 C. C. 49, 1 C. D. 30 (1885).

Remainderman. Gorrill v. Railway Co., 4 C. C. 398, 2 C. D. 617 (1890).

Held not entitled to. Subsequent grantee. Hatry v. Railway, 1 C. C. 426, 1 C. D. 238 (1886); Hyde Park v. Dyer, 7 N. P. n. s. 244; 53 W. L. B. 335 (1908).

Tenant from year to year who occupied the land until the end of the current year. Cincinnati v. Schmidt, 14 Ohio App. 426 (1921).

Owner of easement, if not interfered with by public use. Ohio Oil Co. v. Railroad Co., 4 C. C. 210, 2 C. D. 505 (1889).

Lot owners, in restricted allotment (damages for violation of the restrictions). Doan v. Railway, 92 O. S. 461 (1915); Ward v. Railway, 92 O. S. 471 (1915).

Owner of right of inchoate dower. Long v. Long, 99 O. S. 330 (1919).

Grantor, who had reserved right of entry and forfeiture if land used for other than specified purposes. Cincinnati v. Babb, 29 W. L. B. 84, 4 L. D. 464; aff'd, 55 O. S. 637.

Section 11076. (Condemnation of unfinished road-bed.)

A railroad corporation of this state may condemn and appropriate to its own use the interest and easement in and quiet title to any unfinished road-bed, or part thereof, lying within the state, and on the line of its proposed road, owned or claimed by another railroad company or companies, person or persons, partnership or corporation, when such road-bed, or part thereof has remained in an unfinished condition, and without having the ties and iron placed and continued thereon for the period of five years or more, immediately preceding the commencement of proceedings to condemn or

appropriate it as herein authorized. Every such company, or companies, person or persons, partnership or corporation shall be made a party defendant to such proceedings to condemn or appropriate it, and be required to answer therein, setting forth fully its or their title to or interest in such road-bed, or part thereof, so sought to be appropriated, if any, it or they claim, to which answer the plaintiff must plead issuably, unless it admits the validity of the defendant's claim. In such case, if a party defendant be a non-resident of this state, or a foreign corporation, service of summons may be made by publication, as in other proceedings to appropriate the property of foreign corporations, or persons not residing in Ohio. (R. S. Sec. 6445; April 5, 1882, 79 v. 65; R. S. 1880; March 23, 1875, 72 v. 71, § 9.)

This section has no application to appropriation proceedings in general. *Valley Ry. Co. v. Pouchot*, 4 C. C. 187, 193 (1889); *aff'd*, 51 O. S. 571.

Section 11077. (Construction of terms.) The terms "company or companies" used in this chapter, also embrace "person or persons," "partnership or corporation," as used in the next preceding section. (R. S. Sec. 6445; 79 v. 65; R. S. 1880; 72 v. 71, § 9.)

Section 11078. (Proceedings.) When it is determined by the court, upon issue of law, or by the jury upon issue of fact, or by the admission of the pleadings, or by reason of failure to plead that any company asserting such ownership or claim is not entitled thereto, judgment, including costs, must be rendered accordingly. But when in like manner it is determined that such a company has an interest in such road-bed, or part thereof, so sought to be appropriated, the jury shall determine and state the amount of compensation due to such company, according to law, on account of the appropriation of such interest. (R. S. Sec. 6446; March 23, 1875, 72 v. 71, § 9.)

Section 11079. (Where action to be begun.) Such proceedings may be commenced in the probate court, the common pleas or the superior court of any county in which such road-bed, or part so sought to be appropriated or condemned is situated. All or part only of such road-bed within this state may be included in one proceeding, and when it is begun in the common pleas or superior court, the same proceedings shall be had as are prescribed in this chapter for its conduct in the probate court, so far as applicable and not excepted in this section. On motion, the case shall be

taken out of its order by the court or by a reviewing court, and determined without unnecessary delay. The provisions of this chapter as to viewers shall not apply to appropriations of road-beds as herein authorized. (R. S. Sec. 6447; April 5, 1882, 79 v. 65; R. S. 1880; March 23, 1875, 72 v. 71, § 9.)

Section 11080. (Error.) Proceedings in error to such common pleas or superior courts, may be commenced directly in the supreme court. (R. S. Sec. 6447; 79 v. 65; R. S. 1880; 72 v. 71, § 9.)

Section 11081. (Statement of intention.) When a railroad corporation commences proceedings under section eleven thousand and seventy-six, its president shall make, subscribe and file in the court where such proceeding is had a statement under oath, declaring that it is the bona fide intention of such corporation to complete and operate a railroad on the road-bed so sought to be appropriated. (R. S. Sec. 6447; 79 v. 65; R. S. 1880; 72 v. 71, § 9.)

Section 11082. (Failure to occupy road-bed for one year.) For a period of one year after it acquired right to occupy the road-bed, if such corporation fails to expend in and about the completion of a railroad thereon a sum equal to twenty-five per cent of the total cost of completing it, to be estimated by the railroad commission of Ohio, then such road-bed will be open to appropriation and condemnation by any other railroad corporation. (R. S. Sec. 6447; 79 v. 65; R. S. 1880; 72 v. 71, § 9.)

Section 11083. (Interpretation of word "road-bed.") The word "road-bed" used in any of the preceding sections includes rights of way, depot grounds, and other easements connected therewith, and it will be sufficient in the petition and proceedings under this chapter to designate the road-bed as the road-bed of the railroad corporation by which the route of the road was located and established with the terminal points within which appropriation is sought. (R. S. Sec. 6447; April 5, 1882, 79 v. 65; R. S. 1880; March 23, 1875, 72 v. 72, § 9.)

Section 11084. (Proceedings when land is held without agreement.) When a corporation, authorized by law to make appropriation of private property or lands reserved for school purposes, has taken possession of and is occupying or using the land of any person, or such school lands for

any purpose, and the land so occupied or used has not been appropriated and paid for by the corporation, or is not held by an agreement in writing with the owner thereof, or the trustees or school officers having possession or control of such school lands, such owner or owners, or either of them, or such trustees or school officers, may serve written notice upon the corporation in the manner provided for the service of summons against a corporation, to proceed under this chapter to appropriate the lands. On the failure of such corporation for ten days so to proceed, the owner or owners or such trustees or school officers may file a petition in the probate court of the proper county setting forth the fact of such use or occupation by the corporation, that the corporation has no right, legal or equitable, thereto, and in cases of reserved sections sixteen and twenty-nine, or any part of sections granted by congress instead of section sixteen for school purposes, no right, legal or equitable, derived from the trustees and officers named therein, that such notice has been duly served, that the time of limitation under the notice has elapsed, and such other facts, including a pertinent description of the land so used or occupied, as are proper to a full understanding of the case. (R. S. Sec. 6448; April 12, 1883, 80 v. 114; R. S. 1880; April 23, 1872, 69 v. 88, § 21.)

Cited, *State v. Harrison*, 81 O. S. 105.

This section does not violate Art. 14 of the federal constitution.

In re *George*, 5 C. C. 207 (1891).

The remedy provided by this section is not a substitute for the right to recover possession, but is cumulative.

Railroad Co. v. Perkins, 49 O. S. 326, 330 (1892).

See § 11087.

An abutting owner who is injured by the location of a railroad in a street in front of his property may proceed under § 8765. Section 11084 is not exclusive. *Traction Co. v. Hart*, 2 Ohio App. 1; 19 C. C. n. s. 71; 25 C. D. 347 (1913).

When proceeding lies. This section applies only where the occupation is without any agreement with the owner.

Collins v. Craig Shipbuilding Co., 7 C. C. n. s. 350; 17 C. D. 802 (1905).

It does not apply where the corporation holds under an agreement, although it has violated a condition subsequent;

Field v. Lake Shore, etc., Co., 3 C. C. n. s. 130; 13 C. D. 1 (1897); aff'd, 62 O. S. 633.

or where it uses the property for an unauthorized purpose.

Collins v. Craig Shipbuilding Co., 7 C. C. n. s. 350; 17 C. D. 802 (1905).

Where the corporation took possession under a verbal promise of compensation, but not paid, the owner may elect to proceed under this section, or proceed on the verbal promise.

Fries v. Wheeling, etc., Co., 56 O. S. 135 (1897); s. c., 18 C. C. 721; 14 C. C. 53.

Who may bring proceedings under this section. Remainderman after death of the life tenant.

Webster v. Railroad, 78 O. S. 87 (1908).

Trust company holding the legal title in trust.

Trust Co. v. Railway, 7 N. P. n. s. 497 (Ins. Ct. 1908).

See Bank v. Telegraph Co., 79 O. S. 89 (1908).

The heirs of a deceased landowner, and not his administrator, are the proper parties to bring a proceeding under this section.

Railway Co. v. O'Harra, 50 O. S. 667 (1893).

The plaintiff must hold the legal title to the lands.

Rapp v. Ohio, etc., R. Co., 5 N. P. 497 (1898).

Harrison v. Sabina, 14 W. L. B. 27 (1885).

Railroad Co. v. Davis, 19 C. C. 589 (1900).

Whether a subsequent grantee acquires the right of action under this section merely by a conveyance of the land, has been differently decided. Hatry v. Railway, 1 C. C. 426, 1 C. D. 238 (1886; holding that grantee does not acquire the right); Railway v. Davis, 19 C. C. 589; 10 C. D. 745 (1900; holding that right of action passes to grantee).

Under § 8765 a right of action does not pass to the grantee. Railroad Co. v. Campbell, 51 O. S. 328 (1894); Railroad Co. v. Lersch, 58 O. S. 652 (1898).

Where a public highway is occupied, the owner of the fee, being entitled to compensation, may enforce his rights under this section.

Kramer v. Toledo, etc., R. R. Co., 53 O. S. 436, 444 (1895).

Railroad Co. v. O'Harra, 48 O. S. 343 (1891).

Valley Ry. Co. v. Pouchot, 4 C. C. 187 (1889).

Lawrence R. Co. v. Williams, 35 O. S. 168 (1878).

Railroad Co. v. Wartenbee, 35 W. L. B. 2 (1895); s. c., 53 O. S. 689.

The laying of an additional track in a street, and changing the grade of the street, is a taking of property.

Railroad Co. v. Hambleton, 40 O. S. 496 (1884).

A tenant in common is an "owner" under this section, and, if ousted by a railroad co-tenant, may sue for compensation and damages.

Union, etc., Co. v. Railway, 7 N. P. n. s. 497 (Ins. Ct. 1908).

In such case after the land has been occupied and its value depreciated, the railroad can not compel the co-tenant to sell his interest at its market value, but the co-tenant is entitled to one-half the actual value of the entire land. Foote v. Railway, 21 C. C. 319, 11 C. D. 685 (1901); aff'd, no rep. 67 O. S. 543.

Defendants. Where the title and estate of a railroad is in the corporation, it is the proper defendant, although a receiver has been appointed in another state for some cause other than insolvency.

Pittsburg, etc., R. Co. v. Perkins, 22 C. C. 630; 12 C. D. 676 (1888); affirmed, 49 O. S. 326 (1892).

The lessor and lessee of a railroad may be jointly liable for injuries to land abutting on a highway.

Railroad Co. v. Hambleton, 40 O. S. 496 (1884).

Jurisdictional facts. It must be alleged and proved that the corporation "has no right, legal or equitable, in the premises."

In re George, 5 C. C. 207 (1891).

Pittsburg, etc., R. Co. v. Perkins, 22 C. C. 630; 12 C. D. 676 (1888); affirmed, 49 O. S. 326 (1892).

But such facts need not be found by the court before empanelling a jury.

Kramer v. Toledo, etc., Co., 53 O. S. 436 (1895).

Trial. Either party is, on demand, entitled to trial by jury on an

issue of fact as to the ownership of the land. But where no demand is made, the question may be heard and determined by the court. The jurisdiction of the probate court is not defeated by a denial of the title of the plaintiff; and the court may, on the demand of either party, proceed and impanel a jury for the trial of the issue, in any of the appropriate modes provided by statute for the impanelling of juries in the common pleas court.

Railroad Co. v. O'Harra, 48 O. S. 343 (1891).

Wrongful taking does not divest title. The wrongful taking of land by a railroad company for a right of way does not divest the title of the owner, and reduce his remedy to a mere claim for compensation and damages. He continues the legal owner of the land until he loses the title by adverse possession.

Railway Co. v. O'Harra, 50 O. S. 667, 678 (1893).

Fries v. Wheeling, etc., Ry. Co., 56 O. S. 135 (1897).

Railroad Co. v. Perkins, 49 O. S. 326 (1892).

Railroad Co. v. O'Harra, 48 O. S. 343 (1891).

See Hatry v. Painesville, etc., Ry. Co., 1 C. C. 426 (1886).

Atlantic, etc., R. Co. v. Robbins, 35 O. S. 531, 540 (1880).

Defenses.

Estoppel. While an owner, who stands by, and without objection, sees a public railroad constructed on his land, will, after the road is completed, or large expenditures have been made thereon, upon the faith of his apparent acquiescence, be estopped from reclaiming the land, or enjoining its use by the railroad company, he is not thereby estopped from claiming compensation.

Pennsylvania Co. v. Platt, 47 O. S. 366 (1890).

Goodin v. Cincinnati, etc., Co., 18 O. S. 169 (1868).

See Gorrill v. Toledo, etc., Ry. Co., 4 C. C. 398, 406 (1890).

Fries v. Wheeling, etc., Ry. Co., 56 O. S. 135 (1897).

Longworth v. Cincinnati, 48 O. S. 637 (1891).

Cleveland, etc., Ry. Co. v. Reid, 4 N. P. 127 (1896).

Central Trust Co. v. Valley Ry. Co., 37 W. L. B. 210 (1897).

Coe v. Columbus, etc., R. R. Co., 10 O. S. 411 (1859).

A corporation which has wrongfully entered on land must either yield possession or pay the value of the land.

Railroad Co. v. Perkins, 49 O. S. 326, 332 (1892).

Atlantic, etc., R. R. Co. v. Robbins, 35 O. S. 531, 538 (1880).

See Teegarden v. Davis, 36 O. S. 601 (1881).

Daily v. State, 51 O. S. 348, 363 (1894).

Bothe v. Dayton, etc., R. Co., 37 O. S. 147 (1881).

Statute of limitations. A proceeding under this section is not barred by the statute of limitations in less than twenty-one years.

Fries v. Wheeling, etc., Ry. Co., 56 O. S. 135 (1897).

Railroad Co. v. O'Harra, 48 O. S. 343 (1891).

Railroad Co. v. Davis, 19 C. C. 589 (1900).

Railroad v. Perkins, 22 C. C. 630, 12 C. D. 676; aff'd, no rep. 49 O. S. 326.

The limitation of two years in § 8765 applies only to incidental injuries to property on or adjacent to highways, and does not include the remedy for injuries to the land itself.

Railroad Co. v. O'Harra, 48 O. S. 343 (1891).

Railroad Co. v. Hambleton, 40 O. S. 496 (1884).

The statute does not begin to run against a remainderman until the death of the life tenant.

Webster v. Railroad Co., 78 O. S. 87 (1908).

Saner v. Railroad Co., 7 Ohio App. 238, 28 O. C. A. 255.

Compensation and damages. The measure of compensation is the value of the land at the time it is assessed in the proceeding.

Railroad Co. v. Perkins, 49 O. S. 326 (1892); s. c., 22 C. C. 631 (1888).

The heirs of a deceased owner may recover compensation for the land taken and damages to the remaining land, but not such damages to the lands of the decedent as he could have recovered in his lifetime in an action of trespass.

Railway Co. v. O'Harra, 50 O. S. 667 (1893).

See Railroad Co. v. Campbell, 51 O. S. 328 (1894).

Baltimore, etc., R. Co. v. Lersch, 58 O. S. 639, 652 (1898).

Railroad Co. v. Hambleton, 40 O. S. 496 (1884).

A strip of land leased by a municipality to a railroad company for a term of years does not become a separate parcel of land. Upon appropriation of the strip the municipality may recover damages to the residue. Damages to the residue may be recovered either in an action to compel an appropriation, or in the appropriation proceeding. Railway Co. v. Cincinnati, 16 N. P. n. s. 587; 60 Bull. 284 (Insolvency Ct. 1914).

Section 11085. (Demand of written statement describing the land occupied without appropriation.) Such owner or owners, or such trustees or school officers, intending to institute such proceeding, may demand, in writing, from the president or chief officer of such corporation a specific description of each parcel of land so used or occupied without appropriation by it, of the work, if any, constructed or intended to be constructed thereon, and the use to which it is to be applied. Upon failure of the corporation for ten days to furnish this as fully as would be required of it in a proceeding to appropriate lands, the fact of such demand and failure may be alleged in the petition in such proceeding. On notice to the corporation and proof thereof to the probate judge having jurisdiction of such appropriation, he shall restrain it from the use and occupation of the land until such demand is complied with. Or, such owner or owners, or trustees or school officers may cause the necessary surveys to be made therefor, and the costs thereof must be taxed to the corporation in such proceeding. (R. S. Sec. 6448; April 12, 1883, 80 v. 114; R. S. 1880; April 23, 1872, 69 v. 88, § 21.)

Section 11086. (Summons.) A summons shall issue and be served upon the corporation, and thereafter the proceedings in such court be conducted to final judgment as provided in this chapter. (R. S. Sec. 6449; April 12, 1882, 80 v. 114; R. S. 1880; April 23, 1872, 69 v. 88, § 21.)

Section 11087. (Judgment and execution.) If the corporation fails to pay the judgment and costs awarded against it in the proceeding, they may be collected by execution as in other cases. This section and the next preceding section shall not impair or lessen the right the owner or owners or the trustees or school officers may have to proceed against the corporation as in other cases of the unlawful entry upon lands. (R. S. Sec. 6449; April 12, 1882, 80 v. 114; R. S. 1880; April 23, 1872, 69 v. 88, § 21.)

Lien of judgment. A judgment rendered in a proceeding under § 11084 is not made a charge or lien on the land.

Central Trust Co. v. Valley Ry. Co., 37 W. L. B. 210 (C. C. 1897).

Railroad Co. v. Robbins, 35 O. S. 531, 539 (1880).

But use of the property may be enjoined until the judgment is paid.

§ 11088.

OTHER REMEDIES.

The remedy provided by § 11084 and § 11085 is not a substitute for the remedy to recover possession but is cumulative.

Railroad v. Perkins, 49 O. S. 326, 330 (1892).

An abutting owner who is injured by the location of a railroad in a street in front of his property may proceed under § 8765. Section 11084 is not exclusive. Traction Co. v. Hart, 2 Ohio App. 1; 19 C. C. n. s. 71; 25 C. D. 347 (1913).

Injunction. An owner may enjoin a corporation from entering upon his land until it has been appropriated and paid for.

Gorill v. Toledo, etc., Ry. Co., 4 C. C. 398, 404 (1890).

Railway Co. v. Lawrence, 38 O. S. 41 (1882).

Hathaway v. Springfield, etc., R. Co., 2 W. L. M. 481 (1860).

See Dayton, etc., R. R. Co. v. Marshall, 11 O. S. 497 (1860).

Coe v. Columbus, etc., R. Co., 10 O. S. 412 (1859).

The owner of land abutting on a highway may enjoin the construction of a railroad therein until he shall have been fully compensated, and in a proper case a mandatory injunction may issue requiring the company to restore the street.

Toledo Bending Co. v. Manufacturers' Ry. Co., 2 N. P. 317 (1895).

Ejectment. An owner of land wrongfully occupied may proceed under §§ 11084 and 11085, or may bring his action in ejectment.

Raymond v. Toledo, etc., Ry. Co., 57 O. S. 271 (1897); 16 C. C. 639.

Atlantic, etc., R. R. Co. v. Robbins, 35 O. S. 531 (1880).

Bothe v. Dayton, etc., R. Co., 37 O. S. 147 (1881).

Saner v. Railroad Co., 7 Ohio App. 238; 28 O. C. A. 255.

But where the corporation took possession under an agreement, the owner can not maintain an action in ejectment, although the corporation has committed a breach of a condition subsequent in the agreement.

Hornback v. Cincinnati, etc., Co., 20 O. S. 81 (1870).

Fries v. Railway, 56 O. S. 135 (1897).

See Field v. Lake Shore, etc., Ry., 3 C. C. n. s. 130; 13 C. D. 1 (1897); aff'd, 62 O. S. 633.

A pending suit to recover possession of land, with rents, etc., is not a bar to an action under § 11084.

Trust Co. v. Railway, 7 N. P. n. s. 497 (Ins. Ct. 1908).

Conversion. Where the owner elects to sue for compensation and damages his action must be under § 11084.

Railroad Co. v. Robbins, 35 O. S. 531 (1880).

Turnpike Co. v. Cincinnati, etc., R. Co., 5 W. L. B. 643 (1880).

Suit for compensation in common pleas court. Where land is held by a company under a verbal agreement, and the owner elects to treat it as an appropriation in fact and tenders conveyance, and sues in the common pleas court, he can not enlarge his suit so as to include an inquiry of damages to other lands, but allegations of such damage will not affect the jurisdiction of the common pleas court.

Fries v. Wheeling, etc., Ry. Co., 56 O. S. 135 (1897); s. c., 18 C. C. 721; 14 C. C. 55.

Trespass.

See Little Miami R. R. Co. v. Whitacre, 8 O. S. 590 (1858).

Cleveland, etc., R. Co. v. Stackhouse, 10 O. S. 567 (1860).

Hathaway v. Springfield, etc., R. Co., 2 W. L. M. 481 (1860).

Ward v. Marietta, etc., Bridge Co., 6 O. S. 15 (1856).

Appropriation proceedings are not a bar to an action for damages for a trespass previously committed in grading.

Schaible v. Lake Shore, etc., Co., 10 C. C. 334; 6 C. D. 505 (1895).

Effect of appropriation. After appropriation the owner can not maintain a common law action for damages resulting from construction of a railroad on his land. Hueston v. Railroad, 4 O. S. 685 (1855).

Nor can he maintain an action against an employe of the road for cutting timber on the land appropriated. Prather v. Ellison, 10 Ohio 396 (1841).

Section 11088. (Injunction may issue against corporation.) If execution issued as provided in the next preceding section be returned unsatisfied, in whole or part, with the indorsement that no goods, chattels, lands or tenements, can be found whereon to levy, or if the judgment remains unsatisfied for more than sixty days from its rendition, the court, by injunction, may restrain the corporation from using or occupying the lands until the judgment and costs are paid. (R. S. Sec. 6450; April 23, 1872, 69 v. 88, § 22.)

This section does not authorize an injunction without an undertaking.

In re George, 5 C. C. 207 (1891).

A corporation which has prosecuted error to the judgment can not take possession, while the error proceeding is pending, without paying the amount of the judgment. An undertaking is not a substitute for payment. Such possession may be enjoined under this section after sixty days from the rendition of the judgment.

In re George, 5 C. C. 207 (1891).

See note to § 11065.

Section 11089. (Fees.) The jurors summoned, and attending or serving, in accordance with the provisions of this chapter, shall be paid the same fees per day as jurors in the court of common pleas, and also five cents per mile

for each mile of the distance they travel in the discharge of their duties. Witnesses must be allowed the same fees and mileage as for attendance at the court of common pleas. The sheriff shall be entitled to such fees as he is allowed by law for similiar services in other cases, but not anything in the way of poundage, except on money made on execution. The clerk shall be entitled to a fee of one dollar and fifty cents for drawing, and certifying to the probate judge, the list of jurors. The probate judge shall be allowed to enter a charge of five dollars in the cost bill for each day occupied in the trial of a cause, in addition to his other fees provided by law. The whole costs so taxed must be adjudged against and paid by the corporation, except as provided in the next following section. (R. S. Sec. 6451; April 23, 1872, 69 v. 88, § 24.)

Constitutionality. This section is constitutional.

Railroad Co. v. County, 71 O. S. 454 (1904).

Traction Co. v. Felix, 5 C. C. n. s. 270; 15 C. D. 393 (1904); aff'd, 72 O. S. 608.

Fees of jurors. This section requires that the fees and mileage of jurors be taxed as a part of the costs against the corporation.

Railroad Co. v. County, 71 O. S. 454 (1904).

Traction Co. v. Felix, 5 C. C. n. s. 270; 15 C. D. 393 (1904); aff'd, 72 O. S. 608.

Jurors drawn from the box are talesmen under § 11051 and the fees of a jury so made up should be taxed as a part of the costs.

Hosbrook v. Traction Co., 5 C. C. n. s. 209; 17 C. D. 42 (1904); aff'd, 75 O. S. 584.

Fees of probate judge. The \$5 per day is for the trial of the case to the jury. It may not be charged upon the hearing of a motion, demurrer, or hearing of preliminary questions under § 11046. Opins. Atty. Gen. 1917, p. 1288.

Section 11090. (When costs apportioned.) A corporation, by its proper officer, agent, or attorney, at the time of filing the petition with the probate judge, may deposit with him such sum of money, for each separate parcel of property as it deems a just compensation for the property, rights, and interests described in the petition, and sought to be appropriated. If the final verdict of the jury as to any parcel of property does not exceed the amount so deposited, and the owner has refused, after notice of such deposit, to accept it, the whole costs of the proceedings as to such parcel shall be equally divided between the corporation and the owner or owners of the property. When the final verdict as to any parcel or parcels exceeds, and as to other parcel or parcels does not exceed, the amount deposited, the probate

judge shall apportion the costs in such manner as he deems just. (R. S. Sec. 6452; April 23, 1872, 69 v. 88, § 24.)

Section 11091. (When this chapter does not apply.) The provisions of this chapter shall not apply to proceedings by state, county, township, district, or municipal authorities, to appropriate private property for public uses, or for roads or ditches. In all such cases it shall be optional with such authorities to pay the judgment rendered against them, or to pay the costs and decline to take the property sought to be appropriated. (R. S. Sec. 6453; April 23, 1872, 69 v. 88, § 25.)

See *Railway Co. v. Greenville*, 69 O. S. 492 (1903).

Cincinnati v. Lohman, 10 C. C. n. s. 119; 20 C. D. 92 (1907).

Conservancy District v. Bowers, 100 O. S. 317 (1919).

Kraemer v. Board of Education, 8 Ohio App. 428; motion to certify record overruled, 15 O. L. R. 432.

PART XXVI.

CODE OF CIVIL PROCEDURE.

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| <p>§ 11225-1. When bank liable on forged or raised check.</p> <p>§ 11231. When action deemed commenced.</p> <p>§ 11232. When corporation goes into hands of receiver.</p> <p>§ 11233. Saving in case of reversal, etc.</p> <p>§ 11272. Other actions against corporations.</p> <p>§ 11273. Action against railroad company, interurban, suburban or street railroad and stage companies, where brought.</p> <p>§ 11274. Against turnpike companies.</p> | <p>§ 11275. When this chapter does not apply.</p> <p>§ 11276. Further provisions as to non-residents.</p> <p>§ 11288. How served upon corporation.</p> <p>§ 11289. On an insurance company.</p> <p>§ 11290. On foreign corporation.</p> <p>§ 11292. Service by publication.</p> <p>§ 11351. Pleadings to be subscribed and verified.</p> <p>§ 11416. Change of venue in corporation suit.</p> <p>§ 11761. How judgment creditor to proceed.</p> <p>§ 11819. Grounds of attachment.</p> <p>§ 11833. How garnishee served.</p> |
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Section 11225-1. (When bank liable on forged or raised check.) No bank which has paid and charged to the account of a depositor any money on a forged or raised check issued in the name of said depositor shall be liable to said depositor for the amount paid thereon unless either, (1) within one year after actual written notice to said depositor that the vouchers representing payments charged to the account of said depositor for the period during which such payment was made are ready for delivery, or (2) in case no such notice has been given, within one year after the return to said depositor of the voucher representing such payment, said depositor shall notify the bank that the check so paid is forged or raised. (June 12, 1911, 102 v. 441.)

This section mentions liability to depositors only and not to the holder of a check. A bank is not liable to the holder unless and until it accepts or certifies the check. *Savings Co. v. Walker Co.*, 92 O. S. 406 (1915).

Section 11231. (When action deemed commenced.) Within the meaning of this chapter, an attempt to commence an action shall be deemed to be equivalent to its commencement, when the party diligently endeavors to procure a service, if such attempt be followed by service within sixty days. (*R. S. Sec. 4988; March 16, 1894, 91 v. 72; R. S. 1880; 51 v. 57, § 20; S. & C. 949.*)

Section 11232. (When corporation goes into hands of a receiver.) If the defendant is a corporation, either foreign

or domestic, and whether its charter prescribes the manner and place of service, or either, and before the expiration of such sixty days it passes into the hands of a receiver, then, following such attempt to commence an action, within such sixty days service may be made upon such receiver, or his cashier, treasurer, secretary, clerk or managing agent, or if none of these can be found, by a copy of the summons left at the office or usual place of business of such agents or officers of such receiver, with the person in charge thereof. If such corporation is a railroad company, summons may be served upon any regular ticket or freight agent of the receiver, or, if there be no such agent, then on any conductor of such receiver, in any county in the state in which the company's railroad is located. The summons shall be returned as if served upon the defendant. (R. S. Sec. 4988; March 16, 1894, 91 v. 72; R. S. 1880; 51 v. 57; § 20; S. & C. 949.)

This section does not apply to original service, but applies only to service after the failure of a diligent attempt.

Collins v. B. & O. R. Co., 7 N. P. 270; 7 L. D. 445 (C. P. 1898).

In an action against a railroad company, service on the ticket agent of its receiver is not service on the company.

Collins v. B. & O. R. Co., 7 N. P. 270; 7 L. D. 445 (C. P. 1898)
 Railroad Co. v. Orme, 1 C. C. 511; 1 C. D. 285 (1885).

Where the person served was not the agent of the receiver at the time of service, the attempted service is nugatory.

B. & O. R. Co. v. Freeman, 112 Fed. 237; 13 O. F. D. 66 (C. C. A. 1901).

Independent action in federal court against receiver, see

B. & O. R. Co. v. Freeman, 112 Fed. 237; 13 O. F. D. 66 (C. C. A. 1901).

Section 11233. (Saving in case of reversal, etc.) In an action commenced, or attempted to be commenced, if in due time a judgment for the plaintiff be reversed, or if the plaintiff fails otherwise than upon the merits, and the time limited for the commencement of such action at the date of reversal or failure has expired, the plaintiff, or, if he dies and the cause of action survives, his representatives may commence a new action within one year after such date, and this provision applies to any claim asserted in any pleading by a defendant. If the defendant is a corporation, foreign or domestic, and whether its charter prescribes the manner and place, or either, of service of process thereon, and it passes into the hands of a receiver before the expiration of such year, then service to be made within the year following such original service or attempt to begin the action may be made upon such receiver or his cashier, treasurer, secretary, clerk or managing agent, or if none of these offi-

cers can be found, by a copy left at the office or the usual place of business of such agents or officers of the receiver with the person having charge thereof. If such corporation be a railroad company, summons may be served on any regular ticket or freight agent of the receiver, and if there be no such agent, then upon any conductor of the receiver, in any county in the state in which the railroad is located. The summons shall be returned as if served on such defendant. (R. S. Sec. 4991; March 16, 1894, 91 v. 72; R. S. 1880; 51 v. 57, § 23; S. & C. 950.)

Where a suit for false imprisonment was brought in federal court against two corporations, one a New York corporation, and the other an Ohio corporation, and a demurrer by the New York corporation was sustained, and the case was thereafter dismissed, on the application of the Ohio corporation, for want of jurisdiction, the proceeding was held to be the commencement of an action within the meaning of this section, and plaintiff was entitled to commence a new action within one year from such date, although under G. C. § 11225 the action would be barred.

Railway v. Bemis, 64 O. S. 26 (1901).

A voluntary dismissal by plaintiff is not a failure contemplated by this section. *Siegfried v. Railroad*, 50 O. S. 294 (1893); *White v. Foundry Co.*, 24 C. C. n. s. 180 (1902).

The new action to be commenced within one year must be the same as the first action, and between the same parties. *Larwill v. Burke*, 19 C. C. 449; 10 C. D. 579 (1900); *aff'd*, no rep. 66 O. S. 683.

Section 11272. (Other actions against corporations.) An action other than one of those mentioned in the next four preceding sections, against a corporation created under the laws of this state, may be brought in the county in which such corporation is situated, or has or had its principal office or place of business, or in which such corporation has an office or agent, or in any county in which a summons may be served upon the president, chairman or president of the board of directors or trustees or other chief officer. If such corporation is an insurance company, the action may be brought in the county wherein the cause of action or some part thereof arose; but if it be organized for the purpose of mining or operating for petroleum oil or gas, either exclusively or in connection with other business, the action may be brought in any county where such corporation owns or operates a mine or a well for petroleum oil or gas, and the cause of action, or a part thereof arose. (R. S. Sec. 5023; February 15, 1877, 74 v. 29, § 48; R. S. 1880, § 5026; January 16, 1885, 82 v. 5; April 19, 1898, 93 v. 125; April 16, 1900, 94 v. 270, § 5023; April 23, 1902, 95 v. 237.)

The word "may" in this section does not mean "must". *Bond v. Insurance Co.*, 12 Ohio App. 39, 31 O. C. A. 407 (1919). See *Casebolt*

v. Railroad, 5 Ohio App. 431, 26 C. C. n. s. 161 (1916); Stanton v. Enquirer Co., 7 N. P. 589 (1899).

Although in several earlier cases it had been so held.

Kinsey v. Iron Works, 4 N. P. 293; 6 L. D. 446 (1897).

Johnson v. Railway Co., 5 N. P. n. s. 347; 18 L. D. 247 (1907).

This section is not intended to apply to statutory actions in which a different rule or mode of proceeding is specially authorized.

Infirmary v. Toledo, 15 O. S. 409 (1864).

A suit by a stockholder to enjoin a corporation from acquiring stock in another corporation must be brought in a county having jurisdiction over the corporation in which the plaintiff is a stockholder. Westfall v. Railway, 13 N. P. n. s. 217; 22 L. D. 75 (1910).

To what corporations applicable. This section applies to life insurance companies as well as to fire insurance companies. The action may be brought in the county where the death of the insured occurred.

Insurance Co. v. Pyers, 36 O. S. 544 (1881).

See Householder v. Association, 6 N. P. 520; 8 L. D. 321 (1898).

This section does not limit the venue of an action against an insurance company to the county in which it arose. Bond v. Insurance Co., 12 Ohio App. 39, 31 O. C. A. 407 (1919).

This section applies to an Ohio railroad company owning or operating a railroad within the state. Section 11273 is not exclusive. Casebalt v. Railroad Co., 5 Ohio App. 431; 26 C. C. n. s. 161 (1916).

This section applies to a corporation organized under a special charter, which has brought itself under the general laws.

Insurance Co. v. Bowersox, 6 C. C. 275; 3 C. D. 451 (1892).

Where actions brought.

Where suit may be brought in either of two counties and an action is brought in one, but summons issued to the sheriff of the other county, the action is improperly brought and the service should be set aside. Fostoria v. Fox, 60 O. S. 340 (1899).

County where principal office or place of business is located. An Ohio corporation can be sued only where it is situated, or has its principal place of business or where an officer or agent is maintained.

Kinsey v. Iron Works, 4 N. P. 293; 6 L. D. 446 (1897).

Coal Co. v. Coal Co., 7 N. P. 191; 6 L. D. 178 (1897).

Akron Co. v. Hammond, 24 C. C. n. s. 278 (1902).

The words "has or had" in this section contemplate a suit against a corporation in the county in which its principal place of business had been located, although it had been removed to another county.

Campbell v. Park Co., 3 N. P. 159; 4 L. D. 152 (1896).

See Coal Co. v. Coal Co., 7 N. P. 191; 6 L. D. 178 (1897); s. c., 4 N. P. 115.

Personal service upon the president of a corporation, not having its principal office or place of business in Cincinnati, does not confer jurisdiction on the Superior Court. Schrieffer v. Safe Cabinet Co., 21 N. P. n. s. 127 (1917).

A trust company, having its principal place of business in one county, and a branch in another county, is not "situated" in the latter county within the meaning of the county depository law. State v. Oviatt, 4 N. P. n. s. 481, 17 L. D. 451 (1906).

County in which corporation has an office or agent. A sales agent is not a managing agent and an action may not be maintained in a county in which it has a sales agent only. Monnett v. Goodyear Co., 23 N. P. n. s. 486 (1920).

Suits against joint defendants. Quo warranto proceedings against several corporations, seeking a forfeiture of their corporate franchises for an illegal agreement or conspiracy in restraint of trade and in violation of the anti-trust laws, may be commenced in any county where one or more of the defendant corporations has its principal office or place of business, and summons may be issued to other counties for the other defendant corporations.

State v. King Bridge Co., 7 C. C. n. s. 557; 18 C. D. 147 (1906).

A domestic corporation of another county may be sued jointly with a resident of the county where the suit is brought, and, under G. C. § 11282 summons may issue to the county where such corporation has its principal office or place of business.

Baldwin v. Wilson, 7 N. P. 506; 9 L. D. 620 (C. P. 1900).

Stanton v. Enquirer Co., 7 N. P. 589; 9 L. D. 801 (C. P. 1899).

The receiver of a corporation may be sued in a county other than that of his domicile when joined as a defendant with a resident of the county where suit is brought.

Rogers v. Railroad Co., 6 N. P. 291; 8 L. D. 107 (C. P. 1899).

Insurance company. Under this section jurisdiction may be obtained over a defunct insurance company in a suit brought in a county other than the one in which its principal office is situated; but such jurisdiction does not extend to trustees appointed under G. C. § 12325 et seq. to administer the affairs of such company, and a motion to quash the service as to the trustees individually should be sustained.

Lernenman v. Insurance Co., 11 N. P. n. s. 58; 21 L. D. 269 (C. P. 1911.)

Oil or gas company. Where a corporation has oil or gas wells in a county, it may, under this section, be sued therein although its principal office is in another county.

Hankinson v. Gas Co., 10 N. P. n. s. 269 (C. P. 1910).

Consent or waiver. An action against a corporation may be brought by consent of the parties in a county where the corporation is not situated and has no office, officer or agent, if the court has jurisdiction of the subject matter of the action. Such consent is evidenced by answer and trial on the merits.

Reece v. Hydraulic Co., 12 C. D. 728.

The appearance of a defendant corporation in court for the sole purpose of objecting, by motion, to the jurisdiction of the court over it, is not an appearance in the action.

Kinsey v. Iron Works, 4 N. P. 293; 6 L. D. 446 (C. P. 1897).

President or other chief officer. Where the president is a non-resident of, or is absent from, the state, the vice president is the "chief officer" upon whom service may be made. *Towne v. National Co.*, 10 Ohio App. 265, 29 O. C. A. 375 (1917); motion to certify record overruled, 15 O. L. R. 559.

The secretary is not a "chief officer". *Akron Co. v. Hammond*, 24 C. C. n. s. 278 (1902).

Section 11273. (Action against railroad company, interurban, suburban or street railroad, and stage companies, where brought.) An action against the owner or lessee of a line of mail stages or other coaches, a railroad company, interurban railroad company, suburban railroad company or street railroad company owning or operating a railroad, in-

terurban railroad or street railroad within the state, or against a transportation company owning or operating an electric traction road located upon either bank of a canal belonging to the state, may be brought in any county through or into which such line, railroad, interurban railroad, street railroad or electric traction railroad, passes or extends; provided that all actions against such owner, lessee or company for injuries to person or property, or for wrongful death must be brought in the county in which the cause of action or some part thereof, arose, or in the county in which the claimant for injuries to person or property or one whose wrongful death was caused, resides at the time when the cause of action arose, if the road or line of such owner, lessee or company or any part thereof be located in such county. If no part of such line or road be located in such county, then such actions may be brought in the county in which any part of such road or line is located, nearest the place where the claimant for injuries to person or property or the one whose wrongful death was caused, so resided. (109 v. 81; 108 (Pt. 1) v. 49; R. S. Sec. 5024; April 3, 1866, 63 v. 87, § 49; R. S. 1880, § 5027; April 16, 1900, 94 v. 270, § 5024; April 23, 1902, 95 v. 258.)

In this section the word "may" does not mean "must". *Casebolt v. Railroad Co.*, 5 Ohio App. 431; 26 C. C. n. s. 161 (1916). *Contra*, *Kinsey v. Iron Works*, 4 N. P. 293; 6 L. D. 446 (1897); *Johnson v. Railway Co.*, 5 N. P. n. s. 347; 18 L. D. 247 (1907). This section refers expressly to railroad companies.

Rogers v. Railroad Co., 6 N. P. 291; 8 L. D. 107 (C. P. 1899).

Collins v. Railroad Co., 7 N. P. 270; 7 L. D. 445 (C. P. 1898).

An action against an Ohio railroad company may be brought under § 11272. Section 11273 is not exclusive. *Casebolt v. Railroad Co.*, 5 Ohio App. 431; 26 C. C. n. s. 161 (1916).

The petition need not allege that the railroad of the defendant passes into or through the county in which the action is brought. *Railroad v. Morey*, 47 O. S. 207 (1890).

But the court cannot take judicial notice of the fact. *State v. Railroad*, 18 C. C. n. s. 546 (1912).

Where the petition alleges that the railroad of the defendant passes through the county, in order to raise the issue of jurisdiction, the defendant should file an answer denying the allegation. Admission in open court, by plaintiff, that the railroad does not extend into the county, does not, alone, deprive the court of jurisdiction nor authorize a writ of prohibition. *Railroad v. Common Pleas Court*, 6 Ohio App. 244, 28 O. C. A. 364 (1916).

Where actions brought. A railroad company may be served with summons in a county through which it does not run when properly joined as a codefendant.

Railroad Co. v. McPeck, 16 C. C. 87; 8 C. D. 742 (1898).

Brooks v. Railway Co., 15 L. D. 549 (C. P. 1904).

A railroad company may be sued in a county where it operates a leased line.

Railway Co. v. McLean, 1 C. C. 112; 1 C. D. 67 (1885); *aff'd*, no rep., 19 W. L. B. 217.

Swan v. Railroad Co., 4 L. D. 71 (1895).

Jurisdiction is not obtained over a railroad company in an action brought in the county where its principal office is located, where its line of road does not pass through the county.

Johnson v. Railway Co., 5 N. P. n. s. 347; 18 L. D. 247 (C. P. 1907).

See *Brooks v. Railway Co.*, 15 L. D. 549 (1904).

Foreign railroad companies. An action against a foreign railroad company may be brought in a county through which its road passes.

Swan v. Railroad Co., 4 L. D. 71 (1895).

Consent or waiver. This section relates solely to the jurisdiction of the person, and it is not necessary that the petition should state that its road passes into or through the county where the action is brought. A railroad company, like a natural person, submits itself to the jurisdiction of the court by appearing for any other purpose than to object to such jurisdiction.

Railroad Co. v. Morey, 47 O. S. 207 (1890).

Where a railroad company objects to jurisdiction over its person and expressly reserves its rights in that behalf, it does not voluntarily submit to the jurisdiction by answering on the merits, where the question of jurisdiction can only be decided by a trial on the merits.

Johnson v. Railway Co., 5 N. P. n. s. 347; 18 L. D. 247 (C. P. 1907).

Motion to quash summons as an entry of appearance, see

Railway Co. v. McLean, 1 C. C. 112; 1 C. D. 67 (1885).

The filing of a motion for an interpleader has been held not to amount to the entering of an appearance.

Squire v. Railroad Co., 1 C. C. n. s. 354; 15 C. D. 30 (1903).

Section 11274. (Against turnpike companies.) An action other than one of those mentioned in sections eleven thousand and two hundred and sixty-eight, eleven thousand two hundred and sixty-nine, eleven thousand two hundred and seventy and eleven thousand two hundred and seventy-one against a turnpike road company, may be brought in any county in which any part of the road lies. (R. S. Sec. 5025; March 14, 1853, 51 v. 57, § 50; R. S. 1880, § 5028; April 16, 1900, 94 v. 270, § 5025; S. & C. 960.)

Section 11275. (When this chapter does not apply.) When the charter of a corporation created under the laws of this state prescribed the place where suit must be brought, that provision shall govern. (R. S. Sec. 5026; March 14, 1853, 51 v. 57, § 51; R. S. 1880, § 5029; April 16, 1900, 94 v. 270, § 5026; S. & C. 960.)

Under the charter of the Portage County Mutual Insurance Company suit can only be brought in Portage County.

Insurance Co. v. Stukey, 18 Ohio 455 (1849).

Insurance Co. v. West, 6 O. S. 599 (1856).

This section is not applicable where the company has acted under general laws and thus lost its special rights.

Insurance Co. v. Bowersox, 6 C. C. 275; 3 C. D. 451 (1892).

Section 11276. (Further provisions as to non-residents.)

An action other than one of those mentioned in sections eleven thousand two hundred and sixty-eight, eleven thousand two hundred and sixty-nine, eleven thousand two hundred and seventy and eleven thousand two hundred and seventy-one against a non-resident of this state, or a foreign corporation, may be brought in any county in which there is property of, or debts owing to the defendant, or where such defendant is found, or where the cause of action or some part thereof, arose. (R. S. Sec. 5027; March 14, 1853, 51 v. 57; § 52; R. S. 1880, § 5030; April 16, 1900, 94 v. 270, § 5027; April 17, 1902, 95 v. 203; S. & C. 960.)

The general rule here declared has no reference to actions upon causes arising in this state. No matter where the cause arose, if the subject matter be within the jurisdiction of the court. Nor is the rule confined to corporations, other than insurance companies. Any foreign corporation which may be found in this state, may be sued in any county in this state in any court having jurisdiction of the subject matter of the suit.

Handy v. Insurance Co., 37 O. S. 366, 371 (1881).

A plaintiff may sue in Ohio for an injury to property in Ohio occasioned by the diversion of water in Pennsylvania.

Thayer v. Brooks, 17 Ohio 489 (1848).

Construction of section prior to amendment of 1902 (95 v. 203).

See Handy v. Insurance Co., 37 O. S. 366 (1881).

Foreign corporations. The words "foreign corporation" in attachment cases under the original form of G. C. § 10253 meant foreign to the state, not foreign to the county.

Boley v. Trust Co., 12 O. S. 139 (1861).

Where a foreign corporation has its office and business in one county, and has a debtor in another county, it may be sued and the debts attached in the latter county, personal service being had in the county where its offices are situated.

Rainey v. Jefferson Iron Works, 8 C. C. 674; 4 C. D. 231 (1894).

An action against a foreign life insurance company may be brought where the death of the insured occurred.

Householder v. Kansas Life Association, 6 N. P. 520; 7 L. D. 544 (1898).

Where there are debts owing to a defendant corporation in a county, an action may be brought, under this section, in such county.

Rosenbaum Co. v. Cohen & Mack, 13 C. C. n. s. 102 (1910).

A freight car, used in interstate traffic, and in transit into and from the state, is not subject to seizure in attachment for the purpose of giving jurisdiction.

Buckeye Buggy Co. v. Railway Co., 3 O. L. R. 426; 16 L. D. 279 (C. P. 1905).

Pullman Co. v. Linke, 11 O. L. R. 64; 203 Fed. 1017 (D. C. 1913).

Service.

No jurisdiction can be acquired over a non-resident of the state, unless he is personally served, or appear, or unless the action is one in which service by publication can be made.

Williams v. Welton, 28 O. S. 451 (1876).

Personal service is not necessary in attachment or garnishment pro-

ceedings against a non-resident debtor. Service by publication is sufficient.

Goebel v. Bank, 3 N. P. 109; 4 L. D. 127 (1896).

Section 11288. (How served upon corporation.) A summons against a corporation may be served upon the president, mayor, chairman or president of the board of directors or trustees, or other chief officer; or if its chief officer be not found in the county, upon its cashier, treasurer, secretary, clerk, or managing agent; or, if none of such officers can be found, by a copy left at the office or usual place of business of the corporation with the person having charge thereof. If such corporation is a railroad company, whether foreign or domestic, and whether the charter thereof prescribes the manner and place, or either, of service of process thereon, or, if it be a street railroad company, owning or operating a street railroad passing through two or more counties, or a transportation company owning or operating an electric traction road located upon either bank of any canal belonging to the state, the summons may be served upon any regular ticket or freight agent of such railroad company or street railroad company or transportation company; or, if there be no such agent, then upon any conductor in charge of any train or car upon such railroad or street railroad, or upon any motorman or other person in charge of any electric traction car engine or motor upon any such electric traction road, in any county in this state, in which such railroad, street railroad, or electric traction road is located, or through which it passes. But, if the defendant is an incorporated river transportation company, whether organized under the laws of this or another state, the service of a summons may be upon the master, or other chief officer, or any of its steamboats or other craft, or upon any of its authorized ticket or freight agents, at any port where it transacts business. (R. S. Sec. 5041; 65 v. 116, § 66; 76 v. 145; § 10; 51 v. 57, § 66; S. & C. 963; S. & S. 542; R. S. 1880; § 5044; 94 v. 273, § 5041; April 23, 1902, 95 v. 258.)

Service under this section is limited to Ohio corporations and such foreign corporations as are therein described. Hurd v. Ransom, 13 Ohio App. 135, 31 O. C. A. 477 (1920); Railroad v. Transportation Co., 32 O. S. 116.

This section and § 11290 are exclusive of each other. Section 11290 furnishes the only method of service on foreign corporations, other than those described in this section. Hurd v. Ransom, 13 Ohio App. 135, 31 O. C. A. 477 (1920); Goode v. Association, 3 O. L. R. 600, 16 L. D. 586 (C. P. 1906); Barney v. Railroad, 1 Handy 571 (1855). *Contra*, Lively v. Pieton, 218 Fed. 401 (C. C. A. Ohio 1914); Consolidated Co. v. Maumee Co., 284 Fed. 550.

President or other chief officer.

Service on the president or chief officer must be had personally. Service by leaving a certified copy of the summons at the usual place of residence of the president is not a compliance with this section, is defective and will be quashed on motion.

State v. King Bridge Co., 7 C. C. n. s. 557; 18 C. D. 147 (1906).

Where a suit has been rightfully brought against a corporation, service may be had on the president in that or any other county, or if service can be otherwise made in the county by serving other officers, etc., it is not necessary to follow the president to another county.

Campbell v. Woodsdale Park Co., 3 N. P. 159; 4 L. D. 152 (1896).

When the president is a non-resident of, or is absent from, the state, the vice president is the "chief officer" upon whom service may be made. *Towne v. National Co.*, 10 Ohio App. 265; 29 O. C. A. 375 (1917); motion to certify record overruled, 15 O. L. R. 559.

The secretary is not a "chief officer". *Akron Co. v. Hammond*, 24 C. C. n. s. 278 (1902).

Subordinate officers or agents. When service is made upon a subordinate officer, it must appear from the return that the chief officer of the corporation could not be found. When made by copy left at the office or usual place of business of such corporation, with the person having charge thereof, the return must show that none of the specified officers, either chief or subordinate, could be found in the county.

Fee v. Iron Co., 13 O. S. 563 (1862).

Bucket Pump Co. v. Eagle Iron Co., 21 C. C. 229 (1900).

State v. Standard Oil Co., 15 C. C. n. s. 212 (1907).

A return by a sheriff which sets forth that on a day named "I served this writ on the within company by delivering a true and certified copy thereof to the treasurer" (naming him) "the president or other chief officers not found in my county" is in exact conformity with this section.

Parker v. Iron Works, 3 C. C. n. s. 547; 13 C. D. 444 (1902).

A service of summons on a corporation, "by delivering a true copy of this writ, with all indorsements thereon, to John Doe, secretary of the company, no other chief officer being found," is a compliance with the statute.

Hotel Co. v. Trust Co., 25 W. L. B. 375 (1891); s. c., 25 W. L. B. 295.

A return of an order of attachment reciting that "the attachment was served upon the following named persons, and firms: The S. G. L. Company" is insufficient and does not give the court jurisdiction.

Prout v. Post, 12 L. D. 141 (C. P.).

Service on a travelling solicitor of business is insufficient. *Wilson v. Railroad*, 16 W. L. B. 6.

Service on the chief clerk of the superintendent is not service on a chief officer. *Railway Co. v. Copenhagen*, 12 C. C. n. s. 69 (1908).

Joint-stock company. A joint-stock company, organized under the laws of the state of New York, and having substantially the character and powers of a corporation, may be served with summons in this state in the same manner as corporations are served.

Express Co. v. State, 55 O. S. 69 (1896).

Defunct company. As the last directors of a defunct corporation are in effect the corporation, service on them is sufficient.

Warner v. Callender, 20 O. S. 190 (1870).

In re Columbus Bicycle Co., 1 N. P. n. s. 461; 14 L. D. 407 (C. P. 1904).

Managing agent.

See also note to § 11290.

Where debts are owing to a corporation in a county, service may be made on the secretary or managing agent, if the president or other chief officer be not found in the county. Where a summons and order of attachment were issued and returned together, the two returns may be construed together as showing a proper service of summons.

Rosenham v. Cohen & Mack, 13 C. C. n. s. 102 (1910).

Where service is made on a managing agent, but the sheriff failed to so designate the agent served, leave may be granted to amend the return.

Hankinson v. Gas Co., 10 N. P. n. s. 269 (C. P. 1910).

Where a return showed service on a managing agent, and an affidavit supporting a motion to quash the service denied that the person served was a managing agent, and no evidence was presented in support of the return, the motion to quash was granted.

State v. Standard Oil Co., 15 C. C. n. s. 212 (1907).

Railroad companies.

President or chief officer. Service on the president of a railroad company, or upon the general superintendent in the event that the president, vice-president, secretary, treasurer or other chief officer can not be found, is authorized by this section. This section does not require service upon ticket or freight agents exclusively, but extends the class of agents upon whom service may be made so as to include ticket and freight agents.

Brooks v. Railway, 15 L. D. 549 (C. P. 1904).

Service on the chief clerk of the superintendant of a railroad company is not service upon a chief officer, and where such service is had upon a petition in which a wrong company is named as defendant, the substitution of the name of the proper company, and the amendment of the return of summons to conform thereto, is ineffectual to bring the proper company into court.

Railroad Co. v. Copenhagen, 12 C. C. n. s. 69; 21 C. D. 515 (1908).

Regular ticket or freight agent. Service on the ticket agent of a company operating a leased road is valid.

Railway Co. v. McLean, 1 C. C. 112; 1 C. D. 67 (1885).

See § 8814.

Service on agent of lessor company.

See § 8814.

Collins v. Railroad Co., 7 N. P. 270; 7 L. D. 445 (1898).

Service may be made upon a ticket or freight agent notwithstanding the presence of superior officers in the county.

State v. Standard Oil Co., 15 C. C. n. s. 212 (1907).

A return that the summons was served upon a "ticket agent and general agent" is defective in not showing that the person served was "its regular ticket agent." *Tallman v. Railroad Co.*, 45 Fed. 156; 6 O. F. D. 728 (1891).

But the defect was held cured by affidavit of the officer that to his personal knowledge, the person served was the "regular" ticket agent, and that the word "regular" was omitted through oversight. *Fountain v. Railway*, 210 Fed. 982 (D. C. 1913).

Service on a ticket agent was held sufficient, though the company had no line of road and did not operate in the county.

Woodcock v. Railroad Co. (U. S. C. C.), 46 W. L. B. 121 (1901).

Contra, *State v. Railroad*, 18 C. C. n. s. 546 (1912).

The service of a summons on a regular ticket and freight agent, at and in charge of an established station, the road being in the hands of

a receiver, and such agent being an agent of the receiver, is not good service as against the company.

Railroad Co. v. Orme, 1 C. C. 511; 1 C. D. 285 (1885).

Collins v. Baltimore, etc., R. R. Co., 7 N. P. 270; 7 L. D. 445 (1898).

But see § 11233.

Where a railroad enters the jurisdiction by ferryboat only, service on a ticket agent located in the jurisdiction is sufficient.

Williams v. Railroad Co., 31 W. L. B. 115 (1894).

Foreign railroad company. So far as this section provides for service on foreign railroad companies, it is cumulative and not restrictive or exclusive, and does not affect § 11290.

Wheeling, etc., Co. v. Railroad Co., 1 C. S. C. R. 311; 32 O. S. 135 (1877).

Compare Goode v. Association, 3 O. L. R. 600; 16 L. D. 586 (C. P. 1906).

Service can not be made on a foreign railroad company by serving the writ upon a mere traveling solicitor of business for such company.

Wilson v. Northern Pacific R. R. Co., 16 W. L. B. 6 (1886).

Defective service. On a motion to vacate a judgment, evidence is admissible tending to show that service was not in fact made. The return of the officer is not conclusive.

Parker v. Iron Works, 3 C. C. n. s. 547; 13 C. D. 444 (1902).

Whether jurisdiction over a corporation has been acquired is a question that may be raised by a motion to quash the service and set aside the return.

Burke v. Construction Co., 9 N. P. n. s. 577 (C. P. 1910).

U. S. v. Telephone Co., 29 Fed. 17, 5 O. L. D. 558.

An order sustaining a motion to strike out a special answer as to the regularity of service is not a final order which may be reviewed on error in advance of the final determination of the action. Equitable Co. v. McDonald, 14 Ohio App. 56 (1920).

Suit by resident of Ohio against Ohio corporation in foreign state.

See Cincinnati, etc., R. R. Co. v. Emery, 17 W. L. B. 154 (1837).

Section 11289. (On an insurance company.) When the defendant is an insurance company, and the action is brought in a county in which it has an agency, the service may be upon the chief officer of such agency. (R. S. Sec. 5042; 51 v. 57, § 67; R. S. 1880, § 5045; April 16, 1900, 94 v. 273, § 5042.)

Foreign insurance companies; agent for service of process.

See §§ 9369, 9380, 9381, 9561.

The special modes of service on foreign insurance companies are cumulative and not exclusive. Service may be made on the managing agent under § 11290 or on the local agent under this section.

Householder v. Association, 6 N. P. 520; 8 L. D. 321 (C. P. 1898).

Distilling Co. v. Insurance, 7 W. L. B. 341 (1882).

Section 11290. (On foreign corporation.) When the defendant is a foreign corporation, having a managing agent in this state, the service may be upon such agent. (R. S.

Sec. 5043; 51 v. 57, § 68; S. & C. 963; R. S. 1880, § 5046; 94 v. 274, § 5043.)

Service in actions before justices of the peace, § 10244.

Unless a foreign corporation is "doing business" in the state, jurisdiction to render a personal judgment against it can not be acquired. Jurisdiction to render a personal judgment against a foreign corporation can not be acquired unless the corporation is "doing business" in the state "in such a manner and to such an extent as to warrant an inference that through its agents it was present there". *Green v. Railway*, 205 U. S. 530, 532; *Empire Fuel Co. v. Lyons*, 257 Fed. 890 (C. C. A. Ohio 1919); *Robert Mitchell Furniture Co. v. Selden Breck Construction Co.*, 257 U. S. 213 (1921); *Cons. Iron & Steel Co. v. Maumee Iron & S. Co.*, 284 Fed. 550 (C. C. A. 8th Cir. 1922).

The mere presence of an officer or agent in the state on his personal affairs does not carry the foreign corporation into the state, and service of summons on such officer or agent does not confer jurisdiction. *General Investment Co. v. Railway*, 250 Fed. 160 (C. C. A. Ohio 1918); *aff'd*, — U. S. —; 67 L. Ed. 106; *Harvester Co. v. Kentucky*, 234 U. S. 579 (1914); *Shinkle v. Machine Co.*, 19 N. P. n. s. 104 (1916); *Dickey v. Iron Works Co.*, 19 N. P. n. s. 492 (1915).

The presence of a corporate officer in Ohio for the purpose of attending a convention is not for the purpose of doing business in the state. *Hurd v. Ransom*, 13 Ohio App. 135; 31 O. C. A. 477 (1920).

But where the general manager of a foreign corporation is in the state on corporate business, jurisdiction over the corporation may be acquired by service on him. *Twin Lakes Co. v. Dohner*, 242 Fed. 399 (C. C. A. Ohio 1917).

The fact that the business of a foreign corporation is entirely interstate in its character does not render it immune from the service of process in a state. *Harvester Co. v. Kentucky*, 234 U. S. 579 (1914).

What constitutes doing business in Ohio? See note to § 194.

When not exclusive of other modes of service. Sections 11289 and this section are cumulative and not exclusive of each other, and a foreign insurance company may be served under either section.

Householder v. Association, 6 N. P. 520; 8 L. D. 321 (C. P. 1898).

Distilling Co. v. Insurance Co., 7 W. L. B. 341 (1882).

See *Rocke v. Raney*, 15 W. L. B. 333 (Super. Ct. Cin. 1886).

It has been held that § 11288 and this section are exclusive of each other and that this section provides the only mode of obtaining service on a foreign corporation.

Hurd v. Ransom, 13 Ohio App. 135, 31 O. C. A. 477.

Goode v. Association, 3 O. L. R. 600; 16 L. D. 586 (C. P. 1906).

Barney v. Railroad Co., 1 Handy 571 (1855).

But it has been held in federal courts that this section is not exclusive and that service upon the president of a foreign corporation (under § 11288) is valid. *Lively v. Picton*, 218 Fed. 401 (C. C. A. Ohio 1914); *Consolidated Iron & Steel Co. v. Maumee Co.*, 284 Fed. 550 (C. C. A. 8th Cir. 1922).

But in so far as § 11288 provides for service on foreign railroad companies, it is cumulative and not exclusive of this section, and service may be made on its managing agent, whose duties are to contract for freight and to attend to transfers of freight.

See *Wheeling, etc., Co. v. Railroad Co.*, 1 C. S. C. R. 311; s. c., 32 O. S. 116, 135 (1877).

Service may be made on a managing agent notwithstanding an agent for service has been appointed and his name filed with secretary of state. Lesser Cotton Co. v. Yates, 69 Ark 396; 63 S. W. 997 (1901). Venner v. Water Co., 40 Colo. 212; 90 Pac. 623 (1907). State v. King Bridge Co., 7 C. C. n. s. 557, 569, 570; 18 C. D. 147 (1906).

Managing agent. A "managing agent" is an agent having general supervision over the affairs of a corporation. The term implies control over the business, or some part of the business of a corporation.

Bucket Co. v. Steel Co., 21 C. C. 229; 11 C. D. 418 (1900).

Goode v. Association, 3 O. L. R. 600; 16 L. D. 586 (C. P. 1906).

U. S. v. Telephone Co., 29 Fed. 17; 5 O. F. D. 558 (1886).

A letter from a corporation referring to a person as "our Cincinnati agent," without evidence showing that such person has control or supervision over some portion of its affairs, is not sufficient to show that he is a "managing agent."

Bucket Co. v. Steel Co., 21 C. C. 229; 11 C. D. 418 (1900).

Where a foreign corporation is garnishee, service of the order of garnishment may be made on the managing agent.

Rocke v. Raney, 15 W. L. B. 333 (Super. Ct. Cin. 1886).

Ritter, etc., Co. v. Mzik, 3 C. C. n. s. 125; 13 C. D. 164 (1901).

Rainey v. Maas, 51 Fed. 580; 7 O. L. D. 166; 28 W. L. B. 246 (1892).

Where the managing agent is himself the plaintiff in the action, service on him will not confer jurisdiction. Walsh v. Motors Co., 20 N. P. n. s. 159 (1917).

Likewise where the managing agent was interested with the plaintiff both personally and as a stockholder in plaintiff corporation, service on him was held not to confer jurisdiction. Cons. Iron & Steel Co. v. Maumee Co., 284 Fed. 550 (C. C. A. 8th Cir. 1922).

Held to be a managing agent. Local agent of an express company who keeps an office, and transacts all the business of the company at the place.

American Express Co. v. Johnson, 17 O. S. 641 (1867).

Wheeling, etc., Co. v. Railroad Co., 1 C. S. C. R. 311; s. c., 32 O. S. 116, 135.

President of the company who resides and transacts corporate business within the state.

Fath Co. v. Distillery Co., 1 Hosea 535.

Sales agent in charge of stock of goods.

Toledo, etc., Co. v. Scale Co., 142 Fed. 919; 15 O. F. D. 151 (C. C. A. 1906).

Man in charge of installation of machinery, sent from the plant of the foreign corporation with authority to hire whatever help was needed. Beach v. Kerr Co., 243 Fed. 706; 15 O. L. R. 389 (D. C. Ohio 1917).

Held not to be a managing agent. Sales agent soliciting orders, which are submitted to the home office for approval.

Bucket Co. v. Steel Co., 21 C. C. 229; 11 C. D. 418 (1900).

Factor or commission merchant.

See Gibbin v. Coal Co., 2 C. S. C. R. 75 (1870).

Traveling passenger agent of a railroad company.

Wilson v. Railroad Co., 16 W. L. B. 6 (1886).

Collector of subscriptions for lands of a foreign corporation, although a director thereof.

Foot v. Commercial Co., 7 C. C. n. s. 531; 16 C. D. 378 (1904).

A director.

Barney v. Railroad Co., 1 Handy 571 (1855).

Goode v. Association, 3 O. L. R. 600; 16 L. D. 586 (C. P. 1906).

Secretary and treasurer. McCullough v. United Corp., 247 Fed. 880 (D. C. Ohio 1918).

Service on agent designated by foreign corporation under §§ 179, 181. Service on such agent is sufficient to give an Ohio court jurisdiction of a cause of action arising in another state.

Burke v. McClintic Marshall Co., 9 N. P. n. s. 577 (1910).

Madison v. Construction Co., 11 N. P. n. s. 634; 21 L. D. 368 (1911).

But where a foreign contracting corporation completed its work in Ohio several months prior to the service of a summons in an action arising in another state, and thereafter did no business in Ohio, the service on the designated agent was set aside. The fact that the corporation made a Willis law report under § 5499 after service of the summons did not change the result. In the opinion of the United States Supreme Court service on the designated agent is limited by § 181 to "liability incurred within the state." Robert Mitchell Furniture Co. v. Selden Breck Construction Co., 257 U. S. 213 (1921).

It is held that service may be made on the designated agent in his own action against the corporation.

Kennedy v. Account Co., 1 Dayton T. R. (Iddings) 154.

Where a foreign corporation has designated an agent for the service of process, service may be made either on the designated agent, or on a managing agent.

See State v. Bridge Co., 7 C. C. n. s. 557, 569, 570; 18 C. D. 147 (1906).

Lesser Cotton Co. v. Yates, 69 Ark. 396; 63 S. W. 997 (1901).

Venner v. Water Co., 40 Colo. 212; 90 Pac. 623 (1907).

Process issued from one county may be served upon the designated agent in another county. Blanton v. Adding Machine Co., 13 N. P. n. s. 423 (1912).

Where service of an order of garnishment was made on a district manager, who occupied the same office with the designated agent, and the copy of the garnishee process came into the possession of the designated agent before the filing of a motion to discharge the attachment, the service was held valid as against the defendant.

Riter, etc., Co. v. Mzik, 3 C. C. n. s. 125; 13 C. D. 164 (1901).

Return. While only substantial compliance with the statute is sufficient, a return which does not show that service was had upon the managing agent of the company in the state, but simply "upon defendant's agent," is not sufficient.

Fleckmeyer Wheel Co. v. Commercial Wheel Co., 7 N. P. 613; 8 L. D. 686 (1897).

A service upon J. P. W., agent of said Lamar Insurance Co., and the chief officer of its agency in the city of Cincinnati, no chief officer of said company found," is good as service upon a managing agent.

Mohr Distilling Co. v. Lamar Insurance Co., 7 W. L. B. 341 (1882).

A return showing service of summons by delivering a copy to a superintendent of the corporation, "he being in charge of the usual place of doing business of said company," it not appearing that he is the "managing agent" is defective, and will be quashed where it appears that the corporation has designated another person as agent for service of process.

State v. King Bridge Co., 7 C. C. n. s. 557; 18 C. D. 147 (1906).

Where service is made on a managing agent, but the sheriff failed

to so designate the agent served, leave may be granted to amend the return.

Hankinson v. Gas Co., 10 N. P. n. s. 269 (C. P. 1910).

Validity of service on Ohio corporation in foreign state.

See Cincinnati, etc., R. R. Co. v. Emery, 17 W. L. B. 154 (1837).
Toledo Co. v. Hill, 244 U. S. 49 (1917).

CONSTRUCTIVE SERVICE.

Section 11292. (Service by publication.) Service may be made by publication in any of the following cases:

1. In an action for the recovery of real property or of an estate or interest therein, when the defendant is not a resident of this state or his place of residence can not be ascertained;

2. In an action for the partition of real property, when the defendant is not a resident of this state or his place of residence can not be ascertained;

3. In an action to foreclose a mortgage or to enforce a lien or other incumbrance or charge on real property, when the defendant is not a resident of this state or his place of residence can not be ascertained;

4. In an action to compel the specific performance of a contract for the sale of real property, when the defendant is not a resident of this state or his place of residence can not be ascertained;

5. In an action to establish or set aside a will, when the defendant is not a resident of this state or his place of residence can not be ascertained;

6. In an action by an executor, administrator, guardian, or trustee seeking the direction of the court respecting the trust or property to be administered and the rights of the parties in interest, when the defendant is not a resident of this state or his place of residence can not be ascertained;

7. In an action in which it is sought by a provisional remedy to take or to appropriate in any way property of the defendant, when the defendant is not a resident of this state or is a foreign corporation or his place of residence can not be ascertained;

8. In an action against a corporation organized under the laws of this state, which has failed to elect officers or to appoint an agent upon whom service of summons can be made, and which has no place of doing business in this state;

9. In an action which relates to or the subject of which is real or personal property in this state, when the defend-

ant has or claims a lien thereon, or an actual or contingent interest therein, or the relief demanded consists wholly or partly in excluding him from any interest therein, and such defendant is not a resident of this state, or is a foreign corporation, or his place of residence can not be ascertained;

10. In an action against an executor, administrator, or guardian who has given bond as such in this state, but at the time of the commencement of the action is not a resident of this state or his place of residence can not be ascertained;

11. In an action or proceeding for a new trial or other relief after judgment, or to impeach a judgment or order for fraud, or to obtain an order of satisfaction thereof, when the defendant is not a resident of this state or his place of residence can not be ascertained;

12. In an action where the defendant, being a resident of this state, has departed from the county of his residence, with intent to delay or defraud his creditors, or to avoid the service of a summons, or keeps himself concealed with like intent;

13. In a proceeding in error when the defendant has no attorney of record in this state and is not a resident of and absent from this state, or has left the state to avoid the service of a summons in error, or so conceals himself that it can not be served upon him. (R. S. Sec. 5045; 65 v. 208; § 1; 74 v. 151, § 70; S. & C. 964; S. & S. 543; R. S. 1880, § 5048; 77 v. 45; 87 v. 225; 94 v. 274, § 5045.)

A foreign dissolved corporation may be served by publication.

Vallette v. Bank, 2 Handy 1 (1855).

A plaintiff in an attachment suit, upon a showing that summons can not be served upon the defendant foreign corporation within the county, is entitled to obtain service by publication.

Foote v. Commercial Co., 7 C. C. n. s. 531; 16 C. D. 378 (1904).

Constructive service has no further effect than to give regularity to proceedings for the proper application of the attachment property.

Supply Co. v. Koen, 64 O. S. 422 (1901).

A personal judgment in an attachment suit is void, where the only service upon the defendant was by publication.

Leman v. MacLennan, 7 C. C. n. s. 205; 18 C. D. 137 (1905); *aff'd*, no rep., 75 O. S. 643.

Jurisdiction may be acquired under this section, in an action for the recovery of money, against a non-resident of the state having property within the state sought to be taken by garnishment.

Bank v. Railway, 21 O. S. 221 (1871).

Where non-resident stockholders of an Ohio corporation, by agreement, gave preferred stockholders the right to elect a certain number of the directors, but subsequently repudiated their agreement, a suit by preferred stockholders to enforce their voting rights is one relating to property in the state under par. 9 of this section. *Shinkle v. Machine Co.*, 19 N. P. n. s. 104 (1916).

Section 11351. (Pleadings to be subscribed and verified.)

Every pleading and motion must be subscribed by the party or his attorney, and every pleading of fact, except as provided in the next following section, must be verified by the affidavit of the party, his agent or attorney. When a corporation is the party, the verification may be made by an officer thereof, its agent or attorney. When the state, or an officer thereof in its behalf, is the party, the verification may be made by any person acquainted with the facts, the attorney prosecuting or defending the action, the prosecuting attorney, or the attorney-general. (R. S. Sec. 5102; March 14, 1853, 51 v. 57, § 106; 70 v. 54, § 105; S. & C. 982.)

When a pleading is verified by an agent or attorney of a corporation, the verification must give the reason why it is made by the agent or attorney, and not by an officer. The verification should contain a statement that the case is included in one of the classes defined in G. C. § 11358. The pleading of a corporation may be verified by an officer as by a party.

Manufacturing Co. v. Hedges, 76 O. S. 91 (1907); affirming 10 C. C. n. s. 14.

When in a verification of a pleading by an agent or attorney, the affiant states that he has personal knowledge of the facts, he may state in his affidavit that he believes the facts stated to be true.

Manufacturing Co. v. Hedges, 76 O. S. 91 (1907); affirming 10 C. C. n. s. 14.

Section 11416. (Change of venue in corporation suit.)

When a corporation having more than fifty stockholders is a party in an action pending in a county in which the corporation keeps its principal office, or transacts its principal business, if the opposite party makes affidavit that he can not, as he believes, have a fair and impartial trial in that county, and his application is sustained by the several affidavits of five creditable persons residing in such county, the court shall change the venue to the adjoining county most convenient for both parties. (R. S. Sec. 5030; 50 v. 100, § 1; S. & C. 1140; R. S. 1880, § 5033; 94 v. 271, § 5030; 94 v. 378, § 5033.)

While applicable only to civil cases, this section defines the policy of the state in protecting the rights of litigants to a fair and impartial jury. A defendant charged by indictment with the embezzlement of funds of an insolvent banking corporation which has 257 stockholders and over 5,000 depositors residing in the county, is entitled to a change of venue upon making proof by affidavit pursuant to this section. *Baxter v. State*, 91 O. S. 167 (1914).

Constitutionality. This act is not in conflict with either the state or federal constitution.

Snell v. Street Railway, 60 O. S. 256 (1899); s. c., 66 O. S. 670.
Street Railway v. Snell, 193 U. S. 330; 15 O. F. D. 895 (1904).

Affidavit. It is not necessary, to entitle the applicant to the benefit of the statute in a case for which it provides, that his affidavit shall state the grounds of his belief that he can not have a fair and impartial trial in the county in which the action is pending, nor that the sustaining affidavits shall state the ground of their belief; it is sufficient, that the affidavit of the applicant state that he can not, "as he believes," have a fair and impartial trial in that county, and his application is "sustained within the purview of the statute," when there are filed the several affidavits of five credible persons residing in the county, stating that they entertain the same belief. When so complied with, the statute is mandatory.

Snell v. Street Railway Co., 60 O. S. 256 (1899).

Issue. The issuable facts are (1) whether the adversary is a corporation; (2) whether such corporation has more than fifty stockholders and keeps the principal office or transacts its principal business within the county in which the action is pending; and (3) the credibility and residence of the affiants.

Dodds v. Railway Co., 20 C. C. 709; 10 C. D. 824 (1899); s. c., 41 W. L. B. 209.

Burden of proof. The burden of proof is on the applicant to establish that the corporation answers the description of the statute.

Snell v. Street Railway Co., 60 O. S. 256 (1899).

Discretion of the court. The court has discretion to determine as to the sufficiency of the affidavits, the credibility of the persons making them and mandamus will not lie to compel change of venue. *State v. Wilson*, 12 C. C. 136, 7 C. D. 17 (1896); *Saner v. Cincinnati, etc., Ry.*, 4 N. P. 252, 7 L. D. 19 (1896). See *Stermer v. Cincinnati, etc., Ry. Co.*, 5 N. P. 419, 8 L. D. 514 (1898).

Error. Error in refusing the application is not waived by going to trial. It may be reviewed on error to the final judgment.

Snell v. Street Railway Co., 60 O. S. 256 (1899).

An order overruling the motion for a change of venue is not a final order.

Street Railway v. Snell, 179 U. S. 395; 14 O. F. D. 765 (1900)

Snell v. Street Railway Co., 60 O. S. 256 (1899).

Most convenient adjoining county. The words "most convenient" as used in this section, are to be taken in the sense of the most suitable, becoming or appropriate, and not in the sense of promotion of physical ease.

Wilson v. Street Railway Co., 7 N. P. 511; 9 L. D. 640 (1899).

BY GARNISHMENT AGAINST RAILROAD COMPANIES.

Section 11761. (How judgment creditor to proceed.) The plaintiff, his agent or attorney, in a judgment against a railroad company, rendered in any court, upon a claim due to the common laborers for work and labor performed for the company, or for cross-ties, lumber or wood furnished thereto, to be used in the construction, repair, or operation of its road or for the erection of fences along the line of its road, required by law to be erected, or upon a note,

or other evidence of indebtedness given for the considerations aforesaid, or his agent or attorney, for execution upon such judgment may file his affidavit, with a preceipe, setting forth the claim upon which the judgment is founded, that he has no knowledge of any property of the defendant liable to levy and sale upon the execution, and that a person or corporation, therein named, and within the jurisdiction of the officer to whom the execution is to be directed, is indebted to the defendant, or has property or claims of the defendant, in his possession or under his control, as agent of the defendant, or otherwise. Thereupon the clerk shall issue a notice to each person or corporation named, to the effect that he is required to pay over and deliver to the officer holding such writ the money, property, and claims of the defendant, in his possession or under his control, or which may come into his possession or under his control before the satisfaction of the judgment, not exceeding an amount sufficient to pay it and the costs. (R. S. Sec. 5465; April 5, 1866, 63 v. 126, § 1; S. & C. 1173; S. & S. 119.)

See G. C. § 11762 to 11767 for procedure and practice.

GROUND OF ATTACHMENT.

Section 11819. (Grounds of attachment.) In a civil action for the recovery of money, at or after its commencement, the plaintiff may have an attachment against the property of the defendant upon any one of the grounds herein stated:

1. Excepting foreign corporations which, by compliance with the law therefor, are exempted from attachment as such, that the defendant or one of several defendants is a foreign corporation;
2. Is not a resident of this state;
3. Has absconded with the intent to defraud his creditors;
4. Has left the county of his residence to avoid the service of a summons;
5. So conceals himself that a summons cannot be served upon him;
6. Is about to remove his property, in whole or part, out of the jurisdiction of the court, with the intent to defraud his creditors;
7. Is about to convert his property in whole, or part, into money, for the purpose of placing it beyond the reach of his creditors;

8. Has property or rights in action, which he conceals;
9. Has assigned, removed, disposed of, or is about to dispose of, his property, in whole or part, with the intent to defraud, his creditors;

10. Has fraudulently or criminally contracted the debt, or incurred the obligation for which suit is about to be or has been brought; and

11. That the claim is for work or labor, or for necessities.

An attachment shall not be granted on the ground that the defendant is a foreign corporation or not a resident of this state, for any claim other than a debt or demand, arising upon contract, judgment or decree, or for causing damage to property or death or personal injury by negligent or wrongful act. (109 v. 59; R. S. Sec. 5521; March 20, 1900, 94 v. 44; 93 v. 318; 88 v. 65; R. S. 1880; 62 v. 10, § 191; S. & C. 1002; S. & S. 549.)

Attachment before justice of the peace, see § 10253.

That the defendant is a foreign corporation, which has not complied with the foreign corporation acts, is a ground for attachment.

Auerbach v. Swadner, 18 C. C. 389; 10 C. D. 435 (1899).

Exemption of foreign corporations from attachment.

See also § 186 and notes.

A freight car used in interstate commerce and in transit into and from the state is not subject to seizure in attachment for the purpose of giving jurisdiction to the courts of this state.

Buckeye Buggy Co. v. Railway Co., 3 O. L. R. 426; 16 L. D. 279 (C. P. 1905).

A sleeping car is an instrumentality of interstate commerce, and when actually employed in interstate transportation is immune from attachment under process from a state court. A sheriff who seizes such immune property is liable as for conversion. An attaching creditor and his attorney who actively assist in the seizure may also be liable.

Pullman Co. v. Linke, 11 O. L. R. 63; 203 Fed. 1017 (D. C. 1913).

A foreign transportation company engaged in interstate commerce does not, by a voluntary compliance with G. C. § 183, become exempt from attachment.

Bigalow v. Armour, 74 O. S. 168 (1906).

Affidavit. The affidavit for attachment against a foreign corporation must negative the exceptions in paragraph 1 of § 11819.

Leavitt v. Rosenberg, 83 O. S. 230 (1910).

Edwards Mfg. Co. v. Mill Co., 11 C. C. n. s. 479; 20 C. D. 414 (1908); affirming 6 N. P. n. s. 1; 18 L. D. 413.

An averment in the affidavit that the defendant is a non-resident, when aided by an allegation of the petition that the defendant is a corporation under the laws of Kentucky is equivalent to a statement that it is a foreign corporation.

Edwards Mfg. Co. v. Mill Co., 11 C. C. n. s. 479; 20 C. D. 414; affirming 6 N. P. n. s. 1; 18 L. D. 413.

The affidavit can not be made before a notary public who is the attorney for one of the parties to the action.

Leavitt v. Rosenberg, 83 O. S. 230 (1910).

Venue. Suit was brought in a county in which resided a debtor of the defendant foreign corporation. The foreign corporation had a place of business in another county in Ohio. The debtor of defendant was garnished and a summons was issued to the county where the defendant had its place of business. Held, the court of common pleas in which the action was brought had jurisdiction of the action.

Rainey v. Jefferson Iron Works, 8 C. C. 674; 4 C. D. 231 (1894).
See Kelley Co. v. Garvin Machine Co., 6 N. P. 350; 4 L. D. 374.
§ 11276.

Bond. Where the ground of attachment is that the defendant is a foreign corporation, no bond is required from the plaintiff.

G. C. § 11821.

Nature of claim. The affidavit should contain a statement of the nature of the claim, in order to show that the action is one in which an attachment may issue. An affidavit is sufficient which refers in appropriate terms to the petition, where the allegations of the petition show the nature of the claim.

American Mfg. Co. v. National Supply Co., 9 C. C. n. s. 529; 19 C. D. 433 (1907).

An action for money lost in gaming is an action ex contractu and an attachment will lie under this section.

Harlan v. Investment Co., 11 N. P. n. s. 492; 22 L. D. 12 (C. P. 1911).

(Bucket shop.) Baker v. Morehead, 7 N. P. n. s. 385; 19 L. D. 230 (C. P. 1908).

An action against a sleeping car company for damages on account of the theft of clothing from a berth occupied by plaintiff, alleged to have occurred through the negligence of the porter, sounds in tort and not on contract and attachment will not lie.

Gillett v. Pullman Co., 10 N. P. n. s. 592; 23 L. D. 334 (C. P. 1910).

An action for an injury to a passenger may be brought as for a breach of the implied contract of carriage.

Railroad Co. v. Peoples, 31 O. S. 537 (1877).

Attachment will lie in an action to enforce stockholders' liability.

Gas Co. v. Collins, 19 C. C. 247; 10 C. D. 475.

Bank v. Rolling Mill, 2 N. P. 260; 2 L. D. 67.

An attachment can not issue in an action against a foreign corporation to recover damages for bringing suit in violation of a contract for the extension of the time of payment on a note, and maliciously attaching property.

McCracken v. Covington Nat. Bank, 4 Fed. 602 (1880).

Attachment without bond against non-resident in action to recover damages for fraud in sale of stock. See Hart v. Andrews, 103 O. S. 218 (1921).

Effect of receivership. The following cases were decided before the enactment of the bankruptcy act.

The appointment of a receiver by a state court of another state does not prevent creditors of this state from attaching property located within this state and securing priority as against the receiver.

Wilson v. Gifford, 12 C. C. 597; 5 C. D. 680 (1896).

But a creditor who files his claim with such a receiver is estopped from attaching property.

Rice v. Farnham, 7 N. P. 189; 4 L. D. 217 (1896).

Barbour v. Lockard, 11 W. L. B. 319 (1884).

President, etc., of Manhattan Co. v. Maryland Steel Co., 31 W. L. B. 100; 1 L. D. 286 (1894).

Creditors residing in the same jurisdiction as the receiver can not attach.
 See *Besuden v. Besuden Co.*, 3 N. P. 165; 4 L. D. 406 (1896).
 An application for the appointment of a receiver, consented to by the company, may amount to an attempt to dispose of the property with intent to defraud creditors.

Bacon v. Northwestern Stove Co., 5 C. C. 289; 3 C. D. 143 (1891).

Foreign corporation as garnishee. A foreign corporation which neither transacts business nor exercises its corporate powers within the state can not be made garnishee in an action against another foreign corporation. But a corporation which has complied with the foreign corporation acts, and is capable of suing and being sued in the state may be made garnishee in such an action.

Riter-Conley Mfg. Co. v. Mzik, 3 C. C. n. s. 125; 13 C. D. 164 (1901).
 (Compare *Kelley Co. v. Garvin Machine Co.*, 6 N. P. 350; 4 L. D. 374.

See also *Rocke v. Raney*, 15 W. L. B. 333 (1886).

Pennsylvania R. R. Co. v. Peoples, 31 O. S. 537 (1877).

Baltimore, etc., R. R. Co. v. May, 25 O. S. 347 (1874).

Service of order, see § 11833.

It has been held that a foreign corporation owing a debt in another state can not be made a garnishee in Ohio upon such debt.
Tin Plate Co. v. Lewis, 20 C. C. n. s. 443; 26 C. D. 438 (1911).

Section 11833. (How garnishee served.) If the garnishee is a person, a copy of the order and notice shall be served upon him personally, or left at his usual place of residence. When a partnership is garnisheed by its company name, they shall be left at its usual place of doing business, or with a member of such partnership; and if a corporation, with the president or other principal officer, or its secretary, cashier or managing agent. If such corporation is a railroad company, the copies may be left with a regular ticket or freight agent thereof, in any county in which the railroad is located. (R. S. Sec. 5534; April 16, 1900, 94 v. 283; March 31, 1881, 78 v. 93; R. S. 1880; May 16, 1868, 65 v. 213, § 201; S. & C. 1006; S. & S. 552.)

Service on corporation, see note to § 11288.

Foreign corporation as garnishee, see note to § 11819.

Service on foreign corporation, see note to § 11290.

RECEIVERSHIP.

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| § 11894. Appointment of receiver. | § 11897. Powers of receiver. |
| § 11895. Who ineligible as receiver. | § 11898. Investment of funds by receiver. |
| § 11896. Oath and bond. | |

Section 11894. (Appointment of receiver.) A receiver may be appointed by the supreme court or a judge thereof, the court of appeals, or a judge thereof in his district, the common pleas court or a judge thereof in his district, or the probate court, in causes pending in such courts respectively, in the following cases:

1. In an action by a vendor to vacate a fraudulent purchase of property, or by a creditor to subject property or a fund to his claim, or between partners or others jointly owning or interested in any property or fund, on the application of the plaintiff, or of a party whose right to or interest in the property or fund, or the proceeds thereof, is probable, and when it is shown that the property or fund is in danger of being lost, removed or materially injured;

2. In an action by a mortgagee, for the foreclosure of his mortgage and sale of the mortgaged property, when it appears that the mortgaged property is in danger of being lost, removed or materially injured, or that the condition of the mortgage has not been performed, and the property is probably insufficient to discharge the mortgage debt;

3. After judgment, to carry the judgment into effect;

4. After judgment, to dispose of the property according to the judgment, or to preserve it during the pendency of an appeal, or when an execution has been returned unsatisfied and the judgment debtor refuses to apply the property in satisfaction of the judgment;

5. In the cases provided in this title, and by special statutes when a corporation has been dissolved, or is insolvent, or in imminent danger of insolvency, or has forfeited its corporate rights;

6. In all other cases in which receivers heretofore have been appointed by the usages of equity. (May 6, 1913, 103 v. 428; R. S. Sec. 5587; February 7, 1885, 82 v. 16, 35; R. S. 1880; 51 v. 57, § 283; S. & C. 1018.)

Appointment of receiver on dissolution of corporation, see § 11943 et seq. In actions by creditors against stockholders or directors, see § 8691.

See, generally, articles by Austin V. Cannon on "Receiverships", 20 O. L. R. 429, and by Ralph E. Clark on "Appointment of Receivers of Corporations under the Laws of Ohio". 19 O. L. R. 406.

Nature and purpose of receivership. The appointment of a receiver is an equitable remedy, bearing the same relation to courts of equity that proceedings in attachment bear to courts of law, the appointment being treated as an equitable execution. The purpose is to secure the means for satisfying the final order and judgment of the court in the action, and the effect of the seizure is to place the property seized in the custody of the court.

Spear, J., in *Cheney v. Maumee Cycle Co.*, 64 O. S. 205, 214 (1901).

An action can not be maintained having for its ultimate object the appointment of a receiver. It is merely an ancillary proceeding. A receiver is appointed merely to preserve to the court property upon which its subsequent judgment may operate. It can not be an issuable fact in an action. A party may obtain all the relief sought and yet be denied his prayer for a receiver.

Callahan v. Ice Co., 13 C. C. 479; 7 C. D. 349 (1897).

Railroad Co. v. Sloan, 31 O. S. 1, 7 (1877).

When receiver will be appointed.

In pending action only. Under § 11894 a receiver can only be appointed in an action pending in the court.

Dwelle v. Hinde, 18 C. C. 618; 8 C. D. 177 (1897).

Necessity. The appointment of a receiver is merely a provisional remedy, ancillary and auxiliary to the main action, and can only be made in an action brought to obtain some other equitable relief, which the court has a right to grant, and where it appears to be necessary to make such appointment in order to preserve the property during the litigation, so that the relief awarded by the final judgment, if any, may be effective.

Railroad Co. v. Duckworth, 2 C. C. 518; 1 C. D. 618 (1887).

Railroad Co. v. Sloan, 31 O. S. 1, 7 (1877).

Valve Co. v. Williams, 25 C. C. n. s. 497, 28 C. D. 338 (1916); motion to certify record overruled, 14 O. L. R. 210.

Brown v. Hose Co., 18 C. C. n. s. 328 (1911).

Peter v. Machine Co., 53 O. S. 534, 551 (1895).

Other adequate remedy. A receiver will not be appointed where injunction, or other less stringent means, will afford full relief and protection. The appointment of a receiver under such circumstances would be an abuse of discretion.

Railroad Co. v. Duckworth, 2 C. C. 518; 1 C. D. 618 (1887); *aff'd*, 21 W. L. B. 36.

Benson v. Insurance Co., 7 N. P. n. s. 113; 19 L. D. 17 (1908).

Joy v. Squire, 7 N. P. 345; 5 L. D. 318 (1907).

Storey v. Knapp, 5 O. L. R. 55; 17 L. D. 461.

Hamburger v. Dorusmont, 3 N. P. 222; 4 L. D. 232.

But the defense the plaintiff has not exhausted his remedy at law, or is not a judgment creditor, may be waived by the defendant. *Re Metropolitan Railway Receivership*, 208 U. S. 90 (1908); *Cincinnati Equipment Co. v. Degnan*, 184 Fed. 834 (C. C. A. Ohio 1910); article by Austin V. Cannon, 20 O. L. R. 429, 438.

To preserve property. When necessary for the preservation of its property, a receiver will be appointed for a corporation regardless of its solvency or insolvency.

Salt Co. v. Salt Co., 8 N. P. 325; 11 L. D. 348 (1901).

But where its assets consist of money and securities readily convertible into money, the appointment of a receiver is not justified.

Everhart v. Investment Co., 8 N. P. 463; 11 L. D. 361 (1901).

To prevent creditors from levying on corporate property. A receiver will not be appointed for the purpose of continuing the business under protection of the court and of preventing creditors from levying on the corporate property.

Brewing Co. v. Herman, 2 Ohio App. 260; 20 C. C. n. s. 187; 28 C. D. 362 (1913).

De La Croix v. Steel Co., 8 N. P. n. s. 489; 19 L. D. 767 (C. P. 1909).

Merrill v. Lake, 16 Ohio 373 (1847).

See Payne v. Stapely Co., 7 N. P. n. s. 361; 19 L. D. 453 (suit by surety).

This rule has been applied where the corporation was insolvent and the application for a receiver was made by a bondholder.

Moss N. B. v. Lakeside Co., 19 C. C. 365; 10 C. D. 542 (1900).

And where the corporation was solvent and application for the receiver was made by a stockholder.

Gott v. Schultze Co., 12 N. P. n. s. 206; 21 L. D. 604 (C. P. 1911).

While the appointment of a receiver for an insolvent private corporation may be, and doubtless is, a beneficent remedy for all interested parties, where a bona fide winding up of affairs and distribution of its assets to those who show a right to them is the object sought and steadily kept in view, yet, on the other hand, to employ that extraordinary remedy as a means by which to indefinitely prolong, by aid of a friendly receiver, the substantial control of an insolvent private corporation over its assets and business, can be justified, in the absence of statutory authority, by circumstances only, if there can be any, that most unequivocally demand such action, or by the consent of all parties in interest.

Peter v. Machine Co., 53 O. S. 534, 551 (1895).

A wrongful application for, or consent to, the appointment of a receiver may be such fraud as to support an attachment.

Bacon v. Stove Co., 5 C. C. 289; 3 C. D. 143 (1891).

Fraud or misconduct of directors. Subdivision 5 of § 11894 does not authorize the appointment of a receiver, except in cases provided for in this title, or by special statutes, and does not include an action by a stockholder for the appointment of a receiver because of fraud of directors.

Railroad Co. v. Duckworth, 2 C. C. 518; 1 C. D. 618 (1887).

De La Croix v. Steel Co., 8 N. P. n. s. 489; 19 L. D. 767 (C. P. 1909).

A receiver will not be appointed at the suit of a stockholder merely because of differences of opinion in conducting the corporate business.

Straman v. Water Works Co., 8 C. C. 89, 100; 4 C. D. 339 (1893).

Nor because of past or present irregularities or mismanagement in the absence of actual fraud.

Benson v. Insurance Co., 7 N. P. n. s. 113; 19 L. D. 17 (1908).

No. Fairmount, etc., Co. v. Rehn, 6 N. P. 185; 8 L. D. 594 (1899).

But a receiver will be appointed where it clearly appears that the corporate property will be fraudulently disposed of, unless taken charge of by an officer of the court;

Railroad Co. v. Duckworth, 2 C. C. 518; 1 C. D. 618 (1887).

where the directors have made a fraudulent sale of the entire corporate property for their personal profit;

Heintzman v. Tenacity, etc., Co., 4 O. L. R. 552; 17 L. D. 554 (1906).

See *Hamilton v. Coal Co.*, 12 C. D. 637 (1894).

and where the corporation has no legal directors or officers to care for the property;

Salt Co. v. Salt Co., 8 N. P. 325; 11 L. D. 348 (C. P. 1901).

and where both the corporation and the directors are insolvent and a fraudulent disposition of the assets is threatened,

Upton v. Rocky River, etc., Co., 2 Cleve. L. R. 355 (C. P. 1879).

and where the managing directors, who are also the majority stockholders, wrongfully apply the assets to the payment of alleged debts due to themselves, fraudulently commingle the assets of the corporation in which such directors are interested; have run the business at a loss for two years, and have established a competing company in the place of business of the corporation, and are diverting its business to the competing company.

Divine v. Auto, etc., Co., 9 N. P. n. s. 204 (C. P. 1909).

In dissolution proceedings. Section 11894 does not apply to a proceeding under § 11938 to dissolve a corporation. A receiver can not be appointed in such proceeding until after an order dissolving the corporation has been made.

Bacon v. Stove Co., 5 C. C. 289; 3 C. D. 143 (1891).

See *De La Croix v. Steel Co.*, 8 N. P. n. s. 489; 19 L. D. 767 (C. P. 1909).

Building Co. v. Rehn, 6 N. P. 185; 8 L. D. 594 (1899).

Insolvency of corporation. The mere insolvency of a corporation is not ground for the appointment of a receiver, at the suit of a simple contract creditor who has not reduced his claim to judgment.

Steamship Co. v. Dox, 4 N. P. n. s. 155; 16 L. D. 501 (C. P. 1906).

Building Co. v. Rehn, 6 N. P. 185; 8 L. D. 594 (1899).

Baker v. Mystic Circle, 32 W. L. B. 84; 1 L. D. 579.

Buschle v. Mfg. Co., 15 N. P. n. s. 618 (1913).

Toledo Co. v. Lyons, 290 Fed. 637.

See Payne v. Stapely Co., 7 N. P. n. s. 361; 19 L. D. 453 (C. P. 1908).

When insolvency is one of the essential elements, constituting the basis of the plaintiff's claim for relief against the corporation, such insolvency must be proven by a preponderance of the testimony. It will not be sufficient by the proof to merely raise a doubt as to the solvency of the corporation.

Building Co. v. Rehn, 6 N. P. 185; 8 L. D. 594 (1899).

Where a state court has appointed a receiver for a corporation, on the ground of insolvency, the appointment can not be collaterally attacked by the corporation in a subsequent involuntary bankruptcy proceeding against the corporation, at least where no pleading directly attacks the appointment. Greenwood Gum Co. v. Zimmerman, 240 Fed. 637 (C. C. A. Ohio 1917).

The inability of a corporation to pay its current obligations as they mature in the ordinary course of business constitutes insolvency in a general sense, which will authorize the appointment of a receiver in a creditor's suit in federal court.

Cincinnati Equipment Co. v. Degman, 184 Fed. 834 (C. C. A. 1910).

Illegal business conducted by corporation. Where the corporation has conducted a lottery business, the authorities are conflicting as to whether the court will appoint a receiver to preserve and distribute the fund.

Receiver appointed.

Shaw v. Trust Co., 5 N. P. 411; 8 L. D. 510.

See Everhardt v. Investment Co., 8 N. P. 525; 11 L. D. 687 (1901).

Appointment refused.

Central Safe Dep. Co. v. Jones, 36 W. L. B. 87; 8 L. D. 582 (1896).

See Stevens v. Times Star Co., 72 O. S. 112 (1905).

Where an organization is illegal, because of some of its ancillary purposes, a receiver may be appointed on dissolution.

Kealey v. Faulkner, 7 N. P. n. s. 49; 18 L. D. 498 (C. P. 1907).

Foreign corporation. A receiver may be appointed to wind up that part of the business of a foreign corporation which is conducted in Ohio.

Everhardt v. Investment Co., 8 N. P. 525; 11 L. D. 687 (1901).

Property in other jurisdictions.

See Steamship Co. v. Dox, 4 N. P. n. s. 155; 16 L. D. 501 (1906).

Barbour v. Lockard, 11 W. L. B. 319.

Schroder v. Iron Hall, 7 N. P. 243; 1 L. D. 408.

Where property is in another county. When after the appointment of a receiver it will be necessary to commence ancillary proceedings in another county to determine property rights, the matter of the appointment of a receiver will be left to the court having jurisdiction of the property.

Moss Nat. Bank v. Lakeside Co., 19 C. C. 365; 10 C. D. 542 (1900).

On whose application receiver may be appointed.

Creditors. A creditor whose claim has been reduced to judgment, on which execution has been issued and returned unsatisfied, may have a receiver appointed.

Cheney v. Maumee Cycle Co., 20 C. C. 19; 10 C. D. 717 (1900); affirmed, 64 O. S. 205.

Cincinnati Equipment Co. v. Degnan, 184 Fed. 834 (C. C. A. 1910).

A simple contract creditor, who has not recovered a judgment against a corporation and exhausted his remedies at law, is not entitled to have the affairs of a corporation placed in the hands of a receiver on the ground that it is insolvent.

Brewing Co. v. Herman, 2 Ohio App. 260; 20 C. C. n. s. 187; 28 C. D. 362 (1913).

North Fairmount, etc., Co. v. Rehn, 6 N. P. 185; 8 L. D. 594 (1899).

Steamship Co. v. Dox, 4 N. P. n. s. 155; 16 L. D. 501 (C. P. 1906).

Baker v. Mystic Circle, 32 W. L. B. 84; 1 L. D. 579.

But the defense that the plaintiff has not exhausted his remedy at law, or is not a judgment creditor, may be waived by the defendant. *Re Metropolitan Railway Receivership*, 208 U. S. 90 (1908); *Cincinnati Equipment Co. v. Degnan*, 184 Fed. 834 (C. C. A. Ohio 1910); certiorari denied, 220 U. S. 623; article by Austin v. Cannon, 20 O. L. R. 429, 438.

The creditors are proper parties to an action which seeks the appointment of a receiver.

Walbridge v. Union Mfg. Co., 7 N. P. 430; 5 L. D. 203.

In an action to enforce payment of the statutory liability of stockholders in an Ohio corporation, a receiver may be appointed by the court to collect and distribute the fund, and such receiver may be authorized to maintain in his own name actions to enforce payment of judgments rendered for statutory liability.

Zieverink v. Kemper, 50 O. S. 208 (1893).

See *Clark v. Thomas*, 34 O. S. 46 (1877).

G. C. § 8695.

In an action against an insolvent corporation for a receiver and the winding up of its affairs, a creditor may come in by leave of court and assert his claim.

Koch v. Hotel Co., 13 C. C. n. s. 163; 22 C. D. 581 (1910).

Stockholders.

See note to § 8660. *When stockholder may sue on behalf of corporation*; page 1028.

Directors. The court has no power on the application of the directors of a building association, as such, and who assert no individual rights in the property of the corporation, to divest the stockholders without notice or consent, of the control of their property and place it in the hands of an officer of the court for management and administration.

Schone v. Consolidated, etc., Co., 4 N. P. 216; 6 L. D. 246 (1897).

Surety. Where an insolvent corporation is sued by one of its sureties under G. C. § 12206, as a means of protecting the funds, a receiver may be appointed.

Barbour v. Bank, 45 O. S. 133 (1887).

See *Payne v. Stapely Co.*, 7 N. P. n. s. 361; 19 L. D. 453 (C. P. 1908).

Rapp v. Cincinnati, etc., Co., 10 C. C. n. s. 575 (1907).

Consent of corporation to appointment. Where there is no ground for the appointment of a receiver, the consent of the company can not confer jurisdiction upon the court.

Moss Nat. Bank v. Lakeside Co., 19 C. C. 365; 10 C. D. 542 (1900).

The unauthorized act of the president of a corporation, in consenting to the appointment of a receiver, may be ratified by the directors.

Rapp v. Cincinnati, etc., Co., 10 C. C. n. s. 575 (1907).

The appointment of a receiver by a state court, on the ground of insolvency, with the consent of its president, can not be collaterally attacked in a subsequent involuntary bankruptcy proceeding, by showing that the corporation was in fact solvent and that the president had no authority to consent, at least where no pleading directly attacks the appointment. *Gum Co. v. Zimmerman*, 240 Fed. 637 (C. C. A. Ohio 1917. See also article by A. V. Cannon, 20 O. L. R. 429.

Forms of pleadings, order, etc., in receivership proceeding in federal court. Prepared by A. V. Cannon, Esq., 20 O. L. R. 473.

Notice. The appointment of a receiver to take from the defendant the possession of its property can not be lawfully made without notice, unless the delay required to give such notice will result in irreparable loss.

Railway Co. v. Jewett, 37 O. S. 649 (1882).

Potter v. Bunnell, 20 O. S. 150 (1870).

Salt Co. v. Salt Co., 8 N. P. 325; 11 L. D. 348 (1901).

Where there is no person within the jurisdiction on whom notice can be served, a receiver may be appointed immediately after service by publication is commenced.

Longworth v. McGrew, 2 C. S. C. R. 479 (1872).

Section 11895. (Who ineligible as receiver.) No party, attorney, or person interested in an action, shall be appointed receiver therein except by consent of the parties, and no person, except a resident of this state, shall be appointed or act as receiver of a railroad or other corporation within this state. (R. S. Secs. 3248, 5588; R. S. 1880; March 14, 1853, 51 v. 57, § 254; S. & C. 1019.)

See § 11944.

A person who is a stockholder, director and treasurer of the corporation, at the time of his appointment, is within the direct prohibition of this section. Consent of the plaintiff and of the directors of the corporation is not a sufficient consent of all parties.

Moss N. B. v. Lakeside Co., 19 C. C. 365; 10 C. D. 542 (1900).

Section 11896. (Oath and bond.) Before he enters upon his duties, the receiver must be sworn to perform them faithfully, and, with surety approved by the court, judge, or clerk, execute a bond to such person, and in such sum as the court or judge directs to the effect that he will faithfully discharge the duties of receiver in the action, and obey the orders of the court therein. (R. S. Sec. 5589; March 14, 1853, 51 v. 57, § 255; S. & C. 1019.)

If the receiver is a debtor of the corporation or person, for whom the receiver is appointed, the debt becomes by operation of law, a "chose in possession", for which the surety on the bond may be liable. *Leonard v. Evans*, 24 N. P. n. s. 393 (1923).

An agreement of indemnity to the surety on the bond of a re-

ceiver, authorized by the court, was held binding upon a successor receiver. *Pugh v. Bonding Co.*, 5 Ohio App. 404, 26 C. C. n. s. 44 (1916).

Section 11897. (Powers of receiver.) Under the control of the court, the receiver may bring and defend actions in his own name, as receiver, take and keep possession of the property, receive rents, collect, compound for, and compromise demands, make transfers, and generally do such acts respecting the property as the court authorizes. (R. S. Sec. 5590; March 14, 1853, 51 v. 57, § 256; S. & C. 1019.)

Title and possession. A receiver is a ministerial officer only and does not become vested with the title to the property coming into his possession or control.

Lafayette Bank v. Buckingham, 12 O. S. 419, 425 (1861).

Shoe Co. v. Griffiths, 11 Ohio App. 277, 30 O. C. A. 478.

Cheney v. Maumee Cycle Co., 64 O. S. 205, 214 (1901).

Insurance Co. v. Bowersox, 6 C. C. 1; 3 C. D. 321 (1891).

Possession of property by the receiver is the possession of the court.

Spinning v. Insurance Co., 2 Dis. 336 (1858).

Merrick v. Bank, 8 N. P. 411; 11 L. D. 293 (C. P.).

A levy upon property in the possession of a receiver is a contempt of court.

Coe v. Railroad Co., 10 O. S. 372 (1859).

Lafayette Bank v. Buckingham, 12 O. S. 419 (1861).

Where a levy is made on property in the possession of a receiver, the court may order the property released.

Coe v. Railroad Co., 10 O. S. 372 (1859).

Croy v. Marshall, 3 C. C. 489; 2 C. D. 280 (1888).

The court appointing a receiver has power to order a creditor, residing within the jurisdiction, to dismiss attachment proceedings begun by him in a foreign state.

Besuden v. Besuden Co., 3 N. P. 165; 4 L. D. (1896).

Charges of contempt by a receiver of a corporation, against its treasurer, for failure to deliver possession of funds, will not be decided summarily where the defendant answers that there are no such funds. The defendant is entitled to a trial by the regular modes of procedure.

State v. Christy, 4 O. L. R. 64; 16 L. D. 277 (C. P. 1905).

As against trustee in bankruptcy. Property in the possession of a receiver or assignee appointed by a state court should be delivered on demand to the trustee in bankruptcy of the debtor.

Davis v. Coe, 19 C. C. 639; 10 C. D. 264 (1899).

See *Carpenter Bros. v. O'Conner*, 16 C. C. 526; 9 C. D. 201 (1898); aff'd, no rep., 60 O. S. 605.

A receiver in bankruptcy can not intervene in an action in a state court to obtain a discharge of an attachment and possession of the property, but he may obtain a stay of the action.

Roberts v. Food Co., 14 L. D. 253 (C. P. 1904).

A federal court of bankruptcy has power by summary order to compel a receiver appointed by a state court to turn over money in his possession to the trustee in bankruptcy. In *re Diamond's Estate*, 259 Fed. 70; 16 O. L. R. 515 (C. C. A. Ohio 1919); certiorari denied, 249 U. S. 614. See *Wolf v. Stores Co.*, 17 N. P. n. s. 213.

Real estate. An order appointing a receiver for an insolvent corporation which in terms makes him "receiver for all the property and

assets of the company, of every kind and description, wherever located," is sufficiently broad to embrace its real estate, and is not invalid as to the real estate because the petition and motion in the case do not in terms refer to real estate, but prays "that the court will appoint a receiver to take charge of all the property and assets of the company."

Cheney v. Maumee Cycle Co., 64 O. S. 205 (1901).

Lien of attaching creditor as against receiver. Where, before the appointment of a receiver, an attachment and levy are made by a creditor on the assets of a corporation, carrying on its business, though in fact insolvent, the receiver's rights will be subject to the lien obtained by attachment.

Ford v. Lamson, 17 C. C. 539 (1899).

See New York Rubber Co. v. Gandy Belting Co., 11 C. C. 618; 5 C. D. 286 (1896).

The above cases were decided before the enactment of the bankruptcy act and before the amendment of G. C. § 11104 (R. S. § 6343) in 1898.

POWERS OF RECEIVER.

Receivers of a corporation are not the representatives of the corporation, alone, but are also representatives of its creditors, subject to the orders of the court.

Rogers v. Akron, etc., R. Co., 6 N. P. 291; 8 L. D. 107 (1899).

To continue business. Where receipts from operation are insufficient to pay expenses, the receiver should apply to the court for instructions. Weber v. Naltner, 7 N. P. 290, 10 L. D. 96 (1900).

Authority to perform a contract, as authority to pay for equipment, bond, etc., see McPherson v. Gillespie, 18 N. P. n. s. 167 (1915).

To sell property. A receiver acts under orders and directions of the court, and the only title or property he can convey is that ordered by the court to be sold; therefore, should he include in the sale property not ordered sold, and such sale is afterward confirmed by the court, it must be considered as confirmed inadvertently.

Cincinnati, etc., R. R. Co. v. Cincinnati, etc., Ry. Co., 6 N. P. 427; 9 L. D. 493 (1899).

See also as to orders of sale.

Dunbar v. Casket Co., 19 C. C. 585; 10 C. D. 684 (1900).

Lorenz v. Reynolds, 7 N. P. 17; 19 L. D. 40.

Power of directors to sell property in hands of receiver.

See Donner v. Railroad Co., 1 C. S. C. R. 130 (1877).

To improve or repair property. The court may order improvements or repairs on property in the possession of a receiver.

Stockyards Co. v. Railroad Stockyards Co., 7 W. L. B. 295 (C. P. 1882).

Turnpike Co. v. Howard, 1 W. L. J. 216.

To bind corporation as agent. A receiver is not the agent of the corporation and, after discharge of the receiver, the corporation is not liable on contracts made by the receiver.

Coal Co. v. Railroad Co., 10 W. L. B. 42 (1883).

See Ellis v. Railroad, 6 Am. L. R. 288; 2 W. L. B. 249 (1877).

But the corporation may be liable for negligence of agents of the receiver.

Stewart v. Railroad Co., 8 N. P. 179; 11 L. D. 232 (C. P. 1901).

And where property is returned to the corporation by the receiver on condition that it shall assume all contracts and liabilities made or incurred by him, the corporation is liable.

Brewing Co. v. Betz, 8 C. C. n. s. 64; 18 C. D. 484 (1906).

Receiver's certificates. Where authority is given for an issue of receiver's certificates to borrow money for the purpose of completing contracts on hand, and subsequently a second issue is authorized for the purpose of continuing the business generally by the receiver, the holders of the first issue are entitled to priority in payment over the holders of the second issue.

Morris v. Newark Iron & Steel Co., 9 N. P. n. s. 285 (C. P. 1909).

LIABILITY.

A judgment against a receiver in his official capacity can be satisfied only from the trust funds in his possession.

Marshall v. Caverly Co., 5 N. P. n. s. 185.

Rent. A receiver has a reasonable time in which to decide whether or not he will accept a lease of premises occupied by the corporation. If he accepts he is bound by the terms of the lease. If he does not accept, and no other agreement is made with the landlord, he is liable for reasonable compensation to the landlord not less than the rent stipulated in the lease. When there is an arrear for rent which had accrued prior to the appointment of the receiver, the landlord may make it a condition that such arrears be assumed and paid by the receiver. Where a receiver was authorized, by court order, to pay such arrears of rent, the court refused to vacate the order, although the business was continued by the receiver at a loss and the proceeds of sale of the assets proved insufficient to pay the debts incurred by the receiver. Andrews v. Beigel, 6 Ohio App. 427; 26 C. C. n. s. 433; 28 C. D. 178 (1915). See also Marshall v. Caverly Co., 5 N. P. n. s. 185; 18 L. D. 157 (C. P. 1907).

Insurance. A note given by a corporation for insurance is not payment of the premium, and where a receiver is subsequently appointed and takes possession of the property covered by the insurance, he is chargeable with the cost thereof.

Koch v. St. Charles Hotel Co., 13 C. C. n. s. 163; 22 C. D. 581 (1910).

Taxes. The claim of the state for past due and unpaid taxes on personal property in the hands of a receiver is a lien on the property and is entitled to priority over the claims of general creditors.

Hamilton v. Beggs Co., 7 O. L. R. 397 (U. S. C. C. 1909).

See Treasurer v. Dale, 60 O. S. 180 (1899).

Sandheger v. Brewing Co., 6 N. P. 410; 8 L. D. 592.

Eick v. McDonald, 34 W. L. B. 228; 8 L. D. 675 (1895).

Creech v. Railway, 2 N. P. 164; 3 L. D. 265.

In re Brewing Co., 6 N. P. 472; 9 L. D. 519.

A receiver in possession of personal property should list the same for taxation.

See French v. Bobe, 64 O. S. 323 (1901); distinguishing McNeill v. Hagerty, 51 O. S. 255 (1894).

Franchise taxes, see note to § 5495.

On contract of indemnity to surety on attachment bond. Where a receiver gave bond in an attachment proceeding, with a surety company as surety, under an agreement, authorized by the court, that the surety company should be indemnified against liability and expense, and the surety company incurred expense in defending an action on the attachment bond, the agreement of indemnity was held binding upon a successor receiver. Pugh v. Bonding Co., 5 Ohio App. 404; 26 C. C. n. s. 44; 28 C. D. 80 (1916).

Infringement of trade name. Where receivers continued to use a trade name, owned by a former employe who suggested the use of such trade name, and such receivers were justified in believing that such trade name belonged to the corporation, the receivers can not be charged with fraud. They may be liable for net profits, but not for gross profits. (Rule for determining net profits defined.)

Star Distilling Co. v. Mihalovitch, etc., Co., 12 N. P. n. s. 113; 23 L. D. 342 (1911).

Negligence. The receiver of a railroad is liable in his official capacity for injuries by negligence.

Murphy v. Holbrook, 20 O. S. 137 (1870).

Potter v. Bunnell, 20 O. S. 150 (1870).

Damages for negligence of the receiver or his employes are a part of the expenses of the receivership and in proper cases are chargeable against the corpus of the estate. Brown v. Winterbottom, 98 O. S. 127 (1918).

Where a mortgagee, in applying for a receiver, asks for power to manage and operate the property, he impliedly agrees that damages for injuries, caused by the negligence of the receiver or his employes, shall have priority over the mortgage lien and be paid from the corpus of the property if current earnings or other assets are insufficient. Brown v. Winterbottom, 98 O. S. 127 (1918).

SUITS BY AND AGAINST RECEIVERS.

Railroad receivers, see § 9064.

By receivers. A receiver may sue to avoid a mortgage which is invalid as to general creditors because of failure to record the same.

Cheney v. Maumee Cycle Co., 64 O. S. 205 (1901).

And to avoid an unfiled chattel mortgage

Graydon v. Phonograph Co., 17 C. C. n. s. 236; 25 C. D. 260 (1910).

Bayne v. Brewer Pottery Co., 90 Fed. 754 (1898).

Hamilton v. Beggs Co., 179 Fed. 949 (1910).

To vacate a judgment entered against the corporation.

Smead Foundry Co. v. Chesbrough, 18 C. C. 783; 6 C. D. 670 (1895).

To set aside a fraudulent conveyance.

Sayle v. Guarantee, etc., Co., 2 C. C. n. s. 401; 15 C. D. 503 (1903).

Where a receiver fails to sue to set aside a fraudulent conveyance, a creditor may commence suit making the receiver and all interested persons parties, such action being substantially an application to the court for an order on the receiver.

Monitor Furnace Co. v. Peters, 40 O. S. 575 (1884).

A receiver may sue to collect stock subscriptions.

Smith v. Johnson, 57 O. S. 486 (1898).

By receiver of foreign corporation.

See Leman v. McLennan, 7 C. C. n. s. 205; 18 C. D. 137 (1905); aff'd, no rep., 75 O. S. 643.

Bank v. McLeod, 38 O. S. 174 (1882).

Barbour v Lockard, 11 W. L. B. 319 (1884).

Wilson v. Gifford, 12 C. C. 597 (1896).

President, etc., of Manhattan Co. v. Maryland Steel Co., 31 W. L. B. 100; 1 L. D. 286 (1894).

A suit brought by the receiver of a foreign corporation appointed by an Ohio court excludes the right of a receiver subsequently appointed in its home state, to sue on the same cause of action. Lively v. Picton, 218 Fed. 401 (C. C. A. Ohio 1914).

Suits against receivers. Leave of court must be obtained before a suit can be maintained against a receiver.

Spinning v. Insurance Co., 2 Dis. 336 (1858).

Osborne v. Railway Co., 9 N. P. n. s. 561 (1910).

But failure to obtain leave does not affect the jurisdiction of the court in which the suit is brought. It may be waived by the receiver.

Tobias v. Tobias, 51 O. S. 519 (1894).

When leave refused.

See *Coal Co. v. Coal Co.*, 11 N. P. n. s. 38 (1910).

Where a receiver has been appointed in a foreclosure proceeding, a person having a claim for operating expenses (including a claim for injuries caused by negligence of the receiver of his employes) may intervene in the foreclosure suit before final distribution of the proceeds and apply for an order postponing distribution pending determination of his claim. *Brown v. Winterbottom*, 98 O. S. 127 (1918).

A separate suit for attorney fees for services rendered to the receiver can not be maintained. Application should be made to intervene in the action in which the receiver was appointed.

Friend v. Friend Paper Co., 13 N. P. n. s. 425 (C. P. 1912).

Citing, *Olds v. Tucker*, 35 O. S. 581.

Attorney fees will not be allowed out of a fund unless the attorney or his client have rendered services, the effect of which is to conserve or increase the fund. Where the plaintiff has participated in acts which have diminished the fund, no fee can be allowed to his attorney. *Buschle v. Mfg. Co.*, 15 N. P. n. s. 618 (1913).

Where receivers incur indebtedness in excess of the limit ordered by the court, creditors having such unauthorized claims should file an intervening petition against the receivers and their sureties, in the original suit and not by independent action. *Lumber Co. v. Phillips*, 21 N. P. n. s. 1 (1917).

An action to compel a receiver to allow a claim is not an action for money only and is appealable.

Webb v. Stasel, 80 O. S. 122 (1909).

State v. Jones, 95 O. S. 357.

The receiver may appeal without giving bond. *Young v. Manhattan Co.*, 16 C. C. n. s. 215 (1907); *Smith v. Folsom*, 80 O. S. 218 (1909).

But where a claim against a fund in the possession of the receiver is presented by a motion in the nature of an intervening petition in the receivership proceeding, the receiver may prosecute error. *Schultz v. Cincinnati*, 8 Ohio App. 140; 27 O. C. A. 362; affirmed, 97 O. S. 317 (1917).

A receiver can not appeal from an order or judgment sustaining exceptions to his report. *Scheidler v. Railway Co.*, 20 C. C. 453; 11 C. D. 203 (1900); *Becker v. Real Estate Co.*, 19 C. C. n. s. 593; 26 C. D. 680 (1912).

An appeal lies from an order finally fixing the receiver's compensation. *Thompson v. Denton*, 95 O. S. 333 (1917).

Mandamus against receiver. Where the court of common pleas, having jurisdiction in an action against a railroad corporation, has appointed a receiver, who is in possession and is operating the road under the orders of the court, a mandamus will not be issued against such corporation and receiver directing their conduct in operating the road.

State v. Marietta, etc., R. R. Co., 35 O. S. 154 (1878).

Actions against corporation while in receiver's hands.

See *Mather v. Cincinnati Ry. Co.*, 3 C. C. 284; 2 C. D. 161 (1888).

See also § 11233.

Section 11898. (Investment of funds by receiver.) By order of the court, funds in the hands of a receiver may be invested upon interest. No such order shall be made except upon the consent of all the parties to the action. (R. S. Sec. 5591; March 14, 1853, 51 v. 57, § 257; S. & C. 1019.)

Deposit of funds in bank as a general or special deposit.

See *Smith v. Fuller*, 86 O. S. 57 (1912).

DISSOLUTION OF CORPORATIONS.

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| § 11938. When corporation may petition for dissolution. | § 11961. When the last board is without a quorum. |
| § 11939. What the petition must contain. | § 11962. Petitions under preceding section. |
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| § 11942. Hearing before the master. | § 11965. Judgments by or against such corporations. |
| § 11943. When judgment for dissolution rendered. | § 11966. Title to real estate. |
| § 11944. Who may be appointed receiver. | § 11967. Trustees personally liable for an abuse of trust. |
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| § 11946. Unpaid subscriptions to be collected. | § 11969. May be sued by corporate name. |
| § 11947. Duties of trustees. | § 11970. Judgments may be revived. |
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| § 11949. Duties of creditors and other persons. | § 11972. Directors may appoint trustees. |
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| § 11952. Receiver's compensation. | § 11975. By whom certificates made when dissolved by court. |
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| § 11954. How distribution to be made. | § 11977. Fee for filing certificate. |
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| § 11959. Further duties of receiver. | |
| § 11960. Repealed. | |

Section 11938. (When corporation may petition for dissolution.) When a majority of the directors, trustees, or other officers having the management of the concerns of a corporation, or stockholders representing not less than one-third of the capital stock of a corporation, organized under the laws of this state, discover that the stock property, and effects of the corporation have been so far reduced, by losses or otherwise, that it will not be able to pay all just demands for which it is liable, or to afford a reasonable security to those who deal with it, or deem it beneficial to the interests of the stockholders that the corporation be dissolved; or when such directors, trustees, or other officers are authorized,

by a majority of the stockholders, to apply for a judgment as hereinafter provided, or when the objects of the corporation have wholly failed, or are entirely abandoned, or their accomplishment is impracticable, they may apply by petition to the common pleas court of the county, or the superior court of the city or county, in which the principal place of conducting the business of the corporation is situated, for its dissolution pursuant to the provisions of this chapter. (R. S. Sec. 5651; March 29, 1875, 72 v. 138, § 1; S. & S. 243.)

Voluntary dissolution where all debts paid, §§ 8738 to 8743.

Dissolution in quo warranto proceeding, § 12323, et seq.

Dissolution of railroad companies, § 8819.

Dissolution of building and loan associations, §§ 9665, 687.

Mode of dissolution. Before the adoption of the code, the modes by which private corporations were dissolved were first, by the death of its members; second, surrender of its franchises, and third, a judgment of forfeiture for nonuser or abuse.

Trustees v. Zanesville, etc., Co., 9 Ohio 203 (1839).

State v. College, 32 O. S. 487.

A corporation is not dissolved by a sale of all of its property.

Donner v. Dayton, etc., R. R. Co., 1 C. S. C. R. 130, 139 (1871).

Removal from the state does not cause a dissolution.

Lander v. Burke, 65 O. S. 532 (1901).

Sale of all the corporate property, in an insolvency or bankruptcy proceeding, or by a receiver, does not operate as a dissolution of the corporation, nor affect the right of the stockholders to elect directors.

State v. Merchant, 37 O. S. 251 (1881).

Power of court to wind up corporation. In the absence of statutory authority, a court of equity has no right, at the suit of a stockholder, to take any step, the sole purpose or the primary object of which is, to wind up the affairs of a corporation.

Railroad Co. v. Duckworth, 2 C. C. 518; 1 C. D. 618 (1887).

North Fairmount, etc., Co. v. Rehn, 6 N. P. 185; 8 L. D. 594 (1899).

Cronin v. Potters' Co-op. Co., 29 W. L. B. 52 (1892).

Goebel v. Herancourt Brewing Co., 7 N. P. 231; 2 L. D. 377 (1893).

Schone v. Consolidated, etc., Co., 4 N. P. 216; 6 L. D. 246 (1897).

Woods v. Equitable Debenture Co., 8 N. P. 125 (1900).

De La Croix v. Steel Co., 8 N. P. n. s. 489; 18 L. D. 767.

In re Mansfield Co., 3 Ohio App. 253; 21 C. C. n. s. 95 (1914).

Oppenheimer v. Ptg. Co., 24 N. P. n. s. 483 (1923).

Proceeding under § 11938 et seq. One purpose of this section is to provide a remedy for minority stockholders. In re Mansfield Co., 3 Ohio App. 253; 21 C. C. n. s. 95 (1914).

A public utility company may be dissolved under this chapter. In re Mansfield Co., 3 Ohio App. 253; 21 C. C. n. s. 95 (1914).

To justify dissolution, on the ground of failure of the corporation to discharge its charter purposes, a plain violation must be proved. Becker v. Germannia Co., 22 C. C. n. s. 395 (1908).

The ultimate purpose of a proceeding under this chapter is to wind up the affairs of a corporation.

In re Columbus Bicycle Co., 1 N. P. n. s. 461; 14 L. D. 467 (C. P. 1904).

See also note to § 11960.

Venue. The "principal place" of this section is the same as "principal office" of § 10135.

Mercantile Trust Co. v. Aetna Iron Works, 4 C. C. 579, 588; 2 C. D. 718 (1890).

Parties. In an action for the dissolution of a corporation, the holders of liens on the real estate or personal property of the corporation are proper if not necessary parties.

Mercantile Trust Co. v. Aetna Iron Works, 4 C. C. 579; 2 C. D. 718 (1890).

Persons holding incumbrances against the corporate property are entitled to come in and set up their claims.

In re Columbus Bicycle Co., 1 N. P. n. s. 461; 14 L. D. 467 (C. P. 1904).

The county treasurer may, by answer and cross petition, set up a claim for taxes due and unpaid.

In re Columbus Bicycle Co., 1 N. P. n. s. 461; 14 L. D. 467 (C. P. 1904).

While the proceeding is *in rem*, both the petitioners and the corporation are parties.

In re Columbus Bicycle Co., 1 N. P. n. s. 461; 14 L. D. 467 (C. P. 1904).

On a cross petition, service on the directors is sufficient.

In re Columbus Bicycle Co., 1 N. P. n. s. 461; 14 L. D. 467 (C. P. 1904).

Stockholders and unsecured creditors may intervene.

Everhardt v. U. S., etc., Co., 8 N. P. 525; 11 L. D. 687.

In re Columbus Buggy Co., 1 N. P. n. s. 461; 14 L. D. 467 (C. P. 1909).

Koch v. Hotel Co., 13 C. C. n. s. 163 (1910).

Corporation as a party.

See *Reeder v. Wade*, 2 C. S. C. R. 19 (1870).

Determination of jurisdiction. Where the question of the jurisdiction of the court over the subject matter of the action is raised by the pleadings in the case, it is to be tried and determined as any other issue of fact arising thereon.

Mercantile Trust Co. v. Aetna Iron Works, 4 C. C. 579; 2 C. D. 718 (1890).

Dismissal. A motion by the petitioning stockholders for a dismissal of the proceeding will be refused where creditors have become parties.

In re Columbus Bicycle Co., 1 N. P. n. s. 461; 14 L. D. 467 (C. P. 1904).

Section 11939. (What the petition must contain.) Such application shall contain a statement of the reasons which induce the applicants to desire a dissolution of the corporation, and there shall be annexed to it:

1. A full and true inventory of all the estate, real and personal, in law and equity, of the corporation, and of all the books, vouchers, and securities relating thereto;

2. A full and true account of the capital stock, if any, of the corporation, specifying the names of the stockholders, their residence, when known, the number of shares belong-

ing to each, the amount paid in upon such shares respectively, and the amount still due thereon;

3. A statement of all the incumbrances on the property of the corporation, and of all engagements entered into by it which have not been fully satisfied or canceled, specifying the place of residence of each creditor, and of every person to whom such engagements were made, if known; if not known, the fact to be so stated, and the sum owing to each creditor, the nature of each debt or demand, and the true cause and consideration of such indebtedness. (R. S. Sec. 5652; April 15, 1867, 64 v. 153, § 2; S. & S. 243.)

A petition under this section must contain the amounts and inventories of all the estate of the corporation. There is no provision of the statute for substituting an excuse for not doing what the statute requires shall be done. It is within the power of the court to give the petitioners access to the books of the corporation to enable them to furnish the material required to be set forth, but until such material is set forth, the court has no authority to make an order under § 11941.

Fitch v. Sprague Carriage Co., 19 C. C. 296; 10 C. D. 520 (1900); affirming 7 N. P. 413; 10 L. D. 341.

Section 11940. (Affidavit to be attached to petition.) To every such petition there shall be annexed an affidavit of one or more of the applicants, or if they all are non-residents of the county wherein it is filed, then an affidavit of the agent or attorney of one or more of the applicants, that the facts stated in the application, and the accounts, inventories, and statements contained therein or annexed thereto, are just and true, so far as affiant knows, or has the means of knowing. (R. S. Sec. 5653; April 25, 1902, 95 v. 274; April 15, 1867, 64 v. 153; S. & S. 243.)

Section 11941. (Notice of pendency of petition.) Upon such petition, accounts, inventories, and affidavit being filed, an order shall be entered requiring all persons interested in the corporation to show cause, if any they have, why it should not be dissolved, before some referee or master commissioner appointed by the court, and to be named in the order, at a time and place therein specified, not less than three months from its date. A notice of the contents of such order shall be published once each week, for three consecutive weeks, in a newspaper published and of general circulation in the county wherein the principal place of business of the corporation is situated. (R. S. Sec. 5654; April 15, 1867. 64 v. 153, §§ 4, 5; S. & S. 243, 244.)

The term "persons interested in the corporation" is not limited to the stockholders, but includes creditors and persons otherwise interested.

In *re Columbus Bicycle Co.*, 1 N. P. n. s. 461; 14 L. D. 467 (C. P. 1904).

Section 11942. (Hearing before the master.) On the day appointed in the order, the referee or master shall proceed to hear the allegations and proofs of such parties, take testimony in relation thereto, and, with all convenient speed, report it to the court, with a statement of the property, effects, debts, credits, and engagements of the corporation, and of all other matters and things pertaining to its affairs. (R. S. Sec. 5655; April 15, 1867, 64 v. 153, § 6; S. & S. 244.)

Section 11943. (When judgment for dissolution rendered.) When the report is made, if it appears to the court that the corporation is insolvent, or that its dissolution will be beneficial to the stockholders, and not injurious to the public interest, or that the objects of the corporation have wholly failed, or been entirely abandoned, or that it is impracticable to accomplish such objects, a judgment shall be entered dissolving the corporation, and appointing one or more receivers of its estate and effects. The corporation thereupon shall be dissolved, and cease. (R. S. 5656; April 15, 1867, 64 v. 153, S. & S. 244.)

Where one corporation acquires a majority of the stock of another corporation, its representatives constituting a majority of the board of directors, and by means of such control it is attempted to expend large sums for improvements, chiefly for the benefit of the stockholding corporation, thereby diverting profits from dividends, resulting in injunction suits and controversies with minority stockholders, the court may decree a dissolution. *In re Mansfield Co.*, 3 Ohio App. 253; 21 C. C. n. s. 95 (1914).

Until after an order has been made dissolving the corporation, no receiver can be appointed. Section 11894 does not apply.

Bacon v. Northwestern Stove Co., 5 C. C. 289; 3 C. D. 143 (1891).

Mercantile Trust Co. v. Aetna Iron Co., 4 C. C. 579; 2 C. D. 718 (1890).

Where two principal stockholders for a time conducted the business, and divided the profits, no directors meetings being held and no dividends declared, and one of the stockholders deserted the business, and opened a similar business of his own, the corporation having only four directors who were equally divided into opposing factions, the court decreed a dissolution. *In re Waldorf Amusement Co.*, 13 Ohio App. 438; 32 O. C. A. 138 (1920).

The burden of proving that dissolution would be beneficial to the stockholders rests on the party seeking dissolution. That majority stockholders may benefit by salaries as executive officers, and that minority stockholders desire to withdraw their investment, should be disregarded. Dissolution was refused in a case where the corporation was solvent and earning profits. *Oppenheimer v. Ptg. Co.*, 24 N. P. n. s. 483 (1923).

In a proceeding under former § 11960, it was held not error for the court to refuse to order corporate officers to file an inventory under § 11939 until plaintiff had shown by evidence that dissolution was probably beneficial to stockholders. *Summers v. Mfg. Co.*, 82 O. S. 338 (1910).

Costs. Where the directors of a company filed a petition under this section, and it appears to the court that the corporation has no property liable to execution for the payment of costs of the proceedings, the court may order that the directors pay such costs (masters' fees), and that in default of such payment execution issue against them therefor.

Godley v. Pugh, 29 O. S. 438 (1876).

Appeal. Proceedings under this chapter are not appealable.

Brown v. Sayler, 54 O. S. 246 (1896).

Section 11944. (Who may be appointed receiver.) A director, trustee, or other officer of the corporation, or any of its stockholders, may be appointed a receiver. Before entering upon the duties of his appointment, he shall give such security to the state, and in such penalty, as the court directs, conditioned for the faithful discharge of the duties of his appointment, and for the due accounting for all money received by him. (R. S. Sec. 5657; April 15, 1867, 64 v. 153, § 8; S. & S. 244.)

See § 11895.

Section 11945. (Powers of receiver.) Such receiver shall be vested with all the estate, real or personal, of the corporation, from the time of his filing the security required by law, be trustee of such estate for the benefit of the creditors of the corporation and its stockholders, and have all the powers conferred by law upon trustees to whom assignments are made for the benefit of creditors. (R. S. Sec. 5658; April 15, 1867, 64 v. 153, §§ 9, 10; S. & S. 244.)

The property and rights of the corporation pass to the receiver precisely in the same condition, and subject to the same equities, as they were held by the corporation.

Falkenbach v. Patterson, 43 O. S. 359, 367 (1885).

See Smith v. Johnson, 57 O. S. 486, 488 (1898).

Where a receiver, appointed on the dissolution of a company, takes no step to set aside a fraudulent conveyance of corporate property, a creditor may commence an action to accomplish that purpose, making the receiver and other interested persons parties.

Monitor Furnace Co. v. Peters, 40 O. S. 575 (1884).

The receiver must return for taxation the property of the corporation in his possession.

In re Patent Wood Keg Co., 13 N. P. n. s. 321; 23 L. D. 381 (C. P. 1912).

Section 11946. (Unpaid subscriptions to be collected.) If there be a sum remaining due upon a share of stock subscribed in the corporation, the receiver immediately shall proceed to recover it, unless the person so indebted is wholly insolvent. For that purpose he may prosecute an action without the consent of any creditor of the corpor-

ation. (R. S. Sec. 5659; April 15, 1867, 64 v. 153, § 11; S. & S. 244.)

After judgment against a subscriber in favor of the receiver, the court appointing the receiver may direct the receiver to collect on such judgment only the subscriber's fair share of the corporate debts.

Clarke v. Thomas, 34 O. S. 46 (1877).

An action to collect an unpaid subscription to the capital stock of a corporation by a receiver under this section is a suit at law to recover a money judgment.

Smith v. Johnson, 57 O. S. 486 (1898).

It is not proper practice for such receiver to join in one action all delinquent stockholders as defendants, those who reside out of the county where the suit is brought as well as those who reside within such county, and issue summons to another county to obtain service upon such non-residents, and where this is done a proper motion to set aside service will be sustained.

Smith v. Johnson, 57 O. S. 486 (1898).

An action by the receiver to collect stock subscriptions is not a chancery case and is not appealable. Union Bank, etc., Co. v. Traction Co., 13 Ohio App. 9, 31 O. C. A. 270 (1920); motion to certify record overruled, 18 O. L. R. 112.

In a stockholders' proceeding to dissolve the corporation a creditor may, by cross petition, set up a claim of the corporation against the plaintiffs on stock subscriptions, where the proceeding was delayed indefinitely by the plaintiffs and no action was taken by the receiver to enforce the subscriptions.

Peter v. Machine Co., 53 O. S. 534 (1895).

Payment of dues in building and loan associations are payments upon stock subscriptions analogous to such payments in other stock corporations upon capital stock. When such associations go into liquidation under this act, dues are no longer payable except as ordered by court for the purpose of paying debts and equalizing all the stockholders.

Hinman v. Ryan, 3 C. C. 529; 2 C. D. 305 (1888).

Section 11947. (Duties of trustees.) Immediately on his appointment, the receiver shall give notice thereof, which shall contain the same matters required by law in notices of trustees of insolvent debtors. In addition thereto, it shall notify all persons holding any open or subsisting contract of the corporation to present it to him, in writing and in detail, at the time and place in such notice specified, which shall be published for three weeks in a newspaper printed and of general circulation in the county wherein the principal place of business of the corporation is situated. (R. S. Sec. 5660; April 15, 1867, 64 v. 153, § 12; S. & S. 244.)

Section 11948. (Transfers pending the action void.) All sales, assignments, transfers, mortgages, and conveyances, of any part of the estate, real or personal, including things in action, of every description, made after the petition for the dissolution of the corporation is filed, in payment of or as security for any existing or prior debt, or for any other

consideration, and all judgments confessed by such corporation after that time, shall be absolutely void as against the receiver appointed on such petition, and the creditors of the corporation. (R. S. Sec. 5661; April 15, 1867, 64 v. 153, § 13; S. & S. 244.)

A mortgage given to secure a creditor, made prior to the filing of a petition under this act, but in contemplation thereof, is fraudulent as to creditors.

Damarin v. Huron Iron Co., 47 O. S. 531 (1890).

When proceedings to dissolve a building and loan association are pending, an attempted assignment of a mortgage by the officers of the corporation is void.

Hinman v. Ryan, 3 C. C. 529; 2 C. D. 305 (1888).

Section 11949. (Duties of creditors and other persons.)

After the first publication of notice of the appointment of a receiver, every person having possession of property belonging to the corporation, and every person indebted thereto, shall account and answer to the receiver for the amount of such debt, and for the value of such property. The provisions of law in respect to trustees of insolvent debtors, the collection and preservation of such debtors' property, the concealment and discovery thereof, and the means of enforcing such discovery, shall be applicable to such receiver, and to the property of the corporation, except as otherwise provided herein. (R. S. Sec. 5662; April 15, 1867, 64 v. 153, §§ 14, 15; S. & S. 245.)

Section 11950. (Meeting of creditors.) The receiver shall call a general meeting of the creditors of the corporation, within four months from the time of his appointment, at which all accounts and demands for and against the corporation, and all its open and subsisting contracts, shall be ascertained and adjusted, as fully as may be, and the amount of money in the hands of the receiver declared. He may settle controversies that arise between him and the debtors or creditors of the corporation by arbitrament or reference. (R. S. Sec. 5663; April 15, 1867, 64 v. 153, §§ 15, 16.)

Power of majority of creditors. A majority of the creditors have no right to fix an arbitrary price at which all creditors must dispose of their claims; nor have the majority the right to form a new corporation and compel each creditor to take stock in the new company in proportion to the amount which his claim bears to the whole indebtedness.

Pease v. Pease, 6 O. L. R. 486; 19 L. D. 237 (C. P. 1908).

Section 11951. (How contingent engagements discharged.) If there be open and subsisting engagements on con-

tracts of the corporation which are in the nature of insurance, or contingent engagements of any kind, with the consent of the party holding such engagements, the receiver may cancel and discharge them by refunding to such party the premium or consideration paid thereon by the corporation, or so much thereof as shall be in the same proportion, to the time which remains of any risk assumed by such engagements, that the whole premium bears to the whole term of such risk. Upon such amount being paid by the receiver to the person holding or being the legal owner of such engagement, it shall be cancelled and discharged as against the receiver. (R. S. Sec. 5664; April 15, 1867, 64 v. 153, § 17; S. & S. 245.)

Section 11952. (Receiver's compensation.) In addition to his actual disbursements, the receiver shall be entitled to such commissions as the court allows not exceeding the sum allowed to executors or administrators, as well as reasonable counsel fees for services rendered him. (R. S. Sec. 5665; April 15, 1867, 64 v. 153, § 18; S. & S. 245.)

Section 11953. (Receiver to retain money for certain purposes.) The receiver shall retain, out of the money in his hands, a sufficient amount to pay the sums which he is authorized to pay, for the purpose of canceling and discharging open or subsisting engagements. If a suit be pending against the corporation or the receiver, for a demand he may retain the proportion which would belong to such demand if established, and for the necessary costs of the proceedings, to be applied according to the event of such suit, or distributed in a second or other dividend. (R. S. Sec. 5666; April 15, 1867, 64 v. 153, §§ 19, 20; S. & S. 245.)

Section 11954. (How distribution to be made.) The receiver shall distribute the residue of the money in his hands in the payment of obligations of the corporation exhibited by creditors, and ascertained in the following order:

1. Debts entitled to a preference under the laws of the United States;
2. Mortgages, judgments, and other liens on the real estate of the corporation, in the order of their priority;
3. Debts which are liens upon the capital stock or property of the corporation, other than real estate, in the order of their priority, and the extent of the value of the stock or other property on which they are liens. (R. S. Sec. 5667; April 15, 1867, 64 v. 153, § 21; S. & S. 245.)

One unsecured creditor can not, by becoming a party and obtaining a judgment, obtain a preference over other unsecured creditors.

In re Columbus Bicycle Co., 1 N. P. n. s. 461; 14 L. D. 467 (C. P. 1904).

Section 11955. (When dividend may be made.) From time to time, the receiver may make dividends of the money in his hands, among the creditors of the corporation, until they are paid in full. No dividend shall be made to the stockholders of the corporation until after the final dividend to creditors. If, after such final dividend, a surplus remains in the hands of the receiver, he shall distribute it among the stockholders, in proportion to the respective amounts paid in by them severally on their shares of stock. (R. S. Sec. 5668; April 15, 1867, 64 v. 153, § 23; S. & S. 246.)

Distribution to stockholders, as part of principal or income of trust estate, by which stock is held.

See *Miller v. Miller*, 13 N. P. n. s. 1, 17-24 (1912); aff'd, 15 C. C. n. s. 481.

Distribution among members of building and loan associations.

See *In re Home Mutual Ass'n*, 3 N. P. 145; 4 L. D. 272 (1896).

Section 11956. (Receiver to act on order of court.) The receiver shall be subject to the direction and control of the court as to the time of making dividends, both to the creditors and stockholders of the corporation, and as to the time of closing up its concerns and the rendering of his final accounts, and may be compelled to account at any time. He may be removed by the court; and a vacancy created by such removal, or by death, or otherwise, may be filled by the court. (R. S. Sec. 5669; April 15, 1867, 64 v. 153, §§ 24, 25; S. & S. 246.)

Section 11957. (Account of receiver to court.) When required by the court, the receiver shall render to it a full and accurate account of all his proceedings, on oath, which may be referred to a referee or master commissioner to examine and report thereon. Before he renders such account, he must insert a notice of his intention so to do, once a week, for three consecutive weeks, in a newspaper printed and of general circulation in the county wherein the principal place of business of the corporation is situated, specifying the time and place at which such account will be rendered. (R. S. Sec. 5670; April 15, 1867, 64 v. 153, §§ 26, 27; S. & S. 246.)

Where exceptions are filed to the report of a receiver, it is error for the court to refuse to hear such exceptions, unless the parties excepting give bond conditioned for the payment of costs and interest on the cor-

porate indebtedness, pending the hearing, in case the exceptions are not sustained.

Russell v. Insurance Ass'n, 21 C. C. 472; 12 C. D. 82 (1901).

Section 11958. (Report of referee on receiver's account.) The referee to whom such account is referred shall hear and examine the proofs, vouchers, and documents offered for or against it, and report thereon fully to the court. When the report is made, the court shall hear the allegations of all concerned therein, and allow or disallow the account, and may decree it to be final and conclusive upon all the creditors of the corporation, all persons who have claims against it, upon any open or subsisting engagement, and all stockholders of the corporation. (R. S. Sec. 5671; April 15, 1867, 64 v. 153, §§ 28, 29; S. & S. 246.)

Section 11959. (Further duties of receiver.) The receiver also shall account, from time to time, in the same manner, and with like effect, for all money which comes to his hands after such account is rendered, and for all money retained by him for any of the purposes hereinbefore specified, and pay into court all unclaimed dividends. (R. S. Sec. 5672; April 15, 1867, 64 v. 153, § 29; S. & S. 246.)

Section 11960. (Stockholders' suits to dissolve manufacturing or mining companies.) Repealed May 31, 1911, 102 v. 512. (R. S. § 5673; April 10, 1896, 92 v. 138; March 20, 1875, 72 v. 67, § 1.)

Decisions under § 11960. Dissolution, if beneficial to stockholders, not refused because prejudicial to corporation.

Summers v. Mfg. Co., 82 O. S. 338 (1910).

Parties. Only the registered legal stockholders, and not equitable stockholders, entitled to take proceedings under this section.

Armstrong v. Herancourt Brewing Co., 26 W. L. B. 39 (1891).

In a proceeding under this section persons holding liens on the property of the defendant company were proper if not necessary parties.

Mercantile Trust Co. v. Aetna Iron Works, 4 C. C. 579; 2 C. D. 718 (1890).

Creditor entitled, by cross-petition, to reach stockholders' liability.

Peter v. Farrell, etc., Co., 53 O. S. 534 (1895).

Order to file inventory. Duty of court to make order.

Armstrong v. Brewing Co., 53 O. S. 467, 477 (1895).

Fitch v. Carriage Co., 19 C. C. 296; 10 C. D. 520 (1900).

Not error to refuse to order corporate officers to file inventory under § 11939 until plaintiffs had shown by evidence that dissolution was probably beneficial to stockholders.

Summers v. Mfg. Co., 82 O. S. 338 (1910).

Joinder of actions. An action for dissolution could not be joined with one for relief against other defendants, directors and stockholders, based on fraud.

Rabenstein v. Chicago, etc., Co., 8 N. P. 315; 11 L. D. 22 (1901).

Evidence. Evidence not admissible that majority stockholders had offered to fix a value on shares, if minority would buy or sell thereat. *Summers v. Mfg. Co.*, 82 O. S. 338 (1910).

Error. Motion for new trial necessary.

Mercantile Trust Co. v. Iron Works, 4 C. C. 579, 589; 2 C. D. 718 (1890).

An Ohio corporation had not the right to refuse to make a disclosure of its condition in an action under this section, and therefore an order upon officers of a corporation requiring them to file in court an inventory, etc., was not an order affecting a substantial right, and not reviewable on error.

Armstrong v. Herancourt Brewing Co., 53 O. S. 467 (1895).

Dismissal. It seems that any of the petitioning stockholders had the right to withdraw and cease to prosecute the proceeding at any time before dissolution is ordered.

See *Herancourt Brewing Co. v. Armstrong*, 6 C. C. 468; 3 C. D. 541 (1892); reversed on other grounds, 53 O. S. 467.

Section 11961. (When the last board is without a quorum.) When the last board of directors or trustees of an expired or dissolved corporation, by the refusal or neglect of a part of such trustees to act, or for want of a quorum, becomes unable to act as trustees for closing the affairs of the corporation, any number of such last board of directors or trustees may apply to the common pleas court of the proper county to declare vacant the places of such directors or trustees as refuse or neglect to act. Such court may empower the remaining directors or trustees, not less than two in number, or appoint any other number of persons, not exceeding three, to perform the duties of trustees under the next preceding section. (R. S. Sec. 5676; February 21, 1849, 47 v. 15, § 1; S. & C. 365.)

Section 11962. (Petitions under preceding section.) All applications under the next preceding section, shall be by petition, and the court hearing it, on the same petition, may make needful orders against former trustees, or against assignees of such corporation, for the conveyance of property by them held, for the assignment of rights in them vested, and for the delivery of all books and papers touching the affairs of the corporation. Such order may be enforced by process, or by its terms operate as a conveyance and transfer. (R. S. Sec. 5677; February 21, 1849, 47 v. 15, § 2; S. & C. 365.)

Section 11963. (Trustees appointed succeed to rights of predecessors.) The trustees so appointed, and their successors, shall succeed to all the rights vested in their predecessors, whether trustees or assignees. All securities and effects

by them held or acquired, and judgments recovered, whether in favor of the corporation to which they succeed, or in the names of its trustees shall inure to the succeeding trustees, and pass by operation of law as fully as if they were assigned. (R. S. Sec. 5678; February 21, 1849, 47 v. 15, § 3. S. & C. 365.)

Section 11964. (No action shall abate by dissolution of corporation.) No action pending in any court in favor of or against a corporation shall be discontinued or abate by its dissolution, whether the dissolution occurs by the expiration of its charter or otherwise. Such actions may be prosecuted to final judgment by the creditors, assignees, receivers, or trustees having the legal charge of the assets of the corporation, in its corporate name. (R. S. Sec. 5679; March 10, 1843, 41 v. 52, § 1; 40 v. 67, § 14; S. & C. 363, 364.)

Where a corporation is liable in damages to an agent for wrongful discharge and is subsequently dissolved on petition of its stockholders, it remains liable to the party injured notwithstanding the dissolution.

Tiffin Glass Co. v. Stoehr, 54 O. S. 157 (1896).

No actions abate.

See *Lake Superior Iron Co. v. Brown*, 44 Fed. 539 (1890).

Construction of former acts.

See *Renick v. Bank of West Union*, 13 Ohio 298 (1844).

Miami Exporting Co. v. Gano, 13 Ohio 269 (1844).

Stetson v. City Bank, 2 O. S. 167 (1853).

Stetson v. City Bank, 12 O. S. 577 (1861).

Section 11965. (Judgments by or against such corporations.) Upon all judgments in favor of or against such a corporation, whether they exist at the time of the dissolution or are obtained afterward in actions pending at that time, execution may be had, and satisfaction or performance of them enforced, by the creditors, assignees, receivers, or trustees having legal charge of the assets of the dissolved corporation, in the corporate name of the dissolved corporation. (R. S. Sec. 5680; March 10, 1843, 41 v. 52, § 2; S. & C. 364.)

Section 11966. (Title to real estate.) The title to real estate belonging to such corporation at the time of its dissolution, shall pass to the trustees of the corporation, who may sell and dispose of it in such manner, and on such terms, as they deem best for the interest of the creditors, and stockholders, and, upon any sale, make a good and sufficient deed therefor. (R. S. Sec. 5681; March 10, 1843, 41 v. 52, § 4; S. & C. 364.)

Section 11967. (Trustees personally liable for an abuse of trust.) The trustees of such a corporation shall be subject to the control of the court of common pleas, and be liable to be sued on behalf of any person interested, on account of any neglect or omission of duty, or abuse of trust. Upon the removal of a trustee by the court for an abuse of trust, it may appoint a suitable person to fill the vacancy. Such trustee, for reasonable cause, upon the application of a creditor or stockholder, may be required by the court to give bond and security, in such amount, and subject to such conditions, as it directs. (R. S. Sec. 5682; March 10, 1843, 41 v. 52, § 5; S. & C. 364.)

Section 11968. (Dissolved corporation may prosecute action in its own name.) After its dissolution, whether occurring by the expiration of its charter or otherwise, a corporation may prosecute an action in and by its corporate name, for the use of the party entitled to receive the proceeds thereof, upon causes of action accrued, or which, but for such dissolution, would have accrued, in favor of the corporation, the same as if it were not dissolved. (R. S. Sec. 5683; March 21, 1850, 48 v. 90, § 1; S. & C. 365.)

A corporation may sue its officers for losses caused by negligence.

Kalb v. American N. B., 21 C. C. 1, 6; 11 C. D. 437 (1900).

Suits by trustees or receivers under former statutes.

See Martin v. Bank, 13 Ohio 250 (1844).

Exporting Co. v. Gano, 13 Ohio 269 (1844).

Section 11969. (May be sued by corporate name.) Such dissolved corporation may be sued by its corporate name, for or upon a cause of action accrued, or which, but for the dissolution, would have accrued against it, in the same manner, and with the like effect, as if it were not dissolved. Process by which an action is instituted against it may be served by the sheriff, or other proper officer, by delivering a copy thereof to an assignee, trustee, receiver thereof, or person having charge of its assets, or by leaving such copy at his residence. (R. S. Sec. 5684; March 21, 1850, 48 v. 90, § 2; S. & C. 366.)

Jurisdiction may be obtained, under this section, over a defunct corporation, by service on the receiver or trustee.

Lerenman v. Insurance Co., 11 N. P. n. s. 58; 21 L. D. 269 (1910).

Taxes. Claims and defenses. Rep. Atty. Gen. 1913, p. 604.

Section 11970. (Judgments may be revived.) Judgments in favor of or against a dissolved corporation, whether ren-

dered before or after dissolution, and which become dormant, may be revived in favor of or against it, as the case may be, in and by its corporate name, in the same manner, and with the like effect, as if it were not dissolved. In all cases of such judgments against such corporation, the writ of summons or other process must be served in the manner prescribed in the next preceding section. (R. S. Sec. 5685; March 21, 1850, 48 v. 90, § 3; S. & C. 366.)

Section 11971. (Error may be prosecuted.) Petitions in error upon judgments may be prosecuted in favor of or against such dissolved corporation, and by its corporate name, as if it were not dissolved. Process thereon against it shall be served in the manner prescribed in section eleven thousand nine hundred and sixty nine. (R. S. Sec. 5686; March 21, 1850, 48 v. 90, § 4; S. & C. 366.)

Section 11972. (Directors may appoint trustees.) The board of directors or other officers having the control and management of a corporation in this state, may appoint three trustees to adjust and settle its affairs. The trustees so appointed shall be authorized to use the corporate name for such period as may be necessary for the adjustment and settlement of its affairs, by suit or otherwise. (R. S. Sec. 5687; May 1, 1852, 50 v. 272, § 2; S. & C. 367.)

Where a corporation is in voluntary liquidation under this section, in good faith, a court of equity will not interfere unless it appears that the remedy furnished by the statute is inadequate.

North Fairmount, etc., Co. v. Rehn, 6 N. P. 185; 8 L. D. 594 (1899)

Section 11973. (Removal and duties of trustees.) The trustees so appointed shall report annually to the stockholders of the corporation a full and succinct statement of its affairs. A majority in interest of the stockholders may remove a trustee, or appoint a person to a vacancy occasioned by the death, resignation, or removal of a trustee. (R. S. Sec. 5688; May 1, 1852, 50 v. 272, §§ 3, 4; S. & C. 367.)

Section 11974. (Certificate of dissolution, or revocation to be filed with secretary of state.) In case of dissolution or revocation of its charter, every domestic corporation shall file with the secretary of state a certificate thereof. If the dissolution is by voluntary action of the corporation, such certificate shall be signed by the president and secretary of the corporation. (R. S. Sec. 2780-31; April 25, 1904, 97 v. 383, § 8; April 11, 1902, 95 v. 127.)

Certificate, from tax commission, as to reports and taxes, as condition precedent to filing certificate of dissolution, see § 5521.

Incorporators who have filed articles of incorporation but have done nothing further toward organization may file with the secretary of state a certificate of abandonment of purpose to form the corporation. Opins. Atty. Gen. 1915, p. 137.

Section 11975. (By whom certificate made when dissolved by court.) In case of dissolution or revocation of charter by action of a competent court, or the winding up of a corporation either domestic or foreign, by proceedings in assignment or bankruptcy, such certificate shall be signed by the clerk of the court in which such proceedings were had. The fees for making and filing it, shall be taxed as costs in the proceeding, be paid out of the corporate funds, and have the same priority as other costs. (R. S. Sec. 2780-31; April 25, 1904, 97 v. 383, § 8; April 11, 1902, 95 v. 127.)

This section does not impose a continuing liability for franchise taxes until the certificate of dissolution is filed, where the trustee in bankruptcy does not continue the corporate business, but merely liquidates the assets for creditors. *State v. Harris*, 229 Fed. 892; 14 O. L. R. 95 (C. C. A. Ohio 1916). See Rep. Atty. Gen. 1912, p. 17. See also note to § 5495.

A certificate from the tax commission under § 5521 is required in cases of dissolution by judicial proceedings as well as in voluntary dissolution. Rep. Atty. Gen. 1912, pp. 17, 67.

But a judgment of dissolution or revocation under § 11943, or other judicial proceedings, terminates the corporate existence, although no certificate is filed at the time with the secretary of state. Rep. Atty. Gen. 1912, p. 67.

Where the superintendent of banks has taken possession of a bank, he may, if it is hopelessly insolvent, obtain an order of dissolution from the common pleas court of the county in which the bank had its principal office, and cause a certificate to be filed under § 11975. If the bank is solvent, such order may be obtained and the certificate filed after the meeting of stockholders provided for in § 710-102. Rep. Atty. Gen. 1914, p. 1065.

Section 11976. (Foreign corporations retiring from state shall file certificate.) When it retires from business in this state, every foreign corporation is required to file with the secretary of state a certificate, to that effect, signed by the president and secretary of the corporation. (R. S. Sec. 2780-31; April 25, 1904, 97 v. 383, § 8; April 11, 1902, 95 v. 127.)

“Retirement from business” under §§ 5520 and 11976 refers to retirement from the exercise of the privilege covered by § 183 et seq. When a corporation retires from business in the state it may have its registration under § 178 et seq. continued. Rep. Atty. Gen. 1914, p. 1172.

Section 11977. (Fee for filing certificate.) The fee for fil-

ing certificates of dissolution, revocation of charter, or retirement of corporations, for profit, shall be five dollars; for filing certificates of corporations, not for profit, one dollar, which is shown to be not in active existence subsequent to April 11, 1902, may be surrendered on the payment of one dollar and on proof as otherwise provided by law. (R. S. Sec. 2780-31; April 25, 1904, 97 v. 383, § 8; April 11, 1902, 95 v. 127.)

Section 11978. (Mere retirement from business or voluntary dissolution of corporation.) The mere retirement from business or voluntary dissolution of a domestic or foreign corporation without filing the certificate provided for in sections eleven thousand nine hundred and seventy-four, eleven thousand nine hundred and seventy-five, and eleven thousand nine hundred and seventy-six, shall not exempt it from the requirements to make reports and pay fees in accordance with the provisions of the next four preceding sections. (R. S. Sec. 2780-31; April 25, 1904, 97 v. 383, § 8; April 11, 1902, 95 v. 127.)

Section 5520 relates only to cases of voluntary dissolution. A judgment of dissolution or revocation of charter, in a judicial proceeding, terminates the corporate existence, and there is no further obligation to make reports and pay taxes, although no certificate is filed under § 11975. Rep. Atty. Gen. 1912, p. 67.

TO CURE ERRORS AND OMISSIONS

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| <p>§ 12210. Intention of parties.
 § 12211. Certain errors, defects,
 and omissions may be
 corrected.</p> | <p>§ 12212. Where petition to be filed.
 § 12213. How service to be made.
 § 12214. Judgment of the court,
 and its effect.</p> |
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Section 12210. (Intention of parties.) When, in an instrument in writing, or in a proceeding, there is an omission, defect, or error, by reason of the inadvertence of an officer, or of a party, person, or body corporate, whereby it is not in strict conformity with the laws of this state, the courts of this state may give full effect to such instrument or proceeding, according to the true, manifest intention of the parties thereto. (R. S. Sec. 5867; March 10, 1859, 56 v. 40, § 1; S. & C. 1172.)

See Warner v. Callender, 20 O. S. 190 (1870).
 Spinning v. Home, etc., Ass'n, 26 O. S. 483 (1875).
 Clark v. Thomas, 34 O. S. 46, 59 (1877).

Section 12211. (Certain errors, defects, and omissions may be corrected.) When such error, omission, or defect

occurs in an instrument or proceeding which is required to be made a matter of record, a party, person, body corporate, or persons intending and undertaking to become a body corporate, having or claiming an interest in the correction of such error, omission, or defect, may file a petition in the court of common pleas, setting forth particularly the error, defect, or omission complained of, and asking an order for its correction. (R. S. Sec. 5868; March 10, 1859, 56 v. 40, § 2; S. & C. 1172.)

Section 12212. (Where petition to be filed.) When the record to be corrected is in any way connected with a body corporate, the petition shall be filed in the county wherein the principal office of such corporation is located, and in all other cases, in the county wherein the record is kept. (R. S. Sec. 5869; March 10, 1859, 56 v. 40, § 3; S. & C. 1173.)

Section 12213. (How service to be made.) When the application is made by a body corporate, or by persons intending and undertaking to become such, notice of the application, specifying the error, defect, or omission complained of, and the time and place of hearing it shall be published for six consecutive weeks, in some newspaper of general circulation in the county where the application is made. In all other cases service shall be made in the manner prescribed by law for making service in civil actions. (R. S. Sec. 5870; March 10, 1859, 56 v. 40, § 2; S. & C. 1172.)

Section 12214. (Judgment of the court, and its effect.) Upon being satisfied that such mistake, error or omission, was made, the court shall make an order to correct it, which order shall be filed in the office wherein such record is required to be kept. From and after such filing, such record, and the order correcting it, shall be received as evidence in all cases, in all courts, the same as if no such error, omission, or defect ever existed. (R. S. Sec. 5871; March 10, 1859; 56 v. 40, § 2; S. & C. 1172.)

PROCEEDINGS IN QUO WARRANTO.

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| § 12303. Proceedings against a person. | § 12323. Judgment when corporation has forfeited its rights. |
| § 12304. Against a corporation. | § 12324. Other acts. |
| § 12305. Who may commence action. | § 12325. Dissolution of corporations; appointment of trustees by court. |
| § 12306. Upon whose relation. | § 12326. Remanding to common pleas. |
| § 12307. In case of usurpation of office. | § 12327. Order of court, effect of. |
| § 12308. When to prosecute in absence of prosecuting attorney. | § 12328. Duties of trustees, as to notice of court order. |
| § 12309. Petition against person for usurpation of office. | § 12329. Rejected claims. |
| § 12310. All claimants to be made defendants. | § 12330. Powers of trustee. |
| § 12311. Actions in quo warranto where brought. | § 12331. Demands by trustee. |
| § 12312. Leave to file petition; notice. | § 12332. Report to court. |
| § 12313. Issue of summons and service. | § 12333. Application of this amendment. |
| § 12314. Service by publication. | § 12334. Contempt not to give possession to trustees. |
| § 12315. Pleadings after petition. | § 12335. Costs. |
| § 12316. Court may extend time for pleading. | § 12336. How order to deliver property enforced. |
| § 12317. Judgment where office, franchise, etc., found to have been usurped. | § 12337. Injunction in certain cases. |
| § 12318. Judgment where director of a corporation found to have been illegally elected. | § 12338. Court may require bank directors to give security. |
| § 12319. When court may order new election. | § 12339. Directors may be enjoined from borrowing or issuing money, etc. |
| § 12320. Rights of person adjudged to be entitled to an office. | § 12340. Limitations. |
| § 12321. Action for damages. | § 12341. Action for damages against officers, etc., of ousted corporations. |
| § 12322. How judgment of court enforced. | § 12342. Cumulative remedy. |
| | § 12343. Disposition of fines. |
| | § 12344. Actions under this chapter to have precedence, etc. |

Section 12303. (Proceedings against a person.) A civil action may be brought in the name of the state:

1. Against a person who usurps, intrudes into, or unlawfully holds or exercises, a public office, civil or military, or a franchise, within this state, or an office in a corporation created by the authority of this state;

2. Against a public officer, civil or military, who does or suffers an act which, by the provisions of law, work a forfeiture of his office;

3. Against an association of persons who act as a corporation within this state without being legally incorporated. (R. S. Sec. 6760; March 17, 1838, 36 v. 68, § 1; S. & C. 1264.)

USURPATION OF CORPORATE OFFICE.

In general the proper proceeding to test the validity of an election of directors is a proceeding in quo warranto.

§§ 12318, 12319.

Hullman v. Honcamp, 5 O. S. 237 (1855).

Presbyterian Soc. v. Smithers, 12 O. S. 248 (1861).

See State v. Bonnell, 35 O. S. 10 (1878).

Where an election is held invalid the court may, in its discretion, order a new election.

§ 12319.

Henderson v. Hogan, 1 W. L. B. 227 (Dist. Ct. 1876).

When term of office has expired. A proceeding can not be maintained where the term of office has expired or is about to expire.

State v. Ward, 17 O. S. 543, 548 (1867).

State v. Jacobs, 17 Ohio 143 (1848).

Pleading. Where the information avers continued usurpation of the office of directors, the answer must set out expressly the continuance of every qualification necessary to the enjoyment of the office. It is not sufficient to state the qualifications necessary to appointment, and rely upon the presumption of their continuance.

State v. Beecher, 15 Ohio 723 (1846).

Resignation no defense. The resignation of defendants, after they have been served with process in a quo warranto proceeding, in which they are charged with usurping an office, constitutes no answer to the information. Their successors, as to the unoccupied term, stand in their shoes, and will be bound by the judgment.

State v. McDaniel, 22 O. S. 354 (1872).

Other remedies to try title to corporate office.

See note to § 8647, page 998.

UNLAWFUL EXERCISE OR USURPATION OF FRANCHISE.

The authority of foreign insurance companies to do business in the state is a franchise, the right to exercise which may be tested under this section.

State v. Ackerman, 51 O. S. 163 (1894).

Where the acts complained of are authorized by an amendment of a statute, passed while the quo warranto proceeding is pending, the defendant may be entitled to the benefit of the amendment.

State v. Mutual, etc., Ass'n, 26 O. S. 19 (1875).

Where in a quo warranto proceeding brought against a corporation in its corporate name, charging a usurpation of certain corporate franchises, the defendant answered, pleading in a corporate capacity, and setting up its character, it is not competent for the state, by replication, to deny the corporate existence of the defendant. Where the franchise to be a corporation is intended to be drawn into question, the proceeding should be against the individuals who usurp such franchise.

State, ex rel., v. Coke Co., 18 O. S. 262 (1868).

But a proceeding to oust a corporation from the exercise of franchises which it usurps should be against the corporation and not against individuals.

State, ex rel., v. Taylor, 25 O. S. 279 (1874).

Where an information in the nature of a quo warranto was filed against a corporation, by its corporate name, calling upon it to show by what warrant it claims to be a corporation and to exercise corporate powers, and the defendant pleaded an act of the legislature granting to it the franchises named in the information, it is competent for the relator, by way of replication, to aver cause of forfeiture and to pray for a judgment of dissolution.

State v. Canal Co., 23 O. S. 121 (1872).

The rule of pleading established by the above case was held not to be changed since a quo warranto proceeding has become a civil action.

State, ex rel., v. Road Co., 13 C. C. 375; 7 C. D. 453 (1896).

ASSOCIATIONS OF PERSONS ASSUMING TO ACT AS A CORPORATION.

To bring a case within this section it is not necessary that the association or persons composing it claim to act as a corporation, or assume to do so; it is sufficient if the acts are such as appertain to corporations, or are done after the manner of corporations.

State, ex rel., v. Ackerman, 51 O. S. 163 (1894).

Where the franchise to be a corporation is intended to be drawn in question, the proceeding should, under our statutes, be against the individuals who usurp such franchise.

State, ex rel., v. Coke Co., 18 O. S. 262 (1868).

See State, ex rel., v. Robinson, 12 W. L. B. 269 (1884).

Where, in a proceeding in quo warranto, certain named persons, and others said to be too numerous to be brought upon the record, were charged with usurping the franchise of being a corporation, and the defendants named plead that they were the directors of the corporation, without denying that they were corporators therein, and averred the legal existence of the corporation, in the absence of allegations or proof to the contrary, the defendants are to be regarded as claiming to be members of the corporation.

State, ex rel., v. Sherman, 22 O. S. 411 (1872).

Trusts as business organizations. An unincorporated association, organized under a written agreement adopting a fictitious name, and providing that its property shall be held and business transacted by trustees, for beneficiaries to whom transferable shares are issued, with annual elections at which the shareholders are entitled to vote for and elect new trustees, and providing that the shareholders are not to be personally liable for the debts of the association, is, in the opinion of the attorney general, an unauthorized association under § 12303, having no right to transact business in Ohio and ineligible to be licensed under the Blue Sky law as a dealer in securities. Opins. Atty. Gen. 1919, p. 1023; Elliott's Blue Sky Laws, p. 706. See also Opins. Atty. Gen. 1915, p. 171; State v. Ackerman, 51 O. S. 163. For contra opinion, see article by Edward C. Daoust, 18 O. L. R. 526.

PLEADING AND PRACTICE.

Pleading in general. Quo warranto is a civil action, by the provisions of this section.

State, ex rel., v. Thompson, 34 O. S. 365 (1878).

State v. Cash Register Co., 13 C. C. n. s. 73; 21 C. D. 637 (1910).

But is nevertheless a special proceeding, and the cause of action must be in harmony with the statutory subject of action. State v. Electric Co., 104 O. S. 120 (1922).

Formerly the common law system of pleading was followed and pleadings were not governed by the code.

State, ex rel., v. McDaniel, 22 O. S. 354 (1872).

State, ex rel., v. Taylor, 25 O. S. 279 (1874).

Redundant and irrelevant matter in the petition prejudicial to the defendant may be stricken out, on motion.

State v. Cash Register Co., 13 C. C. n. s. 73; 21 C. D. 637 (1910).

State v. Gas & Electric Co., 13 C. C. n. s. 12 (1910).

Usurpation and misuser of corporate powers and franchises, and the exercise of privileges and franchises prohibited by law, may be alleged in the petition in general terms, without specifying in detail the particulars thereof. But where such allegations in general terms in a petition are followed by specification in detail of some of the particulars, the specification of particulars, if pertinent to the inquiry, are not prejudicial and will not be stricken out on motion.

State, ex rel., v. Cash Register Co., 13 C. C. n. s. 73; 21 C. D. 637 (1910).

The strictness and certainty of an indictment are not required.

State v. Commercial Bank, 10 Ohio 535 (1844).

Right to jury trial. In a proceeding to determine the title to public office neither party is entitled to trial by jury.

Mason v. State, 58 O. S. 30 (1898).

And in a proceeding to forfeit a corporate franchise, neither party is entitled to a jury trial. State v. Toledo Gardners' Exchange, 13 Ohio App. 250 (1919).

It is said that where the constitutional right to a jury trial is recognized, the right to empanel a jury to try issues of fact is inherent in the exercise of jurisdiction in quo warranto.

See Turnpike Co. v. Waechter, 2 C. C. n. s. 21; 15 C. D. 605 (1903).

Burden of proof—right to open and close. The burden is on the defendants to show by what authority they claim to exercise the powers complained of, and they are entitled to open and close the argument.

State, ex rel., v. Vanderbilt, 37 O. S. 590, 631 (1882).

Section 12304. (Against a corporation.) A like action may be brought against a corporation:

1. When it has offended against a provision of an act for its creation or renewal, or any act altering or amending such acts;

2. When it has forfeited its privileges and franchises by non-user;

3. When it has committed or omitted an act which amounts to a surrender of its corporate rights, privileges, and franchises;

4. When it has misused a franchise, privilege, or right conferred upon it by law, or when it claims or holds by contract or otherwise, or has exercised a franchise, privilege, or right in contravention of law. (R. S. Sec. 6761; March 9, 1881, 78 v. 43; R. S. 1880; March 17, 1838, 36 v. 68, § 8; S. & C. 1266.)

What can not be determined in quo warranto proceeding.

Rights and liabilities of third persons.

Society Perun v. Cleveland, 43 O. S. 481 (1885).

See State v. Railway, 13 C. C. n. s. 145 (1909).

Rights of stockholders and policyholders in quo warranto proceeding against insurance company.

State, ex rel., v. Insurance Co., 13 C. C. n. s. 49; 22 C. D. 262 (1910); aff'd, 64 O. S. 272.

Bell v. Insurance Co., 14 C. C. n. s. 385 (1911).

The object of quo warranto proceedings is not to divest the company of its title to property, unless acquired by a usurpation of the proprietary rights of the state, and a prayer that the company be ousted from the right to use the lands of the relator for a private purpose is, in effect, a prayer for the possession of the lands, and not within the purpose of a proceeding in quo warranto.

State, ex rel., v. Railroad Co., 50 O. S. 239 (1893).

Quo warranto is not a remedy for enforcing a contract.

State, ex rel., v. Railroad Co., 50 O. S. 239 (1893).

See State v. Light Co., 3 C. C. n. s. 285; 13 C. D. 603 (1902);
reversed, without report, 73 O. S. 356.

State v. Traction Co., 18 C. C. 490, 498; 10 C. D. 212 (1899);
aff'd, no rep., 84 O. S. 459.

Foreign corporations. A foreign corporation exercising in this state franchises and privileges without authority of law may be ousted therefrom under this section.

State, ex rel., v. Insurance Co., 49 O. S. 440 (1892).

State, ex rel., v. Life Ins. Co., 47 O. S. 167 (1890).

NON-USER OF FRANCHISES.

See also §§ 12323, 12340.

A corporation which fails to complete its organization by the election of directors is liable to ouster for misuse or non-use of its franchise.

See State, ex rel., v. Robinson, 12 W. L. B. 269 (1884).

Irregularities and omissions of statutory requirements, in the organization of a corporation not for profit, are not a sufficient basis for a judgment of ouster, where they were due to inadvertence and not to a design to evade the law.

State, ex rel., v. Burial Ass'n, 8 C. C. n. s. 233; 18 C. D. 397 (1906);
(dismissed in supreme court for want of jurisdiction, 4 O.
L. R. 708).

Where an educational corporation, chartered to maintain both classical and agricultural departments, maintained a competent agricultural instructor, the court refused to forfeit its charter because of a partial decay of its agricultural department caused by students refusing to take that course.

State v. College, 32 O. S. 487 (1877).

MISUSER OF FRANCHISE, ETC.

— **Exclusion of directors.** A proceeding under this section may be brought to prevent the corporation from excluding legally elected directors from the exercise of their duties, and in such a proceeding the persons permitted to act as directors are proper parties.

State, ex rel., v. Ohio, etc., Ry. Co., 6 C. C. 412; 3 C. D. 516 (1892).

See State, ex rel., v. Smith, 6 C. C. 410 (1892).

— **Misuser by railroad company.** A railroad company assumes the performance of duties for the benefit of the public generally. When such corporation, for a period of five years, fails to construct the line of railroad named in its charter, but condemns private property and constructs a railroad wholly unsuited to the wants of the public, and for the benefit only of the coal mines, owned and operated by the principal stockholders of such railroad company, it is a misuse of its corporate powers, franchises and privileges.

State v. Railway Co., 40 O. S. 504 (1884).

See State, ex rel., v. Railroad Co., 50 O. S. 239 (1893).

Building of a bridge across a navigable river, without permission of the board of public works, is a misuse of a franchise.

Railway v. State, 33 W. L. B. 169 (1894).

— **Misuser by interurban railway.** Failure to pave between tracks in accordance with its franchise may amount to misuser. State v. Electric Co., 104 O. S. 120 (1922).

— **Conducting unlawful business.** Where the manner of conducting a business, which the state's charter gives power to a company to conduct as a corporation, is in disregard and defiance of the laws of the state relating to that business, an abuse of the power results, and quo warranto may properly be invoked to stop the abuse, and if the abuse is flagrant, to oust the corporation.

(Illegal manufacture and sale of oleomargarine.)

State, ex rel., v. Capital Dairy Co., 62 O. S. 350 (1900); affirmed, 183 U. S. 238.

(Lottery.)

State, ex rel., v. Investment Co., 64 O. S. 283 (1901).

— **Violation of anti-trust act.**

See § 6400 and note.

Quo warranto was held to be a proper method of testing the constitutionality of the anti-trust act.

State v. Pipe Line Co., 61 O. S. 520 (1899).

— **Misuser by college.** Where the trustees of an incorporated educational institution sign diplomas in blank and leave them within the control of one of its officers who sells them and thus confers degrees without merit, there is such a misuse of power conferred as requires the dissolution of the corporation.

State v. College Co., 63 O. S. 341 (1900).

EXERCISE OR CLAIM OF ILLEGAL FRANCHISE, PRIVILEGE, ETC.

Meaning of "privilege."

See State v. Railway Co., 53 O. S. 189, 240 (1895).

— **Discrimination in rates.** A company operating as a common carrier has no right to discriminate in its freight rates between shippers, and where such a company, for instance, fixes a rate of freight for carrying petroleum oil in tank cars, substantially lower than its rate for transporting it in barrels in carload lots, it is exercising a franchise, privilege or right in contravention of law under this section.

State, ex rel., v. Railway Co., 47 O. S. 130 (1890).

See State, ex rel., v. Gas & Electric Co., 13 C. C. n. s. 12 (1910).

— **Eminent domain.** A proceeding in quo warranto is the only direct method of testing the right of a corporation to exercise the power of eminent domain, and such proceeding is not barred by a judgment of the probate court under § 11046 as to such right.

State, ex rel., v. Salem Water Co., 5 C. C. 58; 3 C. D. 30 (1890).

See Cemetery Assn. v. Traction Co., 93 O. S. 161.

— **Railway relief association.** Quo warranto lies to oust a railway relief association, organized and maintained in violation of G. C. § 9010.

State, ex rel., v. Railways, 13 C. C. n. s. 37 (1909).

— **Franchise of public service corporation in streets.** A proceeding in quo warranto may be brought against a public service corporation using streets in a manner not authorized by its franchise or license from the municipality, or without a franchise.

(Street railway.)

State v. Traction Co., 18 C. C. 490, 498, 499; 10 C. D. 212 (1899); affirmed, 64 O. S. 272.

State v. Electric Co., 104 O. S. 120 (1920).

State v. Light Co., 3 C. C. n. s. 285; 13 C. D. 603.
(Telephone company.)

State v. Telephone Co., 11 C. C. 55; 5 C. D. 311 (1895); s. c.,
14 C. C. 273.

State v. Telephone Co., 72 O. S. 60.

See State, ex rel., v. Railroad Co., 6 C. C. 318 (1891); aff'd, no
rep., 27 W. L. B. 64.

Hamilton v. Coke Co., 8 N. P. 319; 11 L. D. 513 (C. P.).
(Gas company.)

See State, ex rel., v. Cincinnati, etc., Coke Co., 18 O. S. 262 (1868).

State, ex rel., v. Iron-ton Gas Co., 37 O. S. 45 (1881).

Quo warranto was held to be the proper remedy where a consoli-
dated street railway company charged excessive and illegal rates.

State v. Railway & Light Co., 3 C. C. n. s. 285; 13 C. D. 603 (1902);
reversed, without report, 73 O. S. 356.

See State v. Telephone Co., 72 O. S. 60 (1905).

— **License to insurance company.** Quo warranto is the proper
remedy to test the validity of a license issued to an insurance com-
pany. State v. Gearheart, 104 O. S. 422 (1922).

— **Power of railroad company to hold canal lands.** An action
in quo warranto will lie against a railroad corporation to contest its claim
to exercise a right or privilege to or in the canal lands of the state.

State, ex rel., v. Railway Co., 53 O. S. 189 (1895).

— **Directors or trustees exceeding powers.** Quo warranto does
not lie to prevent directors from exceeding their powers. Injunction
is the proper remedy and the trustees or directors are necessary parties.
State v. Toledo, 3 C. C. n. s. 468; 13 C. D. 327 (1902).

Effect of intention. A mere intention on the part of a railroad
company to violate its public duties does not change the legal status
of the company, or afford ground for the forfeiture of its charter.

Railway Co. v. Railway Co., 6 C. C. n. s. 537; 15 C. D. 705 (1902);
aff'd, no rep., 67 O. S. 523.

Where a company misuses its corporate privileges in such way as to
be a public abuse, the writ must issue regardless of intention.

State v. Investment Co., 64 O. S. 283, 317 (1901).

But intention may have an effect on what judgment is rendered.

See State v. Railway, 12 C. C. n. s. 49; 21 C. D. 175 (1909).

State v. Burial Ass'n, 8 C. C. n. s. 233; 8 C. D. 397 (1906).

DEFENSES.

— **Statute of limitations.**

See § 12340.

— **Engagement in interstate commerce.** A railroad company
misusing its franchise, privileges or right is subject to a proceeding under
this section, though it may be engaged in interstate commerce and the
misuser or usurpation to be corrected relates to and concerns that traffic.

State, ex rel., v. Cincinnati, etc., Ry. Co., 47 O. S. 130 (1890).

See State v. Penna. Co., 27 O. C. A. 172; 29 C. D. 286; aff'd, 88
O. S. 540.

State v. Railroad, 8 Ohio App. 450; 28 O. C. A. 241.

— **License to insurance, etc., company.** The issuing of a li-
cense to a foreign insurance company is not a bar to quo warranto pro-
ceedings.

State, ex rel., v. Insurance Co., 49 O. S. 440 (1892).

State, ex rel., v. Investment Co., 64 O. S. 283, 318 (1901).

— Same acts punishable criminally. The mere fact that the criminal laws of the state provide a punishment for certain acts is no bar to a proceeding in quo warranto to oust a corporation engaged in such acts.

State, ex rel., v. Capital Dairy Co., 62 O. S. 350 (1900).

— Res adjudicata. A judgment rendered in an inferior court in favor of a defendant corporation, upon an information in the nature of a quo warranto, filed by a county prosecuting attorney, upon an individual relation, is not a bar to a subsequent information of a similar character, filed by the attorney general, in the exercise of the discretion given him by the statute.

See State ex rel., v. Coke Co., 18 O. S. 262 (1868).

A judgment of the probate court in an appropriation proceeding by a corporation, to the effect that a corporation had a right to make the appropriation, is not a bar to a quo warranto proceeding to determine its right to exercise the power of eminent domain.

State v. Salem Water Co., 5 C. C. 58; 3 C. D. 30 (1890).

PLEADING.

See also note to § 12303.

When an information in the nature of a quo warranto is filed against a corporation by its corporate name, calling upon it to show by what warrant it claims to be a corporation, and to exercise corporate powers, and the defendant pleads an act of the legislature granting to it the franchise named in the information, it is competent for the relator, by way of replication, to aver a cause of forfeiture, and to pray for a judgment of dissolution.

State, ex rel., v. Canal Co., 23 O. S. 121 (1872).

State, ex rel., v. Road Co., 13 C. C. 375 (1889).

State, ex rel., v. Commercial Bank, 10 Ohio 535, 541 (1841).

See State, ex rel., v. American, etc., College, 8 A. L. Rec. 422 (1879).

Where proceedings are instituted by the state against a corporation, by its corporate name, charging a usurpation of certain corporate franchises, it is not competent for the state, by way of replication, to deny the corporate existence of the defendant.

State, ex rel., v. Coke Co., 18 O. S. 262 (1868).

See State, ex rel., v. Canal Co., 23 O. S. 121, 126 (1872).

Where the action is against the corporation for exercising franchises not conferred by law, the corporate existence of the defendant should be alleged.

State v. Granville, etc., Society, 11 Ohio 1, 9 (1841).

The inquiry is limited to the charges in the petition and matters set up in the answer are only material as showing warrant of law for exercising the power claimed to be usurped.

State v. Cincinnati, 23 O. S. 445 (1872).

PARTIES.

See also §§ 12305, 12306, 12307.

A proceeding against the individuals composing a corporation for a nonuser or misuser of franchises is bad on demurrer. The action should be against the corporation after it comes into existence.

State, ex rel., v. Robinson, 12 W. L. B. 269 (1884).

State, ex rel., v. Taylor, 25 O. S. 279 (1874).

Section 12305. (Who may commence action.) When directed by the governor, supreme court, or general as-

sembly, the attorney-general, or a prosecuting attorney, shall commence such action. When, upon complaint, or otherwise, either of such officers has good reason to believe that any case specified in the next preceding section can be established by proof, he shall commence an action. (R. S. Sec. 6762; May 1, 1852, 50 v. 267, §§ 9, 10, 11, 12; March 17, 1838, 36 v. 68, §§ 1, 8; S. & C. 1264; S. & C. 1266.)

The judges of the supreme court, in their private capacity, have no power to direct proceedings in quo warranto.

Railroad Co. v. State, 10 Ohio 360 (1841).

The power of the supreme court should, as a general rule, be exercised only when something relating to the court, or its business, renders it necessary or advisable.

Thompson v. Watson, 48 O. S. 552 (1891).

State, ex rel., v. Taylor, 50 O. S. 120 (1893).

Any citizen of Ohio may, as a matter of right and without leave granted, invoke the original jurisdiction of the supreme court. State v. Fender, 106 O. S. 191 (1922).

For rule prior to 1912 amendment to the state constitution, see State v. Thompson, 34 O. S. 365 (1878).

The prosecuting attorney need not verify the petition or give security for costs: § 12307 does not apply.

State v. Sullivan, 15 C. C. 477; 8 C. D. 346 (1897).

A prosecuting attorney may maintain a quo warranto proceeding to oust a railway relief association organized and conducted in violation of § 9010.

State, ex rel., v. Railway, 13 C. C. n. s. 37 (1909).

Section 12306. (Upon whose relation.) Upon his own relation, such officer may bring such an action, or, on leave of the court, or a judge thereof in vacation, he may bring the action upon the relation of another person. If the action be brought under the first division of the first section of this chapter, he may require security for costs, to be given as in other cases. (R. S. Sec. 6763; March 17, 1838, 36 v. 68, § 1; S. & C. 1264.)

A proceeding to oust persons claiming to be directors of a corporation should be brought by the prosecuting attorney, who may bring it on his own relation without leave of court. But if brought on the relation of another person, leave of court must be obtained. The name of the state can not be used by an individual without leave of court.

State, ex rel., v. Smith, 6 C. C. 410; 3 C. D. 515 (1892).

Crawford v. State, 52 O. S. 62 (1894).

A writ of mandamus will not be awarded to compel the attorney-general to commence proceedings. An application to him to bring the action is addressed to his discretion, the exercise of which the court will not control.

Thompson v. Watson, 48 O. S. 552 (1891).

See In re Bank, 5 Ohio 250 (1831).

Quo warranto can only be brought in the name of the state.

See Railway Co. v. State, 49 O. S. 668, 681 (1892).

A judgment rendered by an inferior court in favor of the defendant corporation, in a proceeding brought by the prosecuting attorney, on an in-

dividual relation, is not a bar to a subsequent proceeding by the attorney-general.

State, ex rel., v. Coke Co., 18 O. S. 262 (1868).

Where the attorney-general applies for leave to file a petition in quo warranto, and it appears that the case is not a proper one for such proceeding, the court may refuse leave.

State v. Hunt, 84 O. S. 143 (1911).

Section 12307. (In case of usurpation of office.) A person claiming to be entitled to a public office unlawfully held and exercised by another, by himself or an attorney at law, upon giving security for costs, may bring an action therefor. (R. S. Sec. 6764; 37 v. 70, § 1; S. & C. 1270.)

Any citizen of Ohio may, as a matter of right and without leave granted, file a petition in quo warranto in the supreme court. State v. Fender, 106 O. S. 191 (1922).

Section 12308. (When to prosecute in absence of prosecuting attorney.) When the office of prosecuting attorney is vacant, or the prosecuting attorney is absent, interested in the action, or disabled, the court, or a judge thereof in vacation, may direct or permit any member of the bar to act in his place to bring and prosecute the action. (R. S. Sec. 6765; March 17, 1838, 36 v. 68, § 23; S. & C. 1269.)

Section 12309. (Petition against person for usurpation of office.) When the action is against a person for usurping an office, the petition shall set forth the name of the person who claims to be entitled to it, with an averment of his right thereto. Judgment may be rendered upon the right of the defendant, and also on the right of the person so averred to be entitled, or only upon the right of the defendant, as justice requires. (R. S. Sec. 6766; 36 v. 68, § 3; S. & C. 1265.)

Section 12310. (All claimants to be made defendants.) All persons who claim to be entitled to the same office or franchise may be made defendants in one action, to try their respective rights to such office or franchise. (R. S. Sec. 6767; March 17, 1838, 36 v. 68, § 7; S. & C. 1266.)

Section 12311. (Actions in quo warranto, where brought.) An action under this chapter can be brought only in the supreme court, or in the court of appeals of the county in which the defendant, or one of the defendants, resides or is found, or, when the defendant is a corporation, in the county in which it is situated, or has a place of business; except that, when the attorney general files the petition, it may be brought in the court of appeals of Franklin county. (May 6, 1913, 103 v. 433; R. S. § 6768; February 7, 1885, 82 v. 16,

39; R. S. 1880; May 1, 1852, 50 v. 267, § 13; March 17, 1838, 36 v. 68, § 1; S. & C. 89; S. & C. 1264.)

The petition must allege the location of the place of business of the corporation.

State v. Granville, etc., Society, 11 Ohio 1, 9 (1841).

Quo warranto proceedings by the attorney-general against several corporations, for violation of the anti-trust act, may be brought in the court of appeals of any county where one or more of the defendants is located, or has a place of business, and process may issue to other counties for the other defendants.

State v. Bridge Co., 7 C. C. n. s. 557; 18 C. D. 147 (1906).

State v. Standard Oil Co., 15 C. C. n. s. 212, 220 (1907).

Quo warranto may be brought by the attorney general in the court of appeals of Franklin county against an individual charged with transacting insurance business without authority, although he is served with summons in another county where he resides. State v. Renschler, 4 Ohio App. 413; 25 C. C. n. s. 218 (1913); affirmed, 90 O. S. 363.

The supreme court has original jurisdiction. State, ex rel., v. Fender, 106 O. S. 191 (1922).

Jurisdiction of court of appeals.

See State, ex rel., v. Buckland, 5 O. S. 216 (1855).

State, ex rel., v. Smith, 6 C. C. 410 (1892).

Railroad Co. v. State, 85 O. S. 251.

The statute construed in State v. Thompson, 34 O. S. 365, requiring the action to be "brought in the county in which the defendant resides or may be summoned in accordance with section 10, chapter 5, title 1, of the act" so far as it relates to the supreme court was repealed by the 1912 amendment to the Ohio Constitution. State v. Fender, 106 O. S. 191 (1922).

Section 12312. (Leave to file petition; notice.) Upon application for leave to file a petition, the court or judge may direct notice thereof to be given to the defendant previous to granting such leave, and may hear the defendant in opposition thereto. If leave be granted, an entry thereof shall be made on the journal, or, the fact be indorsed by the judge on the petition, which shall then be filed. (R. S. Sec. 6769; March 17, 1838, 36 v. 68, § 9; S. & C. 1267.)

See State, ex rel., v. Hunt, 84 O. S. 143 (1911).

A judge of the court may, in the exercise of chamber powers, grant leave to file an information in the nature of a quo warranto.

State, ex rel., v. Buckland, 5 O. S. 216 (1855).

A citizen of Ohio may file a petition in quo warranto, as a matter of right, without leave granted. State, ex rel., v. Fender, 106 O. S. 191 (1922).

Section 12313. (Issue of summons and service.) When the petition is filed without leave and notice, a summons shall issue, and be served as in other cases. Such summons may be sent to and returned by the sheriff of any county by mail, who shall be entitled to the same fees thereon as if it

had been issued and returned in his own county. (R. S. Sec. 6770; March 17, 1838, 36 v. 68, § 2; S. & C. 1265.)

Service on corporations, see § 11288.

Where a petition is filed without leave a summons which fixes answer day as the third Saturday after the return day is bad on a motion to quash. Under § 12315 the time for answer is within thirty days after the return of the summons.

State, ex rel., v. Robinson, 11 W. L. B. 294 (1884).

Service may be made in quo warranto as in other civil actions. Where the defendant is a railroad company, service may be made upon a ticket or freight agent under § 11288.

State v. Standard Oil Co., 15 C. C. n. s. 212 (1912).

Section 12314. (Service by publication.) When a summons is returned not served because the defendant, or its officers or office, cannot be found within the county, the clerk must publish a notice for four consecutive weeks in a newspaper published and of general circulation in the county, setting forth the filing and substance of the petition. Upon proof of such publication, the default of the defendant may be entered, and judgment rendered thereon, as if he had been served with summons. (R. S. Sec. 6771; March 17, 1838, 36 v. 68, § 13; S. & C. 1268.)

Where none of the defendants reside in or are found in the county, and none appear, service by publication is not authorized.

State, ex rel., v. Smith, 6 C. C. 410; 3 C. D. 515 (1892).

In a quo warranto proceeding against a corporation, where certain non-resident directors are proper parties, they may be served under this section.

State, ex rel., v. Railway Co., 6 C. C. 412, 415 (1892).

Section 12315. (Pleadings after petition.) The defendant may demur or file an answer, which may contain as many several defenses as he has, within thirty days after the filing of the petition, if it was filed on leave and notice, or after the return day of the summons; and the plaintiff may file a demurrer or a reply to such answer within thirty days thereafter. (R. S. Sec. 6772; March 17, 1838, 36 v. 68, § 12; R. S. 1880; S. & C. 1268.)

Pleading.

See notes to §§ 12303 and 12304.

The inquiry in proceedings in quo warranto is limited to the charges in the information, and matter set up by way of plea is only material in so far as it shows warrant in law for the exercise of the authority alleged in the information to be usurped.

State, ex rel., v. Cincinnati, 23 O. S. 445 (1872).

See State, ex rel., v. Greenville, etc., Ass'n. 29 O. S. 92, 101 (1876).

In a proceeding against an interurban railway for failure to pave between tracks as required by its franchise, irregularity of the proceedings to pave the highway constitutes no defense. The defenses

in a quo warranto proceeding must be in harmony with the statutory subject of action. *State v. Electric Co.*, 104 O. S. 120 (1922).

Section 12316. (Court may extend time for pleading.)

An order may be made by the court, or a judge thereof, extending the time within which a pleading may be filed; but such order shall not work a continuance of the case. (R. S. Sec. 6773; March 17, 1838, 36 v. 68, § 14; S. & C. 1268.)

Section 12317. (Judgment where office, franchise, etc., found to have been usurped.) When a defendant is found guilty of usurping, intruding into or unlawfully holding or exercising an office, franchise, or privilege, judgment shall be rendered that he be ousted and altogether excluded therefrom, and that the relator recover his costs. (R. S. Sec. 6774; March 17, 1838, 36 v. 68, § 15; S. & C. 1268.)

Section 12318. (Judgment where director of a corporation found to have been illegally elected.) When the action is against a director of a corporation, and the court finds that, at his election, either illegal votes were received or legal votes rejected, or both, sufficient to change the result, judgment may be rendered that the defendant be ousted, and of induction in favor of the person who was entitled to be declared elected. (R. S. Sec. 6775; April 28, 1873, 70 v. 176, § 1; R. S. 1880.)

Where persons claiming office as directors are ousted because of unfair election, their predecessors will be restored to office to continue until their successors are elected and qualified.

State, ex rel., v. Bonnell, 35 O. S. 10, 17 (1878).

Persons elected directors by cumulative votes may be inducted into office, although they did not receive the votes of a majority of the stockholders.

Schwartz v. State, 19 C. C. 350 (1900); affirmed, 61 O. S. 497.

See G. C. § 8636.

Where it is impossible to determine which of the candidates for directors were elected, none of them can hold office as the result of the election. *State v. McIntosh*, 23 C. C. n. s. 305 (1912).

Where a corporation has five directors, the election of four persons entitles them to be inducted into office in the place of the former board of five. *State v. DeBrul*, 100 O. S. 272 (1919).

Before the enactment of this section it was held that the court could not declare elected and induct into office, persons who had only a minority of the votes received by the inspectors of election, although sufficient legal votes, offered in their favor, had been improperly rejected by the inspectors.

State v. McDaniel, 22 O. S. 355 (1872).

See *Renner v. Bennett*, 21 O. S. 431 (1871).

Section 12319. (When court may order new election.)

In a case under the next preceding section the court may

order a new election to be held, at a time and place, and by judges it appoints, notice of which election, and naming the judges, shall be given as provided by law for notice of elections of directors of such corporation. The order of the court shall become obligatory upon the corporation and its officers when a duly certified copy is served upon its secretary personally, or left at its principal office. The court may enforce its order by attachment, or as it deems necessary. (R. S. Sec. 6776; April 28, 1873, 70 v. 176; § 2; R. S. 1880.)

Where the directors elected were not stockholders, and ineligible and the minority candidates all received the same number of votes so that it was impossible to determine who was elected, the court, on ousting the ineligible directors, set aside the election and ordered a new one.

Henderson v. Hogan, 1 W. L. B. 227 (Dist. Ct. 1876).

See State v. Voight, 2 Ohio App. 145; 17 C. C. n. s. 447; 25 C. D. 255 (1913).

Section 12320. (Rights of person adjudged to be entitled to an office.) If judgment be rendered in favor of the person averred to be entitled to an office, after taking the oath of office, and executing any official bond required by law, he may take upon him the execution of the office. Immediately thereafter he shall demand of the defendant all books and papers in his custody or within his power appertaining to the office from which he has been ousted. (R. S. Sec. 6777; March 17, 1838, 36 v. 68, § 4; S. & C. 1265.)

Section 12321. (Action for damages.) Within one year after the date of such judgment, such person may bring an action against the party ousted, and recover damages he sustained by reason of such usurpation. (R. S. Sec. 6778; March 17, 1838, 36 v. 68; § 6; S. & C. 1266.)

Attorneys' fees in prosecuting the quo warranto proceeding can not be recovered.

Palmer v. Darby, 64 O. S. 520 (1901).

See Palmer v. Darby, 2 N. P. 401; 4 L. D. 48 (1895).

Section 12322. (How judgment of court enforced.) If such defendant refuses or neglects to deliver over any such book or paper pursuant to such demand, he shall be guilty of a contempt of court, and shall be fined in any sum not exceeding ten thousand dollars, and imprisoned in the jail of the county until he complies with the order of the court, or is otherwise legally discharged. (R. S. Sec. 6779; March 17, 1838, 36 v. 68, § 5; S. & C. 1266.)

Section 12323. (Judgment when corporation has forfeited its rights.) When, in such action, it is found and ad-

judged that, by an act done or omitted, a corporation has surrendered or forfeited its corporate rights, privileges, and franchises, or has not used them during a term of five years, judgment shall be entered that it be ousted and excluded therefrom, and that it be dissolved. (R. S. Sec. 6780; March 12, 1845, 43 v. 94, § 1; S. & C. 1271.)

There can be no forfeiture without judgment in quo warranto, and corporate property is not lost by mere nonuser.

Webb v. Moler, 8 Ohio 548 (1838).

See State, ex rel., v. Bryce, 7 Ohio (pt. 2) 82 (1836).

A forfeiture can only be claimed by the state, and a corporation is not subject to collateral attack for misuser or nonuser of its franchises.

Webb v. Moler, 8 Ohio 548 (1838).

Toledo, etc., Ry. Co. v. Toledo, etc., Ry. Co., 6 C. C. 362, 391 (1892).

Benninger v. Gall, 1 C. S. C. R. 331 (1871).

Finnell v. Burt, 2 Handy 202 (1856).

Under § 12323 a corporation can allow no lapse in the exercise of its franchise of the extent of five years.

Gas Co. v. Akron, 81 O. S. 33, 50 (1909).

A corporation may forfeit its charter through neglect or abuse of its franchises; but a forfeiture is not allowed, except under express limitations of the charter, unless a plain abuse or neglect of power, by which the corporation fails to fulfill the design of its creation, is shown.

State, ex rel., v. Commercial Bank, 10 Ohio 535 (1841).

State, ex rel., v. Farmers' College, 32 O. S. 487 (1877).

A building and loan association can not be deprived of its charter for non-user unless it has continued for five years. Rep. Atty. Gen. 1912, p. 904.

Effect of judgment of ouster. It is not competent for the court, in a quo warranto proceeding ousting a corporation of the right to be a body corporate, to consider or determine the rights or liabilities of third parties who have acquired such rights or liabilities in their dealings with such acting corporation. The court has exhausted its jurisdiction when it has adjudged that the corporation be ousted; and such judgment is not retroactive, and does not affect the rights and liabilities of those who have dealt with the corporation.

Society Perun v. Cleveland, 43 O. S. 481 (1885).

See also as to effect of judgment.

Bell v. Insurance Co., 14 C. C. n. s. 385 (1911).

Gaff v. Flesher, 33 O. S. 107 (1877).

Sims v. Best, 1 C. C. n. s. 41; 15 C. D. 149 (1903).

See note to § 12325.

Judgment by default. Judgment by default can not be taken unless the petition sets out facts showing a forfeiture.

State, ex rel., v. American, etc., College, 8 A. L. Rec. 422 (1879).

Section 12324. (Other acts.) When it is found and adjudged in such case, that a corporation has offended in a matter or manner which does not work such surrender or forfeiture, or has misused a franchise or exercised a power not conferred by law, judgment shall be entered that it be ousted from the continuance of such offense or the exercise

of such power. (R. S. Sec. 6780; March 12, 1845, 43 v. 94, § 1; S. & C. 1271.)

Discretion of court to dissolve corporation, or to oust it from exercise of particular powers only. Where a corporation has been guilty of an act which is a cause for the forfeiture of its franchises, and the state, on the relation of the attorney-general, demands a judgment of dissolution on account thereof, the court has no discretion to refuse such judgment upon the ground that public or private interest would be better subserved by preserving the existence of the corporation.

State, ex rel., v. Canal Co., 23 O. S. 121 (1872).

State, ex rel., v. Association, 35 O. S. 258 (1879).

See State, ex rel., v. Central Ohio, etc., Association, 29 O. S. 399 (1876).

But except in the above cases, the court is vested with a discretion to determine whether judgment of ouster of the franchise to be a corporation shall be rendered, or whether the corporation shall be ousted from the exercise of the powers illegally assumed.

State, ex rel., v. Oberlin, etc., Association, 35 O. S. 258 (1879).

State, ex rel., v. Peoples, etc., Association, 42 O. S. 579 (1885).

Where a corporation has conducted an illegal business and its acts have been persistent, defiant and flagrant, a judgment of ouster will be rendered.

State, ex rel., v. Dairy Co., 62 O. S. 350, 367 (1900).

See State v. Investment Co., 64 O. S. 283 (1901).

State v. College Co., 63 O. S. 341 (1900).

But where the right is doubtful, and has not been adjudicated or finally settled, and the illegal acts have not been persistent, defiant or flagrant, a judgment of ouster from the right to do the unauthorized business or illegal acts may be rendered.

State, ex rel., v. Railway, 12 C. C. n. s. 49; 21 C. D. 175 (1909). Promises of the defendant may be considered.

Turnpike Co. v. Waechter, 2 C. C. n. s. 21; 15 C. D. 605 (1903).

Where there were irregularities and omissions, in the organization of a corporation not for profit, due to inadvertence and not to a design to evade the law, the court refused to render a judgment of ouster, but entered a decree requiring that a legal organization be effected.

State v. Burial Association, 8 C. C. n. s. 233; 18 C. D. 397 (1906).

Section 12325. (Dissolution of corporations; appointment of trustees by court.) The court rendering a judgment dissolving a corporation shall appoint a trustee or trustees, not exceeding three in number, for the benefit of the creditors and stockholders thereof, who shall each severally give an undertaking payable to the state of Ohio, in such sum and with such sureties as the court may designate and approve, conditioned that he or they will faithfully discharge their respective trusts in accordance with the orders of such court or of the court to which such quo warranto proceedings may be remanded, as hereinafter provided, and properly pay and apply all money and other property that may come into his or their hands, as such trustee or trustees, in accordance with such orders. (R. S. Sec. 6781; March 12, 1909, 100 v. 102; March 12, 1845, 43 v. 94, § 2; S. & C. 1271.)

Where a decree of ouster is entered against a canal company as to its right to be a corporation and its right to operate a canal, there is a forfeiture of the easement of the canal company, and the land reverts to the original owner.

New York, etc., *R. R. Co. v. Parmelee*, 1 C. C. 239 (1885); affirmed, 23 W. L. B. 108.

Day v. Railroad, 44 O. S. 406 (1886).

Jurisdiction over dissolved corporation and trustees in suit brought in another county.

See *Lerenman v. Insurance Co.*, 11 N. P. n. s. 58; 21 L. D. 269 (1911).

Where a corporation is ousted of its right to be a corporation, the court must appoint trustees.

State, ex rel., v. Oberlin, etc., Ass'n, 35 O. S. 258, 264 (1879).

See *Kealey v. Faulkner*, 7 N. P. n. s. 49; 18 L. D. 498 (C. P. 1907).

Section 12326. (Remanding to common pleas court.)

Upon the appointment and qualification of such trustee or trustees, the supreme court or the court of appeals in which the proceedings have been instituted, may remand the proceedings to the court of common pleas of the county in which the corporation has or last had its principal place of business for further proceedings in accordance with law; and upon the proceedings being so remanded, the court of common pleas shall become and be vested with full jurisdiction and shall have the same power with reference thereto as the supreme court or court of appeals would have had if such proceedings had not been remanded. The jurisdiction of the supreme court or court of appeals of the proceedings so remanded shall cease upon such remand being made. (May 6, 1913, 103 v. 433; R. S. Sec. 6781; March 12, 1909, 100 v. 102; March 12, 1845, 43 v. 94, § 2; S. & C. 1271.)

Section 12327. (Order of court, effect of.) Any party to proceedings against a corporation under this chapter, including such trustee or trustees, may prosecute error to any order made in such proceedings in the same manner as in civil cases. The orders of the court in which such quo warranto proceedings are instituted or of the court to which they are remanded shall be binding upon the trustee or trustees, stockholders, creditors and other persons interested in such corporation, unless reversed by appropriate proceedings therefor. (R. S. Sec. 6781; March 12, 1909, 100 v. 102; March 12, 1845, 43 v. 94, § 2; S. & C. 1271.)

Section 12328. (Duties of trustee, as to notice of court order.) Upon the appointment and qualification of such trustee or trustees, he or they shall forthwith give notice of the order dissolving the corporation and of his or their appointment as trustee or trustees thereof, and of the date of

his or their appointment, by publication once a week for four consecutive weeks in a newspaper of general circulation in the county in which the corporation has or had its principal place of business. Such notice shall require all persons having claims against the corporation to file them with such trustee or trustees within ninety days from the date of his or their appointment. All claims not filed with the trustee or trustees within ninety days from the date of the appointment shall be barred as against such trustee or trustees and the property of the corporation, unless the court for good cause shown shall otherwise order. (R. S. Sec. 6782; March 12, 1909, 100 v. 103; March 17, 1838, 36 v. 68, § 19; S. & C. 1268.)

Section 12329. (Rejected claims.) If, in the judgment of such trustee or trustees, any claim or claims so filed with them are for any reason not valid claims against the estate of such corporation, the trustee or trustees shall notify the claimant or claimants that their respective claims are rejected by written notice by registered mail, directed to their last known address. Such claimants at any time within ninety days from the mailing of such notice of rejection may sue such trustee or trustees for the recovery of such claim or claims in any court of competent jurisdiction in the county in which such corporation has or had its last principal place of business. Should such suit finally terminate in favor of the claimant, the judgment therein obtained by him shall be entitled to share with other claims against the corporation, in the manner and to the same extent as if the claim had been allowed in the first instance by the trustee or trustees. Upon the failure of a claimant to bring suit within ninety days from the date of the mailing of the notice that it is rejected by the trustee or trustees, the claim shall be barred and unenforceable against the trustee or trustees or the property of the corporation, unless the court for good cause shown shall otherwise order. (R. S. Sec. 6782; March 12, 1909, 100 v. 103; March 17, 1838, 36 v. 68, § 19; S. & C. 1268.)

Jurisdiction can not be obtained over the trustees in a county other than that in which they may be served. *Lerenman v. Insurance Co.*, 11 N. P. n. s. 58 (1910).

Section 12330. (Powers of trustee.) The trustee or trustees so appointed shall be subject to the orders of the court appointing them or of the court to which such quo warranto proceedings may be remanded, and shall be vested with the title to all the estate, real and personal, of the corporation

from the date of his or their appointment and qualification, as hereinbefore provided, and under and subject to the orders of the court shall have power to settle the affairs of the corporation, collect and pay outstanding debts, and divide among the stockholders the money and other property which may remain after the payment of debts and necessary expenses; and shall have authority to file in the court of his or their appointment, or to which such proceedings may be remanded, motions, applications for instructions or orders and other pleadings; and in the enforcement of any and all demands shall have any and all rights which the stockholders or creditors of the corporation might otherwise be entitled, to enforce, in addition to the rights of the corporation itself. The stockholders and creditors of such corporation shall not be entitled to enforce any such rights except upon the refusal of such trustee or trustees to do so within a reasonable time upon demand therefor by such stockholders and creditors. (R. S. Sec. 6782; March 12, 1909, 100 v. 103; March 17, 1838, 36 v. 68, § 19; S. & C. 1268.)

Section 12331. (Demands by trustee.) The trustee or trustees upon his or their appointment and qualification shall forthwith demand all money, property, books, deeds, notes, bills, obligations and papers of every description within the custody, power or control of the officers of the corporation, or either of them or any other persons, belonging to the corporation, or in any wise necessary for settlement of its affairs or for the discharge of its debts and liabilities. He or they, without leave of court may sue for and recover in the name of such trustee or trustees the demands and property of the corporation, and he or they shall be severally liable to the creditors and stockholders to fully and faithfully administer his or their respective trusts, in accordance with the orders of the court, as hereinbefore provided. (R. S. Sec. 6782; March 12, 1909, 100 v. 103; March 17, 1838, 36 v. 68, § 19; S. & C. 1268.)

Section 12332. (Report to court.) The trustee or trustees shall as soon as possible after his or their appointment prepare and report to such court a statement of assets and liabilities of such corporation; and at such times as may be ordered by such court, shall report to it, his or their proceedings as such trustee or trustees. Upon collecting such assets as may be collectable and disbursing same to the approval of such court, the trustee or trustees and his or their surety or sureties, by order of such court, shall be discharged from any and all further liability in the premises.

(R. S. Sec. 6782; March 12, 1909, 100 v. 103; March 17, 1838, 36 v. 68, § 19; S. & C. 1268.)

Section 12333. (Application of this amendment.) The next eight preceding sections shall apply to all trustees of corporations who may be hereafter appointed in quo warranto proceedings and to all trustees heretofore appointed in such proceedings, who are now engaged in the execution of their trust. (March 12, 1909, 100 v. 104, § 2.)

Section 12334. (Contempt not to give possession to trustees.) An officer of such corporation who refuses or neglects to deliver over money, or other things, pursuant to such demand, shall be guilty of a contempt of court, and shall be fined not exceeding ten thousand dollars, and imprisoned in the jail of the proper county until he complies with the order of the court, or is otherwise legally discharged. He shall further be liable to the trustees for the value of all money, or other things, so refused or neglected to be surrendered, together with the damages sustained by the stockholders and creditors of the corporation, or any of them, in consequence of such neglect or refusal. (R. S. Sec. 6783; March 17, 1838, 36 v. 68, § 20; S. & C. 1269.)

Section 12335. (Costs.) If judgment be rendered against a corporation, or against a person claiming to be a corporation, the court may render judgment for costs against the directors or other officers of the corporation, or against the person claiming to be a corporation. (R. S. Sec. 6784; March 17, 1838, 36 v. 68; § 17; S. & C. 1268.)

Section 12336. (How order to deliver property enforced.) In actions under this chapter, when the judgment is against the defendant the court may make an order directing him forthwith to deliver over the books, papers, property, money, deeds, notes, bills, and obligations, to the persons entitled thereto, or the trustees appointed to receive them, and may send a transcript of the proceedings, including a copy of such order, to the common pleas court of the proper county, with a special mandate directing such court to carry it into effect. On complaint being made to such court of common pleas, by affidavit, of a neglect or refusal to comply with such order, that court shall direct an attachment to issue for the defendant, returnable forthwith, who may be required to answer under oath touching the premises. If it appears that he so neglects or refuses, the court shall render judgment for penalty or imprisonment, or both, such as the court

making the order might have rendered. (R. S. Sec. 6785; March 17, 1838, 36 v. 68, § 21; S. & C. 1269.)

Section 12337. (Injunction in certain cases.) A stockholder, or stockholders, owning not less than one-fourth of the capital stock of a banking association actually paid in, or entitled to the beneficial interest therein, pending proceedings in quo warranto against such corporation, may have an injunction restraining the directors thereof from making any disposition of the assets of such corporation prejudicial to the interests of such stockholder or stockholders, or inconsistent with their duties as directors. (R. S. Sec. 6786; March 20, 1860, 57 v. 50, § 2; S. & C. 1272.)

Section 12338. (Court may require bank directors to give security.) Upon satisfactory proof that the directors of such corporation have violated, or are about to violate any of its franchises, the court, or a judge thereof in vacation, may require them to give security to the stockholders to the satisfaction of the court or judge, for the proper discharge of their duties, and the management and security of the assets. Such court or judge may enjoin such directors from incurring any additional liabilities except for the payment of the necessary services of the officers and employes of such banking association, the amount of which, while such proceedings are pending, shall be under the control of the court. (R. S. Sec. 6787; March 20, 1860, 57 v. 50, § 2; S. & C. 1272.)

Section 12339. (Directors may be enjoined from borrowing or issuing money, etc.) On petition, such court or judge may enjoin such directors from borrowing or issuing, either directly or indirectly, any of the money or assets of such bank, for their individual benefit, while such proceedings are pending. (R. S. Sec. 6788; March 20, 1860, 57 v. 50, § 3; S. & C. 1272.)

Section 12340. (Limitations.) Nothing in this chapter contained shall authorize an action against a corporation for forfeiture of charter, unless it be commenced within five years after the act complained of was done or committed; nor shall an action be brought against a corporation for the exercise of a power or franchise under its charter, which it has used and exercised for a term of twenty years; nor shall an action be brought against an officer to oust him from his office, unless within three years after the cause of such ouster, or the right to hold the office, arose. (R. S. Sec. 6789; March 17, 1838, 36 v. 68, § 26; S. & C. 1270.)

A corporation may be ousted in quo warranto from the exercise of a power or franchise, not conferred by law, where the same has not been exercised for twenty years.

State, ex rel., v. Standard Oil Co., 49 O. S. 137 (1892).

State v. Miami Exporting Co., 11 Ohio 126 (1841).

The ouster of a company from the right to be a corporation, for the misuse of a franchise, is limited for five years from the commission of the offense.

State, ex rel., v. Railroad Co., 50 O. S. 239 (1893).

State, ex rel., v. Standard Oil Co., 49 O. S. 137 (1892).

Neither the five years nor the twenty years limitation prescribed in this section bars an action in quo warranto where its object is to oust a corporation from an unwarranted claim to a right or privilege in lands belonging to the state.

State, ex rel., v. Railway Co., 53 O. S. 189 (1895).

Railroad Co. v. State, 85 O. S. 251.

The use of streets by a gas company for twenty years does not bar an inquiry into the right of the defendant to their exclusive use.

State, ex rel., v. Cincinnati, etc., Coke Co., 18 O. S. 262 (1866).

There is no distinction between an action brought by the attorney-general and one brought by a prosecuting attorney.

See State, ex rel., v. Standard Oil Co., 49 O. S. 137, 188 (1892).

A suit ordered by the legislature is subject to the statute.

State v. Granville, etc., Society, 11 Ohio 1, 20 (1841).

A plea setting up the statute, taken as a whole, must show the user of the franchises in question for twenty years, not by the performance of a single act, but by a variety of acts which taken together constitute the exercise of the franchise.

See State v. Granville, etc., Society, 11 Ohio 1, 19 (1841).

A proceeding is commenced when the information is filed, not when an application is made.

See State v. Granville, etc., Society, 11 Ohio 1, 20 (1841).

The statute commences to run from the time the cause of ouster arose.

See State, ex rel., v. Beecher, 16 Ohio 358 (1847).

Where a franchise has been assigned, an action is not barred by this section unless the assignee has exercised the franchise for twenty years. The time prior to the assignment, during which the assignor exercised the franchise, can not be included.

State, ex rel., v. Northern Ohio, etc., Co., 2 Ohio App. 113; 15 C.

C. n. s. 577; 24 C. D. 262; reversed, 93 O. S. 466; judgment of reversal reversed, 245 U. S. 574.

Section 12341. (Action for damages against officers, etc., of ousted corporations.) When judgment of forfeiture and ouster is rendered against a corporation because of misconduct of the officers or directors thereof, within one year thereafter a person injured thereby, in an action against such officers or directors, may recover the damages he has sustained by reason of such misconduct. (R. S. Sec. 6790; March 17, 1838, 36 v. 68, § 22; S. & C. 1269.)

Section 12342. (Cumulative remedy.) Nothing in this chapter shall restrain a court from enforcing the performance of trusts for charitable purposes, at the relation of the prosecuting attorney of the proper county, or from enforcing

trusts, or restraining abuses, in other corporations, at the suit of a person injured. (R. S. Sec. 6791; March 17, 1838, 36 v. 68, § 24; S. & C. 1270.)

Section 12343. (Disposition of fines.) Fines collected under the provisions of this chapter must be paid into the treasury of the proper county for the use of the common schools therein. (R. S. Sec. 6792; March 17, 1838, 36 v. 68, § 25; S. & C. 1270.)

Section 12344. (Actions under this chapter to have precedence, etc.) Actions under this chapter shall have precedence of other civil business. If the matter is of public concern, on motion of the attorney general or prosecuting attorney, the court must require as speedy a trial of the merits of the case as is consistent with the rights of the parties. (R. S. Sec. 6793; March 20, 1860, 57 v. 50, § 1; S. & C. 1272.)

PART XXVII.

PENAL CODE

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Section 12371. (Definition of "whoever".) In the interpretation of part fourth the word "whoever" includes all persons, natural and artificial, partners, principals, agents, employes, and all officials, public or private. (Codifying Commission, February 15, 1910.)

Section 12472. (Embezzlement by officer of building and loan association.) Whoever, being a president, director, trustee member of a committee, secretary, treasurer, attorney or other officer or agent of a building and loan association or savings association as provided by law, embezzles, abstracts or wilfully misapplies any of the moneys, funds or credits thereof, or issues or puts into circulation a warrant or other order, or assigns, transfers, cancels or delivers a note, bond, draft, mortgage, judgment, decree or other written instrument belonging thereto, or raises money otherwise, or receives money from a member or other person for and in the name of such association unless authorized so to do by the board of directors thereof, shall be imprisoned not less than one year nor more than ten years and be liable to the person injured thereby to the extent of the damage incurred. Suit may be brought against the person so violating and the sureties on his bond given to such association for the faithful performance of his duty. (May 11, 1908, 99 v. 536, § 46; see R. S. Sec. 3836-25.)

Section 12474. (Embezzlement and defaults by bank officials.) Whoever, being president, director, cashier, teller, clerk, or agent of a banking company, embezzles, abstracts, or wilfully misapplies the moneys, funds or credits of such company, or, without authority from the directors, issues or puts forth a certificate of deposit, draws an order or bill of exchange, makes an acceptance, assigns notes, bonds, drafts, bills of exchange, mortgages, judgments or decrees, or makes

a false entry in a book, report or statement of the company, with intent to injure or defraud such company, or other company, body politic or corporate, or any person, or to deceive an officer of the company or an agent appointed to inspect the affairs of a banking company, shall be imprisoned in the penitentiary, at hard labor, not less than one year nor more than ten years. (R. S. Sec. 3821-85; April 24, 1879, 76 v. 74, § 30; March 21, 1851, 49 v. 41.)

Certificates, that a stockholder had paid sixty percent of the par value of a certain number of shares of stock in a free banking company, are not "moneys, funds or credits" of the bank within the meaning of this section.

State v. Davis, 85 O. S. 43 (1911).

This section is constitutional.

In re Bachtel, 11 C. C. n. s. 537; 21 C. D. 159 (1907); aff'd, no rep., 74 O. S. 524; aff'd, 204 U. S. 36; 15 O. F. D. 457.

This section is limited to banks organized under the free banking act (§§ 9676-9701).

State v. Gibbs, 7 N. P. n. s. 345; 18 L. D. 681 (1908).

The cashier of an unincorporated bank, having exclusive custody of its assets, may be guilty of embezzlement although he is a shareholder.

State v. Kusick, 45 O. S. 535 (1888).

Prosecution against officer of bank incorporated under former Free Banking Act. State v. Barkman, 91 O. S. 248 (1915).

Section 12495. (Violating a rule of cemetery association.)

Whoever violates a by-law, rule or regulation adopted by the trustees, directors or other officers of a cemetery company or association, or by a board of township trustees having charge of township cemeteries, with reference to the protection, good order and preservation of cemeteries, and the trees, shrubbery, structures and adornments therein, shall be fined not less than five dollars nor more than fifty dollars. (R. S. Sec. 3580; April 12, 1889, 86 v. 254; Rev. Stat. 1880; April 6, 1869, 66 v. 48, § 2; S. & S. 69.)

Section 12507. (Unlawfully interfering, etc., with electric light power or street railway property.) Whoever wilfully or maliciously injures or destroys or intentionally permits to be injured or destroyed, disconnects, displaces, cuts, breaks, taps, grounds, or makes a connection with or wilfully or maliciously interferes with the poles, cable or wires legally erected, put or strung, electrical apparatus, appliance or machinery used in the construction or operation of an electrical street railway, electric light plant, plant used in producing or generating electric light, or a meter, pipe, conduit, wire, line, post, lamp, burner, heater, machine, motor or other appliance or apparatus belonging to a company engaged in the manufacture or sale of electricity for light, heat, power

or other purposes, or wilfully or maliciously prevents an electric meter belonging to a company furnishing electric current for light, heat, power or other purposes from duly registering the quantity of electricity supplied by such company, or interferes with the proper action or just registration by such meter or alters the index in such meter, or, without the consent of such company, wilfully or maliciously diverts an electric current from a wire of such company, or otherwise wilfully or maliciously uses or causes to be used without the consent of such company, electricity manufactured or distributed by such company, shall be fined not less than fifty dollars nor more than one thousand dollars or imprisoned in the penitentiary not less than one year nor more than three years, or both. (R. S. Sec. 3467a; 89 v. 52; 89 v. 100; 90 v. 346; 95 v. 101.)

Section 12508. (Customer tampering with electric light company's meter.) Whoever, being a customer of an electric light company and having in his possession or under his control a meter belonging to it, wilfully permits any person unlawfully and without consent of such company, to disconnect, change, alter or interfere with the wires running into such meter so as to divert current and prevent such meter from duly registering the quantity of electricity supplied by such company, or wilfully or maliciously aids, agrees with, employs or conspires with any person to do any of the aforementioned acts, shall be fined not less than fifty dollars nor more than one thousand dollars or imprisoned in the penitentiary not less than one year nor more than three years, or both. (R. S. Sec. 3467a; 89 v. 52; 89 v. 100; 90 v. 346; 95 v. 101.)

Section 12511. (Injuring or destroying property of telegraph companies.) Whoever unlawfully and intentionally injures, molests or destroys a line, post, abutment or any material or property of a telephone or magnetic telegraph company shall be fined not more than five hundred dollars or imprisoned in the penitentiary not more than one year, or both. Prosecution under this section shall be by indictment. (R. S. Secs. 3461-4, 3461-5; 45 v. 34, §§ 4, 5.)

Section 12530. (Written consent of owner or presence required. Penalty.) Whoever, without the written consent of the owner or his agent, enters the premises or building of another, for the purpose of constructing, altering, repairing, examining, or attaching thereto a wire, pole, insulator, frame or other appendage, unless such owner or agent is present

and assenting thereto, shall be fined not less than ten dollars nor more than one hundred dollars, provided, however, that such owner or agent shall give such written consent when it shall fairly and reasonably appear that the person applying therefor, in good faith, desires to so enter for the purpose of altering, repairing or examining such wire, pole, insulator, frame or appendage. (April 18, 1911, 102 v. 88; R. S. § 6881-1; 82 v. 166, § 1.)

Section 12546. (Constructing bridges, etc., over tracks.) Whoever violates any provision of law relating to the height of bridges, viaducts, overhead roadways, foot bridges, wires or other structures constructed over the tracks of a railroad by a county, municipality, township, railroad company or other private corporation, or person, shall be fined not less than one hundred dollars nor more than one thousand dollars. Each day such structure or wire is permitted to so remain in violation of law shall constitute a separate offense. (R. S. Sec. 3337-19; 91 v. 365, § 2.)

See § 8903 et seq.

Section 12547. (Demanding compensation when telegraph or telephone wires not in use.) Whoever being an officer, agent or other person acting for or in behalf of a steam railway company operating ten or more miles of its railroad for the carrying or transporting of passengers or freight over its road within this state and failing to erect and maintain telegraph or telephone wires in complete working order for use and operation along the line of its railroad with an office and proper means of communication by such wires at each of its principal railway stations, orders, directs, advises, asks, demands or receives compensation for transportation of passengers or freight, shall be fined not less than one hundred dollars nor more than five hundred dollars or imprisoned in the county jail or a workhouse for not less than thirty days nor more than ninety days, or both. (R. S. Sec. 3354-6; 93 v. 89, § 2.)

MISCELLANEOUS.

Section 12644. (Unlawfully stringing wires, etc., for conducting electricity.) Whoever places, strings, constructs or maintains a line, wire, fixture or appliance of any kind for conducting electricity for lighting, heating or power through a street, alley, lane, square, place or land in a city or village without the consent of such city or village, shall be fined not

less than one hundred dollars more than five hundred dollars. This section shall extend to all levels above, below and along the surface of public ways, grounds or places, but shall not apply to rights which have been received and exercised heretofore through proceedings in a probate court. (R. S. Sec. 3471a; 92 v. 204; 84 v. 7.)

See §§ 9192 to 9194 and notes.

Section 12645. (Erecting poles in cities having subways.)

Whoever erects a telegraph or telephone pole within that portion of a city or village where subways have been constructed, unless such pole is required for the purpose of distributing wires from such subways to subscribers' stations and is located in an alley if practicable, or, within such city or village, constructs or maintains underground wires, pipes, conduits and other fixtures for containing, protecting and operating such wires in the streets and public ways thereof, without obtaining the consent of such city or village, shall be fined not less than fifty dollars nor more than two hundred dollars. This section shall not apply to existing telegraph companies until they shall have had authority and sufficient time to construct subways. (100 v. 85, § 1.)

Section 12657. (Corporations may be prosecuted for nuisance.) Corporations may be prosecuted by indictment for violation of any provision of this subdivision of this chapter, and in every case of conviction under such provisions, the court shall adjudge that the nuisance described in the indictment be abated or removed within a time fixed, and, if it is of a recurring character, the defendant shall keep such nuisance abated. (R. S. Sec. 6919; April 23, 1904, 97 v. 310; April 15, 1857, 54 v. 130, § 3; April 12, 1865, 62 v. 137; April 4, 1866, 63 v. 96.)

A corporation may be punished criminally for nuisance.

Strawboard Co. v. State, 70 O. S. 140 (1904).

A nuisance may also be enjoined. Reduction Co. v. Story, 8 Ohio App. 381, 30 O. C. A. 252.

Order to abate nuisance under former laws, see Smith v. State, 22 O. S. 539; Matthews v. State, 25 O. S. 536.

Section 12658. (Proceedings in contempt.) If the defendant, convicted of a violation of any provision of this subdivision of this chapter, fails, neglects or refuses to abate the nuisance described in the indictment, as ordered by the court, or, if the nuisance is of a recurring character, fails, neglects or refuses to keep it abated, proceedings in contempt of court may be instituted against him and all others

assisting in or conniving at the violation of such order, and the court may direct the sheriff to execute the order of abatement at the cost and expense of the defendant. (R. S. Sec. 6919; April 23, 1904, 97 v. 310; April 15, 1857, 54 v. 130, § 3; April 12, 1865, 62 v. 137; April 4, 1866, 63 v. 96.)

Section 12870. (Corporation officials, etc., refusing to comply with a requirement of law.) Whoever, being a president, secretary, receiver, accounting officer, servant or agent of a railroad company or of a suburban or interurban electric railroad company, refuses to attend before a lawful board of appraisers and assessors when required so to do, or refuses to submit to the inspection of such board any books or papers of such company in his possession, custody or control, or refuses to answer such questions as may be put to him by the board or upon its order touching the business, property, moneys and credits, or the value thereof, of the company, shall be fined not more than five hundred dollars and imprisoned in the county jail not more than thirty days. (R. S. Sec. 2773; 97 v. 573, § 4; R. S. Sec. 2776-4; 59 v. 88, § 4; S. & S. 766.)

Section 12871. (Same.) Whoever, being an officer, employe or agent of an express, telegraph, telephone, sleeping car, freight line or equipment company, refuses to attend before the state board of appraisers and assessors when required so to do, or refuses to bring with him and submit for the inspection of such board, any books or papers of such company in his possession, custody or control, or refuses to answer any questions put to him by such board, or any member thereof, touching the organization, business or property of such company, shall be fined not more than five hundred dollars or imprisoned in the county jail not more than thirty days or both. (R. S. Sec. 2779; 91 v. 410, § 4; 92 v. 91, § 4; R. S. Secs. 2780-10, 2780-15; 91 v. 222; 90 v. 332; 59 v. 91, §§ 2, 3; S. & S. 769.)

Section 12872. (Same.) Whoever, being an officer, employe or agent of an electric light, gas, natural gas, pipe line, water works, street railroad, suburban or interurban railroad, express, telegraph, telephone, messenger or signal, union depot, railroad, water transportation, or heating or cooling company, refuses to attend before the state board of appraisers and assessors for laying excise taxes, when required so to do, or refuses to bring with him and submit for the inspection of such board, any books or papers of such company in his possession, custody or control, or refuses to an-

swer any questions put to him by such board, or any member thereof, touching the organization, business or property of such company, shall be fined not more than five hundred dollars or imprisoned in the county jail not more than thirty days or both. (R. S. Sec. 2780-20; 92 v. 79, § 4; 95 v. 140; 97 v. 328.)

Section 12924-1. (Penalty for violations.) Whoever, being an officer, agent or employe of any public utility, company, firm, person, co-partnership, corporation or association, subject to the provisions of any law which the tax commission of Ohio is required to administer, shall fail or refuse to fill out and return any blanks, as required by such law, or shall fail or refuse to answer any questions therein propounded, or shall knowingly or wilfully give a false answer to any such question where the fact inquired of is within his knowledge, or who shall, upon proper demand, fail or refuse to exhibit to such commission or any commissioner or any person duly authorized, any book, paper, account, record or memoranda of such public utility, which is in his possession or under his control, shall be fined not more than one thousand dollars for each offense. (June 2, 1911, 102 v. 258, § 154; See G. C. § 5542-12; 101 v. 399, § 110.)

Section 12924-2. (Forfeiture.) A forfeiture of not less than five hundred dollars nor more than one thousand dollars shall be recovered from any such public utility, company, firm, person, co-partnership, corporation or association for each violation of the next preceding section, when such officer, agent or employe acted in obedience to the direction, instruction or request of such public utility, company, corporation or association or any general officer thereof. (June 2, 1911, 102 v. 258, § 155; See 101 v. 399, § 110.)

Section 12924-3. (Penalty. Construction and enforcement of the law.) Whoever violates any provision of a law, which the tax commission of Ohio is required to administer, or neglects or refuses to perform any duty therein required, for which a penalty has not otherwise been provided, or neglects or refuses to obey any lawful requirement or order made by such commission, for every such violation, failure or refusal shall be fined not less than twenty-five dollars nor more than one thousand dollars for each offense. In construing and enforcing the provisions of this section, the act, omission or failure of any officer, agent or other person acting for or employed by any public utility, company, firm, person, co-partnership, corporation or association acting with-

in the scope of his employment, shall, in every case be the act, omission or failure of such public utility, company, firm, person, co-partnership, corporation or association. (June 2, 1911, 102 v. 258, § 156; 101 v. 399, § 111; See G. C. 5542-13.)

Section 12924-4. (Penalty for false list or return of assessment or valuation.) Whoever, being a member of the tax commission of Ohio, or an assessor or a member of a county board of equalization, or a person whose duty it is to list, value, assess or equalize real or personal property for taxation, shall knowingly or wilfully fail to list or return for assessment or valuation, any real estate or personal property, or knowingly or wilfully lists or returns for assessment or valuation any real or personal property at any other than its true value in money, or shall wilfully or knowingly fail to equalize any real or personal property according to its true value in money, shall be fined not less than fifty dollars nor more than five hundred dollars and in addition thereto, if he be an officer, shall forfeit his office or position. (June 2, 1911, 102 v. 258, § 157; 101 v. 399, § 112.)

Section 12924-5. (Each day a separate offense.) Every day during which any public utility, company, corporation, association, firm, co-partnership, officer, or individual, subject to the provisions of any law which the tax commission of Ohio is required to administer, or any officer, agent or employe thereof shall wilfully fail to observe and comply with any order or direction of such commission or to perform any duty enjoined by such law, shall constitute a separate and distinct offense. (June 2, 1911, 102 v. 258, § 158; 101 v. 399, § 113.)

Section 12954. (Life insurance company discriminating against colored persons.) Whoever, being a life insurance company organized or doing business in this state, or an officer or agent thereof, violates any provision of law relating to the distinction or discrimination between white persons and colored persons, wholly or partially of African descent, by demanding or receiving from a colored person a different or greater premium than from a white person, or by allowing a discount or rebate upon a premium paid or to be paid by a white person of the same age, sex, general condition of health and hope of longevity of any colored person, or by making or requiring a rebate, diminution or discount from the sum to be paid upon a policy in case of an insured colored person, or by failing to furnish a certificate of a regular examining physician of such company to such colored

person as required by law, shall be fined not less than one hundred dollars nor more than two hundred dollars. (R. S. 3631-3; March 28, 1889; 86 v. 164, § 3.)

Section 12955. (Exceptions.) The next preceding section shall not require a life insurance company, or an agent thereof, to take or receive an application for insurance from any person. (R. S. Sec. 3631-3; March 28, 1889, 86 v. 164, § 3.)

Section 12956. (Discriminations prohibited. Penalty.) Whoever for himself or as officer, agent, solicitor, employe or representative of a life insurance company doing business in this state, makes or permits a distinction or discrimination in favor of individuals between the insured of the same class and of equal expectation of life in the amount or payment of premiums or rates charged for policies of life or endowment insurance or in the dividends or other benefits payable thereon, or in any other of the terms and conditions of the contracts which such company makes; or pays, allows or gives, or offers to pay, allows or gives, directly or indirectly as inducement to insurance or knowingly receives as such inducement to insurance any rebate of premium payable on the policy or any special favor or advantage in the dividends or other benefits to accrue thereon or any special advantage in the date of a policy or date of the issue thereof, or any valuable consideration or inducement whatsoever; or gives or receives, sells or purchases, or offers to give or receive, sell or purchase as inducements to insurance or in connection therewith any stock, bonds or other obligations or securities of any insurance company or other corporation, association, partnership or individual, or any dividends or profits to accrue thereon, or any paid employment or contract for services of any kind or anything of value shall be guilty of a misdemeanor and upon conviction shall be fined in any sum not less than one hundred dollars and not exceeding five hundred dollars, or imprisoned in the jail of the county for a period not exceeding thirty days, or both, at the discretion of the court and shall pay the costs of the prosecution, and the fines which shall be levied and collected for the violation of any of the provisions of this section shall be paid to the county treasurer for the benefit of the common school fund; provided, that nothing in this chapter shall be so construed as to forbid a company, transacting industrial insurance on a weekly payment plan, from returning to policy holders, who have made premium payments for a period of at least one year, directly to the company

at its home or district offices, a percentage of the premium which the company would have paid for the weekly collection of such premium. (May 31, 1911, 102 v. 511; R. S. § 3631-6; April 27, 1893, 90 v. 345.)

Section 12956-1. (Discharging or disciplining employe upon report of "spotter" without hearing, unlawful.) It shall be unlawful for any steam railroad company, its superintendent or manager thereof, employing any special agent, detective, or person commonly known as "spotter" for the purpose of investigating, obtaining and reporting to the employer, its agent, superintendent or manager, information concerning its employes, to discipline or discharge any employe in its service, where such act of discipline or the discharge is based upon a report by such special agent, detective or spotter, which report involves a question of integrity, honesty or a breach of rules of the employer, unless such employer, its agent, superintendent or manager, shall, before disciplining or discharging such employe, grant to him a fair opportunity to be heard in defense or explanation of the complaint against him, at which hearing said employer shall state specific charges on which said act or discharge is based and at which said accused employe shall have the right to furnish testimony in his defense. (107 v. 603, § 1.)

Section 12956-2. (Penalty.) Each and every violation of this act shall be deemed a misdemeanor, and upon conviction thereof shall be punished by a fine of not less than fifty dollars and not more than three hundred dollars, or by imprisonment in the county jail for a period of not more than one year, or both and the imprisonment when imposed shall be imposed upon the officers or agent thereof committing such offense. (107 v. 603, § 2.)

Section 13097. (Issuing notes resembling bank notes.) Whoever, being an officer or member of a banking company, issues or has in circulation a note, draft, bill of exchange, acceptance, certificate of deposit or other evidence of debt which, from its character, form or appearance, resembles a bank note or paper currency, shall be fined or imprisoned, or both, as the court may adjudge. (R. S. Sec. 3821-75; April 24, 1879, 76 v. 72, § 17; March 21, 1851, 49 v. 41.)

This section is limited to banks organized under the free banking act. (§§ 9676-9701.)

State v. Gibbs, 7 N. P. n. s. 345; 18 L. D. 681 (1908).

State banks have no power to issue circulating notes. Rep. Atty. Gen. 1912, p. 712.

Section 13132. (False statement by medical examiner of insurance company.) Whoever, being a medical examiner for a life insurance company or for an applicant for insurance therein, knowingly makes a false statement or report to such company or to an officer thereof, concerning the health or physical condition of an applicant for insurance, or other matter or thing affecting the granting of such insurance, shall be fined not more than five hundred dollars or imprisoned not more than three months. (R. S. Sec. 7078; 69 v. 159, § 31.)

Section 13133. (Obtaining money fraudulently from insurance company.) Whoever obtains or attempts to obtain from a life or accident insurance company, money on a policy issued by such company in this state, by falsely and fraudulently representing the insured to be dead, or procures such policy to be issued to or in a fictitious or assumed name and falsely represents the fictitious person so insured to be dead, thereby obtaining or attempting to obtain from such company the amount of such insurance or part thereof, or obtains insurance upon the life of another not applying for such insurance, or attempts to obtain insurance upon another's life for his own benefit without the knowledge of the person to be insured, or falsely obtains or attempts to obtain money from such company upon a policy by a false and fraudulent written representation or affidavit that the insured is dead or injured, or whoever obtains or attempts to obtain from a fire, motor vehicle or other insurance company, money on a policy issued by such company in this state, by falsely and fraudulently representing that any motor vehicle of any kind, covered by such policy, has been stolen or by procuring or conspiring to permit the same to be stolen, or by fraudulently and wilfully damaging any automobile or motor vehicle covered by such policy or procuring the same to be done, shall be imprisoned in the penitentiary not more than fifteen years, or, when the money so obtained or attempted to be obtained is less than thirty-five dollars, shall be fined not more than five hundred dollars or imprisoned not more than six months, or both. (109 v. 306; R. S. Sec. 7084; 85 v. 119; 64 v. 229, § 1; S. & S. 273.)

Section 13134. (Life insurance; official or agent issuing fraudulent policies.) Whoever, being a trustee, officer, agent or employe of a corporation, company or association, organized to transact the business of life or accident or life and accident insurance on the assessment plan, knowingly insures a person, or permits him to be insured without that

person's knowledge or consent, or insures a fictitious person, a person over sixty-five or under fifteen years of age, or a sickly or infirm person, shall be fined not less than one hundred dollars nor more than one thousand dollars or imprisoned not more than six months, or both. (R. S. Sec. 3630g; 82 v. 138; 80 v. 179.)

Section 13135. (Physician abetting same.) Whoever, being a physician or other person, knowingly aids in or abets any person in effecting insurance described in the next preceding section, or in effecting insurance of his own life, shall be fined not less than one hundred dollars nor more than one thousand dollars or imprisoned not more than six months, or both. (R. S. Sec. 3630g; 82 v. 138; 80 v. 179.)

Section 13136. (Changing life insurance policy.) Whoever, being a life insurance company doing business in this state, or an agent thereof, makes a contract of insurance, or an agreement as to such contract, other than is plainly expressed in the policy issued thereon, shall be fined not less than one hundred dollars nor more than five hundred dollars or imprisoned not more than thirty days, or both. (R. S. Sec. 3631-6; 90 v. 345, § 3.)

Section 13137. (Rebates and other inducements from life insurance companies.) Whoever, being a life insurance company doing business in this state, or an officer, agent, solicitor or representative thereof, pays, allows, gives, or offers to pay, allow or give, directly or indirectly, as an inducement to insurance, a rebate of the premium payable on a policy, or a special favor or advantage in the dividends or other benefits to accrue thereon, or a paid employment or contract for services of any kind or any valuable consideration or inducement not specified in the policy of insurance, or gives, sells or purchases, or offers to give, sell or purchase as an inducement for insurance, any stocks, bonds or securities of an insurance company or other corporation, association or partnership, or any dividends or profits to accrue thereon, or anything of value not specified in the policy, shall be fined not less than one hundred dollars nor more than five hundred dollars or imprisoned not more than thirty days, or both. (R. S. Sec. 3631-6; 90 v. 345, § 3.)

Section 13138. (Soliciting membership in unauthorized fraternal beneficiary association.) Whoever solicits membership or assists in procuring membership in a fraternal beneficiary association not licensed or authorized by law to do

business in this state, shall be fined not less than fifty dollars nor more than two hundred dollars. (R. S. Sec. 3631-23q; 97 v. 432, § 30.)

Section 13139. (Failure to comply with laws relating to same.) Whoever, being a fraternal beneficiary association, or an officer, agent or employe thereof, neglects or refuses to comply with or violates any provision of law relating to such association the penalty for which is not specified elsewhere, shall be fined not more than two hundred dollars. (R. S. Sec. 3631-23q; 97 v. 432, § 30.)

Section 13140. (Fraud by official or medical examiner of fraternal beneficiary association.) Whoever, for himself or as an officer, member or physician of a fraternal beneficiary association, as created and defined by law, wilfully makes a false or fraudulent representation in, or with reference to, an application for membership therein or for obtaining money therefrom or benefit therein, shall be fined not less than one hundred dollars nor more than five hundred dollars or imprisoned in jail not less than thirty days nor more than one year, or both. (R. S. Sec. 3631-23q; 97 v. 432, § 30.)

Section 13141. (Fraud by certificate holder in such association.) Whoever wilfully makes a false representation of a material fact or thing in a sworn statement as to the death or disability of a certificate holder in a fraternal beneficiary association, as created and defined by law, for procuring the benefit named in the certificate of such holder, or wilfully makes a false statement in a report or declaration under oath, required or authorized by the law creating such associations shall be imprisoned in the penitentiary not less than three years nor more than ten years. (R. S. Sec. 3631-23q; 97 v. 432, § 30.)

Section 13141-1. (Suppressing facts. Penalty.) Whoever being an officer, director, trustee, agent or employe of any insurance company, fraternal beneficiary association or assessment association organized under the laws of this state shall wilfully and with intent to deceive the superintendent of insurance or any person interested therein respecting the true financial condition of such company, fraternal beneficiary association or assessment association mutilate, destroy, or falsify any of its books, records, proofs, letters, papers, or documents, or suppress, withhold or conceal any of the same from any person authorized by law to investigate the true financial condition of such company, fraternal bene-

ficiary association or assessment association shall be imprisoned in the penitentiary not more than three years nor less than one year. (April 14, 1910, 101 v. 102.)

Section 13149-1. (Penalty.) Whoever, having accepted a premium note, in payment of the purchase price of a policy of insurance, sells or assigns such note prior to the delivery and acceptance of such policy, shall be fined not more than five hundred dollars or imprisoned not more than six months, or both. (April 23, 1910, 101 v. 120.)

Section 13151. (Selling bonds, certificates, etc., for companies not complying with law.) Whoever, being an officer, agent or representative of a corporation, partnership or association, other than a building and loan company, engaged in placing or selling certificates, bonds, debentures or other investment securities on the partial payment or installment plan, or of an investment guarantee company doing business on the service dividend plan, attempts to place or sell certificates, debentures or other investment securities or transact business in the name or on behalf thereof, when such company, partnership, association or guarantee company has failed or refuses to comply with any provision of law or to file with the supervisor of bond investment companies the statement or report required to be filed by law, shall be fined not less than one hundred dollars nor more than one thousand dollars or imprisoned in the county jail not less than thirty days nor more than six months, or both. (R. S. Sec. 3821z; 94 v. 150, § 9; 93 v. 150.)

See *Bank v. Miller*, 1 C. C. n. s. 569; 14 C. D. 198 (1902).

Section 13171. (Misrepresentation in soliciting insurance; penalty. Revocation of license.) Whoever for himself or as an officer, director, agent, solicitor or representative of any insurance company, except fire insurance companies or associations or fraternal benefit societies, doing business in this state, issues or circulates or causes or permits to be issued or circulated any estimate, illustration, circular or statement of any sort misrepresenting the terms of the policies or policy issued or to be issued by such company or the benefits or advantages promised thereby or the dividends or shares or surplus to be received thereon, or uses any name or title of any policy or class of policies misrepresenting the true nature thereof, or makes, circulates or uses, or causes to be made, circulated or used, any illustration, circular or statement, whether written or oral, misrepresenting the

terms of any policy issued by any such corporation, or the benefits or advantages promised thereby, or any misleading estimate of the dividends or shares of surplus to be received therefrom, or makes any misleading representation or incomplete comparison of policies or certificates of insurance to any person insured in any such corporation for the purpose of inducing or tending to induce such person to lapse, forfeit or surrender his said insurance, shall be guilty of a misdemeanor, and upon conviction thereof shall be fined in any sum not less than one hundred dollars nor exceeding five hundred dollars, or imprisoned in the jail of the county for a period not exceeding thirty days, or both, at the discretion of the court, and shall pay the costs of the prosecution, and the fines which shall be levied and collected for the violation of any of the provisions of this section shall be paid to the county treasurer for the benefit of the common school fund; and upon any such conviction the superintendent of insurance shall revoke the license of the person, firm, corporation or association so offending, for not more than one year. And it shall be the duty of the superintendent of insurance when he is of the opinion that any company or association writing life insurance in Ohio, on any plan, is knowingly permitting any of its agents to violate the provisions of this section, to give such company or association reasonable notice of a hearing upon the charge of knowingly permitting said provisions to be violated, and, if he finds said company or association guilty of said offense, he shall revoke its license; provided, that the action of the superintendent of insurance in revoking any license under this section may be reviewed by action in the court of common pleas of Franklin county, to be begun within thirty (30) days after notice is given by the superintendent of the revocation of said license; and in said action said licensee shall be plaintiff and the superintendent of insurance shall be defendant, and the code of civil procedure shall govern the proceedings in said cause and the review thereof as far as possible, and said court shall have jurisdiction to determine the validity of the action of said superintendent in revoking said license and may enter such judgment as is proper. (110 v. 113; 106 v. 235; 102 v. 511; 99 v. 176, § 3.)

Section 13172. (Misrepresentations in advertisement by insurance companies.) Whoever, being an insurance company, corporation or association authorized to transact business in this state, or an agent thereof, by advertisement in

a newspaper, magazine or periodical or by a sign, circular, card, policy of insurance, certificate or renewal thereof, or otherwise, states or represents that funds or assets are in its possession, not actually possessed by it and available for the payment of losses and claims and held for the protection of its policy holders or creditors, or advertises a subscribed capital not actually paid up in cash, shall be fined five hundred dollars, and for each subsequent offense shall be fined one thousand dollars. (April 22, 1908, 99 v. 177, 178, §§ 1, 3.)

Section 13173. (Such advertisement not corresponding with verified statement.) Whoever, being an insurance company, corporation or association authorized to transact business in this state, purporting to make known its financial standing by an advertisement, public announcement or by making or issuing a circular or card, fails to correspond in all the particulars which it so purports to make known, with the last preceding verified statement made by it to the insurance department of any state, shall be fined five hundred dollars, and for each subsequent offense, shall be fined one thousand dollars. (April 22, 1908, 99 v. 178, §§ 2, 3.)

Section 13174. (Disbursements by domestic life insurance companies.) Whoever, being a domestic life insurance company making a disbursement of one hundred dollars or more, fails to have it evidenced by a voucher signed by or on behalf of the person, firm or corporation receiving the money and correctly describing the consideration thereof, or, if such expenditure be for both services and disbursements, fails to set forth in such voucher, the service rendered and an itemized statement of the disbursement made, or, if such expenditure was in connection with a matter pending before a legislative or public body or a department or officer of any state or government, in addition to the foregoing, fails to correctly describe in such voucher the nature of the matter and of the interest of such company therein, shall be fined not less than ten dollars nor more than one thousand dollars. If such voucher can not be obtained such expenditures must be evidenced by an affidavit describing the character and object of the expenditure and stating the reasons for not obtaining such voucher. (April 22, 1908, 99 v. 177, 178, §§ 1, 2.)

Section 13175. (Publishing or permitting fraudulent prospectus, etc., relating to financial condition of corporation and individual.) Whoever knowingly makes or publishes, or permits or causes to be made or published, a book, prospectus, notice, report, statement, exhibit or other publication of

or concerning the affairs, financial condition or property of a corporation, joint stock association, co-partnership or individual, containing a statement which is false or wilfully exaggerated and intended to deceive any person as to the real value of any shares, bonds or property or part thereof, of said corporation, joint stock association, co-partnership or individual, shall be fined not less than one hundred dollars nor more than ten thousand dollars or imprisoned in the penitentiary not less than one year nor more than five years, or both. (May 9, 1908, 99 v. 336.)

Section 13188. (Signing name to order without authority.) Whoever, being a president, director, trustee, member of a committee, secretary, treasurer, attorney or other officer or agent of a building and loan association or savings association, as provided by law, signs the name of a person to an order or warrant for the payment of money without proper power of attorney or written order from the person to whose order such order or warrant is made payable, shall be imprisoned not less than one year nor more than ten years. (May 5, 1908, 99 v. 536, § 46.)

Section 13189. (Declaring dividend greater than earned.) Whoever, being a member of a board of directors of a building and loan association or savings association, as provided by law, votes to declare, or, being a financial or first secretary thereof, declares or advises the board of directors thereof to declare a greater dividend than has been actually earned by such association, for the purpose of deceiving the people or defrauding the members thereof, shall be imprisoned not less than one year nor more than ten years. (May 5, 1908, 99 v. 536, § 46.)

Section 13190. (False entry in book, etc.) Whoever, being a member of a board of directors of a building and loan association or savings association, as provided by law, certifies to, or makes a false entry on a book, report or statement of or to such association, with intent to deceive, injure or defraud it or another company, body politic or corporate or person, or to deceive any one appointed to examine the affairs of such association, shall be imprisoned not less than one year nor more than ten years. (May 5, 1908, 99 v. 536, § 46.)

A false statement by the secretary is not included in this section. The secretary, however, may be prosecuted for perjury. *State v. Williams*, 104 O. S. 232 (1922).

Section 13191. (Aiding officer to violate preceding section.) Whoever, with intent to deceive, injure or defraud a building and loan association or savings association, as provided by law, or other company, body politic or corporate or person, aids or abets a president, secretary, treasurer, committee or other person in violation of any of the next four preceding sections shall be imprisoned not less than one year nor more than ten years. (May 5, 1908, 99 v. 536, § 46.)

Section 13192. (Failing to make reports, etc.) Whoever, being an officer thereof, fails to make the reports required of him by the laws provided for the organization, regulation and inspection of building and loan associations and savings associations, or, being an officer, employe or other person, solicits business for, aids or assists such association to do business contrary to the provisions of such laws, or without having complied therewith, shall be fined not more than five hundred dollars or imprisoned not more than six months, or both. (May 5, 1908, 99 v. 536, § 46.)

Section 13193. (Liability on bond.) Whoever violates any provision of the next five preceding sections shall be liable to the person injured thereby to the extent of the damage incurred and suit may be brought against the person so violating and the sureties on the bond given by him to such association for the faithful performance of his duty. Fines collected under the next five preceding sections shall be paid into the state treasury. (May 5, 1908, 99 v. 536, § 46.)

Section 13320. (Money for political purposes by corporations.) Whoever, being a corporation engaged in business in this state, directly or indirectly, pays, uses, offers, or consents or agrees to pay or use money or property for, or in aid of a political party, committee or organization, or for or in aid of a candidate for political office, or for a nomination thereto, or uses money or property for any political purpose whatever, or for the re-imbursement or indemnification of any person or persons for money or property so used, shall be fined not less than five hundred dollars nor more than five thousand dollars. (February 26, 1908, 99 v. 23, 24, §§ 1, 3.)

See §§ 8729, 8730.

A corporation may pay for the insertion of an advertisement in a program of a political convention, although the program is published by a committee of the political party.

Rep. Atty. Gen. 1908, p. 86.

This act does not prohibit a newspaper corporation from publishing a partisan newspaper.

Rep. Atty. Gen. 1908, p. 76.

This section prohibits contributions for promoting or defeating a constitutional amendment. Opins. Atty. Gen. 1919, p. 1392; 11 Dept. Rep. 173.

Section 13321. (Aid or advice of such case.) Whoever, being an officer, stockholder, attorney or agent of a corporation violating the next preceding section, participates in, aids or advises such violation or solicits or knowingly receives money or property in violation of such section, shall be fined not more than one thousand dollars or imprisoned not more than one year, or both. (February 26, 1908, 99 v. 24, § 3.)

Section 13322. (Annual report of corporation thereon.) Whoever, being a corporation for profit, violates any provision of the law requiring it to make out, have sworn to by an officer thereof who has knowledge of the facts, and file with the secretary of state, auditor of state or state superintendent of insurance, an affidavit respecting the use of its funds or property for political purposes, or its consent thereto, shall be fined not less than fifty dollars nor more than five hundred dollars. (February 26, 1908, 99 v. 24, § 3.)

Section 13323. (Witnesses under next three preceding sections.) A person violating any of the next three preceding sections is a competent witness against another person so offending and may be compelled to attend and testify on a trial, hearing, proceeding or investigation thereof. The testimony so given shall not be used in a prosecution or proceeding, civil or criminal, against the person so testifying nor shall such person thereafter be liable to indictment, prosecution or punishment for the offense with reference to which his testimony was so given, and he may plead or prove the giving of such testimony in bar of such indictment or prosecution. (February 26, 1908, 99 v. 24, § 3.)

Section 13383-1. (False statement affecting solvency of banks or value of stocks and bonds; penalty.) Whoever, directly or indirectly, wilfully and knowingly makes or transmits to another, or circulates, or counsels, aids, procures or induces another to make, transmit or circulate, any false or untrue statement, rumor or suggestion derogatory to the financial condition, solvency or financial standing of any bank, savings bank, banking association, building and loan association or trust company, doing business in this state, or with intent to depress the value of the stocks, bonds or securities of any corporation, directly or indirectly, wilfully and knowingly makes or transmits to another, circulates, or counsels, aids, procures or induces another to make, transmit

or circulate, any false or untrue statement, rumor or suggestion derogatory to the financial condition, or with respect to the earnings or management of the business of any corporation, or resorts to any fraudulent means with intent to depress in value the stocks, bonds or securities of any corporation shall be fined not more than one thousand dollars or imprisoned in the penitentiary not more than two years, or both. (May 3, 1913, 103 v. 469; May 17, 1910, 101 v. 263.)

It is not an offense to circulate a true statement regarding the solvency of a bank, regardless of the intent. *State v. Kollar*, 93 O. S. 89 (1915).

An advertisement stating in substance that all banks are not safe and that banks which carry bankers insurance are safer than those without it, is not in violation of this section. *Opins. Atty. Gen.* 1916, p. 1904.

Section 13388. (Divulging telegraph message.) Whoever, being connected with a telegraph or messenger company, incorporated or unincorporated, operating a telegraph line or engaged in the business of receiving and delivering messages, wilfully divulges the contents or the nature of the contents of a private communication entrusted to him for transmission or delivery, or wilfully refuses or neglects to transmit or deliver it, or wilfully delays its transmission or delivery, or wilfully forges the name of the intended receiver to a receipt for such message or communication or article of value entrusted to him by said company, with intent to injure, deceive or defraud the sender or intended receiver thereof or such telegraph or messenger company or to benefit himself or any other person, shall be fined not more than five hundred dollars or imprisoned in jail not more than three months. (R. S. Sec. 3466; April 14, 1900, 94 v. 209; March 31, 1865, 62 v. 72, § 10; S. & S. 156.)

Section 13389. (Delaying telegraph message.) Whoever, being a telegraph operator of a railroad or telegraph company, in case of an accident to a railroad train by which a passenger is delayed, fails, neglects or refuses, on tender of the usual charge at regular commercial offices, to accept a telegram for transmission from any person so delayed, or to send it forthwith to the person and point designated, without alteration, revision or approval, shall be fined not less than fifty dollars nor more than five hundred dollars. If such violation arises from obeying an order or rule of his employer, such employer shall repay to him such fine and costs. (R. S. Sec. 3373-2; April 29, 1891, 88 v. 429, § 3.)

Section 13402. (Unlawfully interfering, etc., with telegraph or telephonic messages.) Whoever wilfully and maliciously cuts, breaks, taps or makes connection with a telegraph or telephone wire or reads or copies in an unauthorized manner, a telegraphic message or communication from or upon a telegraph or telephone line, wire or cable, so unlawfully cut or tapped, or makes unauthorized use thereof, or wilfully and maliciously prevents, obstructs or delays the sending, conveyance or delivery of an authorized telegraphic message or communication by or through a line, cable or wire, under the control of a telegraph or telephone company, shall be fined not less than fifty dollars nor more than one thousand dollars or imprisoned not less than one year nor more than three years, or both. (R. S. Sec. 3467a; April 4, 1902, 95 v. 101; April 27, 1893, 90 v. 346; March 15, 1892, 89 v. 100, § 52.)

Section 13415. (Acting as agent, etc., for certain companies in default of taxes.) Whoever, directly or indirectly, acts as agent, or transacts any business on account of or for the benefit of an express, telegraph, telephone or insurance company, against which taxes have been assessed in any county in this state and remain unpaid for twenty days after the time provided by law for the payment thereof, shall be fined not less than one hundred dollars nor more than five hundred dollars or imprisoned in the county jail and fed on bread and water only not more than thirty days, or both. The payment of such unpaid tax by an agent or other person, shall not be a violation of this section. (R. S. Sec. 2843; 82 v. 92; 59 v. 91, § 7; S. & S. 770.)

Section 13416. (Unlawful reinsurance by life insurance company, etc.) Whoever, being an officer, director or stockholder of a company organized under the laws of this state, to do the business of life, accident or health insurance, either on the stock, mutual, stipulated premiums, assessment or fraternal plan, violating or consenting to a violation of any provision of law governing or forbidding the reinsurance of the risks, or any part thereof, or the consolidation of such company with any other company or association, or the assumption or re-insurance of the whole or any portion of the risks of another company by such company, shall be fined not less than ten thousand dollars and imprisoned in a county or city jail not less than one year. (R. S. Sec. 3597; April 6, 1900, 94 v. 103; April 15, 1880, 77 v. 267; April 27, 1872, 69 v. 150, § 2; S. & S. 218.)

Section 13417. (Foreign life insurance companies on the assessment plan.) Whoever, being an officer or agent of a corporation, company or association organized under the laws of any other state of the United States to transact the business of life or accident insurance, or life and accident insurance on the assessment plan, fails or neglects to comply with, or violates any provision of law relating to such corporation, company or association, shall be fined not less than one hundred dollars nor more than one thousand dollars or imprisonment not more than six months, or both. (R. S. Secs. 3630e, 3630g; 77 v. 181; 80 v. 180; 88 v. 252; 97 v. 144; 82 v. 138; 80 v. 179.)

Section 13418. (Violations by accident insurance companies and officers thereof.) Whoever, being a company organized under the laws of this state for the special purpose of insuring against accidental personal injury and loss of life sustained while traveling by railroad, steamboat or other mode of conveyance, against accidental personal injury and loss of life sustained by accident of every description, and against expenses and loss of time occasioned by injury or sickness, and on such terms and conditions, and for such periods of time, and confined to such countries and localities, and to such persons as from time to time, may be provided in the by-laws of such company, or any officer thereof violating any provision of law relating to such company, shall be fined not less than one hundred dollars nor more than one thousand dollars or imprisoned in the county jail where such officer resides, not less than thirty days nor more than one year, or both. (R. S. Sec. 3630i; 84 v. 130; 91 v. 332; 97 v. 435.)

Section 13418-1. (Penalties.) Any person, officer, member or examining physician of any society, authorized to do business under this act, who shall knowingly or wilfully make any false or fraudulent statement or representation in or with reference to any application for membership, or for the purpose of obtaining money from or benefit in any society transacting business under this act, shall be guilty of a misdemeanor, and, upon conviction thereof shall be punished by a fine of not less than one hundred dollars nor more than five hundred dollars, or imprisonment in the county jail for not less than thirty days nor more than one year, or both, in the discretion of the court; and any person who shall wilfully make a false statement of any material fact or thing in a sworn statement as to the death or disability of a cer-

tificate holder in any such society for the purpose of procuring payment of a benefit named in the certificate of such holder, and any person who shall wilfully make any false statement in any verified report or declaration under oath required or authorized by this act, shall be guilty of perjury, and shall be proceeded against and punished as provided by the statutes of this state in relation to the crime of perjury.

Any person who shall solicit membership for, or in any manner assist in procuring membership in any fraternal benefit society not licensed to do business in this state, or who shall solicit membership for, or in any manner assist in procuring membership in any such society not authorized as herein provided, to do business as herein defined in this state, shall be guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not less than fifty nor more than two hundred dollars.

Any society, or any officer, agent or employe thereof neglecting or refusing to comply with, or violating any of the provisions of this act, the penalty for which neglect, refusal or violation is not specified in this section, shall be fined not exceeding two hundred dollars upon conviction thereof. (May 31, 1911, 102 v. 547, § 31.)

Section 13419. (Divulging telephonic communication.)

Whoever, being connected with a telephone company, incorporated or unincorporated, operating a telephone line, or engaged in the business of transmitting to, from, through or in this state, telephone messages, in any capacity, wilfully divulges a private telephone message, or the nature of such message, or a private conversation between persons communicating over the wires of such company, or wilfully delays the transmission of a telephonic message or communication, with intent to injure, deceive or defraud the sender or receiver thereof or any other person, or any such telephone company, or to benefit himself or any other person, shall be fined not less than one hundred dollars nor more than one thousand dollars and imprisoned in the county jail not less than thirty days nor more than three months. (100 v. 10.)

Section 13420. (Diverting freight.) Whoever, being the agent of a railroad company, knowingly diverts or permits freight under his control to be diverted from the railroad or railroads over which it is ordered to be conveyed by the shipper thereof, shall be fined not more than one hundred

dollars or imprisoned in the county jail not more than thirty days, or both. (R. S. Sec. 3370; 58 v. 74, § 3; S. & S. 117.)

See § 8985.

Section 13440. (Humane society may employ an attorney.) A humane society or its agent may employ an attorney to prosecute the following cases, under this section, who shall be paid for his services out of the county treasury in such sum as the judge of the court of common pleas or the probate judge of such county or the county commissioners thereof may approve as just and reasonable:

1. Violations of law relating to the prevention of cruelty to animals or children;

2. Violations of law relating to the abandonment, non-support or ill-treatment of a child by its parent;

3. Violations of law relating to the employment of a child under fourteen years of age in public exhibitions or vocations injurious to health, life or morals or which cause or permit such child to suffer unnecessary physical or mental pain;

4. Violations of law relating to neglect or refusal of adult to support destitute parent. (R. S. Sec. 3718a; 81 v. 181; 85 v. 144; 90 v. 335; 91 v. 412; 94 v. 92; 95 v. 517.)

An attorney employed by a humane society can not be paid from county funds for services in a prosecution for delinquency in a juvenile court. Opins. Atty. Gen. 1915, p. 2402.

An attorney employed by a humane society can not be paid out of the county treasury for services in prosecution under G. C. § 12493 but may be paid for services under G. C. § 13440. Rep. Atty. Gen. 1914, p. 1730.

A prosecuting attorney is not *ex-officio* legal advisor of a humane society. But he may be employed by a society. Rep. Atty. Gen. 1913, p. 1120.

Section 13607. (Summons and indictments against corporations.) When an indictment is returned against a corporation, a summons, commanding the sheriff to notify the accused thereof returnable on the seventh day after its date, shall issue on the precept of the prosecuting attorney. Such summons, with a copy of such indictment, shall be served and returned in the manner provided for service of summons upon such corporation in civil actions. If the service can not be made in the county where the prosecution began, the sheriff may make service in any county of the state upon the president, secretary, superintendent, clerk, cashier, treasurer, managing agent or other chief officer thereof or by a copy left at a general or branch office, or usual place of doing business of such corporation, with the person having

charge thereof. Such corporation, on or before the return day of a summons duly served, may appear by one of its officers or by counsel, and answer to the indictment by motion, demurrer or plea, and upon failure to make such appearance and answer, the clerk shall enter a plea of "not guilty;" and upon such appearance being made or plea entered, the corporation shall be deemed thenceforth continuously present in court until the case is finally disposed of. (R. S. Sec. 7231; April 28, 1890, 87 v. 351; R. S. 1880.)

In a criminal or quasi-criminal proceeding, service can only be made on a corporation under this section.

Reinhart & Newton Co. v. State, 26 C. C. n. s. 429 (1915); affirming, 15 N. P. n. s. 92; 23 L. D. 500.

Where the president of a corporation is arrested on complaint against the corporation for violation of a penal statute, a motion to quash filed by the corporation, on grounds other than lack of jurisdiction of the person, is a voluntary appearance by the corporation.

Reinhart & Newton Co. v. State, 26 C. C. n. s. 429 (1915); affirming, 15 N. P. n. s. 92; 23 L. D. 500.

An indictment against a corporation need not aver that it is a corporation. If such were the requirement, however, the name, The Company, would sufficiently import that it is a corporation.

State v. Dry Fork Ry. Co., 50 W. Va. 235; 40 S. E. Rep. 447 (1901).

See Brady v. Supply Co., 64 O. S. 267 (1901).

Murphy v. State, 36 O. S. 628 (1881).

Burke v. State, 34 O. S. 79 (1877).

Hamilton v. State, 34 O. S. 82 (1877).

APPENDIX

Street Railways.

§ 14770. Municipalities may agree with street railway company for payment of

percentage of gross receipts in lieu of car license fees.

§ 14771. No subsequent change in five years.

[Section 14770.] [Municipalities may agree with street railway company for payment of percentage of gross receipts in lieu of car license fees.] That it shall be competent for the board of public service, in any city of the first grade of the first class, and for the council or other legislative body of any other municipal corporation, by and with the consent of the mayor, to agree with any street railway company or companies operating any street railway route or routes in such city or other municipal corporation for the payment of a percentage or additional percentage not less than one per cent. upon its gross receipts in lieu of car license fees that may have been exacted under existing grants, and upon such changes in and extensions of existing street railway route or routes, and any changes in or revision of any prevailing or existing system of transfers between such routes as such

board of public service or council, or other legislative body, may deem to be to the benefit, convenience or advantage of the public;

[No increase in rate of fare.] provided, that nothing herein contained shall be construed to authorize any increase in the rate of fare by reason of any such changes, revisions or extensions;

[When not necessary to secure consents to changes or extensions of existing routes.] and provided, further, that when any such changes in or extensions of existing routes are made so as to run in whole or in part over and along existing tracks already belonging to such company or companies, it shall not be necessary to secure and file the consents to such changes or extensions of the owners of the property abutting on the streets on which such existing tracks are located. Provided, further, that nothing herein contained shall be construed to authorize the extension of the track or route of one street railway company over those of any other street railway company, otherwise than in the manner already provided by law, excepting by agreement of both such companies.

[No extension in length of franchise.] Provided, that nothing herein contained shall authorize the extension of existing street railway routes or any portion thereof over and along existing tracks or portions thereof for a longer period than the terms for which the original franchises for such roads or routes existing at the time of the passage of this act, were granted.

[Notice of pendency of ordinance to extend or change route.] Provided, further, that no resolution or ordinance, providing for such extension or change of route or routes, or changes or revision of systems of transfers, shall be passed until public notice of the pendency of such resolution or ordinance shall have been given in one or more of the daily newspapers published in said municipal corporation, if there be such, and, if not, then in one or more newspapers of general circulation in said municipal corporation, for the period of at least three consecutive weeks;

[When consent to change, etc., necessary.] and provided, further, that no change or extension of any existing route shall be granted over any street or streets now unoccupied by street railway tracks, unless the consent of a majority of the owners of property abutting on such street or streets shall have been first obtained as now by law required. (May 10, 1902, 95 v. 502, § 1; Bates St. § 1536-189.)

[Section 14771.] No subsequent change in five years.—

Whenever any street railway route or routes shall have been changed under agreement as provided in the preceding section of this act no subsequent change of said route or routes shall be made within a period of five years thereafter. (May 10, 1902, 95 v. 503, § 2; Bates St. § 1536-190.)

Publication of notice. Not required when. The requirement of these sections as to the publication of notice does not apply to an ordinance under G. C. Sec. 3777.

Belle v. Glenville, 5 C. C. n. s. 461; 17 C. D. 181; aff'd, no rep., 73 O. S. 392, 397; 75 O. S. 574.

Consents of abutting owners are necessary, when existing tracks unlawfully occupy street. Consents of abutting owners are necessary to a valid extension under the two foregoing sections, where the existing tracks occupy the street unlawfully under an expired franchise.

Isom v. Low Fare Ry. Co., 10 C. C. n. s. 89; 19 C. D. 583; aff'd, no rep. 77 O. S. 638.

See §§ 9106 and 3770 as amended, 99 v. 102.

PART XXVIII.

FEDERAL LAWS AFFECTING CORPORATIONS.

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FEDERAL CAPITAL STOCK TAX.

(From Revenue Act of 1921, approved November 23, 1921.)

SEC. 1000. (a) That on and after July 1, 1922, in lieu of the tax imposed by section 1000 of the Revenue Act of 1918—

(1) Every domestic corporation shall pay annually a special excise tax with respect to carrying on or doing business, equivalent to \$1 for each \$1,000 of so much of the fair average value of its capital stock for the preceding year ending June 30 as is in excess of \$5,000. In estimating the value of capital stock the surplus and undivided profits shall be included;

(2) Every foreign corporation shall pay annually a special excise tax with respect to carrying on or doing business in the United States, equivalent to \$1 for each \$1,000 of the average amount of capital employed in the transaction of its business in the United States during the preceding year ending June 30.

(b) The taxes imposed by this section shall not apply in any year to any corporation which was not engaged in business (or, in the case of a foreign corporation, not engaged in business in the United States) during the preceding year ending June 30, nor to any corporation enumerated in section 231, nor to any insurance company subject to the tax imposed by section 243 or 246.

(c) Section 257 shall apply to all returns filed with the Commissioner for purposes of the tax imposed by this section.

INCOME TAX RETURNS TO BE PUBLIC RECORDS.

SEC. 257. That returns upon which the tax has been determined by the Commissioner shall constitute public records; but they shall be open to inspection only upon order of the President and under rules and regulations prescribed by the Secretary and approved by the President: Provided, That the proper officers of any State imposing an income tax may, upon the request of the governor thereof, have access to the returns of any corporation, or to an abstract thereof showing the name and income of the corporation, at such times and in such manner as the Secretary may prescribe: Provided further, That all bona fide stockholders of record owning 1 per centum or more of the outstanding stock of any corporation shall, upon making request of the Commissioner, be allowed to examine the annual income returns of such corporation and of its subsidiaries. Any stockholder who pursuant to the provisions of this section is allowed to examine the return of any corporation, and who makes known in any manner whatever not provided by law the amount or source of income, profits, losses, expenditures, or any particular thereof, set forth or disclosed in any such return, shall be guilty of a misdemeanor and be punished by a fine not exceeding \$1,000, or by imprisonment not exceeding one year, or both.

The Commissioner shall as soon as practicable in each year cause to be prepared and made available to public inspection in such manner as he may determine, in the office of the collector in each internal-revenue district and in such other places as he may determine, lists containing the names and the post-office addresses of all individuals making income-tax returns in such district.

CONDITIONAL AND OTHER EXEMPTIONS OF CORPORATIONS.

SEC. 231. That the following organizations shall be exempt from taxation under this title—

- (1) Labor, agricultural, or horticultural organizations;
- (2) Mutual savings banks not having a capital stock represented by shares;
- (3) Fraternal beneficiary societies, orders, or associations,
(a) operating under the lodge system or for the exclusive benefit of the members of a fraternity itself operating under

the lodge system; and (b) providing for the payment of life, sick, accident, or other benefits to the members of such society, order, or association or their dependents;

(4) Domestic building and loan associations substantially all the business of which is confined to making loans to members; and cooperative banks without capital stock organized and operated for mutual purposes and without profit;

(5) Cemetery companies owned and operated exclusively for the benefit of their members or which are not operated for profit; and any corporation chartered solely for burial purposes as a cemetery corporation and not permitted by its charter to engage in any business not necessarily incident to that purpose, no part of the net earnings of which inures to the benefit of any private stockholder or individual;

(6) Corporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private stockholder or individual;

(7) Business leagues, chambers of commerce, or boards of trade, not organized for profit and no part of the net earnings of which inures to the benefit of any private stockholder or individual;

(8) Civic leagues or organizations not organized for profit but operated exclusively for the promotion of social welfare;

(9) Clubs organized and operated exclusively for pleasure, recreation, and other nonprofitable purposes, no part of the net earnings of which inures to the benefit of any private stockholder or member;

(10) Farmers' or other mutual hail, cyclone, or fire insurance companies, mutual ditch or irrigation companies, mutual or cooperative telephone companies, or like organizations of a purely local character, the income of which consists solely of assessments, dues, and fees collected from members for the sole purpose of meeting expenses;

(11) Farmers', fruit growers', or like associations, organized and operated as sales agents for the purpose of marketing the products of members and turning back to them the proceeds of sales, less the necessary selling expenses, on the basis of the quantity of produce furnished by them; or organized and operated as purchasing agents for the purpose of purchasing supplies and equipment for the use of members and turning over such supplies and equipment to such members at actual cost, plus necessary expenses;

(12) Corporations organized for the exclusive purpose of

holding title to property, collecting income therefrom, and turning over the entire amount thereof, less expenses, to an organization which itself is exempt from the tax imposed by this title;

(13) Federal land banks and national farm-loan associations as provided in section 26 of the Act approved July 17, 1916, entitled "An Act to provide capital for agricultural development, to create standard forms of investment based upon farm mortgage, to equalize rates of interest upon farm loans, to furnish a market for United States bonds, to create Government depositaries and financial agents for the United States, and for other purposes";

(14) Personal service corporation. This subdivision shall not be in effect after December 31, 1921.

EXCERPTS FROM THE CLAYTON ACT.

38 U. S. Stats. 730.

Approved October 15, 1914.

SEC. 7. That no corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital of another corporation engaged also in commerce where the effect of such acquisition may be to substantially lessen competition between the corporation whose stock is so acquired and the corporation making the acquisition, or to restrain such commerce in any section or community, or tend to create a monopoly of any line of commerce.

No corporation shall acquire, directly or indirectly, the whole or any part of the stock or other share capital of two or more corporations engaged in commerce where the effect of such acquisition, or the use of such stock by the voting or granting of proxies or otherwise, may be to substantially lessen competition between such corporations, or any of them, whose stock or other share capital is so acquired, or to restrain such commerce in any section or community, or tend to create a monopoly of any line of commerce.

This section shall not apply to corporations purchasing such stock solely for investment and not using the same by voting or otherwise to bring about, or in attempting to bring about, the substantial lessening of competition. Nor shall anything contained in this section prevent a corporation engaged in commerce from causing the formation of subsidiary

corporations for the actual carrying on of their immediate lawful business, or the natural and legitimate branches or extensions thereof, or from owning and holding all or a part of the stock of such subsidiary corporations, when the effect of such formation is not to substantially lessen competition.

Nor shall anything herein contained be construed to prohibit any common carrier subject to the laws to regulate commerce from aiding in the construction of branches or short lines so located as to become feeders to the main line of the company so aiding in such construction or from acquiring or owning all or any part of the stock of such branch lines, nor to prevent any such common carrier from acquiring and owning all or any part of the stock of a branch or short line constructed by an independent company where there is no substantial competition between the company owning the branch line so constructed and the company owning the main line acquiring the property or an interest therein, nor to prevent such common carrier from extending any of its lines through the medium of the acquisition of stock or otherwise of any other such common carrier where there is no substantial competition between the company extending its lines and the company whose stock, property, or an interest therein is so acquired.

Nothing contained in this section shall be held to affect or impair any right heretofore legally acquired: Provided, That nothing in this section shall be held or construed to authorize or make lawful anything heretofore prohibited or made illegal by the antitrust laws, nor to exempt any person from the penal provisions thereof or the civil remedies therein provided.

SEC. 8. That from and after two years from the date of the approval of this Act no person shall at the same time be a director or other officer or employee of more than one bank, banking association or trust company, organized or operating under the laws of the United States, either of which has deposits, capital, surplus, and undivided profits aggregating more than \$5,000,000; and no private banker or person who is a director in any bank or trust company, organized and operating under the laws of a State, having deposits, capital, surplus, and undivided profits aggregating more than \$5,000,000, shall be eligible to be a director in any bank or banking association organized or operating under the laws of the United States. The eligibility of a director, officer, or employee under the foregoing provisions shall be determined by the average amount of deposits, capital, surplus, and undivided profits as shown in the official statements of such

bank, banking association, or trust company filed as provided by law during the fiscal year next preceding the date set for the annual election of directors, and when a director, officer, or employee has been elected or selected in accordance with the provisions of this Act it shall be lawful for him to continue as such for one year thereafter under said election or employment.

No bank, banking association or trust company, organized or operating under the laws of the United States, in any city or incorporated town or village of more than two hundred thousand inhabitants, as shown by the last preceding decennial census of the United States, shall have as a director or other officer or employee any private banker or any director or other officer or employee of any other bank, banking association or trust company located in the same place: Provided, That nothing in this section shall apply to mutual savings banks not having a capital stock represented by shares: Provided further, That a director or other officer or employee of such bank, banking association, or trust company may be a director or other officer or employee of not more than one other bank or trust company organized under the laws of the United States or any State where the entire capital stock of one is owned by stockholders in the other: And provided further, That nothing contained in this section shall forbid a director of class A of a Federal reserve bank, as defined in the Federal Reserve Act, from being an officer or director or both an officer and director in one member bank: And provided further, That nothing in this Act shall prohibit any private banker or any officer, director, or employee of any member bank or class A director of a Federal reserve bank, who shall first procure the consent of the Federal Reserve Board, which board is hereby authorized, at its discretion, to grant, withhold, or revoke such consent, from being an officer, director, or employee of not more than two other banks, banking associations, or trust companies, whether organized under the laws of the United States or any State, if such other bank, banking association, or trust company is not in substantial competition with such banker or member bank. (As amended by Acts of May 15, 1916 and May 26, 1920.)

The consent of the Federal Reserve Board may be procured before the person applying therefor has been elected as a class A director of a Federal reserve bank or as a director of any member bank. (As amended by Act of May 15, 1916.)

That from and after two years from the date of the ap-

proval of this Act no person at the same time shall be a director in any two or more corporations, any one of which has capital, surplus, and undivided profits aggregating more than \$1,000,000, engaged in whole or in part in commerce, other than banks, banking associations, trust companies, and common carriers subject to the Act to regulate commerce, approved February fourth, eighteen hundred and eighty-seven, if such corporations are or shall have been theretofore, by virtue of their business and location of operation, competitors, so that the elimination of competition by agreement between them would constitute a violation of any of the provisions of any of the antitrust laws. The eligibility of a director under the foregoing provisions shall be determined by the aggregate amount of the capital, surplus, and undivided profits, exclusive of dividends declared but not paid to stockholders, at the end of the fiscal year of said corporation next preceding the election of directors, and when a director has been elected in accordance with the provisions of this Act it shall be lawful for him to continue as such for one year thereafter.

When any person elected or chosen as a director or officer or selected as an employee of any bank or other corporation subject to the provisions of this Act is eligible at the time of his election or selection to act for such bank or other corporation in such capacity, his eligibility to act in such capacity shall not be affected and he shall not become or be deemed amenable to any of the provisions hereof by reason of any change in the affairs of such bank or other corporation from whatsoever cause, whether specifically excepted by any of the provisions hereof or not, until the expiration of one year from the date of his election or employment.

SEC. 10. That after two years from the approval of this Act no common carrier engaged in commerce shall have any dealings in securities, supplies or other articles of commerce, or shall make or have any contracts for construction or maintenance of any kind, to the amount of more than \$50,000, in the aggregate, in any one year, with another corporation, firm, partnership, or association when the said common carrier shall have upon its board of directors or as its president, manager or as its purchasing or selling officer, or agent in the particular transaction, any person who is at the same time a director, manager, or purchasing or selling officer of, or who has any substantial interest in, such other corporation, firm, partnership or association unless and except such purchases shall be made from, or such dealings shall be with,

the bidder whose bid is the most favorable to such common carrier, to be ascertained by competitive bidding under regulations to be prescribed by rule or otherwise by the Interstate Commerce Commission. No bid shall be received unless the name and address of the bidder or the names and addresses of the officers, directors, and general managers thereof, if the bidder be a corporation, or of the members, if it be a partnership or firm, be given with the bid.

Any person who shall, directly or indirectly, do or attempt to do anything to prevent anyone from bidding or shall do any act to prevent free and fair competition among the bidders or those desiring to bid shall be punished as prescribed in this section in the case of an officer or director.

Every such common carrier having any such transactions or making any such purchases shall within thirty days after making the same file with the Interstate Commerce Commission a full and detailed statement of the transaction showing the manner of the competitive bidding, who were the bidders, and the names and addresses of the directors and officers of the corporations and the members of the firm or partnership bidding; and whenever the said commission shall, after investigation or hearing, have reason to believe that the law has been violated in and about the said purchases or transactions it shall transmit all papers and documents and its own views or findings regarding the transaction to the Attorney General.

If any common carrier shall violate this section, it shall be fined not exceeding \$25,000; and every such director, agent, manager or officer thereof who shall have knowingly voted for or directed the act constituting such violation or who shall have aided or abetted in such violation shall be deemed guilty of a misdemeanor and shall be fined not exceeding \$5,000, or confined in jail not exceeding one year, or both, in the discretion of the court.

The effective date of sec. 10 was extended by Congress from time to time, the last extension being in the Transportation Act of 1920, in which the effective date was fixed at January 1, 1921, except as to corporations organized on or after January 12, 1918, for which the effective date was fixed at January 8, 1918.

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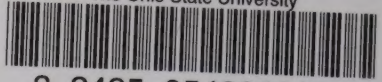
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